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I. ISSUE BEFORE THE SUPREME COURT OF SWEDEN

1. Ian Lundin (“Lundin”), Alexander Schneider (“Schneider”), and Lundin Energy AB (“Lundin Energy”) (collectively, the “Suspects”) claim that the duration of the Swedish Prosecution Authority’s (the “SPA”) investigation constitutes a violation of the Suspects’ right to fair trial within a reasonable time under Article 6 of the European Convention of Human Rights (the “ECHR”) and they claim a right to an effective remedy under Article 13 of the ECHR (the “ECHR Claim”). The Suspects submitted opinions by Professor William Schabas¹ and Professor Lars Heuman² in support of their ECHR Claim. The Suspects claim that they have been under investigation since June 2010 because they were mentioned in a report published by the non-governmental organization European Coalition on Oil in Sudan. While no European Court of Human Rights jurisprudence exists to support the Suspects’ ECHR Claim, the Suspects nonetheless allege that the ongoing investigation—during which the Suspects have never been indicted, arrested, or detained—has continued for an unreasonably long time and therefore violated their right to fair trial within a reasonable time. As a remedy for the alleged violations, the Suspects request the Supreme Court to order that the investigation and all criminal proceedings cease immediately.

II. THE OPINION

2. I submit this opinion to the Supreme Court of Sweden on behalf of the Clooney Foundation for Justice’s (“CFJ”) The Docket Initiative. I served as the U.S. Ambassador-at-Large for War Crimes Issues heading the Office of Global Criminal Justice in the U.S. State Department from 2009 to 2015 and previously served as the Prosecutor of the Special Court for Sierra Leone and the Chief of Prosecutions at the International Criminal Tribunal for Rwanda.³ CFJ is assisting counsel for the southern Sudanese Victims (the “Victims”) in their efforts to seek accountability for the alleged international crimes committed in Block 5A in southern Sudan between 1997 and 2003. CFJ’s mission is to pursue accountability for

¹ William Schabas Opinion, Dkt. No. 287.

² Lars Heuman Opinion, Dkt. No. 295.

³ Please see the attached Annex for further details regarding my extensive experience in both international criminal law and domestic and international prosecutions.

perpetrators and enablers of international crimes and support survivors in their pursuit of justice.⁴

3. This opinion aims to assist the Supreme Court of Sweden in adjudicating the Suspects' ECHR Claim by detailing the jurisprudence of the European Court of Human Rights (the "European Court" or the "Court") as well as providing legal expertise and an analysis of Sweden's international obligations. First, the opinion presents European Court jurisprudence evaluating the four factors the Court considers in adjudicating claims of "unreasonable" delay under Article 6(1) of the ECHR. Second, this opinion illustrates how the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda (collectively, the "International Criminal Tribunals") hearing cases involving international crimes have similarly adjudicated claims of "undue" or "unreasonable" delay. Finally, this opinion focuses on Sweden's international obligations due to the nature of the alleged crimes: because the SPA's investigation into the allegations of the Suspects' activities includes their alleged complicity in human rights abuse and international crimes, the Supreme Court must consider Sweden's international obligations to investigate, prosecute, punish, and provide effective remedies for victims together with its assessment of European Court of Human Rights jurisprudence. This opinion supplements and supports the opinions submitted by counsel for the Victims, represented by Percy Bratt, Göran Hjalmarsson, and Thomas Bodström (together the "Victims' Counsel's Opinion"), which provides further jurisprudence from the European Court of Human Rights regarding the Suspects' ECHR Claim.⁵
4. This opinion submits that there has been no violation of Article 6(1) of the ECHR because the duration of the SPA's investigation into the Suspects' alleged activities in Block 5A has been reasonable when considered in light of European Court case law. Further, this opinion submits that the duration of the SPA's ongoing investigation into the allegations of complicity in international crimes by the Suspects in the former Sudan's Block 5A has also been reasonable in the context of jurisprudence from International Criminal Tribunals. The length of the investigation has not been "undue" or "unreasonable" in light of the jurisprudence from International Criminal Tribunals, which have adjudicated claims of "undue delay" in the context of extensive investigations and prosecutions of cases involving violations of international criminal law. These considerations are similar to those the Supreme Court of Sweden must make in adjudicating the Suspects' ECHR Claim.
5. Finally, not only has the duration of the SPA's investigation been reasonable in light of jurisprudence from the European Court and International Criminal Tribunals, but the SPA's investigation of these serious allegations of international crimes must continue for Sweden to uphold its obligations under international law to investigate and prosecute grave crimes. The Supreme Court must consider Sweden's international obligations to investigate, prosecute, punish, and provide effective remedies for victims of human rights violations and

⁴ Please see the attached Annex for further detail regarding CFJ's experience in the field of international criminal law and human rights law.

⁵ Percy Bratt Victims' Counsel's Opinion, Dkt. No. 362; Göran Hjalmarsson Victims' Counsel's Opinion, Dkt. No. 363; Thomas Bodström Victims' Counsel's Opinion, Dkt. No. 364.

international crimes because the SPA's investigation into the allegations of the Suspects' activities includes their alleged complicity in human rights abuse and international crimes.

III. PROCEDURAL HISTORY

6. The Suspects' ECHR Claim arises in the context of the SPA's ongoing investigation into allegations that the Suspects were complicit in international crimes committed by the Government of Sudan between 1997 and 2003 in southern Sudan (now South Sudan). During this time, thousands of people were allegedly killed, raped, tortured, abducted, and displaced by the armed forces of the Government of Sudan and local armed groups. Human rights organizations investigated these events and concluded that there are reasonable grounds to believe the Suspects enabled the commission of these atrocity crimes while Lundin Energy (then called Lundin Oil AB) engaged in oil exploration in Block 5A amidst an ongoing civil war in Sudan.
7. The SPA opened an investigation into the activities of Swedish corporation Lundin Energy in June 2010 based in part on the submission of a report by the non-governmental organization European Coalition of Oil in Sudan.⁶ As described in the Victims' Counsel's Opinion, press releases issued by the SPA around June 21, 2010 and March 22, 2012 announced that the preliminary investigation had been opened and did not name specific persons or entities as being under investigation.⁷ As the Victims' Counsel's Opinion also states, while independent media have reported on the Suspects' activities in Block 5A since the early 2000s, the SPA did not accuse them of any crime or indicate that they were under suspicion during the initial years of the investigation.⁸
8. Lundin and Schneider were only notified of the suspicion of criminal acts and named as suspects on November 15, 2016. Further, on November 1, 2018, the corporate entity Lundin Energy received a notice of a potential corporate fine of SEK 3 million and a notice of forfeiture of economic benefits from the alleged offenses in the amount of SEK 3,282 million (based on its profits from the sale of Block 5A assets for SEK 729 million in 2003).⁹ After being notified of their status as suspects, Lundin and Schneider were questioned regarding the SPA's investigation in 2016¹⁰ and Lundin Energy's offices in Stockholm and Geneva were

⁶ See *Unpaid Debt*, PAX FOR PEACE, <https://paxforpeace.nl/unpaid-debt> (last accessed June 14, 2021).

⁷ See, e.g., Bratt Victims' Counsel's Opinion, Dkt. No. 362, ¶ 19.

⁸ See, e.g., Bratt Victims' Counsel's Opinion, Dkt. No. 362, ¶ 20.

⁹ Press Release, Lundin Energy, Lundin Petroleum receives information regarding a potential corporate fine and forfeiture of economic benefits in relation to past operations in Sudan (Nov. 1, 2018), <https://www.lundin-energy.com/lundin-petroleum-receives-information-regarding-a-potential-corporate-fine-and-forfeiture-of-economic-benefits-in-relation-to-past-operations-in-sudan/>.

¹⁰ See *Lundin Petroleum CEO, Chairman to be Questioned on Possible Sudan Crimes*, REUTERS (Oct. 21, 2016), <https://news.trust.org/item/20161021120723-qy66w/>. Lundin Energy's dedicated website states that "both [Ian Lundin and Alexander Schneider] subsequently voluntarily attended interviews with the Prosecution." See *Legal Process*, LUNDIN SUDAN LEGAL CASE, <https://www.lundinsudanlegalcase.com/legal-process/> (last accessed June 14, 2021).

raided by Swedish authorities twice in 2018.¹¹ At no point since either June 2010 or November 2016 have either Lundin or Schneider been arrested or detained.

9. The Suspects submitted their ECHR Claim to the Stockholm district court (Stockholms tingsrätt) on April 8, 2020. On May 4, the Stockholm district court rejected the Suspects' ECHR claim at first instance. Upon the Suspects' appeal, the Svea court of appeal (Svea hovrätt) referred the case back to the Stockholm district court on July 30. After consideration, the Stockholm district court again found no support for the Suspects' ECHR Claim and rejected it on December 2, which the Suspects again appealed. On April 27, 2021, the Svea court of appeals confirmed the Stockholm district court's decision in dismissing the Suspects' ECHR Claim. The Suspects appealed to the Supreme Court of Sweden (Högsta domstolen) on May 7, where it is now pending on the same issue.
10. Submitted previously in these proceedings, the Victims' Counsel's Opinion concluded that no violation of Article 6 of the ECHR has occurred because (1) the length of time that has passed is reasonable as is supported by comparable jurisprudence from the European Court of Human Rights;¹² (2) the absence of a statute of limitations in Swedish law and international law for cases involving violations of international criminal law shows that the Swedish legal system strongly protects the possibility of investigating and prosecuting such serious crimes regardless of where they took place, when they took place, or how long they will take to investigate;¹³ and (3) the investigation itself is and has been extensive and complex, with no period of unjustified delay or inactivity: the alleged criminal activities lasted approximately six years; the activities took place in a region that cannot easily be visited for safety reasons; and there have been serious threats against witnesses allegedly by the Suspects, presenting further obstacles for the investigation.¹⁴ The additional limitations presented by the COVID-19 pandemic have compounded these obstacles since early 2020. Further, even if there had been a violation of Article 6, the remedies under the ECHR would be either compensation or mitigation of the sentence; dismissal of all proceedings would be unprecedented.¹⁵

IV. SUMMARY OF THE OPINION

11. The current duration of the SPA's investigation into the Suspects' alleged complicity in international crimes in Block 5A lasting approximately four years and six months has been reasonable. The investigation's length has not been "unreasonable" or "undue"¹⁶ when

¹¹ *Uppgifter till DN: Vittnen i Lundin-utredningen attackeras och hotas*, DAGENS NYHETER (Aug. 6, 2018), <https://www.dn.se/nyheter/uppgifter-till-dn-vittnen-i-lundin-utredningen-attackeras-och-hotas/?fbclid=IwAR1IGj0dMq98ZpZzkQsxRiJxhRbv7qqIzYEDW2jCpky6S1e0ZlubBaKurVo> (English here: <https://unpaiddebt.org/lundin-petroleum-accused-of-witness-tampering/>); see also *Legal Process*, LUNDIN SUDAN LEGAL CASE, <https://www.lundinsudanlegalcase.com/legal-process/> (last accessed June 14, 2021).

¹² See, e.g., Bratt Victims' Counsel's Opinion, Dkt. No. 362, ¶ 23.

¹³ See, e.g., Bratt Victims' Counsel's Opinion, Dkt. No. 362, ¶¶ 16, 24.

¹⁴ See, e.g., Bratt Victims' Counsel's Opinion, Dkt. No. 362, ¶¶ 26–28.

¹⁵ See, e.g., Bratt Victims' Counsel's Opinion, Dkt. No. 362, ¶¶ 8–17.

¹⁶ The "right to be tried without undue delay" and the "right to be tried within a reasonable time" effectively refer to the same right and jurisprudence. They appear to be used interchangeable throughout the various legal mechanisms and analyses. This Opinion uses the relevant language for the jurisprudence or statute in question.

considered in light of the jurisprudence from the European Court. Similarly, the duration of the SPA's investigation is also considered reasonable in the context of the jurisprudence from International Criminal Tribunals, which have adjudicated claims of "undue delay" in the context of extensive investigations and prosecution proceedings for cases involving violations of international criminal law.

12. Regarding the jurisprudence from the European Court, the duration of the SPA's investigation into the Suspects' alleged complicity in international crimes in Block 5A has been reasonable because the duration of the SPA's investigation vis-à-vis the Suspects has not been that long, the case is factually and legally complex, the Suspects have contributed to the delay of the proceedings, the SPA and other authorities have not unjustifiably or inexplicably caused delays, and the prejudice to the Suspects has been minimal. Taken together in the context of the European Court's jurisprudence, there has been no violation of the Suspect's Article 6(1) fair trial rights within a reasonable time and, thus, the ECHR Claim should be dismissed.
13. Regarding the jurisprudence from International Criminal Tribunals, all adjudications of "undue delay" have occurred while the proceedings were in the pre-trial, trial, or post-trial phases. International Criminal Tribunals have not applied the "undue delay" analysis to the investigation phase of the proceedings. Given that no indictment has been issued and that the SPA's investigation against the Suspects for allegations of complicity in international crimes remains in the investigation phase the Suspects' ECHR Claim is unfounded or, at best, premature. Where International Criminal Tribunals have found "undue delay" violations, it has been in cases concerning unjustified or inexplicable lengthy pre-trial or trial detention or in cases involving "simple" proceedings (i.e., a single attack or event by a single defendant on a single day) and unjustifiably long delays. The SPA's investigation involves none of these circumstances under which International Criminal Tribunals consider the length "undue": the Suspects have never been arrested or detained during the course of the investigation and the SPA's investigation is complex, concerning many criminal allegations and likely involving various modes of liability with evidence and witnesses located far from Sweden.
14. Finally, not only has the duration of the SPA's ongoing investigation into the Suspects been reasonable under jurisprudence from the European Court and International Criminal Tribunals, it is crucial that the investigation of the serious allegations of international crimes continue in order for Sweden to uphold its obligation under international law to investigate and prosecute grave crimes. The Supreme Court must also consider Sweden's international obligations to investigate, prosecute, punish, and provide effective remedies for victims of human rights violations and international crimes because the SPA's investigation of the allegations of the Suspects' activities includes their alleged complicity in human rights abuse and international crimes. Sweden's responsibility derives from its obligations undertaken through international treaties, customary international law, and international human rights standards, including those applicable to businesses. The obligation to investigate and prosecute further arises out of Sweden's duty to preserve and effectuate victims' right to remedy and to end impunity for grave crimes.

15. Sweden has consistently affirmed its commitment to the rule of law and its obligations under international law. The duty to investigate and prosecute rests on all levels of the Swedish State, including the SPA and judiciary authorities. It is vital that the SPA continue its investigation into the alleged criminal activities of the Suspect. Based on the State's responsibilities to hold perpetrators of all crimes, including international crimes, accountable, Sweden must affirm and uphold its international obligations and continue to support the investigation of the Suspects.

V. SUBMISSION

A. The Suspects' Claim that the Duration of the SPA's Investigation Constitutes "Unreasonable" Delay under Article 6(1) of the ECHR is Erroneous and Not Supported by European Court Jurisprudence

16. There has been no "unreasonable" delay in the SPA's investigation. The European Court assesses the reasonableness of a length of proceeding by evaluating four factors: (i) the factual and legal complexity of the case, (ii) the conduct of the defendant, (iii) the conduct of the authorities, and (iv) the prejudice to the defendant.¹⁷ Based on the jurisprudence from the European Court, the duration of the SPA's investigation into the Suspects' alleged complicity in international crimes in Block 5A has been reasonable because the case is factually and legally complex, the Suspects have contributed to the delay of the proceedings, the SPA has not unjustifiably or inexplicably caused delays, and the prejudice to the Suspects has been minimal. Therefore, the Suspects' ECHR Claim must be rejected as the Claim is unfounded.
17. However, if the Supreme Court were to find a violation of Article 6(1) or Article 13 of the ECHR, the only possible remedies available to the Suspects are monetary compensation and sentence mitigation. These remedies are in line with those envisioned by the ECHR and affirmed European Court jurisprudence. A dismissal of the SPA's investigation as a remedy for an Article 6(1) or Article 13 violation would be unprecedented.

1. The Assessment of "Undue" Delay under Article 6(1) Begins With the Description of Suspicions

18. The appropriate starting point for the reasonable time analysis under Article 6(1) regarding the Suspects' ECHR Claim is the formal filing of the description of suspicion. In criminal proceedings, the period to take into consideration when assessing "reasonable time" begins on the day the person is formally charged.¹⁸ The European Court has interpreted "charged" broadly to include "an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence or some ... other act which carries the implication of such an allegation and which likewise *substantially affects* the situation of

¹⁷ See, e.g., ECtHR, Barry v. Ireland (App. No. 18273/04), ¶ 36 (2005); ECtHR, Pélissier and Sassy v. France (App. No. 25444/94), ¶ 67 (1999); ECtHR, Pailot v. France (App. No. 32217/96), ¶ 61 (1998); see also Schabas Opinion, Dkt. 287, ¶ 20; Bratt Victims' Counsel's Opinion, Dkt 362, ¶ 22.

¹⁸ See, e.g., ECtHR, Neumeister v. Austria (App. No. 1936/63), As to the Law, ¶ 18 (1968); ECtHR, O'Neill and Laughlan v. U.K. (41516/10 & 75702/13), ¶ 89 (2016).

the suspect.”¹⁹ The point at which a defendant becomes “substantially affected” by the investigation or prosecution activities of officials or authorities has been determined by the European Court to include, for instance: the day the defendant is arrested,²⁰ the day on which search or arrest warrants were issued,²¹ the date when the defendant was notified that they would be prosecuted,²² the first interrogation of the defendant as a suspect,²³ and the date on which the defendant’s home was searched.²⁴

19. The European Court has also considered the start time for an assessment of “undue” delay under Article 6(1) with the commencement of a “preliminary investigation,” in cases where the preliminary investigation related to the defendant so that the defendant was substantially affected.
20. In *Eckle v. Germany*, the European Court held that the start date for counting reasonable time was when the defendants were first aware of, or impacted by, the preliminary investigation,

¹⁹ See ECtHR, *Kangasluoma v. Finland* (App No. 48339/99), ¶ 26 (emphasis added); see also ECtHR, *Deweert v. Belgium* (App. No. 6903/75), ¶ 46 (“The ‘charge’ could, for the purposes of Article 6 par. 1 (art. 6-1), be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence. In several decisions and opinions the Commission has adopted a test that appears to be fairly closely related, namely whether “the situation of the [suspect] has been substantially affected.”) (internal citations omitted); ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 73 (“‘Charge’, for the purposes of Article 6 par. 1 (art. 6-1), may be defined as ‘the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence’, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected.”) (internal citations omitted).

²⁰ See, e.g., ECtHR, *Wemhoff v. Germany* (App. No. 2122/64), As to the Law, ¶ 19 (1968) (“As regards the beginning of the period to be taken into consideration, the Court is of opinion that it must run from 9 November 1961, the date on which the first charges were levelled against Wemhoff and his arrest was ordered. It was on that date that his right to a hearing within a reasonable time came into being so that the criminal charges could be determined.”).

²¹ See, e.g., ECtHR, *Barry v. Ireland* (App. No. 18273/04), ¶¶ 33, 35 (2005) (finding that even though the defendant would not be formally charged until almost one year later, the Court considered the defendant substantially affected when the search warrant was executed); ECtHR, *Manzoni v. Italy* (App. No. 11804/85), As to the Law, ¶ 16 (1991) (“The period to be taken into consideration began on 19 August 1981, the date on which the Italian judicial authorities issued a warrant for the applicant's arrest.”).

²² See, e.g., ECtHR (GC), *Reinhardt and Slimane-Kaïd v. France* (App. No. 23043/93 & 22921/93), ¶ 93 (1998) (“As for Mrs Reinhardt, she was taken into police custody on 16 October 1984 in connection with a preliminary inquiry concerning Mr Slimane-Kaïd, not her. In addition, as Mrs Reinhardt’s home was the registered office of one of the companies managed by Mr Slimane-Kaïd, it is probable that through the search that was carried out there that same day it was intended to obtain evidence of the offences of which the latter was suspected. Neither measure was therefore an “official notification” to Mrs Reinhardt of an “allegation” that she had committed a criminal offence. In her case, the relevant date is, at the latest, 6 February 1985 when the period of police custody that ended in her being charged began . . .”).

²³ See, e.g., ECtHR, *Kalēja v. Latvia* (App. No. 22059/08), ¶ 14 (2017) (“Taking into account that there was a suspicion against the applicant, as evidenced, inter alia, by the decision of 16 January 1998 to institute criminal proceedings, and that she was questioned about her involvement in the various episodes of the alleged misappropriation of the company’s funds from the start of the criminal investigation and throughout it, the Court considers that the applicant was substantially affected on 16 January 1998 . . .”).

²⁴ See, e.g., ECtHR, *Diamantides v. Greece* (App. No. 60821/00), ¶ 21 (2003) (“La Cour note qu'en l'espèce, la perquisition au domicile et au cabinet du requérant s'effectua le 28 juin 1995. Par son ampleur, en raison de l'intérêt que les médias grecques ont porté à celle-ci, et les répercussions qu'elle a eues sur la vie professionnelle du requérant (lequel avait échappé à l'arrestation jusque là car il se trouvait à l'étranger), elle marqua le début de la période à prendre en consideration . . . La Cour considère donc que le requérant fut « accusé » le 28 juin 1995, au sens de l'article 6 § 1 de la Convention.”) (internal citations omitted).

rather than when the police initially opened the investigation.²⁵ The police had initially opened a preliminary investigation in 1959, but this “did not lead to any formal measures of inquiry being ordered” and “neither the prosecutor’s office nor the police questioned witnesses or the applicants.”²⁶ One year later, in 1960, the “true” preliminary investigation began when “numerous witnesses were interviewed in connection with the allegations against Mr. Eckle,” the defendant.²⁷ The Court noted that “the object of these interviews was not to determine whether a preliminary investigation should be opened; the interviews themselves formed part of the preliminary investigation.”²⁸ However, even then, the Court was unable to determine the exact point in time when the defendant officially learned of the preliminary investigation against him or was affected by it. Hence, the Court took a later starting point of January 1961²⁹—four months after the “true” preliminary investigation against the defendant began.

21. In *Ringeisen v. Austria*, the European Court similarly counted the start date from the opening of a preliminary investigation by the prosecutor’s office against the defendant, who became involved in both criminal and civil proceedings related to fraudulent property transfers over the course of several years.³⁰ The Court considered the start time to be February 21, 1963, the date on which the “public prosecutor’s office requested that preliminary inquiries (Vorerhebungen) be instituted against Ringeisen” due to charges relating to the abuse of power of attorney and unlawful transfer of property laid against Ringeisen by victims of his actions.³¹
22. Moreover, in *Neumeister v. Austria*, the European Court held that the start date for considerations of a Article 6(1) reasonable time violation was the day on which the defendant was charged and therefore substantially affected.³² The date the defendant was charged was one year and six months after the prosecutor had first opened a preliminary investigation to look into the allegations of fraud against the defendant and the co-accused, and almost one year after the defendant first appeared before the investigating judge for questioning.³³
23. Finally, in *Barry v. Ireland*, the European Court stated that the appropriate starting point for the relevant time period was the day that the authorities executed the warrant for searching the defendant’s home and office in response to a formal complaint,³⁴ since this was the point at which the investigation against the defendant commenced. Even though the defendant would not be formally charged until almost one year later, the Court considered the defendant substantially affected when the search warrant was executed and the investigation opened.³⁵

²⁵ ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 74 (1982).

²⁶ ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 74 (1982).

²⁷ ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 74 (1982).

²⁸ ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 74 (1982).

²⁹ ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 74 (1982).

³⁰ ECtHR, *Ringeisen v. Austria* (App. No. 2614/65), ¶ 110 (1971).

³¹ ECtHR, *Ringeisen v. Austria* (App. No. 2614/65), ¶ 25, 110 (1971).

³² See ECtHR, *Neumeister v. Austria* (App. No. 1936/63), ¶ 18 (1968).

³³ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), ¶¶ 4–7 (1968).

³⁴ ECtHR, *Barry v. Ireland* (App. No. 18273/04), ¶¶ 33, 35 (2005).

³⁵ See ECtHR, *Barry v. Ireland* (App. No. 18273/04), ¶ 35 (2005).

24. ***The appropriate starting point for reasonable time considerations under Article 6(1) regarding the Suspects' ECHR Claim is the formal filing of the description of suspicion.*** As there has been no indictment, charge, or arrest in the case of the Suspects to formally initiate the prosecution and trial phases, the point at which the Suspects were “substantially affected” by the SPA’s investigation was their receipt of the description of suspicion. Lundin and Schneider were given the description of suspicion in November 2016 (four years and six months ago) and Lundin Energy was given in November 2018 (two years and six months ago). At that point, the Suspects were named as such, indicating that they were under suspicion of having been complicit in international crimes committed in Block 5A based on the SPA’s investigation. Since being notified of their status as suspects, Lundin and Schneider were questioned regarding the SPA’s investigation in 2016³⁶ and Lundin Energy’s offices in Stockholm and Geneva were raided by Swedish authorities twice in 2018.³⁷ The Victims’ Counsel Opinion calculates the same starting point for purposes of the Suspects’ ECHR Claim.³⁸
25. Professor Schabas’ suggestion that the starting point for the reasonable time assessment begins in 2010—because the Suspects were named in a report published by a non-governmental organization and were part of the public record and debate regarding the activities in Sudan—is spurious. At no point has the European Court considered that a publication by non-State actors alleging criminal liability starts the clock on reasonable time considerations. Professor Schabas admits as much when he writes that he “was not able to find authority . . . in the case law of the Court” to start the time “prior to the point when the accused is ‘substantially affected.’”³⁹ This is because the European Court has been clear in its jurisprudence that the Suspects must be formally charged or *substantially affected* by the criminal investigation of the authorities in order to trigger their rights under Article 6(1) of the ECHR. To hold otherwise would suggest that the publication of any report or news article containing allegations of criminal activity would start the clock for the Article 6(1) “undue” delay analysis. Under the jurisprudence of the European Court, the point at which the Suspects were substantially affected by the SPA’s investigation was with the receipt of the SPA’s description of suspicion.

³⁶ See *Lundin Petroleum CEO, Chairman to be Questioned on Possible Sudan Crimes*, REUTERS (Oct. 21, 2016), <https://news.trust.org/item/20161021120723-qy66w/>. Lundin Energy’s dedicated website states that “both [Ian Lundin and Alexander Schneider] subsequently voluntarily attended interviews with the Prosecution.” See *Legal Process*, LUNDIN SUDAN LEGAL CASE, <https://www.lundinsudanlegalcase.com/legal-process/> (last accessed June 14, 2021).

³⁷ *Uppgifter till DN: Vittnen i Lundin-utredningen attackeras och hotas*, DAGENS NYHETER (Aug. 6, 2018), <https://www.dn.se/nyheter/uppgifter-till-dn-vittnen-i-lundin-utredningen-attackeras-och-hotas/?fbclid=IwAR11Gj0dMq98ZpZzkQsxRiJxhRbv7qqIzYEDW2jCpky6Sle0ZlubBaKurVo> (English here: <https://unpaiddebt.org/lundin-petroleum-accused-of-witness-tampering/>); see also *Legal Process*, LUNDIN SUDAN LEGAL CASE, <https://www.lundinsudanlegalcase.com/legal-process/> (last accessed June 14, 2021).

³⁸ See, e.g., Bratt Victims’ Counsel Opinion, Dkt. No. 362, ¶¶ 18–21, 29.

³⁹ Schabas Opinion, Dkt. 287, ¶ 36.

2. The Length of the SPA's Investigation has been Reasonable and there has been No Violation of Article 6(1) of the ECHR

26. When considering whether the length of time of criminal legal proceedings has been reasonable, the European Court evaluates four factors: (i) the factual and legal complexity of the case, (ii) the conduct of the defendant, (iii) the conduct of the authorities, and (iv) the prejudice to the defendant.⁴⁰ In light of these factors, the duration of the SPA's investigation into the Suspects' alleged complicity in international crimes in Block 5A has been reasonable because the case is factually and legally complex, the Suspects have contributed to the delay of the proceedings, the SPA has not unjustifiably or inexplicably caused delays, and the prejudice to the Suspects has been minimal.

i. The SPA's Investigation in the Suspects' Alleged Complicity in International Crimes is Complex

27. The SPA's investigation into the Suspects' alleged activities in Block 5A is complex and the length of the investigation is considered reasonable under European Court jurisprudence given the factual and legal complexity. The European Court has considered various factors as contributing to the complexity of a case, including the nature of the facts to be established,⁴¹ the number of accused persons and witnesses giving evidence,⁴² and the international character of the proceedings.⁴³ The Court has also found factual complexity in cases requiring expert opinions or cases where authorities have difficulty obtaining certain evidence.⁴⁴

28. The European Court has not yet heard a case that is directly analogous to the complexity of the SPA's investigation into the Suspects' alleged complicity in international crimes, including corporate complicity.⁴⁵

29. However, in 1976, the European Commission (the "Commission") did hear a case for international crimes committed in Nazi Germany and found that there was no "unreasonable"

⁴⁰ See, e.g., ECtHR, Barry v. Ireland (App. No. 18273/04), ¶ 36 (2005); ECtHR, Pélissier and Sassy v. France (App. No. 25444/94), ¶ 67 (1999); ECtHR, Pailot v. France (App. No. 32217/96), ¶ 61 (1998); see also Schabas Opinion, Dkt. 287, ¶ 20; Bratt Victims' Counsel's Opinion, Dkt 362, ¶ 22.

⁴¹ See, e.g., ECtHR, Triggiani v. Italy (App. No. 13509/88), As to the Law, ¶ 17 (1991) (stating that "[t]he proceedings were undoubtedly of some complexity owing to the nature of the facts to be established" in a case involving charges of fraud, forgery, and the use of forged documents as well as criminal association).

⁴² See, e.g., ECtHR, Angelucci v. Italy (App. No. 12666/87), As to the Law, ¶ 15 (1991) (noting that "[t]he case was undoubtedly of some complexity owing to the number of accused").

⁴³ See, e.g., ECtHR, Neumeister v. Austria (App No. 1936/63), ¶ 20 (1968) (analyzing in detail the international dimensions of the investigation and case, including location of witnesses and evidence abroad, request for extradition, and the use of Interpol and mutual legal aid treaties in gathering evidence for the case in Austria).

⁴⁴ See, e.g., ECtHR, Iłowiecki v. Poland (App. No. 27504/95), ¶¶ 87, 84 (2001) (stating that the "need to obtain evidence from several experts" abroad has contributed to the complexity of the case).

⁴⁵ Other opinions filed in this case agree that the European Court has not heard a case of this complexity. See William Schabas Opinion, Dkt. No. 287, ¶ 26 ("No European Court of Human Rights cases appear to consider the issue of complexity in the context of prosecution of international crimes by national courts."); Percy Bratt Opinion, Dkt. No. 362, ¶ 23 ("An essential starting point in the present case is that the investigation concerns aiding and abetting, a serious violation of international law, and that there are no European Court decisions that deal with a reasonable time in prosecuting such crimes. Direct guidance from European case law is lacking.").

delay under Art. 6(1) of the ECHR for proceedings that had lasted 11 years, including preliminary investigations that had lasted five years. In *X. v. Germany*, the Commission found no “unreasonable” delay from the 11 years of criminal proceedings concerning allegations of war crimes committed by the defendant in Nazi Germany.⁴⁶ Lasting five years, the preliminary investigation into the defendant’s activities involved “163 witnesses from all over the world, [and] 5 experts.”⁴⁷ The Commission noted that, although 11 years was “such a very long time” for criminal proceedings, the unique and complex nature of international crimes investigation and prosecution required time, leaving the defendants’ “unreasonable” time claim unfounded:

... [T]he exceptional character of criminal proceedings involving war crimes committed during World War II renders, in the Commission’s opinion, inapplicable the principles developed in the case-law of the Commission and the Court of Human Rights in connection with cases involving other criminal offenses. In particular the Commission had regard to the fact that the rules of prescription do not apply to war crimes and that the international community requires the competent authorities of the Federal Republic of Germany to investigate and prosecute these crimes despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned.

*In this situation, the Commission considers that the criteria determining the reasonableness of the lengthy ordinary criminal proceedings are not applicable to the proceedings concerning war crimes, but the length of such proceedings must be measured in light of the above considerations which take into account their exceptional character.*⁴⁸

30. The Commission emphasized not only the importance of national authorities pursuing the investigation and prosecution of grave international crimes, but also that it may take more time to do so, rendering inapplicable the general principles governing “ordinary” criminal offenses developed by the European Court and Commission. The Commission notes that even if the general principles for evaluating “unreasonable” time were applied, the “complexity of the case against the applicant and his co-accused is manifest, given the original number of very serious charges, the large number of witnesses to be heard and the countries in which enquiries had to be made.”⁴⁹ The Commission found no violation of Article 6(1) reasonable time, concluding the “special nature of the charges which concerned war crimes committed more than twenty years ago and the complexity of the case resulting thereof sufficiently explain the length of the proceeding.”⁵⁰
31. While the European Court has seemingly not considered another case involving international crimes and corporate complicity analogous to the case of the SPA’s investigation and the

⁴⁶ ECmHR, *X v. Germany* (App. No. 6946/75) (1976).

⁴⁷ ECmHR, *X v. Germany* (App. No. 6946/75), 114–115 (1976).

⁴⁸ ECmHR, *X v. Germany* (App. No. 6946/75), 115–116 (1976) (emphasis added).

⁴⁹ ECmHR, *X v. Germany* (App. No. 6946/75), 116 (1976).

⁵⁰ ECmHR, *X v. Germany* (App. No. 6946/75), 116 (1976).

Suspects' ECHR Claim, the Court has considered cases of complexity that include investigations with international dimensions involving complex crimes and corporate entities across jurisdictions. In these cases, the European Court has stated that such complex cases require time and has held the length of proceeding to be reasonable.

32. For example, in *C.P. and Others v. France*, the European Court found that proceedings lasting a total of seven years and ten months against six French businessmen was not “unreasonable” due to the “very great complexity” (“sa très grande complexité”) of the case.⁵¹ The Court agreed with the French Government that the case was complex because it involved white-collar crime and fraud on a large scale conducted via multiple companies and persons, involving breaches of trust, forgery, and the use of forged documents, with scams committed over the course of several years, and involving voluminous transfers of several million francs.⁵² The investigation of these allegations required the examining magistrate to “unravel[] a network of related companies and identify[] the exact nature of their relations between each of them, at the institutional, administrative, and financial level.”⁵³ To gather such evidence against the defendants, two international rogatory commissions and significant accounting and financial expertise were needed.⁵⁴
33. Similarly, in *Neumeister v. Austria*, the European Court found no violation of the defendants’ right to fair trial within a reasonable time because “[i]t [was] beyond doubt that the Neumeister case was of extraordinary complexity.”⁵⁵ More than seven years had elapsed since the laying of the charges of aggravated fraud, and there has been no judgment by the time the Court heard the case.⁵⁶ The Court highlighted in detail the international dimension of the investigation and the level of complexity of the charges based on the “number of difficulties inherent in the nature, the size, and the complexity of the acts” in question.⁵⁷ The investigation involved various Austrian authorities, the co-accused fled abroad and required extradition proceedings, and the investigation concerned 22 persons and 22 alleged counts, requiring investigation into fraudulent export and falsified purchases where it was necessary to “reconstruct many business operations which had taken place over a period of several years, to check the routes followed by one hundred and fifty or one hundred and sixty railway trucks, to study a large number of Revenue Office files, to hear dozens of witnesses . . . [who] lived abroad, for example in the Netherlands, Italy, the United States, Canada, Latin America, Africa and the Near East.”⁵⁸ The Court noted that the level of cooperation required for the investigation necessitated the services of Interpol and the implementation of treaties on mutual legal assistance.⁵⁹ Given this complexity—and despite some delays by the authorities,

⁵¹ ECtHR, *C.P. and Others v. France* (App. No. 36009/97), ¶¶ 30, 27 (2000).

⁵² ECtHR, *C.P. and Others v. France* (App. No. 36009/97), ¶¶ 30, 27 (2000).

⁵³ ECtHR, *C.P. and Others v. France* (App. No. 36009/97), ¶¶ 30, 27 (2000).

⁵⁴ ECtHR, *C.P. and Others v. France* (App. No. 36009/97), ¶¶ 30, 27 (2000).

⁵⁵ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), As to the Law, ¶ 21 (1968).

⁵⁶ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), As to the Law, ¶ 20 (1968).

⁵⁷ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), The Facts, ¶ 20 (1968).

⁵⁸ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), The Facts, ¶ 20 (1968).

⁵⁹ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), The Facts, ¶ 20 (1968).

discussed further below—the Court held that the time was reasonable and there had been no violation of the right to fair trial within a reasonable time.⁶⁰

34. Further, even in cases where the European Court ultimately finds a violation of Article 6(1) based on an evaluation of the other factors, the Court considers cases to be factually and legally complex when there are a large number of defendants, witnesses, or victims; when there are grave charges and many counts; when the trial entrails extensive evidence and multiple experts due to the intricacies of the case.
35. In *O’Neill and Lauchlan v. U.K.*, the Court discussed the pre-indictment period (in addition to other lengthy periods of time throughout the criminal case) and noted that the police’s investigation of the defendants’ activities was “undoubtedly complex”: the police’s investigation lasting three years and six months was a “difficult exercise of building up an evidential case against the applicants and periodically reviewing the evidence” where “[t]he delay of the prosecuting authorities in going ahead was not because of negligence but because of a careful and reasoned analysis that resulted in a decision not to prosecute until there was a sufficiency of evidence against both of the applicants, who were suspected of having acted together.”⁶¹ The eventual trial included “evidence from over fifty witnesses.”⁶²
36. Moreover, in *Yalgin v. Turkey*, the European Court recognized the complexity of criminal proceedings lasting 14 years “owing to the large number of defendants, the seriousness of the charges and the courts’ difficulties in handling a large-scale trial.”⁶³ In particular, the Court noted the Government’s submission that “the applicant was accused of more than twenty crimes and was convicted of murder and bombing offences” leading to a “trial involving 723 defendants, including the applicant” where authorities needed “time to establish the scope and activities of the terrorist network of which the applicant was alleged to be a member.”⁶⁴ The Martial Law Court used an expedited procedure to “speed up the trial,” which still had “more than five hundred hearings, at a rate of three per week” and a prosecution case file with “two thousand pages of written submissions . . . [comprising] approximately one thousand loose-leaf binders and the summary of the judgment ran to no fewer than two hundred and sixty-four pages.”⁶⁵
37. The Court has also considered evidence that requires experts to add to the complexity of a case. In *Hlowiecki v. Poland*, the Court recognized the complexity of the case in that it involved “the complicated nature of the issues concerning international banking

⁶⁰ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), As to the Law, ¶ 20 (1968).

⁶¹ ECtHR, *O’Neill and Lauchlan v. U.K.* (App. Nos. 41516/10 & 75702/13), ¶ 91 (2016).

⁶² ECtHR, *O’Neill and Lauchlan v. U.K.* (App. Nos. 41516/10 & 75702/13), ¶ 91 (2016).

⁶³ ECtHR, *Yalgin v. Turkey* (App. No. 31892/96), ¶ 28 (2001)

⁶⁴ ECtHR, *Yalgin v. Turkey* (App. No. 31892/96), ¶ 26 (2001).

⁶⁵ ECtHR, *Yalgin v. Turkey* (App. No. 31892/96), ¶ 26 (2001). The Court found a violation of Art. 6 in this case due to the conduct of the national authorities during the trial because the Martial Law court reached a verdict after eight years and four months and the Military Court of Cassation took more than four years to rule on the applicants’ appeal. The conduct of the authorities outweighed the complexity that the Court acknowledged. *Id.* ¶¶ 28–32.

transactions . . . and the need to obtain evidence from several experts,” including requests from German authorities to take evidence from witnesses abroad.⁶⁶

38. The Court has even recognized complexity in seemingly simple cases. For example, in *Adiletta v. Italy*, the Court recognized the complexity of a case, particularly at the preliminary investigation stage, that involved three Italian post-office employees who were alleged to have signed receipts for pensions paid out by the National Pensions Institute in the space reserved for recipients and for failing to comply with relevant proxy regulations.⁶⁷
39. ***The SPA’s investigation into the allegations of the suspects’ complicity in international crimes in Block 5A is inherently complex.*** While Professor Schabas seems to dismiss SPA Prosecutor Elving’s statements that the SPA investigation into the Suspects’ alleged activities is “complex,”⁶⁸ the SPA’s investigation is the very definition of complex. As the Victims’ Counsel’s Opinion highlights, the SPA’s investigation of the allegations against the Suspects involves alleged criminal activities lasting approximately six years and the alleged criminal activities took place far from the seat of the Swedish courts and in a region that cannot be visited for safety reasons.⁶⁹ In addition, there have been serious threats against witnesses allegedly by the Suspects, presenting further obstacles for the investigation. The COVID-19 pandemic has compounded these obstacles since early 2020. Further, this case presents particular legal complexity: corporate complicity in war crimes is a novel issue under Swedish law, requiring careful collection and analysis of evidence without precedent from Swedish jurisprudence.

ii. The Conduct of the Suspects has Contributed to the Delay of the SPA’s Investigation

40. The conduct of the Suspects has contributed to the delay of the SPA’s investigation over the last four years and six months since they were notified of the description of suspicion. The European Court takes into account whether the conduct of the defendant contributes to the length of the proceedings when assessing whether the delay is “unreasonable.” The Court has noted that Article 6 of the ECHR “does not require a person charged with a criminal offence to co-operate actively with the judicial authorities” and that, further, it does not blame the defendant for taking “full advantage of the resources afforded by national law in their defence,” even though this may slow down the proceedings to some extent.⁷⁰

⁶⁶ ECtHR, *Iłowiecki v. Poland* (App. No. 27504/95), ¶¶ 87, 84 (2001). The Court found a violation because, though the case was complex, the authorities inexplicable delay which resulted in a total delay of two years and ten months. *Id.* 87–89.

⁶⁷ ECtHR, *Adiletta and Others v. Italy* (App. No. 13978/88 & Others), ¶ 17 (1991). The Court found a violation of Art. 6 largely on the grounds that there were long periods of inexplicable delay by the Government, including the investigating judge.

⁶⁸ *See* Schabas Opinion, Dkt. 287, ¶ 25 (“Prosecution of international crimes by national jurisdictions under the principle of universal jurisdiction is rare, and prosecutors may attempt to justify excessively long investigations by pointing to this as an element of ‘complexity’. The Swedish Prosecution Authority has regularly replied to protests about the length of the Lundin investigation with the claim that the proceedings are very complex.”).

⁶⁹ *See, e.g.,* Bratt Victims’ Counsel’s Opinion, Dkt. No. 362, ¶ 26.

⁷⁰ ECtHR, *Yagci and Sargin v. Turkey* (App. No. 16419/90 & 16426/90), ¶ 66 (1995); *see also* ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 82 (1982).

41. However, the conduct of the defendant is “an objective fact which cannot be attributed to the respondent State and which must be taken into account in determining whether or not the length of the proceedings exceeds what is reasonable.”⁷¹ The Court has found that the defendant contributes to the “unreasonable” delay where the defendant or their legal counsel display a “determination to be obstructive.”⁷² Obstructive conduct may include instances where a defendant systematically challenges the judge⁷³ or flees the country.⁷⁴
42. For instances of obstruction during the pre-indictment phase, the European Court in *I.A. v. France* noted the obstructive behavior by the defendant because, *inter alia*, the defendant waited to be informed that the transmission of the case file from the investigative judge to the prosecutor was imminent before requesting additional investigative measures.⁷⁵ The court saw a deliberate attempt by the defendant to delay the investigation by requesting a number of additional investigative measures in July 1995 when the investigating judge was to communicate the file to the public prosecutor after the investigation had been ongoing since December 1991.⁷⁶ The European Court also noted that the case was “sufficiently complex ‘factually’” and the late transmission of the case to the investigating judge caused some delay for the preparatory investigation that lasted four years and six months, but ultimately found no violation of Article 6(1) of the ECHR in large part due to the defendant’s own deliberate delaying conduct.⁷⁷
43. Similarly, in *Eckle v. Germany*, the European Court noted that the defendant had increasingly resorted to actions likely to delay the proceedings, indicating obstructive conduct by the defendant.⁷⁸ During the pre-trial phases, the defendant delayed the indictment by having seven different legal counsel appear to review the prosecutor’s file before it was sent for indictment⁷⁹ and, during the month-long trial, the defendant systematically challenged the court and judge, which the Court “interpreted as illustrating a policy of deliberate obstruction.”⁸⁰

⁷¹ ECtHR, Guide on Article 6 of the European Convention on Human Rights: The Right to Fair Trial (Criminal Limb), ¶ 328 (Apr. 30, 2021); ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 82 (“Nonetheless, [the applicants’] conduct referred to above constitutes an objective fact, not capable of being attributed to the respondent State, which is to be taken into account when determining whether or not the proceedings lasted longer than the reasonable time referred to in Article 6 par. 1 (art. 6-1) . . .”) (internal citations omitted).

⁷² ECtHR, *Yagci and Sargin v. Turkey* (App. No. 16419/90 & 16426/90), ¶ 66 (1995)

⁷³ See, e.g., ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 82 (1982).

⁷⁴ See, e.g., ECtHR, *Sari v. Turkey and Denmark* (App. No. 21889/93), ¶¶ 80–88 (2001) (“The Court notes at the outset that in calculating the delays attributable to each of the three parties to the case, it must be noted that the period of two years, four months and six days, spent between February 23, 1990, date of the applicant’s flight, and on 29 June 1992, the date of his arrest in Istanbul, is the sole responsibility of the applicant who, by his will, has de facto evaded justice. . . . Accordingly, the Court considers that the conduct of the person concerned contributed, in a substantial manner, to lengthening the proceedings.”).

⁷⁵ ECtHR, *I.A. v. France* (App. No. 28213/95), ¶¶ 121–122 (1998).

⁷⁶ See ECtHR, *I.A. v. France* (App. No. 28213/95), ¶¶ 13, 65, 121–122 (1998).

⁷⁷ ECtHR, *I.A. v. France* (App. No. 28213/95), ¶ 122 (1998).

⁷⁸ ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶ 82 (1982).

⁷⁹ See ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶¶ 15, 82 (1982).

⁸⁰ See ECtHR, *Eckle v. Germany* (App. No. 8130/78), ¶¶ 25, 82 (1982).

44. For obstruction in trial proceedings, the European Court in *O’Neill and Lauchlan v. U.K.* “accepted that the applicants’ own actions greatly contributed” to the delay.⁸¹ The defendant lodged “many successive motions and appeals” during the trial phase, which “carried with them an inevitable delaying effect,” and again submitted “appeals against conviction and sentence [as well as] ancillary appeals including a direct Article 6 reasonable-time point argued before the Appeal Court and then the Supreme Court” during the post-trial phase, which also had an “unavoidable delaying effect” on the total length of the proceedings.⁸² Similarly, in *Salapa v. Poland*, the Court found that the “applicant considerably contributed to the prolongation of the proceedings” to the point at which the defendant’s actions “cast some doubt as to whether it was indeed the applicants’ intention to have the proceedings concluded speedily.”⁸³ The defendant lodged 15 procedural motions during trial processes, tried to appeal the court’s refusals of his motions, requested numerous stays of the proceedings, and continuously requested new witnesses and evidence be heard by the court.⁸⁴
45. ***The conduct of the Suspects has contributed to the delay of the SPA’s investigation over the last four years and six months since they were notified of the description of suspicion.*** While the Suspects are expected to diligently prepare their defense and take full advantage of their rights under national law, the Suspects’ conduct since being notified of the description of suspicion appears to cross into obstructive conduct. Based on publicly available information—listed in detail on the website created and maintained by the Suspects themselves⁸⁵—the Suspects have seemingly tried every avenue to delay these proceedings, including pursuing this unfounded ECHR Claim over the last year, requesting further investigation at various times when the SPA was prepared to proceed to prosecution, and allegedly intimidating witnesses, causing the SPA to open a second investigation into the Suspects’ alleged judicial interference. This last development is particularly concerning as it endangers the witnesses and victims and has the potential to subvert the judicial process.

iii. There Has Been No Unjustified or Inexplicable Delay Due to the Conduct of the Authorities

46. The conduct of the SPA in its investigation of the Suspects cannot be said to have contributed to the delay and, therefore, the length of the SPA’s investigation is reasonable. In considering whether the length of the proceedings has been “unreasonable,” the European Court evaluates the conduct of the authorities. “Authorities” encompasses all State-actors involved in the proceedings, including law enforcement, judicial, administrative, and prosecution authorities. Jurisprudence from the Court illustrates that the conduct of the authorities unreasonably delays the proceedings either when the authorities cannot justify or explain the delays or

⁸¹ ECtHR, *O’Neill and Lauchlan v. U.K.* (App. Nos. 41516/10 & 75702/13), ¶ 96 (2016).

⁸² ECtHR, *O’Neill and Lauchlan v. U.K.* (App. Nos. 41516/10 & 75702/13), ¶¶ 92, 94 (2016).

⁸³ ECtHR, *Salapa v. Poland* (App. No. 35489/97), ¶¶ 88, 89 (2002).

⁸⁴ ECtHR, *Salapa v. Poland* (App. No. 35489/97), ¶¶ 88, 89 (2002).

⁸⁵ See *Legal Process*, LUNDIN SUDAN LEGAL CASE, <https://www.lundinsudanlegalcase.com/legal-process/> (last accessed June 14, 2021). Ian H. Lundin, Open Letter from Ian H. Lundin (2016), https://www.lundinsudanlegalcase.com/wp-content/uploads/2019/11/sr-open-letter-ian-h-lundin_eng_20161128.pdf (directing shareholders to explore Lundin Energy’s dedicated website to the company’s history in Sudan).

when the authorities demonstrate a lack of care, negligence, or even egregious conduct that causes delays.

47. First, the SPA's investigation has had no periods of inexplicable or unjustified delay. In evaluating the conduct of the authorities, the European Court has found the length of proceedings to be "unreasonable" largely in cases of long periods of inexplicable or unjustified delay, particularly in cases where the defendant was detained.⁸⁶ The length of the SPA's investigation into the Suspects does not appear to be "unreasonable" because there seemingly have been no inexplicable or unjustified periods of delay during the investigation, as referenced in the Victims' Counsel Opinion, and the Suspects have not been arrested or detained.⁸⁷
48. In *Neumeister v. Austria*, mentioned above, the Court recognized that international investigation requires time, which should not be interpreted as inaction on the part of the authorities. The Court noted that the seven years that had elapsed, including a 15-month period during which the investigating judge did not interrogate the defendant, co-accused, or witnesses nor proceed with other investigation measures, indicated a possible delay.⁸⁸ Finding that there was no "unreasonable" delay, partly because of the complexity of the case, which required extensive international investigation and cooperation, the Court also stated that it could not hold the Austrian judicial authorities responsible for the seeming inaction or delay because their investigation required cooperation and responses to numerous letters rogatory from abroad: "[d]elays of from six to sixteen months had occurred between the sending of requests for legal assistance and the receipt of the results of the investigations which had taken place in the Netherlands, the Federal Republic of Germany, Italy and Switzerland."⁸⁹
49. The European Court has consistently held that inexplicable or unjustified delays contribute to a finding of "unreasonable" delay. In the above-mentioned case *Adiletta v. Italy*, the European Court found that a total length of proceeding of thirteen years and five months was unreasonable largely because the Government could not explain the lengthy periods of inactivity, including a five year delay between the case's referral to the investigating judge and the judge's questioning of the accused and witnesses.⁹⁰ Similarly, in *Barry v. Ireland*, the Court found a violation of the right to fair trial within reasonable time because there were "several periods of excessive delay which are partially or completely attributable to the authorities."⁹¹ The Court found four specific instances totaling about 76 months (6.3 years) during trial proceedings for which the Government either had no explanation or justification or for which the Government was specifically responsible for the protracted delays.⁹² Further, in *Pélissier and Sassi v. France*, the Court found excessive delay attributable to the national

⁸⁶ ECtHR, *Péssilier and Sassi v. France* (App. No. 25444/94), ¶ 73 (1999).

⁸⁷ *See, e.g.*, Bratt Victims' Counsel's Opinion, Dkt. No. 362, ¶ 27.

⁸⁸ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), As to the Law, ¶ 20 (1968).

⁸⁹ ECtHR, *Neumeister v. Austria* (App. No. 1936/63), The Facts, ¶ 20; As to the Law, ¶ 21 (1968).

⁹⁰ ECtHR, *Adiletta and Others v. Italy* (App. No. 13978/88 & Others), ¶ 17 (1991).

⁹¹ ECtHR, *Barry v. Ireland* (App. No. 18273/04), ¶¶ 44, 47 (2005).

⁹² ECtHR, *Barry v. Ireland* (App. No. 18273/04), ¶¶ 44, 47 (2005).

authorities because of “unjustified delays and periods of inactivity during the investigation.”⁹³

50. The cases cited in Professor Schabas’ opinion help illustrate that the Court finds delays that authorities are unable to explain or justify “unreasonable,” particularly if the defendant is in pre-trial detention. The Court recognizes that unreasonable delays while the defendant is detained create a concern and that national authorities must exercise “particular diligence” throughout the legal proceedings while the defendant is detained.⁹⁴ In *Korshunov v. Russia*, the Court noted the unreasonable delay was attributable to the domestic authorities and stressed “the fact that [the defendant] was held in custody required particular diligence on the part of the authorities dealing with the case to administer justice expeditiously.”⁹⁵ The Court made similar observations in *Paskal v. Ukraine*, noting that some delays “remained unexplained by the Government” and that “for the entire period of the criminal proceedings the applicant in the present case was held in detention.”⁹⁶ In *Bakmutskiy v. Russia*, the Court again noted that the “Government have [*sic*] not submitted any satisfactory explanation for the rather substantial periods of inactivity on the part of the domestic court,” which combined to delay the proceedings by almost two years, during which the defendant was held in detention.⁹⁷
51. Second, beyond unjustified or inexplicable delays, the European Court has determined that delays can be “unreasonable” based on the conduct of authorities when, for instance, the authorities repeatedly remit a case for re-investigation and fail to produce a case ready for trial to the court. For example, in *Grauslys v. Lithuania*, the European Court found that the conduct of the authorities had contributed to the delay during the investigation, which had lasted five years already and during which the defendant had been detained for two years.⁹⁸ The Court considered the case “complex” as it involved fraud charges against the defendant, but stated that “domestic authorities have shown neither diligence nor rigour in the handling of the present case” because they failed “to establish and question the victim of the alleged wrongdoing” and to conduct a proper audit of the company concerned, which three times led the adjournment or discontinuance of the case.⁹⁹
52. During the prosecution phase, the European Court in *Ivanov v. Ukraine* found that the conduct of the authorities “disclos[ed] a serious deficiency in the prosecution system” when the case against the defendant was “several times terminated and resumed” over the course of 11 years and brought even after the charges had become time-barred.¹⁰⁰ The Court further highlighted

⁹³ ECtHR, *Péssilier and Sassi v. France* (App. No. 25444/94), ¶¶ 73–74 (1999).

⁹⁴ *See, e.g.*, ECtHR, *Paskal v. Ukraine* (App. No. 24652/04), ¶ 58 (2011).

⁹⁵ ECtHR, *Korshunov v. Russia* (App. No. 38971/06), ¶¶ 71–74 (2007).

⁹⁶ ECtHR, *Paskal v. Ukraine* (App. No. 24652/04), ¶¶ 58, 60–62 (2011).

⁹⁷ ECtHR, *Bakmutskiy v. Russia* (App. No. 36932/02), ¶¶ 158–059 (2009).

⁹⁸ ECtHR, *Grauslys v. Lithuania* (App. No. 36743/97), ¶¶ 60–62 (2000).

⁹⁹ ECtHR, *Grauslys v. Lithuania* (App. No. 36743/97), ¶ 61 (2000).

¹⁰⁰ ECtHR, *Ivanov v. Ukraine* (App. No. 15007/02), ¶¶ 73–74 (2006).

that “the failure of the authorities, following years of investigation, to produce to the court a case ready for trial reveals little diligence on their part.”¹⁰¹

53. ***The conduct of the SPA in its investigation of the Suspects cannot be said to have contributed to the delay and, therefore, the length of the SPA’s investigation is reasonable.*** The SPA’s investigation has had no periods of unjustified or inexplicable delays. Further, the Court’s consideration of particular diligence in the context of detained defendants does not apply here, as the Suspects have never been arrested or detained during the course of the SPA’s investigation. Finally, the SPA’s investigation cannot reasonably be compared to European Court cases where the authorities’ conduct is truly egregious and demonstrates a lack of competence in investigating and prosecuting cases. The SPA’s investigation involves one preliminary investigation, which has been conducted over the course of 10 years and during which the Suspects were informed that they were under investigation four years and six months ago for Lundin and Schneider and two years and six months ago for Lundin Energy. The SPA has been prepared to proceed to trial twice but has undertaken further investigation at the request of the Suspects. The Suspects cannot now claim that the investigation undertaken at their request is causing a delay in the proceedings.

iv. The Suspects Have Not Been Irreversibly Prejudiced by the Length of the SPA’s Investigation

54. Lastly, the Suspects have not been irreversibly prejudiced and have suffered minimal prejudice at most. The European Court must take into account the prejudice to the defendant by the delay—essentially, what is at stake for the defendant in relation to the alleged “unreasonable delay”—as the final factor in its Article 6(1) reasonable time analysis.¹⁰²
55. Prejudice to the defendant is especially important when there are considerations of irreversibility and the European Court has held that: “[i]n cases of this kind the authorities are under a duty to exercise exceptional diligence since [. . .] there is always the danger that any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing.”¹⁰³
56. Jurisprudence from the European Court highlights that defendants who are in pre-trial detention often suffer greater prejudice, which must be taken into account when considering

¹⁰¹ ECtHR, *Ivanov v. Ukraine* (App. No. 15007/02), ¶ 74 (2006). *See also* *Kaçiu and Kotorri v. Albania* (App. Nos. 33192/07 & 33194/07), ¶ 154 (finding the delay to be “entirely attributable to the domestic courts” where the case was remitted to the lower court, which “did not comply with the instructions of the Supreme Court and that failure resulted in another set of proceedings, which lasted approximately two years”).

¹⁰² *See, e.g.*, ECtHR, *Kalēja v. Latvia* (App. No. 22059/08), ¶ 42 (2017); ECtHR, *Barry v. Ireland* (App. No. 18273/04), ¶ 36 (2005).

¹⁰³ ECtHR, *H. v. U.K.* (App. No. 9580/81), ¶ 85 (1987) (noting the “particular quality of irreversibility” in this case as the delay in the proceedings impacted the applicant’s “future relations with her own child” and ran up against a “‘statutory guillotine’ of adoption”).

whether the delay has been “unreasonable.”¹⁰⁴ The Court has also considered grave prison sentences as carrying some weight in potentially prejudicing the defendant.¹⁰⁵

57. *The Suspects have not been irreversibly prejudiced.* While the Suspects face a grave prison sentence if convicted of complicity in international crimes due to their involvement in the activities in Block 5A, the prejudice they face has not been irreversible. The Suspects have never been arrested or detained at any time since the start of the SPA’s investigation.

3. Even if the Supreme Court finds a Violation of Article 6(1) or Article 13 of the ECHR, the Remedies Available to the Suspects are limited to Compensation and Sentence Mitigation

58. If the Supreme Court finds a violation of Article 6(1) or Article 13 of the ECHR, the violation must be cured by a remedy designed to expedite the proceedings or by compensation—or, ideally, by a combination of the two.¹⁰⁶ The European Court has never ordered dismissal of legal proceedings as a remedy for a violation of Article 6(1) or Article 13. Discontinuing the proceedings as a remedy for either article violation would be unprecedented and a misapplication of the rights protected by the ECHR.

i. The Remedy Available for a Violation of Article 6(1) is Compensation or Reduction of Sentence

59. The European Court has never terminated a proceeding based on the finding of a violation of Article 6(1). Insetad, the Court has awarded compensation for non-pecuniary damages, granted pecuniary damages occasionally, considered as adequate compensation a declaration of the violation of Article 6(1), or provided for a reduction in the sentence. If the Supreme Court finds the length of the SPA’s investigation unreasonable and a violation of Article 6(1) of the ECHR, the Suspects should be awarded monetary compensation or a reduction in any eventual sentence.
60. Compensation for non-pecuniary damages is the most commonly awarded remedy by the European Court for a violation of Article 6(1).¹⁰⁷ While the Court commonly awards

¹⁰⁴ See, e.g., ECtHR, *Bakmutskiy v. Russia* (App. No. 36932/02) ¶ 159 (2009) (“Having regard to the foregoing, and especially to what was at stake for the applicant, given that he had been held in detention throughout the whole period in which the proceedings were pending, the Court considers that the length of the proceedings in the present case did not satisfy the “reasonable time” requirement.”); see also ECtHR, *Barry v. Ireland* (App. No. 18273/04) ¶¶ 45–46 (observing that the defendant has been subject to restrictive bail conditions of “having to report to a police station once a week and having his passport impounded” during the delay of about 10 years).

¹⁰⁵ See, e.g., ECtHR, *Kalēja v. Latvia* (App. No. 22059/08), ¶ 47 (2017) (“As to what was at stake for the applicant, the Court notes that although the applicant was not kept in detention pending the determination of criminal charges against her, the charges against her did carry the weight of a prison sentence.”)

¹⁰⁶ See ECtHR, *Sürmeli v. Germany* (App. No. 75529/01), ¶¶ 99–100 (2006) (stating that “[a] remedy is . . . effective if it can be used either to expedite a decision . . . or provide adequate redress for a violation that has already occurred,” and noting that “[s]ome States have understood the situation perfectly by choosing to combine the two types of remedy, one designed to expedite the proceedings and the other to afford compensation.”) (internal citations omitted).

¹⁰⁷ See, e.g., ECtHR, *Kudła v. Poland* (App. No. 30210/96), ¶ 165 (2000); ECtHR, *Easterbrook v. U.K.* (App. No. 48015/99), ¶ 37 (2003); ECtHR, *Rutkowski v. Poland* (App. No. 72287/10 & others), ¶¶ 233, 236, 239 (2015); ECtHR, *Kalēja v. Latvia* (App. No. 22059/08), ¶ 77 (2017).

monetary compensation for non-pecuniary damages, the finding of a violation of Article 6(1) may also be adequate compensation in itself.¹⁰⁸ In *O’Neill and Lauchlan v. U.K.*, the Court found that a declaration of a finding of an Article 6(1) violation was adequate compensation for the defendants because the defendants had engaged in “multiple avenues of recourse aimed at preventing their trial.”¹⁰⁹ Though rare, the European Court has in some cases awarded pecuniary damages for lost economic opportunities.¹¹⁰ In most cases, however, the Court has dismissed claims for pecuniary damages for lack of a causal link between the violation of Article 6(1) and lost opportunities, even in cases where the defendant was detained for prolonged periods of time.¹¹¹

61. Alternatively and used more sparingly, the European Court can reduce the defendant’s sentence in criminal proceedings to account for the length of the proceedings.¹¹²
62. The European Court has never terminated a proceeding based on the finding of a violation of Article 6(1) and has, instead, awarded compensation for non-pecuniary damages, granted pecuniary damages occasionally, considered as adequate compensation a declaration of the violation of Article 6(1), or provided for a reduction in the sentence.

ii. There Has Been No Violation of Article 13 and, if the Supreme Court Finds a Violation, the Available Remedy is Compensation

63. There is no violation of Article 13 in relation to the Suspects’ ECHR Claim. Further, even if there was a violation of Article 13, the termination of the proceedings is unavailable as a remedy. In light of the absence of precedent on termination of proceedings as a remedy for a violation of Article 6(1), Professor Schabas seemingly relies on Article 13 of the ECHR in requesting that the European Court dismiss the proceedings.¹¹³ The European Court has stated that the purpose of Article 13 is to “provide a means whereby individuals can obtain relief at [the] national level for violations of their Convention rights before having to set in motion the international machinery of complaint before the Court.”¹¹⁴ Most relevant to the Suspects’ ECHR Claim, Article 13 “guarantees an effective remedy before a national

¹⁰⁸ See, e.g., ECtHR, *Abdoella v. the Netherlands* (App. No. 12728/87), ¶ 28 (1992) (“[T]he finding of a violation of Article 6 para. 1 . . . constitutes in itself just satisfaction as regards any non-pecuniary damage.”); ECtHR, *O’Neill and Lauchlan v. U.K.* (App. Nos. 41516/10 & 75702/13), ¶ 106 (2016) (deciding that, in light of the applicants engaging in “multiple avenues of recourse aimed at preventing their trial,” the finding of a violation was adequate compensation).

¹⁰⁹ ECtHR, *O’Neill and Lauchlan v. U.K.* (App. Nos. 41516/10 & 75702/13), ¶ 106 (2016).

¹¹⁰ See ECtHR (GC), *Pélessier and Sassi v. France* (App. No. 25444/94), ¶ 80 (1999); see also ECtHR, *Martins Moreira v. Portugal* (App. No. 21/1987/144/198), ¶ 65 (1988).

¹¹¹ See ECtHR, *Vayıç v. Turkey* (App. no. 18078/02), ¶¶ 31, 39, 50, 52 (2006) (rejecting a claim for pecuniary damage where the applicant was detained for over five years in violation of Article 5(3)); see also ECtHR, *Howiecki v. Poland* (App. No. 27504/95), ¶¶ 91, 94 (2001) (rejecting the applicant’s claim for pecuniary damages “for loss of some part of profits from his business activity caused by his detention”).

¹¹² ECtHR (GC), *Cocchiarella v. Italy* (App. No. 64886/01), ¶ 77 (2006); ECtHR, *Beck v. Norway* (App. No. 26390/95), ¶¶ 15, 27–29 (2001); see also ECtHR, *Guide on Article 13 of the European Convention on Human Rights: Article 13 Right to an Effective Remedy*, ¶ 155 (Apr. 30, 2021).

¹¹³ Schabas Opinion, Dkt. No. 287, ¶¶ 40–42.

¹¹⁴ ECtHR, *Kudła v. Poland* (App. No. 30210/96), ¶ 152 (2000).

authority” for an alleged breach of the Article 6(1) reasonable time requirement.¹¹⁵ An “effective” remedy is one which either “expedite[s] a decision” or “provide[s] the litigant with adequate redress for delays.”¹¹⁶ The requirements of Article 13 can be satisfied by a combination of multiple remedies, and the effectiveness of the remedy “does not depend on the certainty of a favourable outcome for the applicant.”¹¹⁷

64. Within European Court jurisprudence on Article 13, the Court has specified that “States are afforded some discretion as to the manner in which they provide individuals with the relief required by Article 13,” and that “the Court must leave a wider margin of appreciation to the State” in the case of compensatory remedies.¹¹⁸ The Court has also expressed a preference for “allowing remedies to develop in a constitutional system.”¹¹⁹ Similar to compensatory remedies for a violation of Article 6(1), a violation of Article 13 can be redressed by the Court through monetary damages or by a finding that the article was violated.¹²⁰ The European Court has never terminated proceedings or required that a State implement a procedure to terminate proceedings as a remedy for a violation of Article 13.
65. Moreover, there is no violation of Article 13 for the Suspects’ ECHR Claim because the remedies available to the Suspects under domestic law are “effective” within the meaning of Article 13. Under Sweden’s Tort Liability Act, if “a person . . . in accordance with the European Convention on Human Rights, has seen their rights abused by the State or a municipality,” then the State or municipality must “pay damages to the extent necessary to compensate the harm caused.”¹²¹ The Tort Liability Act covers non-pecuniary harms as well as litigation costs¹²² in a similar manner to the ECHR. As previously stated, compensatory relief alone satisfies the Article 13 requirement of an effective remedy for violations of Article 6(1). So long as the remedy “operate[s] without excessive delay and provide[s] an

¹¹⁵ ECtHR, *Kudła v. Poland* (App. No. 30210/96), ¶ 156 (2000).

¹¹⁶ See ECtHR, *Sürmeli v. Germany* (App. No. 75529/01), ¶ 98 (2006); see also *Cocchiarella v. Italy* (App. No. 64886/01), ¶ 80 (2006) (discussing compliance with Article 13 and stating that “[w]here a State has taken a significant step by introducing a compensatory remedy, the Court must leave a wider margin of appreciation to the State to allow it to organize the remedy in a manner consistent with its own legal system and traditions”). While a combination of both remedies is better, the ECHR has held that a remedy designed to expedite proceedings is superior to a compensatory remedy. See ECtHR, *Sürmeli v. Germany* (App. No. 75529/01), ¶ 98 (2006); see also *Cocchiarella v. Italy* (App. No. 64886/01), ¶ 199 (2006) (“[A] remedy designed to expedite the proceedings in order to prevent them from becoming excessively lengthy is the most effective solution. Such a remedy offers an undeniable advantage over a remedy affording only compensation . . .”).

¹¹⁷ ECtHR, *Kudła v. Poland* (App. No. 30210/96), ¶ 157 (2000).

¹¹⁸ See *Rutkowski and Others v. Poland* (App. No. 72287/10 & others), ¶ 174 (2015).

¹¹⁹ ECtHR, *McFarlane v. Ireland* (App. No. 31333/06), ¶ 120 (2010).

¹²⁰ See, e.g., ECtHR, *Gazsó v. Hungary* (App. No. 48322/12), ¶ 39 (2015) (finding a violation of Article 6(1) and Article 13 and awarding € 1,000 for non-pecuniary damages); ECtHR, *McFarlane v. Ireland* (App. No. 31333/06), ¶¶ 108, 158–61 (2010) (finding a violation of Article 6(1) and Article 13 and awarding € 5,500 for non-pecuniary damages); see also *Keaney v. Ireland* (App. No. 72060/17), ¶ 133 (2020) (finding a violation of Article 6 and Article 13 but denying monetary damages, reasoning that “the Court does not consider that it is ‘necessary,’ in terms of Article 41 . . . to afford the applicant any financial compensation . . . The Court accordingly holds that the finding of violation of Article 6(1) and Article 13 in itself constitutes adequate just satisfaction”).

¹²¹ Sandra Friberg, *XXVIII. Sweden*, 8 EUR. TORT L. Y.B. 658, 658-59 (2019) (citing Tort Liability Act, Ch. 3 § 4).

¹²² Sandra Friberg, *XXVIII. Sweden*, 8 EUR. TORT L. Y.B. 658, 659 (2019) (citing Tort Liability Act, Ch. 5 § 8 on non-pecuniary damages, and Ch. 6 § 7 on litigation costs).

adequate level of compensation,” it is effective and therefore satisfies Article 13.¹²³ Even if the compensatory remedies available were not sufficient, they are considered in combination with other available remedies for the purpose of satisfying Article 13.

66. Sweden’s Tort Liability Act may function as a sort of last resort as it compensates for “necessary” harms—meaning harms that have not already been addressed through remedies such as a declaration of priority or a reduction in the sentence¹²⁴—and thus is not the only option for relief. According to section 1 of the Act (2009: 1058) on declaration of priority in court (lagen (2009:1058) om förtursförklaring i domstol), the court shall, upon written application from an individual party, declare that a case or matter be handled with priority in the court if the handling of the case or matter has been unreasonably delayed.¹²⁵
67. The Supreme Court has stated that slow proceedings that constitute a violation of Article 6 must be compensated either by reduction of a sentence (påföljdsindring) or damages (NJA 2012 at 1038 I). Both remedies—compensation and expedition—are available to the Suspects and, accordingly, there is no violation of Article 13.¹²⁶ Not only do the available domestic remedies satisfy Article 13, but the combination of a remedy designed to expedite (the declaration of priority) and compensatory remedies (sentence reduction or damages) is an ideal solution for addressing potential violations of Article 6.¹²⁷
68. There is no violation of Article 13 in relation to the Suspects’ ECHR Claim. Further, even if there was a violation of Article 13, the termination of the proceedings is unavailable as a remedy. The European Court gives States discretion in the creation and implementation of remedies. Compensatory remedies are given an especially high degree of discretion. Sweden’s Tort Liability Act, which explicitly brings its tort liability provisions in line with European Court precedent, meets the requirement for an effective remedy by itself, let alone in combination with other available domestic remedies.

¹²³ See ECtHR, *McFarlane v. Ireland* (App. No. 31333/06), ¶ 108 (2010) (citing ECtHR (GC), *Scordino v. Italy* (no. 1) (App. No. 36813/97), ¶¶ 195, 204–207 (2006)).

¹²⁴ Sandra Friberg, *XXVIII. Sweden*, 8 EUR. TORT L. Y.B. 658, 659 (2019) (applying the Tort Liability Act Ch. 3 § 4). Note that the author seemingly uses the term “declaration of precedence” in place of “declaration of priority.”

¹²⁵ In addition, in the preliminary investigation stage, it is possible for the district court to, after notification from the suspect, in various ways order that the prosecutor shall take various measures including, for example, for the case to be handled urgently. SWED. CODE OF JUDICIAL PROCEDURE (RÄTTEGÅNGSBALKEN), Ch. 23 § 19.

¹²⁶ Professor Schabas highlights the Court’s determination in *Barry v. Ireland* that Article 13 was violated because of “the lack of a remedy under domestic law . . . for past and future delay . . .” See Schabas Opinion, Dkt. No. 287, ¶ 40 (citing *Barry v. Ireland* (App. No. 18273/04), ¶ 56 (2005)). In determining that Article 13 was violated, the Court considered that “the judgment of the [Irish] Supreme Court made it clear that Convention case-law would not cause the domestic courts to fashion any remedies,” that it was not clear how the government would clarify damages, and that the Supreme Court would not adequately consider delays caused by national authorities. See *Barry v. Ireland* (App. No. 18273/04), ¶¶ 53–55. Here, however, domestic remedies are actually available to the Suspects, as demonstrated by the applicability of the Tort Liability Act and Supreme Court case law, and the underlying concerns that informed the Court’s decision in *Barry v. Ireland* are not present.

¹²⁷ See ECtHR, *Sürmeli v. Germany* (App. No. 75529/01) (2006).

B. The Suspects' Claim that the Duration of the SPA's Investigation Constitutes "Undue Delay" is Erroneous and Not Supported by International Law Jurisprudence

69. There has been no “undue” delay in the SPA’s investigation. The Suspects’ ECHR claims are unfounded because the SPA’s case is still in the investigation stage and none of the Suspects have been arrested or detained at any point since the start of the investigation. International criminal courts, including the International Criminal Tribunal for the former Yugoslavia (the “ICTY”), the International Criminal Tribunal for Rwanda (the “ICTR”) (jointly the “ICTs”), and the International Criminal Court (the “ICC”) have applied the right to fair trial without undue delay in cases involving violations of international criminal law, similarly to how the Supreme Court is currently being asked to consider the Suspects’ ECHR Claim. The ICTs and the ICC have only found undue delay in trial proceedings where defendants were detained for unjustifiably long periods of time during the pre-trial, trial, and appeals phases or in the context of “simple” cases (i.e., a single attack or event by a single defendant on a single day) for which lengthy trials were inexplicable—neither situation applies in this case and thus the Suspects’ claims of “undue” delay are unfounded.
70. This part of the Opinion is structured in three sections. Section 1 provides a summary of Professor Schabas’s analysis of the ICTs, arguing that Professor Schabas’ simplistic numerical comparison between the ICTs and the SPA’s investigation does little to help the Supreme Court determine what constitutes “undue” or “unreasonable” delay under international law. Further, Professor Schabas fails to engage with the jurisprudence from the ICTs and the ICC on the issue of undue delay. Section 2 fills this gap by demonstrating that the ICTs and the ICC have consistently found undue delay *only* in circumstances where the accused was unjustifiably and inexplicably detained during the pre-trial and trial phase or where the alleged criminal activities involved simple factual and legal issues. Section 3 concludes by highlighting how the Suspects’ ECHR Claim is unfounded when considered in the context of the jurisprudence from the ICTs and the ICC: the Suspects have never been arrested or detained during the course of the investigation, the investigation involves complex issues of fact and law, the SPA has conducted the investigation with seemingly no unjustified or inexplicable delays while the Suspects have seemingly contributed to the delay at least in part, and the Suspects have been under investigation for a reasonable length of time—four years, six months for Lundin and Schneiter and two years, six months for Lundin Energy, from the day the Suspects received the description of suspicions. These circumstances, taken together, establish that the duration of the SPA’s ongoing investigation into the allegations of complicity in international crimes by the Suspects is reasonable.

1. Summary of Professor Schabas’s International Criminal Tribunals Analysis

71. In his opinion, Professor Schabas notes that the international tribunals offer guidance for what may constitute a reasonable length of time for the prosecution of a case involving violations of international criminal law. In summary, he explains that these courts hear “international crimes perpetrated in a place far from the seat of the court, where such special issues as

linguistic problems and witness protection, amongst others, may arise.”¹²⁸ The ICTs offer guidance because they deal in international criminal complexities similar to those that the SPA is likely to face in its investigation into the Suspects’ alleged activities in Block 5A.

72. In his analysis, Professor Schabas provides a brief overview of the ICTR, the ICTY, and the Special Court for Sierra Leone, focusing exclusively on the length of the tribunals’ existence and the number of proceedings completed in the first ten years of their existence.¹²⁹ Professor Schabas states that, in those first ten years, the tribunals issued many judgments: 17 judgments from the ICTY, 17 judgments from the ICTR, and four judgments from the Special Court for Sierra Leone.¹³⁰ Presumably, Professor Schabas uses the ten year mark as a measurement because the Suspects erroneously claim that they have been under investigation since the start of the SPA’s investigation in June 2010. Based on an artificial and purely numerical review, Professor Schabas concludes that the ICTs demonstrate the “feasibility of conducting major investigations and holding complex trials dealing with international crimes within a reasonable time.”¹³¹
73. However, Professor Schabas’s analysis not only disregards the unique position of the ICTs that makes a direct numerical comparison impractical, but it also does not engage with the jurisprudence from the ICTs on the issue of the right to fair trial without undue delay.
74. First, a direct numerical comparison is impractical because the calculation of time for the ICT procedures begins with the indictment and an indictment has not been issued in the case of the Suspects. Even applying a flexible standard and measuring the length of time from the description of suspicion, the Suspects have been the subjects of the investigation for only four years, six months for Lundin and Schneider and two years, six months for Lundin Energy. The Victims’ Counsel Opinion calculates the same length of time.¹³² Professor Schabas’s numerical analysis is therefore unhelpful as he compares the duration of the SPA’s investigation to the duration of the ICTs’ trial procedures.
75. Second, the unique positions of the ICTs do not lend themselves to a direct numerical comparison to the SPA’s ongoing investigation. The ICTs were specialized courts established solely for the purpose of trying international crimes arising out of a particular conflict. Further, Professor Schabas refers mainly to the length of trial proceedings, which are irrelevant to the SPA’s investigation because the SPA has not yet filed the indictment and charges necessary to trigger the prosecution and trial phase of these proceedings. Therefore, as the investigation into the alleged activities of the Suspects and the allegations of complicity in international crimes does not have a comparable phase to the ICTs, a direct numerical comparison between these courts is unhelpful.
76. Third, Professor Schabas’ analysis fails to engage with the jurisprudence from the ICTs on the issue of undue delay, which may be relevant to the Supreme Court’s assessment of the

¹²⁸ Schabas Opinion, Dkt. No. 287, ¶ 26.

¹²⁹ Schabas Opinion, Dkt. No. 287, ¶¶ 26–30.

¹³⁰ Schabas Opinion, Dkt. No. 287, ¶¶ 26–30.

¹³¹ Schabas Opinion, Dkt. No. 287, ¶ 30.

¹³² See, e.g., Bratt Victims’ Counsel’s Opinion, Dkt. No. 362, ¶¶ 18–21, 29.

Suspects' ECHR Claim in the context of an investigation into alleged complicity in international crimes. As summarized in the following sub-section, the ICTs have heard many cases on the issue of undue delay in the context of the right to fair trial and have consistently found undue delay only in circumstances where defendants were unjustifiably and inexplicably detained during the pre-trial and trial phase or where the alleged criminal activities involved simple factual and legal issues. The SPA's investigation into the Suspects' alleged activities in Block 5A cannot reasonably be considered analogous to either of these circumstances and, therefore, should be considered reasonable or not unduly delayed in the context of the ICTs' and ICC's jurisprudence.

2. Jurisprudence by the International Criminal Tribunals and the International Criminal Court on the Right to Fair Trial Without Undue Delay

77. There has been no "undue" or "unreasonable" delay in the SPA's investigation and the Suspects' ECHR claims are unfounded because the SPA's case is still in the investigation stage and none of the Suspects have been arrested or detained at any point since the start of the investigation. The ICTs and the ICC have only found undue delay for trial proceedings where defendants were detained for unjustifiably long periods of time during the pre-trial, trial, and appeals phases or in the context of "simple" cases (i.e., a single attack or event by a single defendant on a single day) for which lengthy trials were inexplicable. Neither situation applies here.
78. Further, even if the Supreme Court assesses the factors considered by the ICTs and the ICC when determining violation because of undue delay during trial proceedings or when the accused is detained, there has been no violation of the Suspects' right to fair trial within a reasonable time.
79. The Statutes of the ICTs as well as the standards applied by the tribunals conform with international human rights caselaw regarding the right to fair trial without undue delay. The Statutes of the ICTR¹³³ and ICTY¹³⁴ reproduce Article 14(3)(c) of the International Covenant on Civil and Political Rights verbatim, demonstrating that their standards are tied closely to international human rights law. The Rome Statute of the ICC similarly establishes the right of the accused "to be tried without undue delay."¹³⁵ Citing the jurisprudence of the European Court of Human Rights, the ICTs have held that whether proceedings have been unduly delayed must be considered on a "case-by-case basis, with reference to the specific

¹³³ The Statute of the ICTR guarantees the right of the accused "[t]o be tried without undue delay" under Article 20(4)(c). Statute of the International Tribunal for Rwanda (1994), art. 20(4)(c). The ICTR confirmed its Statute states the right to be tried without undue delay, which also reflects other international human rights instruments. *See* Prosecutor v. Ntagerura, Case No. ICTR-97-36-I, Decision on the Prosecutor's Motion for Joinder, ¶ 54 (Oct. 11, 1999) ("Before reaching a conclusion the Trial Chamber also must satisfy itself that a joinder would not infringe the right of the accused to trial without undue delay as laid down in Article 20(4)(c) of the Statute and other international human rights instruments.").

¹³⁴ The Statute of the ICTY guarantees the right of the accused "to be tried without undue delay" under Article 21(4)(c). Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (2009), art. 21(4)(c). The ICTY confirmed its Statute reflects human rights law with regard to the right to be tried without undue delay.

¹³⁵ Rome Statute of the International Criminal Court, art. 67(1)(c) (1998).

circumstances of each case”¹³⁶ and the ICC has similarly stated it would assess violations by “taking into account the particularities of the case and in accordance with internationally recognized human rights.”¹³⁷

80. The ICTs have endorsed five factors for a court to weigh in its determination and the ICC has applied similar factors in its analyses: the length of the delay; the complexity of the case; the conduct of the parties; the conduct of the relevant authorities; and the prejudice to the defendants.¹³⁸ In weighing these factors, the ICTs have often drawn on jurisprudence from the European Court of Human Rights, noting, for example, “[t]he reasonableness of the period cannot be translated into a fixed number of days, months or years, since it is dependent on other elements which the judge must consider. . . . [T]he Strasbourg organs have deemed trials that even lasted longer than 10 years to be compatible with Article 6(1) of the ECHR, holding, on the other hand, others lasting less than one year to be in violation of the provision.”¹³⁹
81. The ICC has calculated the delay from the date on which the accused “was first notified of the warrant of arrest.”¹⁴⁰ Even taking the European Court of Human Rights’ more flexible starting point of when the accused is “informed that the authorities are taking steps towards prosecution”—as endorsed in a minority opinion by ICC Judge Christine van den Wyngaert¹⁴¹—the starting point would be the point at which the description of suspicions

¹³⁶ See, e.g., *Prosecutor v. Kovačević*, Case No. IT97-24-AR73, Decision Stating Reasons for Appeals Chamber’s Order of 29 May 1998, ¶ 30 (Int’l Crim. Trib. for the Former Yugoslavia July 2, 1998) (stating that the right to fair trial without undue delay requirement “must be interpreted according to the special features of each case”); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment, ¶ 75 (Dec. 18, 2008) (stating that the right to be tried without undue delay “has to be decided on a case by case basis”).

¹³⁷ *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ¶ 39 (June 3, 2012).

¹³⁸ See, e.g., *Prosecutor v. Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, ¶ 3 (Feb. 27, 2004). Some cases have discussed additional factors, including the complexity of the investigation as distinct from the complexity of the case, the joinder of the accused, the number of motions filed by the parties, the number of witnesses heard and exhibits tendered. See K.J. Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization*, UNIVERSITY OF AMSTERDAM 300–01 (2015). These factors were first confirmed by the ICTR Appeals Chamber in *Mugiraneza* and subsequently endorsed by the ICTY in *Perišić* and the ICTY Appeals Chamber in *Šešelj*. See *Prosecutor v. Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, ¶ 3 (Feb. 27, 2004); *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Motion for Sanctions for Failure to Bring the Accused to Trial without Undue Delay, ¶ 12 (Int’l Crim. Trib. for the former Yugoslavia Nov. 23, 2007) (citing and adopting the ICTR standard in *Prosecutor v. Prosper Mugiraneza*); *Prosecutor v. Šešelj*, Case No. IT-03-67-AR15bis, Decision on Appeal against Decision on Continuation of Proceedings, ¶ 63 (Int’l Crim. Trib. for the former Yugoslavia June 6, 2014).

¹³⁹ *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of the Proceedings, ¶ 68 (May. 23, 2000) (internal citations omitted).

¹⁴⁰ See *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ¶ 38 (June 3, 2012) (“In the present case, the relevant period began to run as soon as Mr. Gbagbo was first notified of the warrant of arrest on 29 November 2011 and subsequently surrendered to the Court on 30 November 2011.”) (internal citations omitted).

¹⁴¹ *Prosecutor v. Katanga*, ICC-01/04-01/0707-3436-AnxI, Minority Opinion of Judge Christine Van den Wyngaert, ¶ 121 (Mar. 7, 2014).

was given to the Suspects (in November 2016 for Lundin and Schneider and November 2018 for Lundin Energy) because this was the point in the investigation that the SPA informed the respective Suspects it was taking steps towards prosecution.

82. While the analysis of the factors of undue delay considered by the ICTs and the ICC do not apply to the case of the Suspects because there has been no arrest warrant, indictment, or detention, this Section will nonetheless analyze the factors to demonstrate that, even if they were applied to the Suspects' ECHR Claim, there has been no "undue" or "unreasonable" delay in the SPA's investigation.

i. Length of Proceedings

83. As none of the statutes for the ICTs or the ICC prescribe a time limit at which point the length of the investigation or proceedings becomes "unreasonable" or "unduly" delayed, the consideration of length alone says little about "reasonableness." The International Criminal Tribunals have instead assessed the length of delay mostly in the context of and weighed against the other factors.

ii. Complexity

84. The ICTs and the ICC have analyzed the issue of complexity—involving both factual and legal complexity—in the context of trial delays, not investigations. The ICC has acknowledged the inherent complexity of trials dealing with genocide, crimes against humanity, and war crimes: "The need to act expeditiously must also be viewed in the context in which the Court operates. The crimes under the Court's jurisdiction are by their nature complex and their adjudication takes time."¹⁴² The ICTs and the ICC have consistently recognized the complexity of international investigation and prosecution and have only found "undue" delay in cases that were "simple."
85. The ICTs and the ICC have considered factual complexity, often related to the investigation facts of the case. The difficulty of the on-site¹⁴³ and international nature¹⁴⁴ of the investigation is often cited as a component of complexity: the broad geographic and temporal scope of the crimes charged and the geographic isolation of witnesses and evidence has been considered to contribute to complexity.
86. For example, in *Gbagbo*, the ICC permitted further delay in a pre-trial case that had already lasted 1.5 years because of "a myriad of incidents allegedly committed by a multitude of

¹⁴² See Prosecutor v. Katanga, ICC-01/04-01/07 OA 10, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings," ¶ 45 (July 12, 2010).

¹⁴³ See, e.g., Prosecutor v. Blaskić, Case No. IT-95-14-T, Order Denying a Motion for Provisional Release, (Int'l Crim. Trib. for the former Yugoslavia Dec. 20, 1996) (stating that "the real complexity of the case which led the Prosecutor to draft an amended indictment containing nineteen counts and the great difficulties encountered in the conduct of the on-site investigations should be noted").

¹⁴⁴ See, e.g., Prosecutor v. Bagosora and Nsengiyumva, Case No. ICTR-98-41-A, Appeals Judgement, ¶ 37 (Dec. 14, 2011) (noting the need for "securing of witnesses and documents located around the world" as a legitimate reason for intervals between trial segments); Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Judgement and Sentence, ¶ 77 (Sept. 30, 2011) (same consideration).

perpetrators over several months, necessitating a complex investigation.”¹⁴⁵ In *Bemba*, the judge considered the volume of evidence, the disclosure process, and the number of filings as contributing to the complexity of the case and justifying longer periods of detention where the accused had been in pre-trial detention for seven months and three days.¹⁴⁶ In *Mbarushimana*, the judge considered the multiplicity of crimes alleged, the distance between the accused’s actions and the scene of the actual crime, and the reliance on novel forms of individual responsibility as contributing to the complexity and found no undue delay where the defendant had been in detention for eleven months.¹⁴⁷ The ICC also noted the added complexity in the pre-trial process when all evidence is situated abroad.¹⁴⁸

87. The bulk of the International Criminal Tribunals’ considerations of undue delay have occurred in the context of trials. The ICTs have considered the legal complexity of the prosecution and trial phases and most often cite the number of witnesses and volume of the evidence as contributing to the size of the case, which contributes to its complexity.¹⁴⁹

¹⁴⁵ See *Prosecutor v. Gbagbo*, ICC-02/11-01/11, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ¶¶ 40–42 (June 3, 2012).

¹⁴⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-321, Decision on Application for Interim Release, ¶ 47 (Dec. 16, 2008) (citing European Court of Human Rights caselaw in justifying longer pre-trial detention considering “the seriousness of the charges brought against him, the fear he will influence witnesses, the complexity of the case resulting from inter alia the volume of evidence and the disclosure process as well as the number of filings in the case”).

¹⁴⁷ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-428, Review of Detention and Decision on the “Third Defence Request for Interim Release,” ¶¶ 54–55 (Sept. 16, 2011) (justifying a finding of no undue delay partly because of the complexity of the case considering “(i) there are over a dozen international crimes alleged across a variety of crime bases, (ii) the suspect’s alleged contribution occurs a significant distance from the crime scenes and raises novel issues as one of the first cases presented to the Court relying on article 25(3)(d) of the Statute to establish criminal responsibility and (iii) there is an enormous amount of evidence sought to be relied upon in this case which has been obtained as a result of an investigation across at least three countries”).

¹⁴⁸ See, e.g., *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-428, Review of Detention and Decision on the “Third Defence Request for Interim Release,” ¶ 55 (Sept. 16, 2011) (finding no undue delay and considering as a factor that “there is an enormous amount of evidence sought to be relied upon in this case which has been obtained as a result of an investigation across at least three countries”).

¹⁴⁹ See, e.g., *Prosecutor v. Šešelj*, Case No. IT-03-73-T, Decision on Oral Request of the Accused for Abuse of Process, ¶ 29 (Int’l Crim. Trib. for the former Yugoslavia Feb. 10, 2010) (“Nevertheless, the complexity of this trial and the seriousness of the charges against the Accused cannot be overstated. To date, 76 witnesses have been heard and almost 900 exhibits have been admitted in the course of these proceedings.”); *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-T, Judgement and Sentence, ¶ 38 (Feb. 2, 2012) (finding no undue delay and considering as part of its complexity analysis that “the Chamber heard 153 witnesses, admitted 114 witness statements under Rule 92 *bis*, received over 1,400 exhibits and issued nearly 900 written decisions”); *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment, ¶ 78 (Dec. 18, 2008) (considering in its complexity analysis that “[o]ver the course of 408 trial days, the Chamber heard 242 witnesses, received nearly 1,600 exhibits and issued around 300 written decisions”); *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Proseper Mugiraneza’s Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, ¶ 13 (June 23, 2010) (considering that the proceedings “involving four co-accused 171 witnesses, 404 trial days and several thousand pages of exhibits and court transcripts, are very complex indeed” and finding no undue delay); *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza’s Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, ¶ 30 (May 29, 2007) (finding no undue delay and considering as part of the complexity analysis that, “[t]o date, the Chamber has heard some 57 witnesses for the Prosecution, and more than 40 witnesses for the Defense” and has entered into evidence “in excess of 25 volumes of documentary exhibits”); *Prosecutor v. Gatete*, Case No. ICTR-2000-61-T, Judgement, ¶ 60 (Mar. 31, 2011) (“With respect to the complexity of the case, the Chamber notes that this is a single-accused case and, therefore, cannot be compared to multi-accused trials which have run for years and involved hundreds of trial days with over a thousand exhibits and in excess of a hundred witnesses. The trial of

Additional factors of complexity considered by the courts include the number of accused,¹⁵⁰ the number of crimes,¹⁵¹ the number of motions filed by the parties,¹⁵² and the language translation into the working languages of the court and the respective areas where the crimes occurred.¹⁵³

88. For example, in *Mugenzi and Mugiraneza*, the ICTR Appeals Chamber held that proceedings that were ongoing for 12 years, during which the four accused persons were in detention, did not violate the accused's right to trial without undue delay based on the size and complexity

Gatete ran for 30 days over a period of five months and nine days. A total of 49 witnesses appeared before the court and 146 exhibits were admitted.”) (internal citations omitted).

¹⁵⁰ See, e.g., Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on Proseper Mugiraneza's Fourth Motion to Dismiss Indictment for Violation of Right to Trial without Undue Delay, ¶ 13 (June 23, 2010) (considering that the proceedings “involving four co-accused 171 witnesses, 404 trial days and several thousand pages of exhibits and court transcripts, are very complex indeed” and finding no undue delay); Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment, ¶ 78 (Dec. 18, 2008) (justifying the lengthy proceedings due to the “particular complexity of the case” which includes three indictment against four accused, “each charged direct and superior responsibility and between 10 and 12 counts”); Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgement, ¶ 60 (Mar. 31, 2011) (“With respect to the complexity of the case, the Chamber notes that this is a single-accused case and, therefore, cannot be compared to multi-accused trials which have run for years and involved hundreds of trial days with over a thousand exhibits and in excess of a hundred witnesses.”) (internal citations omitted).

¹⁵¹ See, e.g., Prosecutor v. Gatete, Case No. ICTR-2000-61-T, Judgement, ¶ 60 (Mar. 31, 2011) (noting in its consideration of complexity that the accused was originally charged with ten counts, which were reduced to six counts, though the remaining counts and “underlying crimes involve several allegations, allege participation in a joint criminal enterprise, as well as conspiracy to commit genocide and, thus, involve complex issues of fact and law, as evidenced in this Judgement”); Prosecutor v. Nahimana et al., Case No. ICTR-99-52-A, Appeals Judgement, ¶ 1076 (Nov. 28, 2007) (“There is no doubt that the present case is particularly complex, due inter alia to the multiplicity of counts, the number of accused, witnesses and exhibits, and the complexity of the facts and the law, and that the proceedings could be expected to extend over an extended period.”); Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment, ¶ 78 (Dec. 18, 2008) (justifying the lengthy proceedings due to the “particular complexity of the case” which includes three indictment against four accused, “each charged direct and superior responsibility and between 10 and 12 counts”).

¹⁵² See, e.g., Prosecutor v. Karemera and Ngirumpatse, Case No. ICTR-98-44-T, Judgement and Sentence, ¶ 38 (Feb. 2, 2012) (finding no undue delay and considering as part of its complexity analysis that “the Chamber heard 153 witnesses, admitted 114 witness statements under Rule 92 bis, received over 1,400 exhibits and issued nearly 900 written decisions”); Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, ¶ 29 (June 3, 2005) (finding no undue delay even with the length of time elapsed between the initial appearance and the beginning of trial because of the complexity of facts, law, and proceedings as the case involved a joint indictment with four co-accused and prosecution and defense counsel filed numerous motions with the court which had subsequent hearings); Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Second Motion to Dismiss for Deprivation of his Right to Trial without Undue Delay, ¶ 30 (May 29, 2007) (finding no undue delay and considering as part of the complexity analysis that “[t]he Trial Chamber has rendered more than 200 written decisions in this case”); Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment, ¶ 78 (Dec. 18, 2008) (finding no undue delay and considering as part of its complexity analysis that the Chamber has “issued around 300 written decisions”); Prosecutor v. Karemera and Ngirumpatse, Case No. ICTR-98-44-T, Judgement and Sentence, ¶ 38 (Feb. 2, 2012) (finding no undue delay and considering as part of its complexity analysis that “the Chamber heard 153 witnesses, admitted 114 witness statements under Rule 92 bis, received over 1,400 exhibits and issued nearly 900 written decisions”).

¹⁵³ See, e.g., Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgment, ¶ 81 (Dec. 18, 2008) (finding no undue delay and considering as part of its analysis “[t]here was a need for intervals between the trial segments to allow the parties to prepare in view of the massive amounts of disclosure relevant to the case, the need to translate a number of documents, and the securing of witnesses and documents located around the world.”).

of the case alone.¹⁵⁴ The Appeals Chamber assessed the factual and legal complexity of the case, considering that it involved “several modes of liability and 10 counts[,] . . . four Accused, 171 witnesses, 399 trial days and 975 documentary exhibits totaling more than 8,000 pages[,] . . . [t]ranscripts in this proceeding amount to more than 27,000 pages . . . [and] 391 written decisions outside the [Chamber’s] Judgment.”¹⁵⁵ Moreover, the case was factually broad in scope, included “four high-level government ministers” accused of “massacres throughout Rwanda,” and required assessing “evidence covering nearly four years, from 1990 to 1994.”¹⁵⁶

89. Similarly, in the case of *Karemera and Ngirumpatse*, which took 16 years to complete, the ICTR Appeals Chamber affirmed the Trial Chamber’s consideration of seven different factors in assessing whether there had been a violation of the accused’s fair trial rights and agreed that there had been no undue delay against the accused: “In the circumstances of this case, which is among the largest ever heard by the Tribunal, the period of time which elapsed during these proceedings can be reasonably explained by the size and complexity of the case.”¹⁵⁷
90. In contrast, the ICTR Appeals Chamber in *Gatete* found undue delay and a violation of the accused’s fair trials right because it determined the case was “simple” for a case involving violations of international criminal law: it was a single-accused case with a trial that “ran for only 30 days, during which 49 witnesses were called and 146 exhibits were admitted” and during which “the Prosecution was nonetheless able to present its case in 13 days.”¹⁵⁸ The Appeals Chamber determined that this “simple” case did not justify a pre-trial delay of over seven years, during which the accused was in detention.¹⁵⁹
91. However, unlike the ICTs, the ICC has found no undue delay even in seemingly “simple” cases. For example, in *Katanga*, the ICC found no undue delay in the trial process for a judgment issued one year and four months after the Notice of Decision. Judge Christine van den Wyngaert dissented, arguing that the accused’s right to trial without undue delay had been violated, with supporting references to human rights law and adjudicating bodies, considering the delayed conduct of the ICC itself and the relative simplicity of the case (“a single attack on a single location on a single day”)—making the delays “inexplicable and unjustifiable.”¹⁶⁰
92. Even applying the lower standard of undue delay from the dissenting opinion—which would be in line with the ICTs approach for finding undue delay in “simpler” cases—the case here

¹⁵⁴ Prosecutor v. Mugenzi and Mugiraneza, Case No. ICTR-99-50-A, Appeals Judgement, ¶¶ 31–37 (Feb. 4, 2013) (counting the 12 year duration from the arrest of the accused persons to the trial judgment).

¹⁵⁵ Prosecutor v. Mugenzi and Mugiraneza, Case No. ICTR-99-50-A, Appeals Judgement, ¶ 31 (Feb. 4, 2013).

¹⁵⁶ Prosecutor v. Mugenzi and Mugiraneza, Case No. ICTR-99-50-A, Appeals Judgement, ¶¶ 31–37 (Feb. 4, 2013).

¹⁵⁷ Prosecutor v. Karemera and Ngirumpatse, Case No. ICTR-98-44-A, Appeals Judgement, ¶¶ 71, 68 (Sept. 29, 2014) (stating that the case took 12 years from arrest to trial judgment).

¹⁵⁸ Prosecutor v. Gatete, Case No. ICTR-00-61-A, Appeals Judgement, ¶ 29 (Oct. 9, 2012).

¹⁵⁹ Prosecutor v. Gatete, Case No. ICTR-00-61-A, Appeals Judgement, ¶ 29 (Oct. 9, 2012) (stating that there was a pre-trial delay of seven years).

¹⁶⁰ See Prosecutor v. Katanga, ICC-01/04-01/07-3436 –AnXI, Minority Opinion of Judge Christine van den Wyngaert, ¶ 128 (Mar. 7, 2014).

involving the Suspects alleged activities in Block 5A in Sudan would be considered a “complex” rather than “simple” case. The SPA’s investigation into the alleged crimes committed in Block 5A that implicate the Suspects is complex because the alleged activities took place over the course of many years, far away from the seat of the Swedish courts, and involved allegations of many crimes and various modes of liability, including corporate complicity.

iii. Conduct of the Parties

93. The ICTs and the ICC have considered the conduct of the parties—including that of the accused, the prosecutor, and the judicial authorities—as a factor when determining whether there has been undue delay in the trial proceedings and have found undue delay only when there were periods of unjustified or inexplicable delay.
94. For example, the ICTR Appeals Chamber has considered the conduct of both parties in its assessment of undue delay¹⁶¹ and has stated that both parties have a duty to expedite the proceedings.¹⁶² While the accused, of course, has every right to mount a proper defense, extensive pre-trial litigation that included numerous motions filed by the defense and led to delays was considered to add to the complexity of the case, and the ICTR considered that this accounted for some of the delay of the proceedings.¹⁶³ Similarly, in *Mbarushimana*, the ICC discussed the delay attributable to the parties and determined that there was greater delay attributable to the defense’s requests after the ICC found the prosecutor had “no inexcusable delay” while the defense had not exercised due diligence in raising the delay issue.¹⁶⁴
95. Regarding the conduct of the prosecutor, the ICTR Appeals Chamber has stated that the prosecutor has a duty to ensure that “the case proceeds to trial in a way that respects the rights of the accused,” which includes no undue delay or unjustified periods of inactivity and protection of the rights of the defendants (taking into account additional investigation).¹⁶⁵ For example, in *Bemba*, the ICC discussed the activities of the prosecution and the court in its

¹⁶¹ Prosecutor v. Mugiraneza, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, ¶ 3 (Feb. 27, 2004) (stating that, with reference to ECHR law, the tribunal must take into account “the conduct of the applicants and the competent authorities” in determinations of undue delay).

¹⁶² Prosecutor v. Kanyabashi, Case No. ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of the Proceedings, ¶ 69 (May 23, 2000) (“However, the Chamber emphasises that the conduct of both parties can cause the trial of an Accused to be unduly delayed and reminds both parties to perform their duties in a manner to expedite the proceedings so as to ensure respect of the Accused’s fundamental human right to trial without undue delay.”).

¹⁶³ Prosecutor v. Ndindiliyimana et al., Case No. ICTR-00-56-A, Appeals Judgement, ¶ 45 (Feb. 11, 2014) (noting that the accused is free to raise procedural and substantive challenges during pre-trial proceeding and highlighting the particular complexity of the accused’s pre-trial proceedings where the accused “raised challenges regarding selective prosecution, objected to his prosecution before the Tribunal on the basis of *res judicata*, and sought to stay proceedings and have his case transferred to a national jurisdiction”) (internal citations omitted).

¹⁶⁴ See Prosecutor v. Mbarushimana, ICC-01/04-01/10-428, Review of Detention and Decision on the “Third Defence Request for Interim Release,” ¶¶ 55, 57–65 (Sept. 16, 2011).

¹⁶⁵ See, e.g., Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Decision, ¶ 99 (Nov. 3, 1999) (finding that the prosecutor failed in her duty to diligently prosecute the case when there was a 96 day delay between the accused’s transfer to the Tribunal and his initial appearance, a delay for which the prosecutor could not demonstrate an explanation).

considerations of undue delay, finding that there were no unreasonable periods of inactivity by the ICC and other delays were beyond the control of either the prosecution or the court.¹⁶⁶ However, in *Gatete*, the ICTR Appeals Chamber found undue delay partly because the prosecutor and judicial authorities could not explain or justify Gatete's lengthy pre-trial detention of 2,564 days—a period of time which amounts to over 7 years.¹⁶⁷

96. Regarding the delay within the judicial process, the ICTs have considered that the accused must demonstrate the “relative significance of the judges’ workload distribution, overlapping duties, and outside activities, or the relative significance of any related staffing issues, for the conduct of this case.”¹⁶⁸ Thus, the accused must show actual delay and issues with the judicial activities and may not merely reference the length of the proceedings.
97. As discussed in detail in the following sub-section, the duration of the SPA’s investigation here does not appear “undue” or “unreasonable” as there have seemingly been no “inexplicable” or “unjustified” periods of delay over the course of the investigation, as referenced in the Victims’ Counsel Opinion,¹⁶⁹ and the Suspects themselves may have contributed to the alleged “undue” delay over the last four years after they were notified of the description of suspicions.

iv. Remedies

98. Neither the ICTs nor the ICC has dismissed proceedings for undue delay. The remedies considered and awarded by the ICTs in the few cases where they have found undue delay include compensation and mitigation of sentence. The ICC has not yet found a case of undue delay.
99. For example, in *Mugenzi and Mugiraneza*, in a partially dissenting opinion from ICTR Appeals Chamber Judge Patrick Robinson, he finds that the accused’s right to be tried without undue delay has been violated and suggests compensation in the amount of U.S. \$5,000 for the accused’s detention of almost 14 years.¹⁷⁰ In addition, the ICTs have considered the jurisprudence of the European Court of Human rights and mitigated sentences in cases where

¹⁶⁶ Prosecutor v. Bemba Gombo et al., ICC-01/05/01/13 A10, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Trial Chamber VII of 17 September 2018 entitled “Decision Re-sentencing Mr. Jean-Pierre Bemba Gombo, Mr. Aimé Kilolo Musamba and Mr. Jean-Jacques Mangenda Kabongo,” ¶¶ 91–92 (Nov. 27, 2019) (finding that the absence of unreasonable periods of inactivity by the courts and delays beyond the control of the prosecution and the courts did not lead to undue delay).

¹⁶⁷ See Prosecutor v. Gatete, Case No. ICTR-00-61-A, Appeals Judgement, ¶¶ 13, 16, 19–23, 45 (Oct. 9, 2012) (explaining that Gatete was detained from his initial appearance in September 2002 to the commencement of trial in October 2009).

¹⁶⁸ Prosecutor v. Mugenzi and Mugiraneza, Case No. ICTR-99-50-A, Appeals Judgement, ¶ 35 (Feb. 4, 2013) (finding that in a proceeding that lasted more than 12-years from the arrest of the accused to Trial Judgment, the accused did not show how the “relative significance of the judges’ workload distribution, overlapping duties, and outside activities, or the relative significance of any related staffing issues” came to bear on the delay).

¹⁶⁹ See, e.g., Bratt Victims’ Counsel’s Opinion, Dkt. No. 362, ¶ 27.

¹⁷⁰ Prosecutor v. Mugenzi and Mugiraneza, Case No. ICTR-99-50-A, Appeals Judgement, Partially Dissenting Opinion of Judge Patrick Robinson, ¶¶ 2, 6–12 (Feb. 4, 2013).

they have found undue delay. The ICTR Appeals Chamber in *Gatete*, for example, reduced Gatete’s sentence from life imprisonment to forty years upon a finding of “undue” delay.¹⁷¹

100. As the ICC has not yet found a case of undue delay, the ICC has discussed remedies for undue delay only as a passing reference, but seems to endorse the same remedies of compensation and mitigation of sentence. For example, in the ICC’s discussion of severance in the case of *Katanga and Ngudjolo Chui*, the ICC Trial Chamber acknowledged that severing and re-characterizing the facts at this late stage of the proceeding could result in delays, but that whether the delay would be “undue” would depend on the specific facts and circumstances of the case.¹⁷² The ICC’s discussion relied on ECHR caselaw and noted that the Chamber could compensate the accused for the possible delays via a reduction of the sentence, if necessary.¹⁷³ Further, the ICC has stated that in exceptional circumstances, the reduction of a sentence may be available as a remedy where the length of the proceedings is disproportion through no fault of the accused or for other violations of their rights.¹⁷⁴

3. The Suspects’ ECHR Claim is unfounded in light of the Jurisprudence from the ICTs and the ICC

101. Considered in the context of the jurisprudence of the ICTs and the ICC—international tribunals established specifically for the purpose of adjudicating complex international crimes—the length of the SPA’s ongoing investigation of the Suspects’ alleged activities and complicity in international crimes in Block 5A is reasonable.
102. First, the Suspects here have never been arrested or detained during the course of the SPA’s investigation. The ICTs and the ICC have drawn a clear distinction between detained defendants because the detention of the accused curtails their freedoms and brings a heightened responsibility to protect the defendants’ rights. Lundin and Schneiter have never been arrested or detained, making it less likely that the length of time is “undue” or “unreasonable.”
103. Second, as with the vast majority of cases involving allegations of international crimes or complicity in international crimes, complexity is a key feature of the SPA’s investigation into the Suspects. As the Victims’ Counsel’s Opinion highlights, the SPA’s investigation of the allegations against the Suspects is complex and far from a “simple” case: the alleged criminal activities lasted approximately six years and took place far from the seat of the Swedish courts and in a region that cannot be visited for safety reasons.¹⁷⁵ In addition, there have been serious threats against witnesses allegedly by the Suspects, presenting further obstacles for the

¹⁷¹ Prosecutor v. Gatete, Case No. ICTR-00-61-A, Appeals Judgement, ¶¶ 284–87 (Oct. 9, 2012) (affirming Gatete’s convictions for genocide and the crime of humanity of extermination).

¹⁷² Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-3319, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ¶ 43 (Nov. 21, 2012).

¹⁷³ See Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-3319, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ¶¶ 43–46 (Nov. 21, 2012).

¹⁷⁴ See, e.g., Prosecutor v. Bemba, ICC-01/05-01/08-3399, Decision on Sentence pursuant to Article 76 of the Statute, ¶¶ 88, 89 (June 21, 2016) (stating the standard and finding that the defense does not substantiate the accused’s claim that his rights were violated and the Chamber has already in the past addressed and remedied alleged rights violations).

¹⁷⁵ See, e.g., Bratt Victims’ Counsel’s Opinion, Dkt. No. 362, ¶ 26.

investigation. The COVID-19 pandemic has compounded these obstacles since early 2020. Further, this case presents particular legal complexity: corporate complicity in war crimes is a novel issue under Swedish law, requiring careful collection and analysis of evidence without precedent from Swedish jurisprudence.

104. Third, the conduct of the parties is an important factor to consider in this case. Even applying the standard of “inexplicable” or “unjustified” delays used by the ICTs and the ICC when assessing delays during the prosecution phases to the SPA’s current investigation phase, the delays here do not appear “undue” or “unreasonable.” The SPA has maintained that there have been no unjustified or inexplicable periods of time during the investigation, as referenced in the Victims’ Counsel Opinion.¹⁷⁶ Further, should the Supreme Court entertain the Suspects’ claim, it should also carefully evaluate the extent to which the Suspects may have contributed to the alleged “undue” delay over the last four years since they were notified of the description of suspicions. Any defendant is expected, of course, to diligently prepare and assert their defense. However, based on publicly available information—listed in detail on the website created and maintained by the Suspects themselves¹⁷⁷—the Suspects have seemingly tried every avenue to delay these proceedings, including pursuing this unfounded ECHR Claim over the last year, requesting further investigation at various times when the SPA was prepared to proceed to prosecution, and allegedly intimidating witnesses, causing the SPA to open a second investigation into the Suspects’ alleged judicial interference. This last development is particularly concerning as it endangers the witnesses and victims and has the potential to subvert the judicial process.
105. Finally, while not dispositive in itself, the length of time that the Suspects have been under investigation is reasonable. Even applying the flexible standard and using the description of suspicion as the starting point to measure the length of time, the Suspects have been the subjects of the investigation for four years, six months for Lundin and Schneiter and two years, six months for Lundin Energy. The Victims’ Counsel Opinion calculates the same starting point for purposes of the Suspects’ ECHR Claim.¹⁷⁸ When considered in the context of the other factors above and in light of similar cases of complexity heard by International Criminal Tribunals, this time frame is reasonable.

C. Sweden’s Obligations under International Criminal Law

106. Not only has there been no “undue” delay in the SPA’s investigation of the Suspects’ alleged complicity in international crimes in Block 5A, but it is also vital that the SPA continues to investigate the allegations as Sweden has an obligation under international law to investigate and prosecute such crimes. Sweden’s responsibility to investigate and prosecute crimes under international criminal law, including war crimes and crimes against humanity, as well as complicity in such crimes, is based on its treaty obligations and customary international law.

¹⁷⁶ See, e.g., Bratt Victims’ Counsel’s Opinion, Dkt. No. 362, ¶ 27.

¹⁷⁷ See *Legal Process*, LUNDIN SUDAN LEGAL CASE, <https://www.lundinsudanlegalcase.com/legal-process/> (last accessed June 14, 2021). Ian H. Lundin, Open Letter from Ian H. Lundin (2016), <https://www.lundinsudanlegalcase.com/wp-content/uploads/2019/11/sr-open-letter-ian-h-lundin-eng-20161128.pdf> (directing shareholders to explore Lundin Energy’s dedicated website to the company’s history in Sudan).

¹⁷⁸ See, e.g., Bratt Victims’ Counsel Opinion, Dkt. No. 362, ¶¶ 18–21, 29.

Additionally, as illustrated by cases involving violations of international criminal law litigated in European domestic jurisdictions as well as International Criminal Tribunals, the obligation to investigate and prosecute can extend over many years and remains even when the alleged criminal activity itself took place many years ago. These obligations do not infringe upon a suspect's right to be tried without undue delay.

107. In adjudicating the Suspect's ECHR Claim, the Supreme Court must consider Sweden's international obligations to investigate, prosecute, punish, and provide effective remedies for victims of human rights violations and international crimes because the SPA's investigation of the allegations of the Suspects' activities includes their alleged complicity in human rights abuse and international crimes. Sweden's responsibility derives from its obligations undertaken from international treaties, customary international law, and international human rights standards, including those applicable to businesses. The obligation to investigate and prosecute also arises out of Sweden's duty to preserve and effectuate victims' rights to remedy and truth, and to end impunity for grave crimes.
108. As Lundin Energy is a Swedish company¹⁷⁹ and its executives¹⁸⁰ were allegedly complicit in international crimes through the activities of Lundin Energy, Sweden carries a responsibility to ensure a proper and thorough investigation of Lundin's activities and to ensure effective remedies for Sudanese victims impacted by Lundin's alleged crimes.
109. Sweden has consistently affirmed its commitment to the rule of law and its obligations under international law. The duty to investigate and prosecute rests on all levels of the Swedish State, including the SPA and judiciary authorities. It is vital that the SPA continue its investigation into the alleged criminal activities of the Suspect. Based on the States' responsibilities to hold perpetrators of all crimes, including international crimes accountable, Sweden must affirm and uphold its international obligations and continue to support the investigation of the Suspects.

1. Sweden's Obligations under International Treaties

110. Sweden has an obligation to investigate and prosecute based on its ratification of international treaties. The 1949 Geneva Conventions and the 1977 Additional Protocol I impose an obligation on State Parties to not only "search for persons alleged to have committed, or ordered to be committed, such grave breaches," but also to bring "such persons, regardless of their nationality, before its own courts."¹⁸¹ Beyond the Geneva Conventions and its

¹⁷⁹ Lundin Energy is a publicly listed Swedish corporation with its headquarters in Stockholm.¹⁷⁹ It is listed on the Stockholm Stock Exchange (LUNE). See NASDAQ STOCKHOLM, <http://www.nasdaqomxnordic.com/aktier/microsite?languageId=1&Instrument=SSE22335> (last accessed June 14, 2021). Lundin Energy has existed since 1981 under different names, including as Lundin Oil AB beginning in 1998 and as Lundin Petroleum AB beginning in 2001 during the course of the events in Sudan's Block 5A. See *History*, LUNDIN ENERGY, <https://www.lundin-energy.com/about-us/history/> (last accessed June 14, 2021).

¹⁸⁰ Lundin is the former President and CEO of Lundin Energy and a Swedish national. Schneiter is the former Vice President of Exploration of Lundin Energy and a Swiss national.

¹⁸¹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), art. 50; Geneva Convention Relative to the Treatment of Prisoners of War

Additional Protocols, international treaties contain the obligation to investigate and prosecute possible war crimes, including the Genocide Convention,¹⁸² the Convention Against Torture,¹⁸³ the Chemical Weapons Convention,¹⁸⁴ the Amended Landmines Protocol,¹⁸⁵ the Hague Cultural Property Convention and its Second Protocol,¹⁸⁶ the Ottawa Convention on Landmines,¹⁸⁷ and the Dublin Convention on Cluster Munitions.¹⁸⁸ Under the Rome Statute, Sweden has an obligation to ensure that “the most serious crimes of concern to the international community as a whole must not go unpunished” and is obligated to “exercise its criminal jurisdiction over those responsible for international crimes” in order to ensure “effective prosecution” at the national level.¹⁸⁹ Sweden is a party to all of the above-mentioned treaties,¹⁹⁰ meaning that Sweden is legally bound by treaty provisions regarding the obligation to investigate.

2. Sweden’s Obligations under Customary International Law

111. Moreover, State practice and international obligations have evolved to extend the obligations to investigate and prosecute—initially only applied to grave breaches in international armed conflict under the 1949 Geneva Conventions and its 1977 Additional Protocol I—to all breaches and war crimes committed during any type of armed conflict based on customary

(1949), art. 129; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), art. 146. The articles in each of the four treaties are nearly identical and obligate States to (1) enact domestic legislation to prosecute potential perpetrators; (2) search for individuals alleged to have committed violations; and (3) either prosecute the individual or extradite them to a State that can. Additional Protocol I, art. 85(1) provides that the provisions of the four Geneva Conventions “relating to the repression of breaches and grave breaches” applies to the Protocol as well and obligates military to prevent, suppress, report, and “initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977), arts. 85(1) & 87.

¹⁸² Convention on the Prevention and Punishment of the Crime of Genocide, art. IV (1948).

¹⁸³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7 (1984).

¹⁸⁴ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, art. VII(1) (1993).

¹⁸⁵ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Amended Protocol II, art. 14 (1996).

¹⁸⁶ Convention for the Protection of Cultural Property in the Event of Armed Conflict, art. 7 (1954); Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, arts. 15–17 (1999).

¹⁸⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, art. 9 (1997).

¹⁸⁸ Convention on Cluster Munitions, art. 9 (2008).

¹⁸⁹ Rome Statute of the International Criminal Court, preamble (1998).

¹⁹⁰ Sweden has ratified all major international humanitarian law treaties, including: the four core 1949 Geneva Conventions (GC) (ratified in 1953) and its two 1977 Additional Protocols (AP) (ratified in 1979); the 1954 Hague Cultural Property Convention (ratified in 1985) and its 1999 Second Protocol (ratified in 2017); the 1993 Convention Prohibiting Chemical Weapons (ratified in 1993); the 1996 Amended Landmines Protocol (ratified in 1997); the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (ratified in 1998); the 1998 Rome Statute of the International Criminal Court (ratified in 2001); and the 2008 Dublin Convention on Cluster Munitions (ratified in 2012). For a full list of Sweden’s ratification of international humanitarian law treaties, see *Sweden: Treaties, States Parties, and Commentaries*, INT’L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SE (last accessed June 14, 2021).

international law.¹⁹¹ Therefore, as the International Committee of the Red Cross (the “ICRC”) stated in its *Customary International Humanitarian Law* review, the obligation to investigate, prosecute, and remedy is a customary international law norm applicable to both international and non-international armed conflicts.¹⁹²

112. International Criminal Tribunals established to investigate and prosecute grave crimes have also extended the obligations to investigate and prosecute to non-international armed conflicts based on customary international law. For example, the ICTY considered the obligations to investigate and prosecute to extend to non-international armed conflicts by applying the obligations of the Geneva Conventions Common Article 3 and Additional Protocol II in adjudicating its cases.¹⁹³ The preamble of the Rome Statute of the ICC reaffirms

¹⁹¹ The conflict in southern Sudan between the Government of Sudan and various non-state armed groups, including the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) during the 1990s and 2000s, is considered to be a non-international armed conflict. *See, e.g.*, INT’L COMM’N OF INQUIRY ON DARFUR, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶¶ 74–76 (Jan. 25, 2005), https://www.un.org/ruleoflaw/files/com_inq_darfur.pdf; *Non-International Armed Conflicts in Sudan*, RULE OF LAW IN ARMED CONFLICTS, <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-sudan> (last accessed June 14, 2021).

¹⁹² *See Rule 158*, Customary Int’l Humanitarian Law Database, Int’l Comm. of the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 (last accessed June 14, 2021) (“Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. . . . State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.”); *see also* INT’L COMM’N OF JURISTS, *THE RIGHT TO A REMEDY AND REPARATIONS FOR GROSS HUMAN RIGHTS VIOLATIONS, PRACTITIONER’S GUIDE NO. 2*, 236–38 (2018) (“International practice has also evolved to establish a duty to prosecute and punish other war crimes, such as . . . serious violations of Article 3 common to the four Geneva Conventions of 1949 and other serious violations of the laws and customs of war committed in non-international armed conflict.”) (internal citations omitted); *see also* Michael Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT’L SEC. J. 31, 35–48 (2011) (discussing the international humanitarian law framework for investigations as established by treaty law and customary international law); *see also* Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, in 14 Y.B. OF INT’L HUMANITARIAN L. 37, 39 (Michael N. Schmitt et al. eds., 2012) (“The duty to investigate is far broader [than the “traditional focus on the Geneva grave breaches regime in the context of military investigations” under the Geneva Conventions and 1977 Additional Protocol 1, instead] encompassing alleged violation of many other norms of [international humanitarian law] and [international human rights law] and engaging the responsibility of both military and civilian officials.”); *see also* Amy M. L. Tan, *The Duty to Investigate Alleged Violations of International Humanitarian Law: Outdated Deference to an Intentional Accountability Problem*, 49 INT’L L. AND POLITICS, 181, 203–210 (2016) (“Alongside the explicit obligations outlined in the Geneva Conventions and Additional Protocol I, these treaties also create a general duty to investigate and prosecute all violations of the Conventions, not just violations considered to be grave breaches or war crimes.”); *see also* Alon Margalit, *The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice*, in 15 Y.B. OF INT’L HUMANITARIAN L. 155, 167–72 (Terry D. Gill et al. eds., 2012) (discussing the circumstances giving rise to a State’s duty to investigate civilian casualties under the laws of armed conflict and stating that the fundamental rules found in the four Geneva Conventions and 1977 Additional Protocol I “form part of customary [law of armed conflict] and thus apply during international and non-international armed conflict”); *see also* Durward Johnson & Michael N. Schmitt, *The Duty to Investigate War Crimes*, ARTICLES OF WAR (Dec. 22, 2020), <https://lieber.westpoint.edu/duty-investigate-war-crimes/>. *But see* U.S. Joint Letter From John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study, 46(3) INT’L L. MATERIALS 511 (2007).

¹⁹³ *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 134 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other

“the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”¹⁹⁴ The preamble does not distinguish between international and non-international armed conflict, reinforcing the customary law application of the obligation to investigate and prosecute all war crimes and breaches of international humanitarian law.

113. Swedish courts have recognized the customary international law application of the obligation to investigate and prosecute war crimes in non-international armed conflicts in its domestic system. For example, in *Prosecutor v. Jackie Arklöv*, the Stockholm district court accepted and applied customary international law in a case involving war crimes in a non-international armed conflict. Arklöv, a Swedish national and mercenary who was part of the Croatian Council of Defense, was charged with committing atrocity crimes against prisoners of war and Bosnian Muslim civilians during the conflict in the former Yugoslavia, which the court deemed to be a non-international armed conflict.¹⁹⁵ The specific criminal acts charged were primarily from the four Geneva Conventions and Additional Protocol I—treaties traditionally thought to only apply to international armed conflicts.¹⁹⁶ In discussing the applicability of the Geneva Conventions and Additional Protocol I to Arklöv’s case, the Stockholm district court referenced the *ICRC Customary Humanitarian Law* review and U.N. Security Council resolutions to conclude that “several rules in international humanitarian law, of which the primary scope is international armed conflict, are on the basis of custom applicable in the case”—a case of non-international armed conflict.¹⁹⁷ The court applied various provisions of the Geneva Conventions and both Additional Protocols to Arklöv’s case and found him guilty of most of the charged counts of war crimes.¹⁹⁸
114. Sweden has an obligation to investigate and prosecute allegations of criminal activities and complicity in criminal activities based on customary international law, including those committed in the context of non-international armed conflicts such as the conflict in Sudan during the 1990s and 2000s.¹⁹⁹

general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”).

¹⁹⁴ Statute of the International Criminal Court, preamble (1998).

¹⁹⁵ See Mark Klamberg, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, 9 INT’L CRIM. L. REV. 395, 403–04 (2009).

¹⁹⁶ Mark Klamberg, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, 9 INT’L CRIM. L. REV. 395, 404 (2009).

¹⁹⁷ See Mark Klamberg, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, 9 INT’L CRIM. L. REV. 395, 404 & n. 28 (2009) (citing *Prosecutor v. Jackie Arklöv*, Case no. B 4084-04, Judgment, ¶ 52 (Stockholm District Court Dec. 18, 2006)) (noting that no official translations of the case exist and all quoted portions of the case are unofficially translated by the author himself).

¹⁹⁸ See Mark Klamberg, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, 9 INT’L CRIM. L. REV. 395, 404–405 (2009).

¹⁹⁹ The conflict in southern Sudan between the Government of Sudan and various non-state armed groups, including the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) during the 1990s and 2000s, is considered to be a non-international armed conflict. See, e.g., INT’L COMM’N OF INQUIRY ON DARFUR, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, ¶¶ 74–76 (Jan. 25, 2005), https://www.un.org/ruleoflaw/files/com_inq_darfur.pdf; *Non-International Armed Conflicts in Sudan*, RULE OF LAW IN ARMED CONFLICTS, <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-sudan> (last accessed June 14, 2021).

3. The Inherent Complexity of Investigating and Prosecuting Cases Involving Violations of International Criminal Law Requires Time

115. The inherent complexity of trying and adjudicating cases involving violations of international criminal law requires time, as demonstrated by the duration of such cases increasingly brought in domestic jurisdictions as States fulfill their obligation to investigate and prosecute international crimes and grave violations of human rights. The duration or length of investigation required by the State to carry out its international obligations is not limited under international law, as evidenced by the cases in this section. International law has rejected statutes of limitations for war crimes, crimes against humanity, and genocide²⁰⁰ to ensure proper and thorough investigation of these crimes, accountability for perpetrators, and justice for victims.²⁰¹
116. Some cases involving violations of international criminal law proceed swiftly; others take time due to the specific circumstances of the alleged criminal acts. The length of the proceeding itself says very little since the duration for such cases can be significantly longer for a number of reasons. For example, cases with violations of international criminal law usually involve grave and complex crimes that require the application of unique or novel approaches to the law;²⁰² cases may be revisited when new evidence or witnesses emerge; or

²⁰⁰ See, e.g., Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N. Treaty Series 73 (1970); Statute of the International Criminal Court, art. 29, non-applicability of statute of limitations (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”). The Genocide Convention does not include a statute of limitations. Under customary international law, statutes of limitation may not apply to war crimes. See *Rule 160: Statutes of Limitation*, Customary Int’l Humanitarian Law Database, Int’l Comm. of the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule160 (last accessed June 14, 2021) (“State practice establishes this rule as a norm of customary international law applicable in relation to war crimes committed in both international and non-international armed conflicts.”). The International Criminal Tribunals of the former Yugoslavia and Rwanda did not have statutes of limitations but, rather, were limited by the events underlying the criminal activity. The International Residual Mechanism for the Criminal Tribunals exists to continue the work of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and continues to conduct investigations and prosecutions of cases of crimes committed in the 1990s. See *Cases*, INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://www.irmct.org/en/cases> (last accessed June 14, 2021).

²⁰¹ See, e.g., U.N. Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, U.N. Doc. A/53/850, S/1999/231, ¶ 99 (March 1999) (stating that perpetrators of international crimes “deserve punishment as a matter of morality and fundamental consideration of justice” even after considerable time has passed between prosecution and the commission of the crime); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N. Treaty Series 73 (1970) (stating in the preamble that “the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security” and “[n]oting that the application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes”).

²⁰² The ICC in *Prosecutor v. Katanga* noted the inherent complexity of trials dealing with genocide, crimes against humanity and war crimes: “The need to act expeditiously must also be viewed in the context in which the Court operates. The crimes under the Court’s jurisdiction are by their nature complex and their adjudication takes time.” *Prosecutor v. Katanga*, ICC-01/04-01/07 OA10, Judgment on the Appeal of Mr. Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled “Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings,” ¶ 45 (July 12, 2010).

cases may take time because of the unavailability of the defendants, witnesses, or evidence that may be located abroad. None of these “delays” constitute grounds for dismissing the non-applicability of a statute of limitations for cases involving violations of international criminal law. The duration of key cases of international crimes tried in domestic courts illustrate the inherent complexity of these types of crimes, investigations, and prosecution proceedings.

117. The investigation of cases involving violations of international criminal law may take over a decade in order to gather proper evidence and overcome procedural obstacles during this pre-trial phase of the proceedings. For example, the Argentinian Ford Motor lawsuit concluded over 35 years after the defendants’ criminal activities, which included political repression, abduction, and mistreatment of plant workers and union organizers on its premises during and in collaboration with Argentina’s military dictatorship in the 1970s and 1980s.²⁰³ The pre-indictment phase of the proceedings itself lasted 11 years: from October 2002, when a federal prosecutor filed the initial criminal complaint in order to trigger a criminal investigation, to May 2013, when three former Ford Motor executives were indicted for complicity in crimes against humanity.²⁰⁴ During the 11 years from the initial filing of the criminal complaint to the indictment, the investigation and legal process was ongoing: the Argentinean court initiated and pursued the criminal investigation of Ford Motors; a second lawsuit was filed in the United States federal court alleging similar complicity charges against 25 Ford employees, but stalled due to Argentinian amnesty laws; Argentina’s Supreme Court struck down the amnesty laws; and a third lawsuit was filed by former workers and union organizers in Argentina against Ford.²⁰⁵ The “delay” was thus a result of the complexity of the crimes charged and factual allegations as well as the international legal issues inherent to the case.
118. Further, the investigation and prosecution of international crimes may occur many years after the events themselves. For example, in the same Ford Motors Argentina case, the criminal investigation commenced 30 years after the Ford executives’ last alleged criminal activity.²⁰⁶ Moreover, in the case of Frans van Anraat in the Netherlands, the defendant was prosecuted 17 years after the conclusion of the events. Van Anraat was a Dutch businessman who delivered thousands of tons of raw materials to Saddam Hussein’s regime between 1984 and 1988, which were used by the regime to make chemical weapons to attack Kurdish communities in 1988 and Iranian towns in 1987 and 1988.²⁰⁷ Van Anraat lived in Iraq until

²⁰³ For a timeline of the cases related to Ford Motor’s activities in Argentina, see *Ford Lawsuit (re Argentina)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/latest-news/ford-lawsuit-re-argentina-2/> (last accessed June 14, 2021).

²⁰⁴ *Ford Lawsuit (re Argentina)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <https://www.business-humanrights.org/en/latest-news/ford-lawsuit-re-argentina-2/> (last accessed June 14, 2021).

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²⁰⁷ *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, INTERNATIONAL CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/> (last accessed June 14, 2021).

the regime fell in 2003, at which point he returned to the Netherlands, where he was arrested, prosecuted, and convicted for complicity in war crimes.²⁰⁸ Additionally, Holocaust-related litigation and restitution processes against corporations and banks for their role in facilitating the crimes of Nazi Germany began in earnest in the 1990s²⁰⁹—40 years after the end of the Second World War—and were still ongoing through the 2010s, almost half a century after the end of the Second World War.²¹⁰ Recently, requests to open criminal investigations have been filed with the French prosecutor against BNP Paribas for complicity in genocide, torture, and crimes against humanity related to the Sudanese civil war from at least 2002 to 2008²¹¹—11 year after the alleged events—and, previously, complicity in genocide and crimes against humanity for BNP Paribas’s financial involvement in the Rwandan genocide in 1994²¹²—over 23 years after the atrocities crimes there. Finally, the international community established the Extraordinary Chambers in Cambodia in April 2005, giving the tribunal jurisdiction over crimes committed by former leaders of the Khmer Rouge Regime for acts of genocide committed between 1975 and 1979²¹³—almost 30 years after the events.

119. Swedish courts have similarly tried cases involving violations of international criminal law more than a decade after the conclusion of events and when new evidence emerged, as was the case with Jackie Arklöv. As described above, Arklöv, a Swedish national, was charged with committing atrocity crimes against prisoners of war and Bosnian Muslim civilians during the conflict in the former Yugoslavia.²¹⁴ The initial Swedish investigation into Arklöv’s crimes committed in 1993 was closed in 1995 when Arklöv was transferred into Swedish custody from Bosnia, but re-opened based on new witnesses and evidence in

²⁰⁸ *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, INTERNATIONAL CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/> (last accessed June 14, 2021).

²⁰⁹ For a timeline of Holocaust restitution litigation through 2005, see MICHAEL J. BAZYLER & ROGER P. ALFORD, HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY xiii–xviii (2006), <https://www.degruyter.com/document/doi/10.18574/9781479845620-002/html>.

²¹⁰ For example, the case of *Alperin v. Vatican Bank*, which was a U.S. class-action case brought by Holocaust survivors against the Vatican Bank for alleged looting of gold by Nazis during World War II that the Vatican Bank allegedly knew about. The case was originally filed in 1999 and had many procedural obstacles over the course of the 12 years. Most recently, in March 2011, the Ninth Circuit Court of Appeals confirmed the district court’s dismissal of the case; the case was not appealed further. See *Alperin v. Vatican Bank*, Docket No. 08-16060 (9th Cir. May 1, 2008).

²¹¹ See *Sudanese Victims Ask French Judges to Investigate BNP Paribas’ Role in Atrocities*, AFRICAN CENTRE FOR JUSTICE AND PEACE STUDIES (Sept. 26, 2019), <http://www.acjps.org/sudanese-victims-ask-french-judges-to-investigate-bnp-paribas-role-in-atrocities/>.

²¹² See *France Assigns Magistrates to BNP Rwanda Lawsuit*, SHERPA (Sept. 26, 2017), <https://www.asso-sherpa.org/france-assigns-magistrates-to-bnp-rwanda-lawsuit>.

²¹³ See U.N. General Assembly, Res. 47/228B, U.N. Doc. A/RES/57/228B (May 22, 2003); see also Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (Oct. 27, 2004) (“Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”).

²¹⁴ See Mark Klamberg, *International Criminal Law in Swedish Courts: The Principle of Legality in the Arklöv Case*, 9 INT’L CRIM. L. REV. 395, 403–04 (2009).

2004²¹⁵—11 years after the crimes took place. Arklöv was convicted in 2006 for war crimes.²¹⁶

120. The prosecution of cases involving violations of international criminal law may further take time due to procedural steps, appeals processes, and remanded trials—all vital to the proper execution of justice. For example, in the case of Guus Van Kouwenhoven in the Netherlands, the Dutch authorities’ investigation into Van Kouwenhoven’s activities began in 2004 and his final appeal for his 2017 conviction of crimes against humanity was upheld in December 2018²¹⁷—the total length of proceedings spanning 14 years. In the three years prior to the 2017 trial, the prosecution was significantly impeded in their investigation due to the Ebola outbreak in Liberia and Sierra Leone.²¹⁸ Van Kouwenhoven was a Dutch businessman who operated logging companies in Liberia since the 1980s (including during Liberia’s civil war from 1999 to 2003) and was convicted for complicity in war and arms trafficking: he supported ex-President Charles Taylor by facilitating the import of arms into Liberia in violation of a U.N. arms embargo and supplying militias with vehicles and installations to transport and store the arms.²¹⁹
121. Moreover, the legal proceedings can take significantly more time when, for example, the defendants themselves are unavailable. As mentioned above, Van Anraat lived in Afghanistan until the fall of Saddam Hussein’s regime in 2003 led him to return to the Netherlands, where his arrest and prosecution commenced in 2004.²²⁰ More recently, Félicien Kabuga, a Rwandan businessman, was a fugitive for 26 years after he allegedly participated in the 1994 Rwanda genocide as one of the primary financiers of Hutu extremist media outlets, including the RTLM radio station that helped direct the massacre by broadcasting Tutsi names and locations, and allegedly helped import hundreds of thousands of machetes into Rwanda in the year before the genocide.²²¹ Kabuga will now be prosecuted for genocide and complicity in genocide and crimes against humanity by the International Residual Mechanism for Criminal Tribunals, the residual mechanism for the ICTs.²²²
122. Finally, comparing the duration of SPA’s investigation into the activities in Block 5A to the duration of ICC’s Office of the Prosecutor’s (the “OTP”) preliminary examinations is

²¹⁵ See *Swede Convicted of Bosnia Torture*, THE LOCAL SWEDEN (Dec. 18, 2006), <https://www.thelocal.se/20061218/5838/>; Maciej Zaremba, *En tortyrturist och hans offer*, DAGENS NYHETER (March 2004), <https://www.dn.se/arkiv/kultur/en-tortyrturist-och-hans-offer/>.

²¹⁶ See *Swede Convicted of Bosnia Torture*, THE LOCAL SWEDEN (Dec. 18, 2006), <https://www.thelocal.se/20061218/5838/>.

²¹⁷ *Guus Van Kouwenhoven*, TRIAL INTERNATIONAL, <https://trialinternational.org/tag/guus-van-kouwenhoven/> (last accessed June 14, 2021).

²¹⁸ *Guus Van Kouwenhoven*, TRIAL INTERNATIONAL, <https://trialinternational.org/tag/guus-van-kouwenhoven/> (last accessed June 14, 2021).

²¹⁹ *Guus Van Kouwenhoven*, TRIAL INTERNATIONAL, <https://trialinternational.org/tag/guus-van-kouwenhoven/> (last accessed June 14, 2021).

²²⁰ *Public Prosecutor v. Frans Cornelis Adrianus van Anraat*, INTERNATIONAL CRIMES DATABASE, <http://www.internationalcrimesdatabase.org/Case/178/Van-Anraat/> (last accessed June 14, 2021).

²²¹ See *KABUGA, Félicien (MICT-13-38)*, INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://www.irmct.org/en/cases/mict-13-38> (last accessed June 14, 2021).

²²² See *KABUGA, Félicien (MICT-13-38)*, INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://www.irmct.org/en/cases/mict-13-38> (last accessed June 14, 2021).

informative because both processes serve similar purposes: collecting evidence and information regarding possible suspects, the alleged crimes, and the conflict and context surrounding the crimes while also addressing procedural questions like jurisdiction. ICC preliminary examinations allow the OTP to investigate a situation of potential violations of international crimes while assessing whether the situation meets the legal criteria to warrant investigation by the ICC.²²³ The OTP's preliminary examinations are not defined temporally by the Rome Statute,²²⁴ giving the OTP discretion over the direction of the investigation. A detailed study published in 2019 assessing 15 years of ICC preliminary examinations (through 2018) found that one-third of the studied preliminary examinations (9 out of 27) had been ongoing for more than 1500 days—or approximately four years.²²⁵ Additionally, some of the preliminary examinations have been more extensive in duration: the preliminary examinations into Afghanistan and Colombia, for example, were both ongoing for over 14 years.²²⁶

123. These cases involving violations of international criminal law in national courts and International Criminal Tribunals demonstrate that the investigation and prosecution of these complex crimes take time in order to properly and effectively discharge the State's obligation under international law. Various factors bear on the length of time of an investigation, prosecution and trial, and post-trial and appellate proceedings, where prosecutors must account for complex case facts, contextual elements, novel legal questions, procedural obstacles, and political realities. The SPA's investigation, which has only been ongoing for four years and six months for Lundin and Schneider and two years and six months for Lundin Energy, has so far been reasonable compared to other complex cases involving international crimes in domestic courts and International Criminal Tribunals, as well as the ICC preliminary examinations processes.

4. Sweden Must Continue to Uphold its International Obligations in its Domestic Courts

124. In addition to Sweden's commitment to international treaties and the practice of customary international law, Sweden has consistently and publicly emphasized the importance of the

²²³ See *Preliminary Examinations*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/pages/pe.aspx> (last accessed June 14, 2021).

²²⁴ The OTP has commented on multiple occasions that a rigid timetable for the preliminary examination phase “would not be workable.” See ICC Office of the Prosecutor, Annex to the Paper on Some Policy Issues before the Office of the Prosecutor: Referrals and Communications 3–4 (2003). The OTP has reiterated this on numerous occasions. See, e.g., ICC Office of the Prosecutor, Report on Preliminary Examination Activities 2017, ¶ 13 (Dec. 4 2017); ICC Office of the Prosecutor, Policy Paper on Preliminary Examinations, ¶ 89 (Nov. 2013). The OTP has given various reasons for supporting a lack of timetable: the need to monitor certain situations as they develop over time; monitoring of national proceedings before making admissibility decisions; and prioritization based on the limited resources of the OTP. See ICC Office of the Prosecutor, Annex to the Paper on Some Policy Issues before the Office of the Prosecutor: Referrals and Communications 3–4 (2003); ICC Office of the Prosecutor, Policy Paper on Preliminary Examinations, ¶ 90 (Nov. 2013).

²²⁵ Sara Wharton & Rosemary Grey, *The Full Picture: Preliminary Examinations at the International Criminal Court*, 56 CAN. Y.B. OF INT'L L. 1, 41–43 (2019). The study could not calculate an average duration for preliminary investigations because some of the specific start dates of the preliminary examinations were not known. *Id.* at 13.

²²⁶ Sara Wharton & Rosemary Grey, *The Full Picture: Preliminary Examinations at the International Criminal Court*, 56 CAN. Y.B. OF INT'L L. 1, 42 (2019).

States' responsibility to investigate and pursue accountability for international crimes on both the international and domestic stage.

125. Internationally, Sweden has had a long history of publicly supporting the development and application of international law. As a member of the Assembly of States for the ICC, Sweden has confirmed its commitment to investigate and prosecute perpetrators of international crimes.²²⁷ More recently, in a 2018 statement before the U.N. General Assembly regarding the status of the Additional Protocols to the Geneva Conventions and relating to the protection of victims of armed conflicts, the representative of Sweden emphasized that “[p]erpetrators must be held accountable under national legislation and procedures. Investigation of suspected abuses of humanitarian law is a necessity and a duty.”²²⁸
126. On a national level, Sweden has incorporated its international obligations regarding its duty to investigate and prosecute international crimes into its national legal framework, regularly updating and amending its legislation to concord with the requirements of international law. Since 1962, Sweden’s penal code has provided the punishment for grave violations of international law and Sweden has passed new laws to ensure compliance with its ratification of international treaties, including the recent 2014 Act on Criminal Responsibility for Genocide, Crimes Against Humanity, and War Crimes, which provides universal jurisdiction for international crimes.²²⁹
127. Sweden has further enforced accountability for international crimes in its national courts. The SPA and judiciary authorities have upheld their obligation to exercise jurisdiction over international crimes and to bring perpetrators of war crimes to justice. Sweden has carried out its international obligations in the past, including in pursuing cases of international crimes

²²⁷ See, e.g., Sweden, Statement by Ambassador Carl Magnus Nesser at the General Debate, 18th Session of the Assembly of States Parties to the Rome Statute (Dec. 2, 2019), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.SWE.2.12.pdf; Sweden, Statement at the 17th Session of the Assembly of States Parties to the Rome Statute (Dec. 6, 2018), <https://www.swedenabroad.se/en/embassies/netherlands-the-hague/current/news/swedish-statement-at-the-17th-session-of-the-assembly-of-states-parties-to-the-rome-statute/#>; Sweden, Closing joint statement of Sweden on behalf of the Netherlands, Switzerland, the United Kingdom of Great Britain and Northern Ireland, 12th Session of the Assembly of States Parties to the Rome Statute (Nov. 20–28, 2013), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP12-CLOS-SW-NL-SZ-UK-ENG.pdf; Sweden, Statement by Ambassador Per Sjögren at the General Debate of the 10th Session of the Assembly of States Parties to the Rome Statute (Dec. 14, 2011), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/Statements/ICC-ASP10-GenDeba-Sweden-ENG.pdf.

²²⁸ See *Practice Relating to Rule 158. Prosecution of War Crimes*, Customary Int’l Humanitarian Law Database, Int’l Comm. of the Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule158 (last accessed June 14, 2021) (citing Denmark, Statement by the representative of Sweden before the Sixth Committee of the U.N. General Assembly on “Item 76: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts,” made on behalf of Denmark, Finland, Iceland, Norway, and Sweden (Oct. 23, 2008)).

²²⁹ SWEDISH CODE OF STATUTES, SFS 2014:406 (June 11, 2014, as amended up to SFS 2016:515). Previously, the Swedish Act on Criminal Responsibility for Genocide was passed in 1964 in accordance with the Genocide Convention. LAG OM STRAFF FÖR FOLKMORD [Law on Penalty for Genocide] 1964:169 (Mar. 20, 1964) (Swed.).

committed during the conflicts in the former Yugoslavia and Rwanda in the 1990s and more recently in conflicts in the Middle East, including Syria and Iraq.²³⁰

128. Sweden recognizes that there is no statute of limitations for war crimes, crimes against humanity, and genocide,²³¹ demonstrating its understanding and commitment to ensuring that these grave crimes can be investigated and prosecuted with the time necessary and required to serve justice and accountability. The Victims' Counsel's Opinion similarly highlights the absence of a statute of limitations period for international crimes under Swedish law as well as Sweden's international obligations, demonstrating how strongly the legal systems promotes and protects the possibility of investigation and prosecution of this kind of crime, regardless of how long it may take.²³²
129. Sweden's international law obligations in this case arise from customary international law obligations of international criminal law as well as specific international treaties that Sweden has ratified, which are directly relevant to the allegations of complicity for international crimes committed by the Suspects in Block 5A. Sweden has an obligation under international humanitarian and criminal law to investigate, prosecute, punish, and provide redress for the Victims.

D. Sweden's Obligations under International Human Rights Law

130. In parallel, Sweden has obligations under international human rights law to investigate and prosecute human rights violations that may rise to the level of international crimes.
131. Sweden is a party to international human rights treaties²³³ under which it has the duty to investigate, prosecute, and remedy all instances of human rights violations, including those

²³⁰ See, e.g., Mark Klamberg, *Trials in Sweden, Participants in the Proceedings and other Actors*, 66 SCANDINAVIAN STUDIES IN LAW 27 (2020); Universal Jurisdiction Database, TRIAL INTERNATIONAL, https://trialinternational.org/resources/universal-jurisdiction-database/?keywords=&country=2333&topic=&resource_type=Trial+Watch&body=&orderBy=date&submitted=1 (last accessed June 14, 2021).

²³¹ LAG OM STRAFF FÖR FOLKMORD, BROTT MOT MÄNSKLIGHETEN OCH KRIGSFÖRBRYTELSE [Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes] (SFS 2014:406) (Swed.), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=F0FED3FA6059C2E0C1257E6200491650&action=openDocument&xp_countrySelected=SE&xp_topicSelected=GVAL-992BU6&from=state. While Sweden initially opposed the Convention on Non-Applicability in 1967, Sweden has since ratified the Rome Statute (in 2001), which states the non-applicability of the statute of limitations as it relates to its criminalization of international crimes, and has passed the 2014 Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes, which does not include statutes of limitations for international crimes over which Sweden has universal jurisdiction under the Act. See Statute of the International Criminal Court, art. 29, non-applicability of statute of limitations (1998); LAG OM STRAFF FÖR FOLKMORD, BROTT MOT MÄNSKLIGHETEN OCH KRIGSFÖRBRYTELSE [Act on Criminal Responsibility for Genocide, Crimes Against Humanity and War Crimes] (Svensk författningssamling [SFS] 2014:406) (Swed.), https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=F0FED3FA6059C2E0C1257E6200491650&action=openDocument&xp_countrySelected=SE&xp_topicSelected=GVAL-992BU6&from=state.

²³² See, e.g., Bratt Victims' Counsel's Opinion, Dkt. No. 362, ¶ 24.

²³³ Sweden has ratified all major international human rights law treaties, including: the 1976 International Covenant on Civil and Political Rights (ICCPR) (ratified in 1971); the 1987 Convention against Torture and Other Cruel

that can be considered international crimes.²³⁴ The obligation to investigate and prosecute also arises out of Sweden's duty to preserve and effectuate victims' right to a remedy and contributes to ending impunity for grave crimes.²³⁵

132. In relation to corporate actors, the *U.N. Guiding Principles on Business and Human Rights* (the "UNGPs") stipulate a State's responsibility to "investigate, punish, and redress" human rights abuses, including those committed by corporate actors.²³⁶ The UNGPs specifically address States' duties for domiciled businesses operating in conflict zones abroad under Guiding Principle 7, which describes the States' duty to ensure "policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses."²³⁷ The legislative history (*travaux préparatoires*)

Inhuman or Degrading Treatment or Punishment (CAT) (ratified in 1986); the 2006 Convention for the Protection of all Persons from Enforced Disappearance (CED) (signed in 2007); the 1989 Convention on the Rights of the Child (CRC) (ratified in 1990); the 2000 Optional Protocol on the Involvement of Children in Armed Conflict (ratified in 2003); the four core 1949 Geneva Conventions (GC) (ratified in 1953) and its two 1977 Additional Protocols (AP) (ratified in 1979); the 1948 Convention on the Prevention and Punishment of Genocide in (ratified 1952); and the 1998 Rome Statute of the International Criminal Court (ratified in 2001). For a full list of Sweden's ratification of human rights treaties, see *Sweden: U.N. Human Rights Treaty Body Database*, U.N. OFFICE OF THE HIGH COMM'R OF HUMAN RIGHTS, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=168&Lang=EN (last accessed June 14, 2021). For humanitarian treaties, see *Sweden: Treaties, States Parties, and Commentaries*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SE (last accessed June 14, 2021).

²³⁴ See, e.g., ICCPR, art. 2(1) & (3); HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, ¶¶ 15, 16 (May 26, 2004) (stating that there is a "general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies"); CED, arts. 3, 10, 12 & 13; and CAT, art. 12.

²³⁵ See, e.g., Amichai Cohen & Yuval Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, in 14 Y.B. OF INT'L HUMANITARIAN L. 37, 48 (Michael N. Schmitt et al. eds., 2012) ("[T]he duty to investigate all IHL violations may be independently supported by the need to satisfy victims and afford them with remedies."); INT'L COMM'N JURISTS, INTERNATIONAL LAW AND THE FIGHT AGAINST IMPUNITY, PRACTITIONERS' GUIDE NO. 7, (2015); Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1, principle 19 (Feb. 8, 2005) ("'Impunity' means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."); Eradicating Impunity for Serious Human Rights Violations, Guidelines adopted by the Committee of Ministers of the Council of Europe at the 1110th meeting of the Ministers' Deputies, Guideline I (Mar. 3, 2011) ("States are to combat impunity as a matter of justice for the victims, as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system.").

²³⁶ See U.N. Guiding Principles on Business and Human Rights, principle 1 ("States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.").

²³⁷ See U.N. Guiding Principles on Business and Human Rights, principle 7 ("States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses").

to Guiding Principle 7,²³⁸ as well as subsequent reports by the U.N. Working Group on Business and Human Rights,²³⁹ make clear that investigation and prosecution of domiciled businesses involved in gross human rights abuses abroad are core components of the States' duties envisaged by the UNGPs. This includes ensuring access to effective remedies for victims who have suffered abuses of their rights.²⁴⁰ This is particularly important for corporations operating in conflict-affected areas, where "the risk of gross human rights abuses is heightened,"²⁴¹ as was the case with Lundin Energy when it entered and operated in southern Sudan in the midst of an ongoing civil war. As Lundin Energy is a Swedish company, Sweden is responsible for ensuring proper investigation of the Suspects' alleged activities and ensuring effective remedies for Sudanese victims impacted by their alleged actions.

133. While not all human rights treaties explicitly reference the obligation to investigate, international and regional human rights bodies have repeatedly reaffirmed the right to a prompt, effective, impartial and independent investigation.²⁴² Investigations must be prompt in that they proceed without unreasonable delay.²⁴³ Further, they must be exhaustive in that they are thorough and effective in order to establish the material facts of the crime and the identity and participation of implicated individuals.²⁴⁴ Furthermore, investigations must be conducted independently and impartially, which applies to all authorities involved, judicial

²³⁸ U.N. Human Rights Council, Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, U.N. Doc. A/HRC/17/32, ¶ 18 (May 27, 2011) ("... [W]here enterprises commit or contribute to gross human rights abuses and disregard any advice to mitigate or remediate their impact, other additional measures should need to be considered, such as: ... Law enforcement may investigate/indict on international crimes, both senior managers and the business enterprise itself. . . ."), <https://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf>.

²³⁹ See U.N. General Assembly, Business, Human Rights and Conflict-Affected Regions: Towards Heightened Action, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/75/212 (July 21, 2020), <https://undocs.org/en/A/75/212>.

²⁴⁰ See U.N. Guiding Principles on Business and Human Rights, principle 25 ("As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."); see also U.N. Guiding Principles on Business and Human Rights, principle 26 ("States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.").

²⁴¹ See U.N. Guiding Principles on Business and Human Rights, principle 7 ("Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses..."); see also Jennifer Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies, Report prepared for the Office of the U.N. High Commissioner for Human Rights (2014), <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

²⁴² See INT'L COMM'N OF JURISTS, THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS, PRACTITIONER'S GUIDE NO. 2, 88 (2018). The Practitioner's Guide enumerates jurisprudence from U.N. bodies, the Inter-American Commission and Court of Human Rights, the European Court of Human Rights, and the African Commission on Human and Peoples' Rights. *Id.* at 88–96.

²⁴³ See, e.g., U.N. Principles on Investigation and Documentation of Torture and other Ill-treatment, principle 2.

²⁴⁴ See CED, art. 12(1); see also Declaration on the Protection of All Persons from Enforced Disappearance, art. 13(1); U.N. Principles on Extra-Legal Executions, principle 9; and U.N. Principles on Investigation and Documentation of Torture and other Ill-treatment, principle 2.

and non-judicial.²⁴⁵ Finally, investigations must be transparent so that victims can participate and the public can monitor and ensure trust in the institutions.²⁴⁶ In cases of gross human rights violations, Sweden must pursue criminal proceedings to fulfill its duty to investigate and prosecute.²⁴⁷

134. Sweden’s failure to investigate thoroughly could itself give rise to a violation of the ECHR and the International Covenant on Civil and Political Rights (the “ICCPR”). The European Court of Human Rights and the U.N. Human Rights Committee have both affirmed the duty to investigate and stated that “a failure by a State Party to investigate could in and of itself give rise to a separate breach” under the ECHR²⁴⁸ and the ICCPR,²⁴⁹ respectively.

VI. CONCLUSION

135. The Supreme Court of Sweden should reject the Suspects’ ECHR Claim because the claim is unfounded and erroneous.
136. Under European Court jurisprudence, the Suspects’ ECHR claim should be dismissed because the duration of the SPA’s investigation into the allegations of the Suspect’s complicity in international crimes in Block 5A has been reasonable: the duration of the SPA’s

²⁴⁵ See, e.g., CAT, art. 12; CED, art. 12(1); U.N. Principles on Extra-Legal Executions, principle 9; Declaration on the Protection of All Persons from Enforced Disappearance, art. 13(1); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 9; U.N. Principles on Investigation and Documentation of Torture and Other Ill-Treatment, principle 2.

²⁴⁶ See Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, ¶ 22; CED, arts. 12, 24; African Commission of Human and Peoples’ Rights, General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), 57th Ordinary Session, ¶ 7 (Nov. 4–18, 2015); International Convention for the Protection of All Persons from Enforced Disappearance, art. 24; Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, principle 16; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, principle 4; 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, arts. 11.c & 12; and Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, art. 20.

²⁴⁷ The U.N. Human Rights Committee has repeatedly affirmed that the duty to investigate and prosecute cannot be discharged with mere administrative proceedings in the case of gross human rights violations and calls for the establishment of criminal proceedings in such cases. See HRC, General Comment No. 36 on Article 6 the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36 ¶ 27 (Oct. 30, 2018); HRC, General Comment No. 6 on Article 6 (Right to Life), U.N. Doc. HRI/GEN/1/Rev.9 (Vol I) 176 ¶ 4 (Apr. 30, 1982); HRC, General Comment No. 20, Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.9, ¶¶ 13–14 (March 10, 1992); HRC, General Comment No. 31, The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, ¶¶ 15–18 (May 26, 2004).

²⁴⁸ See, e.g., *Marguš v. Croatia*, App. No. 4455/10, ¶¶ 125, 127 (May 27, 2014) (“The obligations to protect the right to life under Article 2 of the Convention and to ensure protection against ill-treatment under Article 3 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to ‘secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention,’ also require by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.”).

²⁴⁹ See HRC, General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 15 (May 26, 2004).

investigation vis-à-vis the Suspects has not been that long, the case is factually and legally complex, the Suspects have contributed to the delay of the proceedings, the SPA has not unjustifiably or inexplicably caused delays, and the prejudice to the Suspects has been minimal. Further, if the Supreme Court were to find a violation of Article 6(1) or Article 13, the remedies available to the Suspects are monetary compensation and sentence mitigation as a dismissal of the SPA's investigation as a remedy for Article 6(1) or Article 13 violations would be unprecedented.

137. Under the jurisprudence of the International Criminal Tribunals, the Suspects' ECHR Claim should similarly be dismissed because no "undue" delay claim is possible at the investigation stage of the proceedings because the Suspects here have neither been indicted nor arrested or detained. Further, should the Supreme Court wish to nonetheless apply the standards of "undue delay" to its evaluation of the length of the investigation phase, the Suspects' ECHR Claim should still be dismissed because the duration of the SPA's investigation into the Suspects' alleged crimes has been reasonable. The investigation's length has not been "undue" or "unreasonable" when considered in light of the jurisprudence from International Criminal Tribunals, which has only found "undue" delay when the pre-trial or trial detention of the accused was unjustified or inexplicably long or the case was relatively "simple." Neither situation applies to the case of the Suspects to make the length of the SPA's investigation "undue" or "unreasonable."
138. Because the international criminal justice system relies primarily on States to fulfill their obligations to hold perpetrators of international crimes accountable,²⁵⁰ Sweden must now uphold these obligations by allowing the SPA's investigation into the Suspects' alleged complicity in criminal activities in Block 5A to continue. The Supreme Court must consider Sweden's international obligations to investigate, prosecute, punish, and provide effective remedies for victims of human rights violations and international crimes, based on Sweden's obligations under international treaties and customary international law. The obligation to investigate and prosecute arises out of Sweden's duty to preserve and effectuate victims' right to a remedy and a failure to investigate thoroughly could itself give rise to a violation of their human rights. The SPA's investigation of the serious allegations of complicity in international crimes must continue in order for Sweden to uphold its obligation under international law to investigate and prosecute grave crimes and ensure justice and redress for victims.



Ambassador Stephen J. Rapp

June 30, 2021

²⁵⁰ See, e.g., Statute of the International Criminal Court, preamble & art. 1 (1998) ("Emphasizing [in the preamble] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions" and stating in Article 1 that the Court's "jurisdiction over persons for the most serious crimes of international concern . . . shall be complementary to national criminal jurisdictions").

VII. ANNEX

Ambassador Stephen J. Rapp

Stephen J. Rapp is a Senior Fellow at the United States Holocaust Memorial Museum's Center for Prevention of Genocide, and at Oxford University's Center for Law, Ethics and Armed Conflict. During 2017–2018, he was the Father Robert Drinan Visiting Professor for Human Rights at Georgetown University. He serves as Chair of the Commission for International Justice and Accountability (CIJA), a Senior Peace Fellow of the Public International Law and Policy Group, and on the boards of Physicians for Human Rights, the International Bar Association Human Rights Institute, the American Bar Association Rule of Law Initiative, and the Siracusa International Institute for Criminal Justice and Human Rights.

From 2009 to 2015, he was Ambassador-at-Large heading the Office of Global Criminal Justice in the U.S. State Department. In that position, he coordinated U.S. Government support to international criminal tribunals, including the International Criminal Court, as well as to hybrid and national courts responsible for prosecuting persons charged with genocide, war crimes, and crimes against humanity. During his tenure, he traveled more than 1.5 million miles to 87 countries to engage with victims, civil society organizations, investigators and prosecutors, and the leaders of governments and international bodies to further efforts to bring perpetrators to justice.

Rapp was the Prosecutor of the Special Court for Sierra Leone from 2007 to 2009 where he led the prosecution of former Liberian President Charles Taylor. During his tenure, his office achieved the first convictions in history for sexual slavery and forced marriage as crimes against humanity, and for attacks on peacekeepers and recruitment and use of child soldiers as violations of international humanitarian law. From 2001 to 2007, he served as Senior Trial Attorney and Chief of Prosecutions at the International Criminal Tribunal for Rwanda, where he headed the trial team that achieved the first convictions in history of leaders of the mass media for the crime of direct and public incitement to commit genocide.

Before his international service, he was the United States Attorney for the Northern District of Iowa from 1993 to 2001.

He received a B.A. degree from Harvard, a J.D. degree from Drake, and several honorary degrees from U.S. universities in recognition of his work for international criminal justice.

The Docket, Clooney Foundation for Justice

The Clooney Foundation for Justice's The Docket initiative aims to ensure that individuals and corporations complicit in international crimes face justice. The Docket's mission is to pursue accountability for perpetrators and enablers of international crimes and to support survivors in their pursuit of justice. We gather evidence to trigger cases against perpetrators and then represent victims' interests in those cases.

Amal Clooney is co-founder and co-President, along with her husband George, of the Clooney Foundation for Justice. She also is also a barrister specializing in international law and human rights who represents victims of human rights violations in national and international courts. She has appeared in cases before the International Court of Justice, the International Criminal Court, and the European Court of Human Rights.

Ms. Clooney currently represents Yazidi victims of genocide in national courts including in the first genocide case against an ISIS member. She also represents over 100 Sudanese victims of crimes committed by Janjaweed leader Ali Kushayb who faces trial before the International Criminal Court. And she represents a state in one of the most groundbreaking cases before the International Court of Justice alleging that Myanmar is responsible for the crime of genocide against the Rohingya people.

Ms. Clooney has also helped to secure freedom for political prisoners around the world including journalists and opposition figures. She currently represents award-winning Filipino journalist Maria Ressa who faces a lifetime behind bars for her work in the Philippines. And in 2020 she was the recipient of the Gwen Ifill Award for “extraordinary and sustained achievement in the cause of press freedom” from the Committee to Protect Journalists. She is also deputy chair of the High-Level Legal Panel of Experts on Media Freedom chaired by former UK Supreme Court President Lord Neuberger and in 2019-2020 she was the UK’s Special Envoy on Media Freedom.

Ms. Clooney is a visiting Professor at Columbia Law School and author of *The Right to a Fair Trial in International Law*, published by Oxford University Press. She practiced as a litigation attorney at Sullivan & Cromwell LLP in New York and holds law degrees from Oxford University and New York University School of Law.

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Antonia David is a Cleary Gottlieb Legal Fellow at the Foundation's Docket initiative. Prior to starting her fellowship and while an Associate at Cleary Gottlieb Steen & Hamilton LLP, she focused on complex civil litigation in the New York office. Her pro bono practice has included international criminal law, human rights law, and U.S. immigration law cases. Previously, she was a Clinical Intern with the University of California, Berkeley, School of Law International Human Rights Law Clinic; a Research Intern at the University of California, Berkeley, School of Law Human Rights Center; and a Research Fellow at the Miller Institute for Global Challenges and the Law. She served as Publishing Editor of the California Law Review. She holds a J.D. from the University of California, Berkeley, School of Law with Certificates of Specialization in International Law and Public Interest and Social Justice and a B.A. from the University of Vermont magna cum laude.