Justice for Victims of Crimes Under the Rome Statute
Is Asylum-Seeking Victims’ Access to Participation in National and International Criminal Proceedings Ensured?

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Abstract

On 1 July 2002, the Rome Statute of the International Criminal Court (ICC) entered into force. The Rome Statute constitutes the ICC as a permanent international court with the task to investigate and to prosecute individual suspects of the “most serious crimes of international concern,” including genocide, crimes against humanity, and war crimes. The Rome Statute is a landmark in victim-oriented justice, and it gives attention to the role, rights, and interests of victims. Importantly, it gives victims the right to participate in the Court’s proceedings when their interests are affected.

In 2015, the world witnessed record-high numbers of forcibly displaced individuals, with Sweden receiving 156,400 new applications for asylum. According to the UN High Commissioner for Refugees, UNHCR, the great number of forcibly displaced individuals reported in 2015 was “a result of persecution, conflict, generalized violence, or human rights violations.” This paper assumes that many asylum-seekers in Sweden are victims of crimes defined in the Rome Statute. It raises the question: To what extent is international criminal justice, and more specifically, the right to participate in criminal proceedings for crimes under the Rome Statute, accessible to this group of people?

The aim of this thesis is twofold: First, to determine what rights asylum-seeking victims in Sweden have to participate in criminal proceedings and what rights they have to access participation in criminal proceedings. Second, to determine whether Sweden lives up to its obligations to ensure that asylum-seeking victims of crimes under the Rome Statute have access to participation in criminal proceedings. It describes established law in order to determine victims’ participation and access rights, and then analyzes two cases of asylum-seeking victims in Sweden to assess their access to their participation rights.

Regarding the first aim, this thesis shows that victims have robust rights to participate in judicial proceedings both before the ICC and in Swedish courts. They have substantial rights to access these participation rights as well, which impose corresponding obligations on both the ICC and the Swedish authorities to ensure them. Regarding the second aim, the two case studies show that, in spite of the substantial legal and institutional structures that enable victims’ access to participation rights, there are cracks in these structures and asylum-seekers in Sweden can fall through them. Policies governing the cooperation between the ICC and Sweden and the reporting of crimes under the Rome Statute to Swedish authorities continue to reflect a perpetrator-focused conception of justice, to the detriment of a victim-centered conception. The thesis concludes by suggesting that it might be in Sweden’s interest to revise its policies toward asylum-seeking victims so that they better enable victims’ participation rights and thereby better reflect a victim-centered conception of justice.
Contents

1 Introduction ............................................................................................................. 4
  1.1 Background ........................................................................................................ 4
  1.2 Aim and Research Questions ............................................................................... 6
  1.3 Delimitations ...................................................................................................... 6
    1.3.1 Definitions .................................................................................................. 7
  1.4 Method and material .......................................................................................... 9
  1.5 Disposition .........................................................................................................10

2 The Rome Statute, the ICC, and the Swedish Legal System .......................... 11
  2.1 The Rome Statute and the ICC ..........................................................................11
    2.1.1 The Jurisdiction of the International Criminal Court ................................11
    2.1.2 Triggering Jurisdiction ...........................................................................12
    2.1.3 Admissibility ..........................................................................................14
  2.2 The Rome Statute and the Swedish Legal System ........................................... 15
    2.2.1 The Implementation of the Rome Statute into Swedish Law ......................16
    2.2.2 Swedish Jurisdiction over Crimes defined in the Rome Statute Committed
         outside Swedish Territory ............................................................................18
    2.2.3 Initiating Swedish Legal Proceedings against Crimes Defined in the Rome
         Statute Committed outside Swedish Territory ..............................................18
    2.2.4 Procedural Impediments for Prosecuting Crimes in Swedish Courts .......20

3 Victims and their Access to International Criminal Justice at the
   ICC and in Swedish Courts ................................................................................. 22
  3.1 Victims and the ICC ............................................................................................22
    3.1.1 The Rights of Victims in the ICC’s Proceedings ........................................22
    3.1.2 Access to Proceedings and Outreach .........................................................24
  3.2 Victims in the Swedish Legal System ..................................................................28
    3.2.1 The Rights of Victims in the Swedish Legal Proceedings ..........................28
    3.2.2 Access to Proceedings and Reaching Out to Victims .................................30

4 Case Studies and Analysis: Asylum-Seeking Victims’ Access to
   International Criminal Justice in Practice .........................................................32
  4.1 Carol Mirembev. the Swedish Migration Agency ..............................................32
    4.1.1 Case Background .....................................................................................32
1 Introduction

1.1 Background

On 1 July 2002, the Rome Statute of the International Criminal Court (ICC) entered into force. The Rome Statute constitutes the ICC as a permanent international court with the task to investigate and to prosecute individual suspects of the “most serious crimes of international concern,” including genocide, crimes against humanity, and war crimes. The Preamble of the Rome Statute states that the Court’s purpose is to hold perpetrators accountable for such crimes and, by doing so, combat impunity and prevent these crimes from happening again.

The Court’s stated purpose of combating impunity might give the impression that the Rome Statute contains a perpetrator-oriented conception of justice, where the focus of the proceedings is on the accused, to the detriment of victims’ interests. It can also give the impression that the Court is solely focused on retributive justice, which consists in punishing perpetrators for their crimes, rather than reparative justice, which consists in compensating victims for the harm they suffer due to crime, and restorative justice, which seeks to restore social cohesion.

However, this impression would be mistaken. The Rome Statute is a landmark in victim-oriented justice, and it gives attention to the role, rights, and interests of victims that goes beyond the traditional perpetrator-oriented functions of investigation, prosecution, and conviction. This focus on victims is the result of a process of development within international justice that has taken place since the middle of the last century. The victim-centered conception of justice in the Rome Statute can be seen as the result of an attempt to compensate for victims’ alienation from previous ad hoc tribunals.

The victim-oriented vision of the Rome Statute is expressed in rights that can be divided into three basic categories: rights to protection (Article 68), rights to reparations (Article 75), and rights to participation in judicial proceedings (Article 68(3)). One of the most important ways...
in which the Rome Statute is a victim-oriented legal document is that it gives victims the right to participate in the Court’s proceedings when their interests are affected. The right for victims to participate affects how the three forms of justice mentioned above are realized at the ICC. Victims can participate in proceedings and affect both indictment and sentencing, thereby affecting retributive justice. By having their views and concerns presented before the Court, victims can show their eligibility for reparations, which is essential for reparative justice, and engage in truth-telling, which is essential for restorative justice. The Rome Statute thus contains a richer conception of what justice is than can be found in prior institutions of international criminal justice.

These additional rights for victims entail additional obligations for the Court to ensure that these rights are satisfied. The Court has developed outreach strategies that aim to fulfill these obligations. The ICC confirms that “people most affected by crimes have the right to understand, to participate in, and to have a sense of ownership of the justice process.” Hence, the ICC “strives to bridge the distance between the Court and these communities and to make its proceedings accessible to them.” This activity takes place through an outreach program created by the Court, with the ambition to make information regarding the work of the ICC and its proceedings accessible for those who are affected by them. The ICC then turns to both communities as a whole, and to specific vulnerable groups, such as victims and those displaced from their homes.

The Rome Statute is today ratified by 124 states, with Sweden among them. One of the fundamental principles in the Statute is what has come to be called the “Complementarity Principle”: That State Parties to the Rome Statute are primarily responsible for prosecuting crimes under international law, including crimes defined in the Rome Statute, and that the ICC will only exercise jurisdiction when State Parties are unable or unwilling to do so. By ratifying the Rome Statute, states further agree to cooperate fully with the ICC and to provide support for such cooperation under national law.

Due to the ratification of the Rome Statute, Sweden has adapted its legislation to fulfil its obligations in accordance with the Statute. Moreover, Sweden has legislated that Swedish courts shall have universal jurisdiction over international crimes such as those defined in the

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7 Bonacker and Safferling (n 4) 5. See Chandra Lekha Sriram, ‘Victims, Excombatants and the Communities: Irreconcilable Demands or a Dangerous Convergence?’ in Bonacker and Stafferling, (eds), Victims of International Crimes: An Interdisciplinary Discourse (Asser 2013) 238-239, who notes that it is important not to conflate victim-centered justice with restorative justice, as is often done in the literature.
10 Ibid.
11 See part 2.1.3. below.
12 See 2.2.1. below.
13 See 2.2.1. below.
Statute. Hence, Swedish national courts have jurisdiction to prosecute these crimes regardless of where or by whom they have been committed. In addition, Swedish legislation provides for comprehensive rights for victims.

1.2 Aim and Research Questions

In 2015, the world witnessed record-high numbers of forcibly displaced individuals, reaching in total 65.3 million worldwide, including 3.2 million asylum-seekers.\(^{14}\) Europe was much affected by these increased numbers, when many made their way to seek protection in the region. This year, Sweden turned out to be the third largest recipient of asylum-seekers in the world, receiving 156,400 new applications for asylum.\(^{15}\) The major source countries of asylum-seekers in Sweden were Syria, Afghanistan, and Iraq.\(^{16}\)

According to the UN High Commissioner for Refugees, UNHCR, the great number of forcibly displaced individuals reported in 2015 was “a result of persecution, conflict, generalized violence, or human rights violations.”\(^{17}\) With this in mind, this paper is based on the idea that there is a high probability that there is a significant number of individuals among this population in Sweden who have been victims of crimes defined in the Rome Statute. It raises the question: To what extent is international criminal justice accessible to this group of people?

This thesis aims to describe established law and regulations in this field and analyze their implementation in practice. It assumes that there are many forcibly displaced asylum-seekers who count as victims under the Rome Statute and asks the following research questions: First, what rights do these victims have to participate in judicial proceedings and what rights do they have to access participation in judicial proceedings? Second, does Sweden live up to its obligations to ensure that asylum-seeking victims of crimes under the Rome Statute have access to participation in judicial proceedings?

1.3 Delimitations

The choice to limit this study to asylum-seeking victims in Sweden is based on the principle of proximity and the role Sweden plays as a recipient of forcibly displaced people. As was


\(^{16}\) Swedish Migration Agency (n 15).

\(^{17}\) UNHCR (n 14) 2
mentioned above, Sweden was the third largest recipient of asylum seekers in the world in 2015. Sweden has played a central role as a host for forcibly displaced people, which makes Sweden an interesting nation to study regarding this topic.

As is clear from the research question above, this study will concentrate on one aspect of victim-oriented justice: the victim’s right to participate in proceedings. Thus, victims’ rights to protection and reparations will not be discussed in detail.

This thesis will also limit its focus to crimes committed outside Swedish territory by perpetrators who find themselves outside Swedish territory. This delimitation reflects the situation of most asylum-seeking victims in Sweden.

Finally, this study will concentrate on the role of the Swedish Migration Agency in making justice accessible to asylum-seeking victims, since it is the Swedish institution that is responsible for asylum-seekers and thus has the most contact with them.

1.3.1 Definitions

Definition of “Victim”

Who, and what, can be an individual victim in cases managed by the ICC is defined in the Court’s Rules of Procedure and Evidence (RPE). Rule 85 of the RPE states that “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”

Unlike the RPE, Swedish legislation does not contain a single concrete definition of the concept “victim.” Indeed, Swedish law rarely makes use of the term “victim of crime” (“brottsoffer”) and refers to the “injured party” or “plaintiff” (“målsägande”) instead with regard to victims’ cooperation and rights in the criminal trial procedure. An “injured party” or “plaintiff” is defined in the Swedish Code of Judicial Procedure as a person against whom a crime is committed or whom has been offended or injured by a crime.

In spite of this terminological difference, the ICC shares with the Swedish justice system the conception of victimhood in the *UN Declaration of Basic Principles of Justice for Victims of*...
Crime and Abuse of Power, which contains broader definition of individual victims.\textsuperscript{21,22} The Trial Chamber I of the ICC has, with support of Article 21(3) of the Statute, accepted the definition of victims presented in the guidelines of this declaration,\textsuperscript{23} where Article 8 and 9 state the following:\textsuperscript{24}

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

In this thesis, the conception of victimhood from the UN Declaration and its guidelines mentioned above will be used. The basic outline of this conception that is relevant for the subject of this thesis, is this: an individual victim is a natural person who, individually or collectively, has suffered direct or indirect harm from crimes defined in the Rome Statute.\textsuperscript{25}

\textit{Definition of “Asylum-seeker”}

Article 14 of the Universal Declaration of Human Rights (1948) states that “Everyone has the right to seek and to enjoy in other countries asylum from persecution.” This thesis will make use of the definition of an asylum-seeker in §1:1 of the Swedish Law (1994:137) for the Reception of Asylum-Seekers, where an asylum-seeker is defined to be a person who “has applied for residency in Sweden as a refugee according to Chapter 4, §1 or as otherwise in need of protection according to Chapter 4 §2 or 2a of the Aliens Act (2005:716) or older corresponding provisions.”


\textsuperscript{23} 'Situation in the Democratic Republic of the Congo, ICC-01/04, in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on Victims’ Participation.’ (18 January 2008) ICC-01/04-01/06-1119, para 35.

\textsuperscript{24} Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005).

\textsuperscript{25} The idea that a natural person can be either a direct or indirect victim has been elaborated by the Appeal Chambers of the ICC. The Appeal Chamber considers harm suffered by a natural person to be personal, i.e. material, physical or psychological harm, if suffered personally by an individual. Such harm can be caused by harm suffered by another person, such as a direct victim of a committed crime within the jurisdiction of the Court. See ‘Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008’ (11 July 2008) ICC-01/04-01/06 OA 9 OA 10.
Asylum-seekers are hence persons who have left their homes and sought asylum in a country other than that of their origin, but whose application has not yet been decided upon. A clarification, and delimitation, of how the term “asylum-seeker” is used in this thesis is that individuals will be considered to be asylum-seekers from the date of their application until the day their decision in their case has become legally binding. This includes the period when an appeal is being processed by the Immigration Court or the Immigration Supreme Court. According to §1:1 of Law (1994:137), the person is registered with the Swedish Migration Agency during this period and covered by that law.

1.4 Method and material

In this thesis, the “legal-dogmatic method” and the “legal-analytical method” will be used. The legal-dogmatic method aims to describe and systematize the established law concerning a certain question,26 in this case, the rights of victims to participate in proceedings concerning crimes under the Rome Statute and the rights of victims to access such proceedings. The legal-dogmatic method will be used in Chapter 2, where established law concerning the victims’ right to participation in proceedings will be examined, first, at the ICC, and second, in Swedish courts.

The materials that will be used in the legal-dogmatic portions of the thesis are the various laws and preparatory documents, precedents and legal doctrine. The primary legal documents used in Chapter 2 are the Rome Statute of the International Criminal Court, the Act (2014:406) on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes, the Cooperation with the International Criminal Court Act (2002:329), and the Regulation with Instructions for the Swedish Migration Authority (2007:996). The preparatory documents for these documents will be used as well, when necessary. Since the ICC is based on a young and evolving body of legal practice, precedent and legal doctrine will play an important role in determining established law. William A. Schabas’ authoritative An Introduction to the International Criminal Court has been especially useful in describing the Rome Statute and the ICC. This study also makes use of Peter Asp’s Internationell straffrätt for general information concerning international criminal law in Sweden.

In Chapter 3, the Rome Statute, the Rules for Procedure and Evidence, and various court precedents concerning the evolving interpretations of the right to participate in ICC proceedings. The Swedish Penal Code (1962:700) and the Swedish Code of Judicial Procedure (1942:740), and the EU Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime will be used to determine victims’ rights to access justice and participation in Swedish courts in general. Contributions in Thorsten Bonacker and Christoph Stafferling’s anthology Victims of International Crimes: An Interdisciplinary Discourse has been used in describing victims’ rights under the Rome

Statute at the ICC. Görel Granström’s and Ruth Mannelqvist’s anthology Brottsoffer – rättsliga perspektiv for a discussion of the role and rights of victims in Swedish law.

This thesis makes use of the legal-analytical method in addition to the legal-dogmatic method because its research question goes beyond the scope of established law to analyze how established legal rights are made available to victims. It makes use of non-legal sources to investigate the ICC’s and the Swedish state’s policies for reaching out to victims and making justice available to them, such as the ICC’s Strategic Plan for Outreach. Chapter 4 examines verdicts from two asylum cases at the Swedish Migration Court, including the Swedish Migration Agency’s decisions on these cases. These decisions serve not as precedents for determining established law, but rather as case studies of victims’ access to international criminal justice as defined by the Rome Statute. These materials are complemented by email correspondence with representatives from the Swedish Migration Authority, the Swedish Police Agency, and the Swedish Prosecutor-General’s office.

1.5 Disposition

This thesis consists of five chapters. Following this introduction, chapter two discusses the jurisdiction of the International Criminal Court and the different ways in which it is triggered, the admissibility of situations to the Court and its complementary function in relation to national courts. It then examines how the Rome Statute has been transformed into the Swedish legal system. It takes up the universal jurisdiction of Swedish Courts over the crimes contained in the Rome Statute and how this jurisdiction is triggered.

Chapter three analyzes victims’ rights under the Rome Statute, especially the right to participation, and the ICC’s outreach strategies to make the ICC’s proceedings available to victims. It then discusses victims’ rights in Swedish legislation and how Swedish legislation reflects the provisions contained in the EU Victims’ Directive regarding reaching out to victims.

Chapter four consists of two case studies that analyze asylum-seeking victims access to international criminal justice in practice. After describing each case, it presents the rights that these victims have in theory, and discusses who has the corresponding obligations to satisfy these rights. It then analyzes whether these victims’ rights are satisfied by the appropriate authorities in practice.

Chapter five draws general conclusions from these analyses.

27 ibid 45-46. While the ICC’s outreach activities are recognized to be “a non-judicial core function” of the court, the work of outreach is “a central element of a fair trial and therefore necessary to ensure the quality of justice,” Chamberlain Bolaños (n 8) 155-156.
2 The Rome Statute, the ICC, and the Swedish Legal System

This chapter outlines the fundamental institutional framework for ensuring justice under the Rome Statute. It discusses a fundamental issue in analyzing victims’ access to justice under the Rome Statute: determining jurisdiction over a crime, that is, who has the legal authority and obligation to prosecute a particular crime under the Rome Statute? This chapter consists of two parts. The first part discusses how justice under the Rome Statute is ensured at the ICC, and the second part considers how this is done in the Swedish legal system.

2.1 The Rome Statute and the ICC

The aim of this part is to clarify the ICC’s role in securing justice for crimes under the Rome Statute. It begins by describing the Rome Statute’s provisions determining the jurisdiction of the ICC – what kinds of crimes it can prosecute, who it can prosecute, and when and where the crimes must be committed in order for the Court to be able to prosecute them. It then considers the triggering of this jurisdiction, that is, the mechanisms whereby proceedings at the Court can be initiated. Finally, it discusses the admissibility of situations to the ICC, and especially the principle of complementarity between the ICC and national courts, which determines whether national courts or the ICC has the authority to prosecute a particular crime.

2.1.1 The Jurisdiction of the International Criminal Court

The Rome Statute specifies the jurisdiction of the International Criminal Court. This jurisdiction is determined with respect to type of crime or subject-matter jurisdiction, temporal jurisdiction, and, most importantly for this thesis, personal jurisdiction and territorial jurisdiction.\(^\text{28}\)

The subject matter jurisdiction of the Court consists of the crimes named in Article 5 of the Rome Statute: genocide, crimes against humanity, and war crimes. The Court has the authority to prosecute individuals suspected of such crimes, which Article 5(1) of the Statute describes as “the most serious crimes of concern to the international community as a whole.”

The temporal jurisdiction of the Court is restricted in Article 11(1) to crimes committed after the Statute entered into effect on July 1, 2002. Article 11 goes hand in hand with Article 24, according to which “No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”\(^\text{29}\) If a State becomes a Party to the Rome Statute


\(^{29}\) See Schabas (n 28) 70.
after this date, then jurisdiction extends only to the date of that State’s ratification of the Statute.\textsuperscript{30,31}

The \textit{personal jurisdiction} of the Court is defined in Article 12 of the Rome Statute, which gives the ICC authority to prosecute persons over the age of 18 who are accused of crimes and who are nationals of State Parties to the Rome Statute.\textsuperscript{32,33} In addition, the Court has jurisdiction over nationals of States that voluntarily accept the jurisdiction of the Court on an \textit{ad hoc} basis.\textsuperscript{34}

The \textit{territorial jurisdiction} of the Court is governed by Article 12 as well. The Court has territorial jurisdiction over any crime committed within the territory of a State Party.\textsuperscript{35} This authority to prosecute is not restricted by the nationality of the alleged perpetrator.\textsuperscript{36} This basic form of territorial jurisdiction can be extended in two ways. First, a Non-State Party can make an \textit{ad hoc} request that the Court exercise jurisdiction over its territory.\textsuperscript{37} Second, according to Article 13(b), the United Nations Security Council has the authority to refer cases to the Court, regardless of whether the territory where the situation in question occurred is that of a State Party or not.\textsuperscript{38}

\textbf{2.1.2 Triggering Jurisdiction}

Since the ICC was not created to investigate and prosecute specific past crimes, as was the case with the \textit{ad hoc} tribunals in Yugoslavia and Rwanda, its jurisdiction must be initiated or \textit{triggered} so that it may be exercised over a specific situation.\textsuperscript{39} According to Article 13 of the Rome Statute, the jurisdiction of the ICC can be triggered in three different ways: by a State Party referral, by a UN Security Council referral, and by a prosecutorial \textit{proprio motu} referral.

\textit{State Party Referral}

The most basic triggering mechanism for ICC jurisdiction is the referral of a situation within the jurisdiction of the Court to the Prosecutor by a State Party.\textsuperscript{40} The original intent of Article

\begin{itemize}
  \item \textsuperscript{30} Rome Statute, Art. 11(2).
  \item \textsuperscript{31} However, there is an exception to this rule. A state can make an ad hoc declaration in which it recognizes the Court’s jurisdiction even if it is not a party to the Statute. Hence, a state can accept the Courts jurisdiction for crimes retroactively, to the period prior to the ratification of the statute but not before the Statute entered into force on 1 July 2002. See Schabas (n 28) 69 and 87.
  \item \textsuperscript{32} Rome Statute, Art. 12(2)(b).
  \item \textsuperscript{33} Article 26 of the Rome Statute states that “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.”
  \item \textsuperscript{34} Rome Statute, Art. 12(3)
  \item \textsuperscript{35} Rome Statute, Art. 12(2)(a)
  \item \textsuperscript{36} Schabas (n 28) 81
  \item \textsuperscript{37} Rome Statute, Art. 12(3)
  \item \textsuperscript{38} Schabas (n 28) 81; Andrew Novak, \textit{The International Criminal Court: An Introduction} (Springer 2015)
  \item \textsuperscript{39} Schabas (n 28) 157
  \item \textsuperscript{40} Rome Statute, Art. 13(1)
\end{itemize}
13(1) was that it would be a mechanism for *interstate* complaints, where State Parties refer situations in other State Parties to the Prosecutor.\(^{41}\) However, in practice, it has functioned as a mechanism for *self-referral*, where, for example, the governments of Uganda and the Democratic Republic of the Congo referred rebel groups within their borders to the Prosecutor.\(^{42}\) According to personal communications with the ICC Office of the Prosecutor (15 May 2017), State Party referrals to the Prosecutor are confidential until the investigation phase of the proceedings begins.

Pursuant to Article 12(3), a Non-State Party can refer a situation in its territory to the Prosecutor and thereby trigger jurisdiction over its territory or its nationals on an *ad hoc* basis. Ukraine is a Non-State Party that has referred a situation in its territory to the Prosecutor for investigation under Article 12(3) of the Rome Statute.\(^{43}\) A key difference between referral by a State Party and a Non-State Party is that the Prosecutor *must* pursue a case referred to it by a State Party, whereas it is only discretionary in the case of a Non-State Party.\(^{44}\)

**The UN Security Council Referral**

A second mechanism by means of which the jurisdiction of the ICC can be triggered is a referral of a situation that falls within the subject-matter jurisdiction of the Court as stated in Article 5 by the UN Security Council.\(^{45}\) The resolution to refer a situation to the ICC Prosecutor requires the votes of nine of the fifteen members of the Security Council. Any one of the five permanent members of the Council may veto the resolution.\(^{46}\) The nature of the cooperation between the ICC and the UN Security Council is not detailed in the Rome Statute, but is spelled out in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.\(^{47}\) According to this agreement, the Security Council referral of situations to the ICC occurs under Chapter VII of the UN Charter, which stipulates that the Council has the obligation “to maintain or restore international peace and security.”\(^{48}\)

As with referrals by the Non-State Parties, the Prosecutor is not obliged to initiate an investigation of a situation because of a referral by the UN Security Council.\(^{49}\)

\(^{41}\) Schabas (n 28) 159-160, 163
\(^{44}\) Novak (n 38) 51-52
\(^{45}\) Rome Statute, Art. 13(b)
\(^{46}\) Schabas (n 28) 168-169; Novak (n 38) 52
\(^{47}\) Schabas (n 28) 168-169
\(^{48}\) Charter of the United Nations Ch IV Art 39
\(^{49}\) Novak (n 38) 52
The first referral by the Security Council was the situation in Darfur, which was referred to the Court in March of 2005. This case also provided the first example of charges being made against an incumbent head of state, Omar Al Bashir, and the first charges of genocide. Al Bashir is, however, still in power and has not faced trial. More recently, efforts have been made to ratify a Security Council referral of the situation in Syria, which is not a party to the Rome Statute. However, China and Russia have used their veto rights as permanent Security Council members in order to block the referrals. In justifying their votes, Russia and China cited among other things the ongoing negotiations to resolve the conflict and emphasized working toward a political solution to the conflict.

The Prosecutor and proprio motu Referral

The third way of triggering the ICC’s jurisdiction is for the Prosecutor to initiate an investigation, which is called a proprio motu referral, as defined in Article 15. This is the most innovative and controversial way of triggering the jurisdiction of the ICC, since the Prosecutor is given wide discretion in choosing situations for a preliminary examination. However, this freedom is not unchecked: if the Prosecutor determines on the basis of this preliminary examination of the situation that it merits a full-fledged criminal investigation, then the Pre-Trial Chamber must approve of it.

Various entities can propose situations to the Prosecutor for preliminary examination and investigation, for example, individuals, groups, States, non-governmental organizations, intergovernmental organizations, and the United Nations. According to Article 15(2), the Prosecutor can seek additional information from such sources, including States, as he or she sees fit.

The Prosecutor has recently made a proprio motu referral of the situation in Georgia to the Court. The situation is currently under investigation for war crimes and crimes against humanity committed by Russian, Georgian, and South Ossetian forces.

2.1.3 Admissibility

Article 17 of the Rome Statute lays down criteria for the admissibility of situations to the ICC. Even if it is established that the Court has jurisdiction over a situation that comes to the

51 Ibid.
53 Rome Statute, Art. 13(c), Art. 15.
54 Schabas (n 28) 158.
55 Schabas (n 28) 177 and Novak (n 38) 52.
56 Rome Statute Art. 15(3).
57 Novak (n 38) 53.
Prosecutor’s attention, this does not entail that the case must be investigated and prosecuted by the Court. A situation over which the Court has jurisdiction might still be inadmissible because, first, a relevant national court is willing and able to investigate the situation or, second, the situation is not sufficiently serious to merit prosecution by the Court or, third, the accused has been prosecuted for the crime before. These three issues, complementarity, gravity, and *non bis in idem*, constitute the requirements for admissibility of a situation to the Court. In order for the Prosecutor to proceed with a case, a majority of the judges of the Pre-Trial Chamber must agree that the case is admissible. The most important of these conditions for this thesis is the condition of *complementarity*, which must be discussed in further detail.

**The concept of complementarity**

The concept of complementarity is closely linked to one of the fundamental aims of the Court as stated in the Preamble of the Rome Statute: that the Court should fight impunity for the perpetrators of the most serious crimes of international concern. Since this impunity is the result of the failure of national courts to bring these perpetrators to justice, the ICC functions as a *complement* to national courts when they are unable or unwilling to prosecute perpetrators. Conversely, if a national court is willing and able to prosecute a situation that otherwise falls under the jurisdiction of the ICC, then that case is not admissible to the ICC. Thus, in a world with properly functioning national courts, the ICC would be superfluous. Article 17(2)(a-c) gives three criteria for determining whether a national court is unwilling to prosecute: the national proceedings aim to shield someone from criminal prosecution, the proceedings are delayed in a way that is incompatible with justice, or they lack independence, impartiality, or some other feature that would make them incompatible with bringing individuals to justice. Article 17(3) gives the criteria for determining whether the national courts are unable to prosecute: there is a “a total or substantial collapse or unavailability of its national judicial system.” If a majority of the judges of the Pre-Trial Chamber agree that one of these criteria is met, then the case is admissible with regard to complementarity.

### 2.2 The Rome Statute and the Swedish Legal System

Sweden signed the Rome Statute on October 7, 1998 and ratified it on June 28, 2001. It was one of the 60 states that at first adopted and ratified the Statute, and when it initially entered into force on July 1, 2002, it did so in Sweden as well. This part describes the implementation of the Rome Statute into the Swedish legal system, Swedish jurisdiction over the crimes in the Rome Statute committed outside Sweden, the initiation of Swedish legal

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59 Schabas (n 28) 190.
60 Novák (n 38) 54.
61 Rome Statute Preamble.
62 Schabas (n 28) 190-191.
63 Novák (n 38) 54.
proceedings concerning these crimes, and procedural impediments to initiating proceedings in Swedish courts.

**2.2.1 The Implementation of the Rome Statute into Swedish Law**

Due to the structure of the Swedish legal system, rules under international law and international agreements are not necessarily applicable on a national level. The relationship between international and national law in Swedish law is *dualistic*, which means that the rules of international law must be made a part of the national law in order to become applicable law in Sweden.\(^{65}\) This implementation of international rules can take two different forms: incorporation and transformation.\(^{66}\)

In the first form of implementation, incorporation, Swedish legislation refers directly to the original international legislation or agreement and makes the content of that international document, whatever it is, into applicable law in Sweden. In this case, the international legal document is adopted directly into Swedish national law without being rewritten or reformulated in national law. The international law thereby becomes Swedish applicable law.\(^{67}\)

In the second form of implementation, transformation, an international law is implemented into Swedish law by changing Swedish law.\(^{68}\) For example, if an international law criminalizes genocide, this law would be rewritten and possibly reformulated as an ordinary Swedish penal provision that criminalizes genocide. Thus, the international law against genocide itself does not become applicable law in Sweden – only the corresponding Swedish law against genocide is applicable law. Transformation allows for the transformed law to be adapted to the particularities of the Swedish legal system. However, in practice, the international law can play a limited role in aiding the interpretation of the implemented Swedish legislation.\(^{69}\)

The Rome Statute is implemented into Swedish national law through transformation. This has taken place through a number of pieces of legislation. In relation to the ratification of the Statute, the Cooperation with the International Criminal Court Act (2002:329)\(^{70}\) was adopted. This Act is a response to and a transformation of part IX in the Rome Statute, which contains Articles 86-102 and regulates international cooperation and judicial assistance. According to Article 86 of the Rome Statute, State Parties are obligated to cooperate with the Court in investigating and prosecuting crimes under the Court’s jurisdiction: \(^{71}\) “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its

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\(^{67}\) Asp (n 65) 79-80.

\(^{68}\) Asp (n 65) 80.

\(^{69}\) Asp (n 65) 80.

\(^{70}\) Lag (2002:329 t.o.m. SFS 2017:130) om samarbete med Internationella brottmålsdomstolen.

\(^{71}\) Prop. 2001/02:88 47.
investigation and prosecution of crimes within the jurisdiction of the Court.” 72 In order to make the fulfillment of these provisions possible, Article 88 stipulates that State Parties must ensure that there are national procedures available for the forms of cooperation that are required by the Statute, and are defined in part IX. 73

The Act (2002:329) sets out how Sweden should cooperate with the ICC in its investigative and prosecutorial activities, for example, in interrogation, collection of evidence, various coercive measures during the investigation, surrender of suspects to the ICC for prosecution, enforcement of sentences, and so on. 74 According to personal communications with the ICC Office of the Prosecutor (15 May 2017), State Party communications with the Office of the Prosecutor are confidential. It is important to note that both Part IX of the Rome Statute and Act (2002:329) focus on State cooperation with the Court in investigating and prosecuting crimes. The Rome Statute does not appear to require any form of cooperation from State Parties to ensure that victims can effectively realize their right to participate in proceedings before the Court, which, as was discussed in the previous chapter, is essential to the victim-oriented conception of justice in the Statute. The preparatory documents to Act (2002:329) recognize that victims play a more independent and central role in the Court proceedings than in the international criminal tribunals, 75 but the law does not require cooperation with the Court to ensure that this right is realized.

The crimes described in the Rome Statute that constitute the material jurisdiction of the ICC are transformed into Swedish legislation in the Swedish Act (2014:406) on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes. 76 The stated aim of the law, according to the preliminary documents, is, among other things, that genocide, crimes against humanity, and war crimes should be able to be prosecuted in Sweden to at least the same extent that they can at the ICC. 77 This law updated previous Swedish legislation concerning genocide and international crime and criminalized crimes against humanity and war crimes for the first time as such. 78

Finally, the Swedish Penal Code 79 was amended so that it asserts a claim of universal jurisdiction for Swedish courts with regard to the crimes defined in the law. 80 A more detailed discussion of Swedish jurisdiction regarding these crimes will be given below.

72 Rome Statute Art. 86.
73 Prop. 2001/02:88 47.
74 ibid 1.
75 ibid 43.
76 Lag (2014:406) om straff för folkmord, brott mot mänskligheten och krigsförbrytelser
77 Proposition 2013/14:146, Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser
78 Asp (n 65) 153-154.
79 Brottsbalk (1962:700) [BrB].
80 Prop. 2013/14:146 2.
2.2.2 Swedish Jurisdiction over Crimes defined in the Rome Statute Committed outside Swedish Territory

As was discussed in the previous chapter, one of the fundamental jurisdictional principles contained in the Rome Statute is the Complementarity Principle: that national courts have priority in the investigation and prosecution of the crimes contained in the Statute, and that the ICC functions only as a complement to national legal systems when they lack the will or the capacity to investigate and prosecute the crimes that fall within its jurisdiction.\footnote{Rome Statute Preamble and Art. 17; Prop 2013/14:146 46-47, 67.}

A basic rule in criminal law is that states have jurisdiction over crimes committed within their own territory. In some cases, however, states additionally have jurisdiction over crimes committed outside their own borders. This is the case when crimes are subject to \textit{universal jurisdiction}.\footnote{Asp discusses the form of connection between the alleged crime and the state that is required for states to have jurisdiction over crimes committed outside its own territory, which should fall in one of four categories; 1) connection due to the location of the crime, which, beyond the territoriality principle mentioned in the text above, includes admiralty jurisdiction over vessels beyond the state’s territory that are flying its flag, 2) connection due to the identity to the perpetrator, 3) connection due to the identity of the victim or object of the crime, and 4) connection due to the nature of the crime itself. The forth form of connection contains the principle of universal jurisdiction and is particularly relevant for this thesis. Asp (n 65) 26-27.} According to the principle of universal jurisdiction, certain crimes are of such a character or seriousness that they merit an international interest in their being investigated and prosecuted.\footnote{Asp (n 65) 27.} When a state claims universal jurisdiction over a crime, it claims the right to prosecute that crime regardless of who committed it and regardless of where it was committed.\footnote{ibid.}

Swedish procedural jurisdiction for international crimes is regulated primarily by Chapter 2 of the Swedish Penal Code. Section 6 of Chapter 2, Paragraph 3 of the Penal Code contains crimes committed on foreign territory over which Swedish courts have jurisdiction as a result of adopting international conventions and the state’s claim of universal jurisdiction. This section refers specifically to the crimes contained in the Rome Statute as they are transformed into Swedish legislation in Act (2014:406). In addition to universal jurisdiction, Swedish courts have \textit{unconditional authority} to prosecute these crimes, which means that there is no requirement for double criminality, i.e., that the act that is criminalized in Swedish law also be criminalized in the territory where it was committed.\footnote{ibid. 45, 48-49.}

2.2.3 Initiating Swedish Legal Proceedings against Crimes Defined in the Rome Statute Committed outside Swedish Territory

Approval from the Swedish authorities is not required to prosecute crimes committed on Swedish territory. However, to prosecute crimes committed abroad, the Swedish Penal Code requires that permission to prosecute, i.e. prosecution mandates, be sought. Approval to
prosecute a crime committed abroad by a Swedish citizen or an alien that is domiciled in Sweden must be sought from the Prosecutor-General. Approval to prosecute such crime committed by a non-citizen or non-resident alien must be sought from the Government.\textsuperscript{86} 

The decision to prosecute crimes committed abroad takes into account a number of basic considerations. These include whether there is a significant Swedish or foreign interest in prosecuting the crime, whether there is some special connection between the crime and Sweden, and how serious the crime is.\textsuperscript{87}

Reports of genocide, crimes against humanity, and war crimes should be submitted to the Swedish Police Authority’s “Group for Investigation of War Crimes.”\textsuperscript{88} This group investigates this category of crimes in collaboration with specially delegated prosecutors at the Swedish International Prosecution Authority,\textsuperscript{89} which has the mandate to process serious crimes that correspond to the crimes under the Rome Statute.\textsuperscript{90} Reports of above-mentioned crimes can be submitted to the Group for Investigation of War Crimes by either the public, the Swedish local police, or other Swedish authorities.\textsuperscript{91}

One Swedish authority that is obligated to submit reports of suspicions of such crimes is The Swedish Migration Agency. This is stated in the Regulation (2007:996) with Instructions for the Swedish Migration Agency\textsuperscript{92} and is of importance for this study. The Swedish Migration Agency is the authority to which individuals turn to seek asylum. The Agency decides asylum seekers’ cases and provides them with housing and allowance for food during the asylum process. Before a case is decided, the Agency carries out at least two individual interviews with asylum seekers: an application interview and an asylum enquiry.\textsuperscript{93} Frequently, the Migration Agency is in contact with these people on more occasions during the asylum process, when they, if necessary, provide for accommodation and funding for asylum seekers.\textsuperscript{94} Finally, if asylum-seekers appeal the Migration Agency’s decision and their case goes to the Migration Court, then they will have additional interviews with the

\textsuperscript{86} BrB 2:5 st. 1 and 2, Förordning (1993:1467) med bemyndigande för riksåklagaren att förordna om väckande av åtal i vissa fall § 1. 
\textsuperscript{87} Asp (n 65) 60 
\textsuperscript{89} ibid. 
\textsuperscript{90} ÅFS 2005:5 9-10 
\textsuperscript{92} Förordning (2007:996) med instruktion för Migrationsverket § 2 17. 
\textsuperscript{94} ibid.
Migration Agency. Moreover, the Agency will be their opponent during the appeal process. This entails that during an asylum-seeker’s time in Sweden, there are multiple opportunities for the Migration Agency to obtain grounds of suspicion or knowledge of crimes under the Rome Statute, whether it be from both victims or from offenders.

According to these procedures outlined in the Migration Agency’s Handbook on Migration Cases, which was developed in response to the Regulation (2007:996) with Instructions for the Swedish Migration Agency, case officers at the Migration Agency are to report suspicions that asylum-seekers are perpetrators of such crimes to the Police. However, there are no procedures concerning a case where asylum-seekers provide information that would give rise to the suspicion that they might be victims of such crimes.

Since July 1, 2002, when the Rome Statute entered into force, the Swedish Migration Agency has submitted 80 reports of suspicion of war crimes and violations of international law (in accordance with the Police Authority's categorization) to the Swedish Police Authority. According to the Swedish Migration Agency, the numbers of reports of suspicions of genocide, crimes against humanity, and war crimes in the last three years have been 43 in 2016, 21 in 2015 and 12 in 2013. However, according to the Police and the Migration Agency, these reports have only been submitted when there were suspicions that a perpetrator, and not a victim, of such crimes was in Sweden. “The Swedish Migration Agency has never submitted a report regarding victims that live in the country and perpetrators who are not in Sweden.”

2.2.4 Procedural Impediments for Prosecuting Crimes in Swedish Courts

In spite of the universal jurisdiction of Swedish courts over the crimes included in the Rome Statute, there are a number of procedural impediments to prosecution that are described in the Cooperation with the International Criminal Court Act (2002:329). According to §16, a deed may not be prosecuted in Sweden if the question regarding the responsibility for the deed has been examined by the ICC, or if the ICC has decided that this question shall be examined by the ICC in spite of an ongoing investigation or prosecution in Swedish courts, or if the ICC has requested that the person in question be surrendered to the Court because of the deed and this request has not been denied. However, deeds that constitute universal crimes according to the Swedish Penal Code, which includes the crimes under the Rome Statute, may still be

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95 Swedish Migration Agency ‘Återrapportering enligt uppdrag i regeringsbrev’ (17 November 2016) Diarienummer: 1.1.1.2-2016-172602 (Swedish Migration Agency homepage) <https://www.migrationsverket.se/download/18.2d998f0c151ac38715918f0f/1485556165386/1.1.1.2-2016-172602-%C3%85terrapportering+myndighets%C3%B6vergripande+%C3%85terv%C3%A4ndande.pdf> accessed 10 May 2017.
96 “Migrationsverket har aldrig inkommit med en anmälan gällande brottsöffer som bor i riket och förövare som inte befinner sig i Sverige.” Email from the Swedish Police Authority to the author [4 May 2017].
97 Lag (2002:329) 16 §; Asp (n 65) 60 s
prosecuted in Sweden even if they are being prosecuted by another state. Exceptions to this are when a state is prosecuting the crime on the request of a Swedish agency or the suspect has been transferred or extradited from Sweden in order to be prosecuted for the crime.99

Since July 1, 2002, when the Rome Statute entered into force, the Government has issued 25 decisions about prosecution mandates regarding crimes that were committed outside Sweden where the suspected perpetrator did not have Swedish citizenship and was not domiciled in Sweden at the time of the crime. Four of these have contained suspicions of genocide or crimes against international law. However, in all four cases, the suspected perpetrators have had Swedish citizenship or have been domiciled in Sweden at the time of the prosecution mandate.

99 Asp (n 65) 59
3 Victims and their Access to International Criminal Justice at the ICC and in Swedish Courts

As mentioned in the introduction of this thesis, the Rome Statute is a landmark in victim-oriented international justice, where the role, rights, and interests of victims take center stage. One of the ways in which the Statute expresses this is the right of victims to participate in proceedings when their interests are affected. This chapter discusses victims’ rights to participate in proceedings before the ICC and before Swedish courts, describes the corresponding obligations to see to it that these rights are realized, and presents the strategies for ensuring that the obligations that these rights entail are fulfilled. It begins by discussing these issues at the ICC, and then continues to examine them regarding Swedish courts.

3.1 Victims and the ICC

3.1.1 The Rights of Victims in the ICC’s Proceedings

Victims of crimes under the Rome Statute can play a number of different roles at the ICC: as participants in proceedings, as witnesses, and as recipients of reparations. The victims’ role as participants, which is in focus here, can be clarified by contrasting it with the role of witnesses before the Courts: 100 victims participate voluntarily in order to express their own interests and concerns, whereas witnesses are called by the defense, the prosecution, or a participating victim and are compelled to answer questions in the interests of the Court and the party who calls them. Whereas witnesses usually have no legal representative and always testify in person, victims have the right to legal representation and usually participate through such a representative rather than in person.

Article 68 of the Rome Statute outlines the various rights of victims before the ICC. Article 68(3) is the key text defining victims’ participation rights and role. Since this right is the focus of this thesis, it will be cited in full:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

The Rome Statute thus establishes that victims should be provided the opportunity to present their views and concerns and have them considered during ICC proceedings. The text of Article 68(3) is the result of intensive debates concerning the participatory rights of victims during the drafting of the Rome Statute. This resulted in a text that has been variously characterized both as containing “constructive ambiguity” and as being “frustratingly vague.” The result of this is that the Court has been forced to interpret virtually every significant phrase in the text. In the following, the Court’s various interpretations of the key terms of Article 68(3) will be discussed in order to clarify victims’ rights to participate in the ICC’s proceedings.

The Court’s tendency has been to interpret the main terms of Article 68(3) broadly. First, the phrase “when the personal interests of the victims are affected” has been interpreted quite liberally by the Pre-Trial Chambers. The scale of “personal interests” of victims is extensive, as to “include an interest in receiving reparations, an interest in being allowed to express their views and concerns, an interest in verifying particular facts and establishing the truth, an interest in protecting their dignity during the trial and ensuring their safety, and an interest in being recognised as victims in the case, among others.” The result is that the distinction between “victim” and “victim whose personal interests are affected” threatens to disappear and practically all victims have the right to participate.

A second central term of Article 68(3), “proceedings,” has also been given a broad interpretation by the Court. It has been interpreted by two Pre-Trial Chambers to include not only the trial stage, as would be expected, but in the pre-trial stage and, controversially, the investigation stage as well. For example, Pre-Trial Chamber I recognized a right for victims to participate at the investigation phase by appealing to human rights courts and the background of the drafting of the Rome Statute. The Appeals Chamber has subsequently limited the right to participation in investigations, arguing that the Pre-Trial Chamber’s

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101 The Rome Statute, Art. 68.
102 Van den Wyngaert (n 3) 478.
103 Philippe Kirsch, first president of the ICC in Van den Wyngaert (n 3) 478.
105 Van den Wyngaert (n 3) 478; Kelly (n 2) 53-54; Schabas (n 28) 356.
106 Van den Wyngaert (n 3) 478-479; Kelly (n 2) 54.
107 Kelly (n 2) 54 citing Trumbull (n 104) 798.
109 Kelly (n 2) 54 citing Trumbull (n 104) 798.
110 Kelly (n 2) 54-55; Van den Wyngaert (n 3) 484.
reading could “find no justification under the Statute, the Rules of Procedure and Evidence or the Regulations of the Court.”\textsuperscript{112}

Efforts have been made by some Chambers to require a justification of victim participation in each phase of the proceedings by documenting how victim interests have been affected.\textsuperscript{113} However, this has led to an explosion of applications for participation that must be examined on a case-by-case basis, which has overburdened the Court.\textsuperscript{114}

Finally, the phrase “presentation of views and concerns” was also left open to interpretation by the drafters of the Rome Statute.\textsuperscript{115} It has been interpreted broadly as well, to include functions usually reserved to the prosecution and defense, such as the questioning of witnesses and the presentation of evidence,\textsuperscript{116} although there is nothing in the Statute or the RPE saying whether victims can present evidence to the Court.\textsuperscript{117} While this interpretation can allow victims to contribute to the truth-finding process and help the Court to see evidence through their eyes, thereby fighting impunity,\textsuperscript{118} prosecutors have generally fought against this broad interpretation of “views and concerns.”\textsuperscript{119}

3.1.2 Access to Proceedings and Outreach

In order to participate in Court proceedings, victims must apply for victim status and show that they meet the definition of a victim in Rule 85 of the RPE and be granted this status by the Court. Scholars have discussed two basic problems with the application process. As was mentioned above, on the side of the Court, the large scope of the crimes within the Court’s jurisdiction entails that there are many victims who can and do apply for victim status.\textsuperscript{120} When victims must then submit an application at every stage in which they wish to participate in order to show that their interests have been affected, the Court is saddled with an enormous

\textsuperscript{112} ‘Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the Decision of Pre-Trial Chamber I of 24 December 2007’ (19 December 2008) ICC-01/04 OA4 OA5 OA6; See Van den Wyngaert (n 3) 484.

\textsuperscript{113} Van den Wyngaert (n 3) 482.

\textsuperscript{114} Van den Wyngaert (n 3) 483.

\textsuperscript{115} Schabas (n 28) 355-356.

\textsuperscript{116} Kelly (n 2) 55, citing Trumbull (n 104) 795-796 and ‘Situation in the Democratic Republic of the Congo, ICC-01/04, in the Case of the Prosecutor v. Thomas Lubanga Dyilo ‘Decision on the schedule and conduct of the confirmation hearing’ (7 November 2006) ICC-01/04-01/06-678. Trumbull also cites paragraph 108 of ICC-01/04-556 above.

\textsuperscript{117} Schabas (n 28) 355-6.

\textsuperscript{118} Van den Wyngaert (n 3) 487.

\textsuperscript{119} Kelly (n 2) 55.

\textsuperscript{120} Kelly (n 2) 51 citing ‘Situation in the Central African Republic, ICC-01/05, in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo. Corrigendum to the Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims' applications to the Registry’ (21 July 2011) ICC-01/05-01/08-1590-Corr.
administrative burden\textsuperscript{121} that can violate the right of the accused to a speedy trial.\textsuperscript{122} Scholars have suggested that participation should take the form of a class action.\textsuperscript{123}

From the victims’ perspective, the application process can be long and cumbersome, and many victims are simply unaware of their right to participate or lack the resources to participate.\textsuperscript{124} The Court has developed extensive institutional support services for victims in order to ensure their role and rights.\textsuperscript{125} The Victims Participation and Reparations Section (VPRS) was established within the Registry in order to inform victims of their participation and reparation rights. It also facilitates the application process and access to legal representation. The Victims and Witnesses Unit (VWU) is also within the Registry and provides support services to witnesses and victims appearing before the Court. These services include the provision of security and counseling in accordance with Article 68(1), which stipulates that “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”\textsuperscript{126} Finally, the Office of Public Counsel for Victims (OPCV) is an independent office that can provide victims with legal representation or assist victims and their representatives with legal research and advice.\textsuperscript{127}

Beyond these institutional measures for ensuring victims’ access to the Court’s participation in proceedings, the Court’s outreach programs aim to remedy some of the problems with victims’ access. The ICC affirms that “people most affected by crimes have the right to understand, to participate in, and to have a sense of ownership of the justice process” of the ICC.\textsuperscript{128} As mentioned earlier in this thesis, the Pre-Trial Chamber of the ICC further has recognized that article 68(3) of the Rome Statute entails positive obligations on the court to concretely and effectively enable victims to exercise their right to access to the court.\textsuperscript{129}

A central requirement for ensuring that people affected by crimes can participate in the ICC’s proceedings is that the function of the court is understood by its audience.\textsuperscript{130} This means that

\textsuperscript{121} Van den Wyngaert (n 3) 481-483.
\textsuperscript{122} Kelly (n 2) 51 citing Christodoulos Kaoutzanis ‘Two birds with one stone: how the use of the class action device for victim participation in the International Criminal Court can improve both the fight against impunity and victim participation’ (2010) 17 UC Davis JILP 111, 128.
\textsuperscript{123} Kelly (n 2) 52 citing Kaoutzanis (n 122) 22. Cf. Van den Wyngaert (n 3) 483.
\textsuperscript{124} Kelly (n 2) 51 citing Kaoutzanis (n 122) 131-133.
\textsuperscript{125} See Van den Wyngaert (n3) 479-480.
\textsuperscript{126} Victims Guide (n 100) 10-11.
\textsuperscript{127} Victims Guide (n 100) 18.
\textsuperscript{129} ‘Situation in the Democratic Republic of the Congo, ICC-01/04, Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6’ (Jan. 17 January 2006).
\textsuperscript{130} See ICC (n 128) and ICC Assembly of States Parties (n 128).
people affected by crimes need to know and understand their rights, the work of the court, and how they can obtain access to the Court’s proceedings through the application procedure described above. With this in mind, the ICC is actively working to establish a close link to communities affected by Court proceedings through an outreach program.\textsuperscript{131,132}

The work of outreach is not a part of the ICC’s central juridical capacities, but it has been recognized to be an integral part of the strategic plan of the Court.\textsuperscript{133} The ICC’s work in this regard is essential in the sense that it makes the activities of the court available to victims of crimes and the public.\textsuperscript{134} To be accessible to this audience in this way is a prerequisite for the ICC to ensure fair trials and the quality of justice.\textsuperscript{135}

Since it was created, the ICC has worked with outreach strategies. However, in 2006 the Court presented a Strategic Plan for Outreach for the ICC, with the ambition to enhance its outreach program and to continue build upon and intensify its activities within this area. The Strategic Plan for Outreach states that the Court must seek to bridge the distance between the Court and affected communities by establishing an effective system of two-way communication. This means that, on the one hand, the Court should reach out to and inform these communities about the work of the court. But on the other hand, it advocates a system that enables the Court to better understand the concerns and expectations of the communities.\textsuperscript{136}

The Strategic Plan for Outreach lists the objectives of the Court’s outreach program. Among these objectives are to inform “affected communities” about “the Court’s role and activities,” to inform them about the different phases of Court proceedings in order to gain community support for these different phases, to encourage community participation in Court activities, and, most importantly for this thesis, “to promote access to and understanding of judicial proceedings among affected communities.”\textsuperscript{137}

The ICC’s outreach activities can be addressed towards several different target groups, with different characteristics and needs.\textsuperscript{138} The court has recognized that some groups may for various reasons become a part in activities conducted by the Court more naturally than others. However, the Strategic Plan for Outreach presents a list of groups that will always be targets of the Court’s outreach program presented. In this list, victims and refugees are included. The term refugee is here “taken in its general meaning, and not in a legal terminology, as an

\textsuperscript{131} ICC (n 128).
\textsuperscript{132} Chamberlain Bolaños (n 8) 154ff.
\textsuperscript{134} Chamberlain Bolaños (n 8) 154.
\textsuperscript{135} Chamberlain Bolaños (n 8) 155 and the ICC Outreach Unit (n 133) 81.
\textsuperscript{136} ICC Assembly of States Parties (n 128) para 3.
\textsuperscript{137} Ibid., paragraph 13
\textsuperscript{138} Ibid., paragraph 18
Outreach general paper is not a legal document,” which hence is interpreted to include all international forcibly displaced and asylum-seeking people.\textsuperscript{139}

With regard to victims, the Plan for Outreach recognizes that outreach activities may have to be adapted to “the accessibility of the locations of individuals and groups.”\textsuperscript{140} Regarding refugees, the Plan recognizes that refugee groups “may contain a high concentration of victims” and that “they can be particularly vulnerable and cut off from customary sources of information.”\textsuperscript{141}

In order to reach out to the communities and the target groups listed in the Strategic Plan for Outreach, various communication tools and techniques may be employed. These communication tools and techniques should always be adjusted to the circumstances of its recipients and the environment in which they are used. In addition to discussing various ways of communicating with, among others, the general public, the media, NGOs and civil society groups, and the government, the Plan specifies communication tools and techniques that could be appropriate with victims (paragraph 52) and refugees (paragraph 57). These tools include various forms of printed and broadcast media, meetings such as seminars, workshops, and lectures, as well as working with various organizations and agencies working with victims and refugees.\textsuperscript{142}

The Court must adapt its outreach activities to the specific phase of the judicial process as well. There are six phases in the Court’s judicial processes: analysis or initial examination of a situation, investigation, pre-trial, trial, appeal, and implementation.\textsuperscript{143} The Plan also distinguishes between outreach activities that are applicable to situations in general and are thus conducted throughout the entire judicial process and outreach activities that are applicable to specific cases and are thus relevant only once an arrest warrant has been issued.\textsuperscript{144}

During the initial analysis phase, where the Prosecutor makes a preliminary examination of the situation, the Court does not undertake any positive outreach activities. Rather, it lays the ground for such activities by seeking background information from public sources about “potential challenges and opportunities, existing communication networks, potential networks of partners and target groups.”\textsuperscript{145} If a situation moves on to the investigative and pre-trial phases, then basic information about the Court, its organization, and its procedures should be disseminated.\textsuperscript{146} Special efforts should be made to direct specific information to victims at

\begin{flushright}
139 Email from the Public Affairs Unit of the ICC to author 27 March, 2017.
140 ICC Assembly of States Parties (n 128) para 22.
141 Ibid., para 27.
142 Ibid., paras 52 and 57.
143 Ibid., para 32.
144 Ibid., paras 32, 33, and 37.
145 Ibid., para 34.
146 Ibid., para 35.
\end{flushright}
this stage. If the situation moves on to the trial phase, then outreach activities should become more focused and specific. With regard to victims, they should be informed that they have the right to participate during the pre-trial confirmation of charges. When the trial has begun, outreach will additionally aim to make the proceedings accessible to “affected communities.” These efforts will continue throughout the appeal and implementation phases.

Outreach activities are carried out by a permanent Outreach Unit, established within the ICC Public Information Unit. The unit will “consist of permanent staff at the ICC Headquarters and staff based in the field office where the core outreach activities will be carried out.” However, the Outreach Unit does not aim to carry out all the activities on its own. Instead, the Court coordinates its activities with external local partners who can support the Court in reaching out to the broader local population through culturally appropriate intermediaries.

### 3.2 Victims in the Swedish Legal System

#### 3.2.1 The Rights of Victims in the Swedish Legal Proceedings

In this part of the thesis, the rights of victims in the Swedish legal system will be described. As was mentioned in the Introduction above, the concept “victim” is not defined in Swedish legislation. Rather, Swedish legislation refers to “målsägande” – “plaintiffs” or “injured parties.” Nevertheless, victims’ rights are well-represented in Swedish law independently of the Rome Statute. This is reflected in the preliminary documents for implementing the EU Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime (Victims’ Directive) into Swedish law. The aim of the Victims’ Directive is “to ensure that victims of crime receive appropriate information, support and protection and are able to participate in criminal proceedings.” Since the Victims’ Directive collects and enumerates victims’ rights in one document and since Swedish law has been amended in accordance with it, the EU Victims’ Directive and the preliminary documents to its implementation in Swedish legislation will be used here to describe victims’ rights in Sweden in a systematic way.

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147 Ibid., para 35.  
148 Ibid., para 40.  
149 Ibid., para 41.  
150 Ibid., para 44.  
151 Ibid., paras 63-66.  
154 Victims’ Directive Art. 1  
155 The required amendments were made in SFS 2015:429.
According to the preliminary documents for implementation of the Victims Directive into Swedish legislation, various provisions scattered throughout Swedish law already lived up to the provisions contained in the EU Victims’ Directive regarding victim participation in and access to proceedings that are relevant for this thesis, and thus did not require extensive amendment. This part will describe victims’ participation rights in the different phases of Swedish court proceedings, and the next part will describe their access to these rights. This will be complemented by additional references to Swedish legislation that goes beyond the minimum level of victims’ rights that is contained in the Victims’ Directive.

Chapter 3 of the Victims’ Directive covers participation in criminal proceedings, and contains some of the rights to participation that can be found in the Rome Statute and subsequent ICC rulings. The first article of this chapter, Article 10, describes victims’ right to be heard during criminal proceedings and to present evidence. According to the preliminary documents, police and prosecutors have the obligation to investigate all crimes. This gives victims the corresponding right to have their cases investigated. Victims are implicitly given the possibility to be heard and to present evidence in Swedish legislation by The Code (1942:740) of Judicial Procedure (RB) 23 Chapter § 6, which reads “During the preliminary investigation, anyone who is reasonably likely to possess information relevant to the inquiry may be questioned.” According to the preliminary documents, it is reasonable to assume that on this basis, victims will be heard and can present evidence in the preliminary investigation phase, especially if they wish to do so.

During the indictment phase, the victim has the right to participate by modifying the description of the crime, presenting evidence, and arguing for an alternative sanction to the one proposed by the prosecutor. During the main hearing phase, victims have the right to participate, to be heard, to develop their claims, and to present evidence. During the questioning of the victim, the prosecutor, the defense, and the court may pose questions to victims. If victims have counsel, they may be questioned by them as well. Furthermore, victims have the right to have their claims for damages examined at the same time. This allows victims to avoid undergoing a second proceeding and enduring secondary or repeat victimization, as is required by the Victims’

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156 Prop. 2014/15:77. According to this document, Swedish legislation must be amended to ensure that, among other things, non-Swedish speaking victims’ rights to interpreters and translations are realized.
157 DS 2014:14, Genomförande av Brottsofferdirektivet 130; see 23 kap 1 § Rättegångsbalk (1942:740 t.o.m. SFS 2017:176) (RB).
159 RB (1942:740).
161 DS 2014:14 128; 20 ch 8 § second paragraph RB; see Landström (n 158) 37.
162 46 ch 6 § RB, see Landström (n 158) 29.
163 37 ch 1 § and 36 ch 17 RB.
164 22 ch 1 § RB, see Landström (n 158) 36-37.
Directive Article 12(1) and 18(1). Victims can also be active in the closing statements phase of the main hearing via their counsel.\textsuperscript{165}

Finally, victims have the right to know and to respond to all that has been presented and that underpins the outcomes of the proceedings.\textsuperscript{166} The Court’s deliberations take into consideration everything that was presented during the main hearing, and the victim has the right to be aware of and to have responded to all evidence.\textsuperscript{167} Victims have the right to be informed of the Court’s decision in the case,\textsuperscript{168} and they can appeal the decision as well.\textsuperscript{169}

\subsection*{3.2.2 Access to Proceedings and Reaching Out to Victims}

This part will describe Swedish legislation that guarantees victims’ access to judicial proceedings in Swedish courts, especially those corresponding to the ICC’s outreach activities. State Parties to the Rome Statute do not appear to commit themselves to establishing outreach and accessibility programs to victims of crimes under the Rome Statute who find themselves within their borders as part of their cooperation with the ICC. Rather, “If the ICC finds that outreach activities to certain communities in a specific place are needed, the ICC conducts its outreach activities with the cooperation of the concerned State.”\textsuperscript{170} There is nothing in the Cooperation with the International Criminal Court Act (2002:329) nor in Act (2014:406) on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes concerning outreach to victims.

Nevertheless, the Victims’ Directive describes victims’ rights that correspond to the content of the ICC’s Plan of Outreach and other accessibility efforts that were discussed in the first part of this chapter. For example, Article 13 requires that legal services be provided to victims that correspond to those furnished by the OPCV, and Articles 18-24 describe security and counseling services that correspond in large part to those performed by the VPRS and the VWU. According to the preliminary documents to the adoption of the Victims’ Directive, these rights are guaranteed by Swedish legislation.

This section, however, will focus on provisions in Swedish legislation that correspond to the ICC’s outreach activities. Article 3(1) of the Victims’ Directive stipulates that States have the responsibility to help victims “understand and to be understood from the first contact and during any further necessary interaction they have with a competent authority in the context of criminal proceedings.” According to the preliminary documents, this provision is guaranteed in Swedish legislation by the Language Act (2009:600), which requires that language used by public institutions be standard, simple, and understandable, and other initiatives in particular governmental agencies that have contact with victims.\textsuperscript{171}

\begin{thebibliography}{99}
\bibitem{165} 46 ch 10 § RB; see Landström (n 158) 40.
\bibitem{166} DS 2014:14 128; 46 ch 10 § RB; see Landström (n 158) 40.
\bibitem{167} 30 ch 2 § RB; see Landström (n 158) 40.
\bibitem{168} 30 ch 7 § RB; see Landström (n 158) 40.
\bibitem{169} 49 ch 1 § and 20 ch 8 § second paragraph RB; see Landström (n 158) 40.
\bibitem{170} Email from Public Affairs Unit of the ICC to author 27 March, 2017.
\bibitem{171} DS 2014:14 48-54.
\end{thebibliography}
Article 4 of the Victims’ Directive confirms that states shall guarantee that victims are offered information to enable them to access the victims’ rights set out in the Directive. This information shall be provided to victims “without unnecessary delay, from their first contact with a competent authority.” The Article stipulates that type of information that should be provided to victims should include, information regarding the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures, how and under what conditions they can access legal advice, legal aid and any other sort of advice, the type of support they can obtain and from whom, how and under what conditions they can access compensation, and the available restorative justice services.

The preparatory documents to the implementation of the Victims’ Directive state that it applies from the time that a crime was reported or from the time that the Police Authority initiates a criminal investigation. Further, the definition “competent authority” has been interpreted to refer to the Swedish Police Authority, the Swedish Prosecution Authority, and the judiciary. Consequently, the obligation to provide information and support in accordance with Article 4 of the Victims’ Directive is imposed on the Swedish Police Authority in Swedish law, since it is the authority that is primarily responsible for investigating crimes and that, in most cases, has the initial contact with victims.

According to personal correspondence with the Swedish Migration Agency and the Handbook on Migration Cases, the Migration Agency does not provide such information, even though it is often the Swedish agency that has first contact with asylum-seeking victims. The primary provisions in Swedish legislation governing these requirements on the Police Authority are the Police Regulation (1998:1558) and the Decree (1947:948) on Preliminary Examinations.

The Police Regulation requires the police to strive to give citizens advice and support and to give victims information that they need. They should pay attention to and take account of the demands and wishes of those who live and work in their districts. The Decree on Preliminary Examinations contains provisions that describe in more detail what kinds of information victims have the right to receive. Victims shall be informed as soon as possible that the prosecutor under certain circumstances can initiate prosecution of a crime concerning an individual claim and that it might be possible to receive compensation. They also have the right to be informed as soon as possible about rights to legal assistance and counseling, about which government agencies, organizations can provide support, help, and care.

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172 DS 2014:14 35.
173 DS 2014:14 44.
177 13 a § Förundersökningskungörelsen (1947:948); DS 2014:14 59ff.
Chapter 4: Case Studies and Analysis: Asylum-Seeking Victims’ Access to International Criminal Justice in Practice

This chapter describes the cases of two asylum-seekers, Carol and A, that have been processed by the Swedish Migration Agency and appealed their decisions to the Swedish Migration Court. It then uses the results from the first three chapters of the thesis concerning the rights of victims and the corresponding obligations of the ICC and Swedish authorities to analyze their access to international criminal justice.

During their asylum processes, Carol and A have described that they, in their countries of origin, have been victims of crimes defined in the Rome Statute. The aim is to use these cases to illustrate asylum-seeking victims’ access to justice in theory and practice. In theory, what rights do these victims have, and who has the corresponding obligations to satisfy these rights? In practice, are these victims’ rights satisfied by the appropriate authorities? The two cases that will be analyzed contain alleged crimes over which the ICC, according the Rome Statute, has subject-matter, temporal, territorial, and presumably personal jurisdiction, as described in section 2.1.1. above.

4.1 Carol Mirembe vs. the Swedish Migration Agency

4.1.1 Case Background

The first case concerns Carol Mirembe, born on November 25, 1984 in Uganda, who applied for asylum in Sweden. At the time of her application, the ICC had exercised jurisdiction over the situation and was conducting an ongoing investigation of alleged crimes against humanity, such as enslavement, sexual enslavement, and rape, and war crimes, such as the cruel treatment of civilians by the Lord’s Resistance Army in Uganda that was initiated due to a self-referral by the Ugandan government.  

According to the Registry’s report “Public Information and Outreach,” the ICC had outreach activities ongoing in Uganda at the time which continue to this day. However, these outreach activities were limited to northern Uganda and did not include refugees. As of the beginning of 2017, the ICC has no active outreach programs in Europe.

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181 Email from ICC Public Affairs Unit to author (27 March 2017).
Maria Kamara, Outreach Coordinator for Kenya and Uganda, admits that finding the victims of crimes is one of the greatest obstacles to informing them of their rights to participate in proceedings: “One of the main challenges facing the Court is locating the victims of the crimes to inform them of their rights to participate in the processes.” She adds that the Court’s limited resources are one of the most important reasons for this. “This is true especially so given the fact that the Court has limited resources.”

4.1.2 Case Description

On October 15, 2012, Carol applied for asylum at the Swedish Migration Agency in Sweden. She described the following circumstances to the Agency:

In December 1999, Carol was kidnapped in her home in Onayama, Uganda, by rebels from Joseph Kony's army of resistance, the Lord’s Resistance Army (LRA). Together with 20 other women, she was held captive by a group of approximately 50 LRA rebels from Uganda, Congo, and Sudan until 2010. Some of the women were trained by the rebels, but Carol had the task of cooking, writing, and reading to them. Carol was also beaten, punished, raped, and forced to kill.

The rebels, who held Carol captive, moved from place to place in southern Uganda, Congo, and then in Sudan. When moving, Carol helped to carry the rebel's belongings. According to Carol, the rebels brought the women so that they could exploit them sexually. Carol could not deny sexual intercourse with the rebels because of the risk of being beaten or even killed. Among the rebels, there was one man, commander Sifo, who took care of Carol.

During her time as a captive by the rebels, Carol had six children: three survived, two died from difficult living conditions, and one died at birth as a result of Carol being abused by the rebels after an attempt to escape. The paternity of the children is unknown. Carol was sexually exploited by several different men and therefore does not know who is the father of her children.

Carol made two failed escape attempts from the rebels. During an ongoing conflict between Juba rebels and Duma in Southern Sudan in 2010, Carol succeeded in a third attempt to escape. From that day, she lived with the Dinka people, and under the Dinka's control, where Carol describes the conditions being better than when living with the rebels. However, Carol was taken advantage of in exchange for food and shelter. She was not forced to stay with the Dinkas, but did not know any other way of living.

With the Dinka’s, there was a commander who cared for Carol and provided her with food. One day, in 2012, this commander urged Carol to run away from an ongoing conflict with two men. Due to the urgent situation, the commander told Carol that she was unable to get and bring her children, and that she had to leave without them. Carol did not know, and did not dare to ask, where the men would take her, but she thought they would only go away and come back again.

After a week-long ride in a van, they arrived at an airport from which they would travel to Sweden. When they arrived in Sweden, the men held Carol captive in an apartment building, where she was forced to serve the two men and their customers with sexual services. Carol was at that time well into her pregnancy. After

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three to four weeks, Carol managed to escape from the apartment and then contacted the Swedish Police Authority. On November 20, 2012 Carol gave birth to her daughter, for whom Carol applied for asylum ten days later.

In the decision in Carol's asylum case, from February 17, 2013, the Swedish Migration Agency judged that there were credibility deficiencies in Carol’s description of her case and therefore rejected her application for asylum. However, when the Migration Agency’s decision was appealed, the Swedish Migration Court overturned this decision. In a judgement from October 13, 2013, the Court found that only a small part of what had been presented by Carol in her case, regarding her age and her travel to Sweden, lacked credibility. Beyond that, the Court stated that there was no reason to question the content of Carol's story, which Carol presented and elaborated upon during the court proceedings.

### 4.1.3 Case Analysis

The analysis of this case will determine whether Carol is a victim, what participation rights she has as a victim before the ICC, and who bears responsibility for ensuring her access to the Court’s proceedings. Carol’s account describes numerous deeds that count as crimes against humanity or war crimes under the Rome Statute: for example, acts of sexual violence, such as rape, sexual slavery, and forced pregnancy, and other crimes such as enslavement and inhumane treatment. Some of these crimes are among the crimes that were being investigated in Uganda at the time. Furthermore, Carol would count as a victim under the definition of “victim” in Rule 85 of the RPE of the ICC, since her account shows that she “suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”

Given her status as a victim, Carol has the rights discussed in section 3.1 above. First, section 3.1.1. shows that she has the rights to participation in Court proceedings when her interests have been affected according to Article 68(3) of the Rome Statute. Second, section 3.1.2. shows that she has the right to know about and understand the Court and its proceedings and to know about and understand her rights as a victim.

The question then arises: who has the obligation to ensure Carol’s rights? What access does Carol have to justice? At the time of her case, the ICC had initiated an investigation of the crimes committed in Uganda, so she had the right to know about, understand, and take part in these proceedings, but who was obligated by these rights? Section 3.1.2. above showed that the Pre-Trial Chamber of the ICC has determined that the Court has positive obligations to make its proceedings accessible to victims. It also showed that the Court aims to live up to this positive obligation through outreach programs. The design of these programs is guided by

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184 ibid.
185 ibid.
186 Rome Statute, Art. 7(1)(g), and 8(2)(b)(xxii) and (e)(vi).
187 Rome Statute, Art. 7(1)(c).
188 Rome Statute, Art. 7(1)(k) and Art. 8(2)(a)(2).
189 The relevant crimes here were crimes against humanity, such as enslavement, sexual enslavement, and rape, and war crimes, such as the cruel treatment of civilians.
the Strategic Plan for Outreach by the ICC, and should always include activities aimed at
victims and refugees, including asylum-seekers, and be adjusted to the circumstances of its
recipients.

Based on these results, the ICC has an obligation to ensure that Carol knows about,
understands, and can exercise her right to participate in the ICC’s proceedings. However, as
was discussed above, the ICC’s outreach activities were limited to northern Uganda and did
not include refugees in Europe. Thus it appears that the ICC is not living up to its obligations
to ensure that Carol knows about, understands, and can exercise her participatory rights before
the ICC. The comments of Outreach Coordinator Maria Kamara suggest that the Court’s
limited resources for outreach could explain the lack of outreach to refugees in Europe like
Carol.

Alternatively, one can ask whether Sweden has any obligations to ensure Carol’s rights to
participation in proceedings before the ICC. As was noted in section 2.2.1. above,
cooperation between the ICC and Swedish authorities is limited to the investigation and
prosecution of crimes, and does not extend to ensuring that victims can effectively realize
their rights to participate in proceedings before the Court. Furthermore, cooperation between
the ICC and Swedish authorities must be initiated by the ICC. So from this perspective, the
obligation to ensure Carol’s rights still lies with the ICC, and not with Sweden.

Nonetheless, Carol is the victim of a crime under the Rome Statute and Swedish law. Could
her right to participation in proceedings be ensured by Swedish laws regarding victims’ rights
to participation? The discussion of victims’ rights in section 3.2.1. above showed that victims
in Sweden have rights to participate in proceedings that are even more robust than those that
are found in the Rome Statute. Swedish law also contains provisions that ensure victims’
access to information about their role in judicial proceedings, support services, compensation,
and restorative justice services. However, while it is clear that these provisions concerning
victims’ rights apply regarding proceedings in Swedish national courts, it is unclear whether it
would apply to proceedings at the ICC. Thus, there appears to be a gray zone regarding
Sweden’s obligations in ensuring access to the participation rights of victims where the
proceedings are at the ICC.

4.2 A vs. the Swedish Migration Agency

4.2.1 Case Background

The second case concerns a boy, A, from Afghanistan, who applied for asylum in Sweden.
Since before A applied for asylum, the ICC has conducted a preliminary examination of the
situation concerning alleged crimes against humanity, “murder, and imprisonment or other
severe deprivation of physical liberty,” and war crimes, “murder; cruel treatment; outrages
upon personal dignity; the passing of sentences and carrying out of executions without proper
judicial authority; intentional attacks against civilians, civilian objects and humanitarian
assistance missions; and treacherously killing or wounding an enemy combatant,” in Afghanistan, but has not yet initiated any investigation or prosecution.190

4.2.2 Case Description

On September 6, 2014, A applied for asylum at the Swedish Migration Agency.191 A has described the following circumstances to the Agency:

One night in 2013, several men with weapons and masked faces entered by force the home of 13-year-old A and his family in Afghanistan. The family were awakened from their sleep, and A was captured by force, thrown into a car, and driven away. A’s mother tried to stop the men from taking her son, but they responded by hitting her with their weapons. A and his family were Hazaras and Shiite Muslims, and his father had recently disappeared since he was taken by the Taliban when he was on a bus ride home from Kabul.

In the car that A was brought to, shouts from other people were heard. A was taken to an unknown and dark place where he had to spend the night. At dawn, it became clear to A that other children from his hometown were there as well.

According to A, he had been brought to a place, which he described as a camp, where there where Taliban who gave him food and water. These Taliban taught him how to use weapons and how to become a suicide bomber. The Taliban claimed that all non-Muslims in Afghanistan must be killed, and by killing many such persons, A would go to paradise. They showed a key which they said was a key to paradise, and every day they hung a key around one or two boys’ necks, took them away, and then they would never come back again. The Taliban told A that they were protecting his family at home and that they provided them with dollars.

After about 15-20 days A managed to escape with some other boys that were held captive. During the escape attempt, the Taliban attacked them with guns and hand grenades. A got injured and got a piece of metal in his arm. But still, he managed to escape by getting into the mountains and the woods. The following morning A met a Hazara shepherd who brought him to his home where he received care. The shepherd removed the metal piece in A’s arm, after which A became unconscious. With the help of the shepherd, they came into contact with A’s uncle, who came to pick A up and brought him to a hospital, where his arm was operated on.

Because A had escaped from the camp where he had been held captive, the Taliban came to A’s town to threaten to kill all of his family if they would not find A in the next few days. Consequently, A’s uncle contacted a smuggler who helped the family to flee. During the journey, A got separated from the rest of his family when they were shot at in Turkey. A arrived as an unaccompanied child to Sweden.

In the decision in A’s asylum case, from December 16, 2014, the Swedish Migration Agency judged that there were credibility deficiencies in A’s claims (even though account was taken of the fact that he was a minor at the time). However, when the Migration Agency’s decision in A’s asylum case was appealed, the Migration Court made another assessment. In a judgement from April 4, 2014, the Court found that A’s testimony was credible. Furthermore, the Court stated that it cannot be excluded that the Taliban may have used forced recruitment in the manner that was described by A. The basis for the Court's position was the information

A had put forward in the investigation of his case, what was further claimed during the court proceedings, and information about the situation in Afghanistan.

Unlike the Swedish Migration Agency, the court granted him a residence permit in Sweden. The court granted the appeal and at the end of the judgment, the court determined: “It is the responsibility of the Swedish Migration Agency to issue authorization certificates and otherwise to take whatever measures this judgment gives rise to.”

4.2.3 Case Analysis

The analysis of this case will determine whether A is a victim of a crime under the Rome Statute and who is responsible to prosecute perpetrator of the crime to which he has been exposed. Thus, the question of jurisdiction, and further, the procedure to have A’s case tried in court will be analyzed. Moreover, the way A is enabled to effectively exercise his rights to participation will be evaluated.

A’s account describes a crime that counts as a war crime under the Rome Statute: “Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.” Furthermore, A would count as a victim under the Rome Statute and Swedish law and since he has, as defined in section 1.3.1 above, suffered direct harm from crimes defined in the Rome Statute. Given that A is a victim under the Rome Statute, two questions must be answered. First, what are A’s rights under the Rome Statute? Second, what access to justice does he have under the Rome Statute?

Regarding the first question, this thesis focuses on A’s access to the right to participate in proceedings. However, in order for this right to participate in proceedings to be realized, the proceedings must exist in the first place, which leads to the second question. The situation must be investigated, charges must be brought, and perpetrators must be prosecuted. Only then can A’s access to his participation rights be ensured. Thus, in order to determine A’s access to justice, the jurisdiction over A’s situation initially must first be determined. Secondly, the procedural path that must be taken in order that the proceedings against the perpetrators be initiated must be determined. Finally, the way in which A is enabled to effectively exercise his rights and obtain access to participation in proceedings must be determined.

Regarding the first point, concerning jurisdiction over A’s situation, Sweden has accepted primary responsibility to investigate and prosecute crimes under the Rome Statute over which it has jurisdiction in accordance with the complementarity principle discussed in 2.1.3. above. Furthermore, Swedish courts have universal jurisdiction over these crimes. This jurisdiction is limited if the question regarding the responsibility for the deed has been examined by the ICC, as discussed in section 2.2.4. above.

192 Ibid.
193 Rome Statute, Art. 8(2)(b)(xxvi) and (e)(vii).
The ICC has been undertaking a preliminary examination of the situation in Afghanistan since before A sought asylum in Sweden in 2014. However, at this point, the ICC has not determined whether it will investigate or prosecute the alleged crimes there. Furthermore, the crime of which A is a victim is not part of the initial examination of the situation by the ICC. From this, it can be concluded that there are no ongoing proceedings that could limit Sweden’s jurisdiction over these crimes.

With the question of Swedish jurisdiction over the crime now answered, it is now possible to address the second point, regarding the procedural path that must be taken in order that proceedings against the perpetrators be initiated. This path was outlined in part 2.2. above. The previous section showed that the Migration Court’s decision in A’s case states that “It is the responsibility of the Swedish Migration Agency to issue authorization certificates and otherwise to take whatever measures this judgment gives rise to.” Since the judgment affirms the veracity of A’s account, the judgment contains grounds for the Migration Agency to suspect that crimes under the Rome Statute, namely, the crime of recruiting child soldiers, have been committed. The Migration Agency is thus bound by the decision “to take whatever measures this judgment gives rise to.”

As was discussed in part 2.2. above, the Regulation (2007:996) with Instructions for the Swedish Migration Agency obligates the Migration Agency to report this suspicion to the Swedish Police Authority. There, the Group for Investigation of War Crimes, in cooperation with the Swedish International Prosecution Authority, would analyze the situation. If the prosecutors from the Swedish International Prosecution Authority would decide to initiate an investigation into A’s case, then they would have to seek the permission of the Government, since the crimes were committed outside Sweden and the perpetrators were non-citizens and non-alien.

As was mentioned in section 2.2.3., deliberations concerning whether to prosecute the crimes consider Swedish and foreign interests in prosecuting the crime and the seriousness of the crime. If these requirements are not met, then the decision would be made not to prosecute. If, however, Swedish authorities judge that the case should be pursued, then the case could be tried in Swedish courts. If Swedish courts lack the capacity to prosecute the case, then they could refer the situation to the ICC, while specifying that the crime of recruitment of child soldiers should be included in the Court’s preliminary examination of the situation. However, as was mentioned in 2.1.2. and 2.2.1. above, information regarding communications and referrals from State Parties to the Office of the Prosecutor are confidential prior to the investigation stage, so there is no way of knowing whether Sweden has made such a referral.

The case of A described above illustrates the path to justice for an asylum-seeking victim in Sweden. Now the question of how such situations have been handled in practice will be examined. As was discussed in 2.2.3. above, the Migration Agency and the Police Authority confirm that the Migration Agency has only reported suspicions of asylum-seeking perpetrators, but not victims, to the Police. This result is in line with the Migration Agency’s
procedures for reporting crimes under the Rome Statute to the Police, which direct case officers to report suspicions of asylum-seekers who are perpetrators, but not those who might be victims.

As was mentioned in part 2.2.3., the Police also receive reports from other Swedish agencies, the general public and other actors in addition to the Migration Agency. Suppose that A would file a report with the Police with the help of his legal guardian, or that such report would be submitted by the Migration Court – would this be a path to a criminal investigation, and perhaps prosecution and participation for him? The review of prosecution mandates extended by the Government given in 2.2.4. above shows that there is no precedent for this course of action. In the four prosecution mandates issued concerning cases of genocide or crimes against international law, the suspected perpetrators have either been Swedish citizens or they have been domiciled in Sweden at the time of the prosecution mandate.

Hence, there have been no mandates to prosecute in cases where the suspected perpetrator has committed a crime defined in the Rome Statute outside Sweden and who lacked Swedish citizenship or domicile in Sweden when the crime was committed and when the mandate to prosecute was issued. This entails that no mandates to prosecute such perpetrators and such crimes have been issued on the basis of the presence of a victim of such crimes in Sweden, as in A’s case. So A’s path to justice through Swedish courts is without precedent.

Finally, the third point from earlier in this section must be addressed: the way in which A is enabled to effectively exercise his rights and obtain access to proceedings. As mentioned in section 3.2.2., Sweden shall guarantee that victims are offered information that enables them access to their rights. The type of information that should be provided to victims should include information regarding the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures, how and under what conditions they can access legal advice, legal aid and any other sort of advice, the type of support they can obtain and from whom, how and under what conditions they can access compensation, and the available restorative justice services. However, as was discussed in 3.2.2. above, the obligation to provide this information has been imposed on the Swedish Police Agency, which is considered to be the “competent authority” in this regard, since it is the authority that is primarily responsible for investigating crimes and that, in most cases, has the initial contact with victims. Section 3.2.2. above showed that the Swedish Migration Agency, however, has no procedures for communicating this information to victims. This entails that A could have gotten information about his rights as a victim only if he had reported the crimes to the Police of his own accord.
5 Conclusion

As was mentioned in the introduction to this thesis, the Rome Statute contains provisions for a victim-centered conception of justice that is groundbreaking in the realm of international criminal justice. One of the rights that partially constitutes this conception of justice is the right of victims to participate in judicial proceedings in order to express their views and concerns. The aim of this thesis has been twofold. The first aim was descriptive – to describe the rights of victims under the Rome Statute to participate in judicial proceedings and their rights to access these proceedings at both the ICC and in Swedish courts. The second aim was evaluative – to analyze two case studies to illustrate concretely asylum-seeking victims’ access to justice in Sweden in theory and to evaluate it in practice.

Regarding the first aim, this thesis has shown that victims have robust rights to participate in judicial proceedings both before the ICC and in Swedish courts. The rights to participate are not limited to the trial, but can include other phases of the proceedings as well. Both the ICC and Swedish authorities are obligated to enable victims’ access to these participatory rights through legal and institutional means. However, cooperation between member states and the ICC, which is governed by Part IX of the Rome Statute, extends only to investigation and prosecution, and not to ensuring victim participation, which reflects a more traditional, perpetrator-centered conception of justice.

Regarding the second aim, the two case studies showed that, in spite of the substantial legal and institutional structures that enable victims’ access to participation rights, there are cracks in these structures and asylum-seekers in Sweden can fall through them.

The first case study considered the situation of Carol, a victim of crimes under the Rome Statute that were and are the subject of ongoing proceedings at the ICC. Carol had the right to be informed of her right to participate in these proceedings, and the ICC had the obligation to ensure her access to these rights. However, the ICC’s outreach programs were active only in Uganda, and not in Europe. The ICC’s Outreach Coordinator for Kenya and Uganda, Maria Kamara, admits that the ICC’s outreach capacities are limited by its meager resources. The problem is that there is no clear procedural path for asylum-seeking victims from a State Party to participation in ICC proceedings.

A proposal for addressing Carol’s situation would be to amend the Rome Statute and include an article analogous to Part IX that would govern cooperation between State Parties and the ICC in ensuring victims’ participation rights and victim-centered justice in general. However, in order for such a proposal to make the ICC’s proceedings accessible in Carol’s case, member States must be required to take the initiative in making the ICC’s proceedings to victims, unlike Part IX, where the ICC initiates cooperation. In addition, Swedish legislation guaranteeing victims’ rights to know about and understand their rights in judicial proceedings could be amended to extend explicitly not only to proceedings in Swedish courts, but to proceedings at the ICC as well.
The second case study considered the situation of A, who was an asylum-seeking victim of crimes under the Rome Statute in Sweden where there were no ICC proceedings concerning the crimes of which he was a victim. A had the right to have the crimes of which he was a victim reported to the Police Authority, the right to have his situation examined, the right to participate in whatever proceedings might be initiated to prosecute these crimes, and the right to be informed of and understand these rights. However, there has been no evidence showing that such a path to justice being taken by an asylum-seeking victim in Sweden. This suggests that A lacks access to justice under the Rome Statute.

One proposal for improving A’s access to participation in proceedings would be to change the Migration Agency’s procedures to include reporting crimes described by victims to the Police Authority, and not just those reported by perpetrators. A second strategy would be to acknowledge that the Migration Agency, and not the Police, is often the first government agency to have contact with asylum-seeking victims and amend legislation so that they require the Migration Agency to inform asylum-seeking victims of their rights to report crimes and participate in criminal proceedings under the Rome Statute and Swedish legislation. This could give rise either to more prosecutions in Swedish courts or to more Swedish referrals to the ICC, thus opening access to justice for victims like A.

One possible objection to these proposals would be that it does not lie in Sweden’s interests to commit resources to investigating and prosecuting crimes against asylum-seekers committed outside the country where the perpetrators are outside the country. However, given the number of asylum-seekers in Sweden and Europe today who are likely to be victims of the most serious crimes of international concern, these interests might need to be reassessed. What will Europe’s future look like if there are tens or hundreds of thousands of such victims within its borders who have no access to a form of justice that takes their needs and interests into account?
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