A Norwegian Perspective on the Prosecution of International Crimes

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1 Introduction

I was asked to write this article, in order to give an introduction to the investigation and prosecution of international crimes in Norway. Yet attempting to account for a Norwegian approach to international criminal prosecutions, is somewhat of a paradox. On the one hand, Norway prides itself on having played an active role in the creation of international criminal justice mechanisms abroad.[1] At the same time, its domestic efforts to prosecute international crimes have been somewhat tepid. As this contribution will show, Norway only integrated international crimes into its criminal code in 2008.[2] In light of this late criminalization, Norwegian authorities have been unable to prosecute perpetrators from the Yugoslavia and Rwanda conflicts on the basis of international crimes; and have rather been forced to prosecute them using ordinary domestic crimes.[3] For this reason, Norway's experience with prosecuting international crimes domestically, is rather thin. Particularly when compared to many of the other Scandinavian countries, as illustrated by contributions to the present volume.

Nevertheless, Norway has in recent years taken a much more proactive approach to criminalizing and prosecuting individuals who have participated in the Syrian Civil War. Norway had as of 2020, prosecuted a relatively large number of cases against individuals who have been accused of participating in the so called 'Islamic State' (ISIS).[4] While these cases have thus far been prosecuted on the basis of terrorism legislation, Norwegian police and prosecutors are actively investigating whether there are individuals who could also be prosecuted for having committed international crimes in Syria.[5] The

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1 By example, the Norwegian Foreign Minister wrote an op-ed in Norway's main broadsheet in 2018, to commemorate the 20th anniversary of the Rome Statute. In the op-ed she emphasized the importance of the creation of the International Criminal Court (hereafter 'ICC') and international justice for Norwegian foreign policy: "From the outset, Norway has been one of the Court's central supporters and has worked for a strong, independent and effective institution. Helping to maintain the international legal order is a main line in Norway's foreign policy." See Søreide, Ine Eriksen, Aftenposten, *Krigsforbrytelser må ikke gå ustraffet*, 16 July 2018, <https://www.aftenposten.no/meninger/debatt/i/Kv9dGM/krigsforbrytelser-maa-ikke-gaa-ustraffet-ine-eriksen-soereide>, checked 20 April 2020.

2 See: Ot.prp. nr.8 (2007–2008) Lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpende og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet) (hereafter 'Ot.prp. nr. 8 (2007-2008)').

3 See Rt. 2010 s. 1445, a Norwegian Supreme Court Case that will be discussed further in part 4 of this article.

4 For more on Norway's prosecution of foreign fighters from the Islamic State see: Glent, Jan, 'ISIL-fremmedkrigerne fra Norge i et strafferettslig perspektiv', in Sæther, Knut Erik et al. (eds.), *Straff og frihet: Til vern om den liberale rettsstat*, Oslo: Gyldendal Juridisk, 2019, p. 215 (hereafter 'Glent, 2019').

5 As part 5 will show, Syrian torture victims have as of February 2020 attempted to bring their cases before Norwegian prosecutors, in the hope that it will lead war crimes investigations against leading members of the Syrian army. However, Norwegian police have been investigating potential Syrian war crimes cases since 2016. See Skjetne, Oda, Verdens Gang, *Kripos jakter syriske krigsforbrytere i Norge: Har funnet ti interessante personer*, 5 October 2016, <https://www.vg.no/nyheter/innenriks/i/42wdG/kripos-jakter-syriske-krigsforbrytere-

ongoing investigation of potential Syrian cases, means that Norway might finally be poised to develop its case law on international crimes in the near future.

This article will begin its analysis by examining the manner in which international crimes have been incorporated into Norwegian law. Part 3 will then proceed to take a closer look at chapter 16 of the penal code, which contains the most important statutory provisions on international crimes; and part 4 will survey the few relevant cases that have been conducted in Norway following its implementation. Lastly, part 5 will account for how the investigation of international crimes has been structured within the Norwegian criminal justice system, and look at the potential prosecution of Syrian cases in Norway.

2 The (Lengthy) Path to Criminalization of International Crimes in Norway

This article employs a definition of 'international crimes' that is based on Article 5 of the Rome Statute of the International Criminal Court (hereafter 'Rome Statute'), which is to say: (i) war crimes, (ii) crimes against humanity, (iii) genocide, (iv) and the crime of aggression.[6] These four categories of crimes are often thought to constitute the 'core' crimes of international criminal law.[7] Having said that, this contribution will be focusing most of its legal analysis on the first three categories. The simple reason for this is that Norway has only integrated the crimes of genocide, crimes against humanity and war crimes into its General Civil Penal Code.[8]

2.1 A Brief Look at the Crime of Aggression and the Norwegian Military Penal Code

Norway has yet to sign or ratify the crime of aggression amendments to the Rome Statute, often referred to as the 'Kampala amendments'.[9] The crime of

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i-norge-har-funnet-ti-interessante-personer>, checked 20 April 2020 (hereafter 'Skjetne, 2016').

6 See Article 5 of the Rome Statute, 1998 (hereafter 'Rome Statute').

7 For more on the definition of these core crimes see: Damgaard, Ciara, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues*, Berlin: Springer Berlin Heidelberg, 2008. pp. 56-57. For a more recent take on core crimes see: Heller, Kevin, *What Is an International Crime? (A Revisionist History)*, Harvard International Law Journal, 2017, vol. 58, no. 2, p. 353.

8 See chapter 16 of the Norwegian General Civil Penal Code of 2005 (hereafter 'General Civil Penal Code'). An English translation of the Norwegian penal code can also be found through 'Lovdata': <https://lovdata.no/dokument/NLE/lov/2005-05-20-28>.

9 See Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, 2010. Said amendment was only 'activated' in July 2018, and the crime of aggression is therefore a fairly recent addition to the Rome Statute. For more see: Assembly of the States Parties ICC, *Activation of the jurisdiction of the Court over the crime of aggression*, Resolution ICC-ASP/16/Res.5, 14 December 2017, <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf>, checked 24 April 2020. For an analysis of this new crime see: Kreß, Claus, *On the Activation of ICC*

aggression has therefore not been integrated into Norwegian criminal law.[10] In early 2020, the Red Party did put forward a proposal in the Norwegian Parliament, for Norway to ratify this amendment.[11] Said proposal had however not yet been voted on at the time of publication. As such, the crime of aggression does not exist as a distinct crime in the Norwegian civil penal code as of 2020.

Having said that, some scholars have interpreted the Norwegian Constitution, as prohibiting the government from engaging in a war of aggression.[12] Article 26 of the Constitution states that the King (which in this context must be interpreted as meaning the Norwegian government),[13] is to have the power "to engage in war in *defence* of the Realm and to make peace".[14] While this wording itself does not *explicitly* prohibit the act of aggressive warfare, the historical context of Articles 25 and 26 of the Constitution bolsters such an interpretation. Prior to the outbreak of World War 1 ('WW1'), Article 25 of the Constitution contained a provision that authorized the use of military personnel for the purpose of 'Angrebskrig' or aggressive warfare, when the Norwegian Parliament consented to such an act.[15] This provision was removed from Article 25 in 1917, following the outbreak of WW1. Article 26 was also amended at the same time. It was amended so that the King would no longer have the right to "start war and make peace", but would only have the power to "start war in the *country's defense* and make peace".[16] The Constitutional Committee of the Norwegian Parliament explicitly argued that their amendments of these articles: "would make self-defense against armed powers the only form of war, our Constitution recognizes and takes aim at."[17]

Jurisdiction over the Crime of Aggression, Journal of International Criminal Justice, 2018, vol. 16, no. 1, p. 1.

10 For a detailed review of the crime of aggression and its status in Norwegian law see Einarsen, Terje, "Aggresjonsforbrytelsen – en glemt forbrytelse i norsk rett?", in Matningsdal, Magnus & Strandbakken, Asbjørn, *Integritet og ære*, Oslo: Gyldendal Juridisk, 2019, p. 45 (hereafter 'Einarsen, 2019').

11 See Representantforslag 63 S (2019–2020) 'Representantforslag fra stortingsrepresentant Bjørnar Moxnes om ratifikasjon av tillegg til Roma-vedtektene om straffeforfølgelse av folkerettsstridig angrepskrig og kriminalisering av folkerettsstridig angrepskrig i norsk straffelov'.

12 See §§ 25 and 26 of the Norwegian Constitution of 1814 (hereafter 'Norwegian Constitution'). See also Baumann, Elizabeth & Stigen, Jo, *Internasjonal strafferett: en innføring*, Oslo: Gyldendal Juridisk, 2018, p. 86 (hereafter 'Baumann & Stigen, 2018); and Einarsen, 2019, p. 55.

13 Eskeland, Ståle, *De mest alvorlige forbrytelser*, Oslo: Cappelen Damm akademisk, 2011, p. 128 (hereafter 'Eskeland, 2011').

14 See § 26 of the Norwegian Constitution (emphasis added).

15 See historical version of Article 25 of the Norwegian Constitution, as amended in 1905 "Til Angrebskrig maa Norges Tropper og Roeflotillie ikke anvendes, uden Storthingets Samtykke." (Beslutn. 18 nov 1905).

16 See historical version of Article 26 of the Norwegian Constitution from 1905 (Beslutn. 18 nove 1905), and the amended version of Article 26 from 1917 (grlbest. 29 okt 1917 kunngjort 9 nov 1917) (emphasis added).

17 See Indst. S LI (1917) Indstilling fra Konstiutionskomiteen Angaaende Forslag fra Berhard Hanssen, I. J. Svendsbøe M. Fl. Til forandring i Grundlovens §§ 25 og 26 (Om krigsmagtens anvendelse) (Dok. Nr. 51 for 1914. –Forsag nr. 4), p. 7. For more see also: Galtung, Ida,

In light of said amendments, it seems plausible to interpret today's wording of Article 26, as also setting out a prohibition on aggressive warfare.[18] Such an interpretation raises the rather interesting question of whether members of a Norwegian government could be impeached under Article 86 of the Constitution, for authorizing aggressive acts of war. Former Professor of Norwegian criminal law, Ståle Eskeland, argued in his book on core international crimes, that this was the case.[19] Hence, there is a theoretical possibility that members of a Norwegian government could be impeached and imprisoned for aggressive acts of war, based on Articles 26 and 86 of the Constitution.[20] Still, Norway has as stated, not ratified the crime of aggression amendments to the Rome Statute, nor introduced this crime into its ordinary penal code. This means that aside from this theoretical possibility of impeachment, the crime of aggression cannot (at present) be investigated or prosecuted through the regular criminal justice system in Norway.

Having addressed the crime of aggression, the analysis will now proceed to look at the manner in which Norway has integrated the remaining three core international crimes into its penal code. More specifically, the article will concentrate on the introduction of international crimes into the Norwegian *civil* penal code. Norway does have a Military Penal Code from 1902, which has long criminalized certain war crimes.[21] There is also a separate office of prosecutors who have jurisdiction over cases pertaining to breaches of the military penal code, namely The Norwegian Military Prosecution Authority.[22] Nevertheless,

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Stortingets Utredningsseksjon, *Om «krig» i Grunnloven § 26*, Perspektiv 04/18 < https://www.stortinget.no/globalassets/pdf/utredning/perspektiv_04_18.pdf>, checked 24 April 2020.

18 This interpretation has been endorsed in Baumann & Stigen, 2018, p. 86, as well as in Eskeland, 2011, p. 128. From a historical perspective, it is also interesting to note that Professor Eirik Holmøyvik documents that the drafters of the Norwegian Constitution considered including an explicit prohibition on aggressive warfare when writing the Constitution in 1814. See Holmøyvik, Eirik, *Maktfordeling og 1814*, Bergen: Fagbokforlaget, 2012, p. 466.

19 See chapter 5.3 in Eskeland, 2011. Likewise, Einarsen points towards there being the possibility of impeaching members of the government for the crime of aggression. However, he also refers to this as 'a theoretical possibility'. Einarsen, 2019, p. 56.

20 By example, section 11 of the Norwegian law on impeachment, stipulates that members of the government can be impeached for acts or omissions which are in conflict with the Norwegian Constitution. See Lov om ansvar for handlinger som påtales ved Riksrett av 5. februar 1932.

21 See the Norwegian Military Penal Code of 1902, particularly §§ 100-108. Up until 2008, Norway also had a law that was introduced after the occupation of Norway under World War 2: Lov om straff for utlendske krigsbrotsmenn av 1946. This law was designed to prosecute foreign nationals who had breached the laws of war in Norway. For more see: Innst. O. nr. 29: Innstilling fra justiskomiteen om lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpende og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet), p. 19 (hereafter 'Innst. O. nr. 29').

22 For more on the work of the Norwegian Military Prosecution Authority, see their annual report for 2019: Generaladvokatembetet, Virksomhetsrapport for 2019, 14 February 2020, <https://www.generaladvokaten.no/uploads/U39XufIY/VirksomhetsrapportGA2019140220903.pdf>, checked 24 April 2020.

this article will focus on the introduction of international crimes into the civil penal code, in line with the other contributions to the present volume.

2.2 Background to the 2008 Amendment of the Criminal Code

Like many of the countries who joined the International Criminal Court ('ICC'), Norway only integrated core international crimes into its criminal code, following its ratification of the Rome Statute.[23] This might be surprising to some, as Norway has long been a party to key international conventions that concern core international crimes.[24] Norway has also played a significant diplomatic role in supporting the work of international criminal tribunals.[25] In this light, it might seem somewhat of a paradox that Norway only explicitly integrated international crimes into the Norwegian penal code in 2008. Prior to this, war crimes, crimes against humanity and genocide were not distinct crimes under Norwegian law.[26]

A case that highlighted the gaps in the Norwegian legal framework prior to 2008, was the *Bagaragaza* case before the International Criminal Tribunal for Rwanda ('ICTR').[27] Michel Bagaragaza was a Rwandan national who had been indicted by the ICTR in 2005.[28] Following an extensive cooperation agreement with the tribunal, Mr. Bagaragaza had however "agreed to be judged in a national system", rather than have his case tried at the ICTR.[29] Norway volunteered to act as the national justice system that would prosecute the case against Mr. Bagaragaza.[30] Yet, the Appeals Chamber of the ICTR did not approve the prosecution's request to have the case against him transferred to Norway. The request was denied precisely because Norway had failed to introduced the crime of genocide into its penal code. Although Norway had submitted "that its provisions against homicide and bodily harm would cover the underlying acts

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23 Norway signed the Rome Statute in July 1998. The treaty was then ratified in line with Article 26 of the Norwegian Constitution, following the Norwegian Parliament's approval of 'St.prp. nr. 24 (1999-2000) Om samtykke til ratifikasjon av vedtektene av 17. juli 1998 for Den internasjonale straffedomstol («Roma-vedtektene»)' in January 2000.

24 By example, Norway was one of the first signatories to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, signing the Genocide Convention in December 1948 and ratifying it in 1949 (see United Nations Treaty Collection for more).

25 As shown by the op-ed referenced in footnote 1.

26 This was underscored by the Norwegian Supreme Court in Rt. 2010 s. 1445. This case will be examined closely in part 4 on the Norwegian case law.

27 It is interesting to note however, that Norway did in fact introduce a domestic law in 1994, in order to better facilitate cooperation between Norway and the ICTY and ICTR. However, this law only sets out rules of cooperation between Norway and the UN tribunals. It does not take the step of incorporating the crimes set out in the statues of the ICTY and ICTR into Norwegian law. See: Lov om gjennomføring i norsk rett av De forente nasjoners sikkerhetsråds vedtak om å opprette internasjonale domstoler for forbrytelser i det tidligere Jugoslavia og Rwanda av 1. juli 1994.

28 *Prosecutor v. Bagaragaza*, ICTR Prosecution, Acte d'Accusation Annoté, ICTR-2005-86-I, 28 July 2005.

29 See *Prosecutor v. Bagaragaza*, ICTR Prosecutor, Prosecutor's Request for Referral of the Indictment to Another Court, ICTR-2005-86-PT, 15 February 2006, at para. 7.

30 *Id*, at para. 19.

alleged in the Indictment against Mr. Bagaragaza,"[31] the Chamber was not satisfied. Rather the ICTR's Appeals Chamber found that "in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the 'ordinary crime' of homicide",[32] and denied the transfer request on that basis.[33]

Norway's submission that they could satisfactorily prosecute Bagaragaza based on the ordinary crime of bodily harm or homicide - as this would somehow cover the underlying acts of genocide - is indicative of the Norwegian position at the time. As Gröning et al. writes, the position of the Norwegian government had been that most international crimes were already covered by and could be prosecuted through the 'ordinary' crimes that already existed in Norwegian criminal law.[34] Hence, a murder committed as part of a genocide, could simply be prosecuted using the regular statutory framework for homicide. In this way, Norway underplayed the importance of legally *characterizing* the crimes being indicted, as an international crime when seeking to prosecute Mr. Bagaragaza. The refusal by the ICTR to transfer him to Norway however, effectively undercut this position. Yet, as part 4 will show, legal misunderstandings over the question of characterization would continue to frustrate Norway's efforts to prosecute international crimes, even after the 2008 amendment of its criminal code.

2.3 Amending the Criminal Code

Norway can best be described as adhering to a dualistic approach to international law.[35] This means that legal obligations deriving from public international law need to be 'incorporated' or 'transformed' into Norwegian law through national legislation.[36] The Norwegian Ministry of Justice considered the question of how best to integrate international crimes into the Norwegian penal code as early as 2001, when Norway adopted a law designed to regulate its relationship with the ICC.[37] In their legislative proposal to Parliament, the Ministry recognized that Norway did not at the time have a criminal code that included the crimes set out

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[31] *Prosecutor v. Bagaragaza*, ICTR AC, Decision on Rule 11*bis* Appeal, ICTR-05-86-AR11bis, 30 August 2006, at para. 14.

[32] *Id*, at para. 17.

[33] In the end, Mr. Bagaragaza was tried at the ICTR and sentenced to eight years imprisonment. See *Prosecutor v. Bagaragaza*, ICTR TC III, Sentencing Judgment, ICTR-05-86-S, 17 November 2009.

[34] Gröning, Linda, Husabø, Erling Johannes & Jacobsen, Jørn, *Frihet, forbrytelser og straff: En systematisk fremstilling av norsk strafferett*, 2nd edition, Bergen: Fagbokforlaget, 2019 p. 93 (hereafter 'Gröning, Husabø & Jacobsen, 2019').

[35] See Ruud, Morten & Ulfstein, Geir, *Innøring i folkerett*, 5th edition, Oslo: Universitetsforlaget, 2018, p. 59.

[36] Klamberg, Mark, "Förhållande mellan folkrätt och svensk rätt: monism och dualism" in Klamberg Mark (ed.) *Lagföring i Sverige av internationella brott*, Stockholm: Jure, pp. 57-59.

[37] See Lov om gjennomføring i norsk rett av Den internasjonale straffedomstolens vedtekter 17. juli 1998 (Roma-vedtektene) av 15. juni 2001.

in the Rome Statute.[38] The Ministry also took note of the fact that both Finland and Sweden (as illustrated by the other contributions in this volume), had already harmonized their criminal codes to be more in line with the crimes provided for in the Rome Statute, than what Norway had done at the time.[39]

Nevertheless, the Ministry of Justice did not propose that the crimes set out in Article 5 of the Rome Statute, be incorporated into Norwegian law in 2001.[40] Rather, the Ministry concluded that the question of how best to introduce international crimes into Norwegian law, needed a more thorough and careful review. They therefore suggested that it be addressed by the expert committee that at the time were drafting the new Norwegian civil penal code.[41] The *Straffelovkommisjonen* or 'Criminal Law Commission', had been appointed by the Norwegian government in 1980, and tasked with writing a new criminal code.[42] Their work had however dragged on considerably, and the Commission was still not finished in 2001.[43] Hence, the Ministry suggested that the Criminal Law Commission also examine questions related to the criminalization of international crimes.[44]

The Commission took heed of this request, and in 2002 they published their 'Official Norwegian Report (NOU)', which contained a proposal for an entirely new chapter on international crimes in the Norwegian criminal code.[45] In their report, the Commission was unequivocal about the need to integrate international crimes into Norwegian law. In fact, they argued that the core international crimes in question, were of such a "universal and extremely serious character",[46] that they ought to be placed as the very first crimes chapter of the new penal code. The Commission also stated that:

> For the Commission it has been crucial that one by introducing distinct crimes that cover Article 6, 7 and 8 of the Rome Statute, avoids questions being asked about the Norwegian authorities' willingness or capacity to prosecute in this field. Such a

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38 See Ot.prp. nr. 95 (2000-2001) Om lov om gjennomføring i norsk rett av Den internasjonale straffedomstols vedtekter 17. juli 1998 (Roma-vedtektene), p. 14 (hereinafter 'Ot.prp. nr. 95 (2000-2001)').

39 *Id*, p. 16.

40 See the crimes set out in Article 5 Rome Statute, as they were prior to its amendment following the introduction of the crime of aggression into the Rome Statute.

41 See Ot.prp. nr. 95 (2000-2001), p. 17.

42 For more on this Commission see chapter 2 of: NOU 1983: 57 Straffelovgivningen under omforming Straffelovkommisjonens delutredning I, 4 November 1983.

43 That is to say that the original Commission that was appointed in 1980s had produced a series of partial reports. See by example: NOU 1992: 23 Ny straffelov – alminnelige bestemmelser Straffelovkommisjonens delutredning V, 25 November 1991.

44 See Ot.prp. nr. 95 (2000-2001), p. 17.

45 See chapter 9.2 of: NOU 2002: 04 Ny straffelov— Straffelovkommisjonens delutredning VII, 4 March 2002 (hereafter 'NOU 2002: 04').

46 *Id*, p. 276.

> solution would also be a signal that Norway considers these crimes to be of a particularly serious nature.[47]

As this quote shows, the Commission 'found it natural' to use Articles 6, 7 and 8 of the Rome Statute, as the basis for the crimes to be integrated into Norwegian law.[48] Still, the Commission concluded that it was best that these crimes be 'transformed' into Norwegian law, rather than have them be incorporated directly.[49] For this reason, the Commission proposed the introduction of an entirely new chapter in the penal code. 'Chapter 16' would become the first chapter on crimes in the new Norwegian penal code[50], and would act as a distinct chapter on international crimes. The new chapter was to consist of 5 concrete crimes:[51] (i) the first three would be more or less direct 'transformations' of the crimes of genocide, crimes against humanity and war crimes;[52] and (ii) the last two would codify distinct modes of criminal liability for committing international crimes.[53]

3 Chapter 16 of the General Civil Penal Code of 2005

Having examined the path to proscribing international crimes in Norway, this part will now spend some time analyzing the crimes that were introduced in chapter 16 of the penal code in 2008. For while the Commission submitted their draft of a new criminal code in 2002, the General Civil Penal Code of 2005 did not actually come into effect before 2015.[54] In light of the time it was taking to implement the new code, the Norwegian government decided to introduce the chapter on international crimes early,[55] and chapter 16 therefore entered into

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47 See NOU 2002: 04, p. 276.

48 *Id*, p. 277.

49 *Id*.

50 The Norwegian penal code has traditionally been divided into two parts. The first part sets out the chapters containing the general provisions of Norwegian criminal law. The second part of the code then contains the chapters that set out the concrete criminal acts that have been criminalized under Norwegian law. See the Norwegian General Civil Penal Code of 1902 and 2005.

51 For a critical perspective on the Criminal Law Commission's proposal see Harlem, Mads, *Straffelovkommisjonens forslag til nytt kapittel 16 om krigsforbrytelser, folkemord og forbrytelser mot menneskeheten*, Tidsskrift for strafferett, 2003, vol. 3, no. 2, p. 238.

52 See the draft proposals for a new §§ 16-1, 16-2, and 16-3 in NOU 2002: 04, p. 279-280.

53 See the draft proposals for a new §§ 16-4, and 16-5 in NOU 2002: 04, p. 280; as well as Article 28 of the Rome Statute.

54 It is safe to say that one would not characterize the process of creating a new criminal code in Norway, as having been speedy. The new criminal code came into effect on the 1 October 2015, almost 35 years after the Criminal Law Commission had originally been tasked with drafting a new code. See Lov om ikraftsetting av straffeloven 2005 (straffelovens ikraftsettingslov) av 19. juni 2015.

55 See Ot.prp. nr. 8 (2007-2008).

force in March 2008.[56] The international crimes that were implemented through this chapter have not been amended or revised since their introduction.[57]

3.1 Genocide

Chapter 16 begins with the crime of genocide in section 101 of the code.[58] The crime of genocide that has been introduced into this section draws heavily from the language and structure of Article 6 of the Rome Statute, as well as the Genocide Convention.[59] Section 101 punishes individuals "who with the intention of wholly or partly destroying a national, ethnic, racial or religious group",[60] commit almost exactly the same list of crimes that are enumerated in the Rome Statute. These are the acts of (i) murder,[61] (ii) causing bodily harm,[62] (iii) inflicting living condition aimed at the destruction of the group,[63] (iv) "[i]mposing measures intended to prevent births within the group",[64] and (v) "[f]orcibly transferring children of the group to another group."[65] Hence, genocide as a crime, has been implemented into Norwegian law in close alignment with the crime of genocide as articulated in the Rome Statute and the Genocide Convention of 1948.[66]

3.2 Crimes Against Humanity

Likewise, section 102 of chapter 16, which integrates crimes against humanity into Norwegian law, also draws heavily from the Rome Statute. Section 102

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[56] See Lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (skjerpende og formildende omstendigheter, folkemord, rikets selvstendighet, terrorhandlinger, ro, orden og sikkerhet, og offentlig myndighet) av 7. mars 2008.

[57] In 2009 the government introduced a law aimed at further transitioning the old penal code of 1902 to the new code of 2005. However, this amendment did not change the content of the paragraphs contained in chapter 16. See Lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. (siste delproposisjon – sluttføring av spesiell del og tilpasning av annen lovgivning) av 19. juni 2008.

[58] See § 101 of the General Civil Penal Code.

[59] See Article 6 Rome Statute.

[60] See § 101(1) of the General Civil Penal Code.

[61] See § 101(1)(a) of the penal code and Article 6(a) of the Rome Statute.

[62] *Id*, § 101(1)(b) and Article 6(b).

[63] *Id*, § 101(1)(c) and Article 6(c).

[64] Quoting from Article 6(d) of the Rome Statute, with similar language to be found in § 101(1)(d) of the Norwegian penal code.

[65] Quoting from Article 6(e) of the Rome Statute, with similar language to be found in § 101(1)(e) of the Norwegian penal code.

[66] Indeed, the Ministry of Justice was clear when they drafted §101, that they had done so on the premise that it should be in as close alignment with the Rome Statute and Genocide Convention as possible. See Ot.prp. nr. 8 (2007-2008), p. 77. For a brief analysis of some of the minor differences between the crime of genocide as defined in the Rome Statute and § 101 of the penal code, see: Baumann & Stigen, 2018, p. 99-100.

makes a person "liable to punishment for crimes against humanity who as part of a broad or systematic attack on a civilian population", commits any of the acts that are specified in a-k of the section.[67] These acts are identical in character to the ones that have been enshrined in Article 7(1)(a) to (k) of the Rome Statute.[68] Section 102 of the Norwegian penal code does not however, incorporate the legal definitions of these acts, as set out in Article 7(2) and (3) of the Rome Statute.[69] An important consequence of this, is that Norwegian law therefore operates with a somewhat different definitions of the types of attacks against civilian populations that constitute a crime against humanity.

Article 7(2)(a) of the Rome Statute defines 'attack directed against any civil population' as meaning an attack "involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[70] The idea that attacks have to be conducted in pursuant of a 'State or organizational policy', was not integrated into Norwegian law. Rather, the drafter of § 102 argued that this requirement that an act be committed in the context of a State or organizational policy, was not in line with customary international law.[71] The drafters emphasized that both the Statutes of the ICTY and ICTR do not contain such a requirement.[72] For this reason § 102 simply states that the crimes against humanity have to be "part of a broad or systematic attack on a civilian population";[73] language that is more in line with Article 3 of the ICTR Statute.[74] This means that Norwegian law employs a broader definition of the types of civilian attacks that could constitute a crime against humanity, than what the Rome Statute does.

3.3 War Crimes

With regards to war crimes, the crimes that were introduced in chapter 16 of the penal code were quite different to what had initially been proposed by the Criminal Law Commission in 2002. Where the Commission seemed to have proposed one unified section on war crimes that would be based on Article 8 of the Rome Statute,[75] chapter 16 rather includes five separate sections on war crimes. Section 103 criminalizes war crimes against persons, section 104

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67 See § 102(1) of the General Civil Penal Code.

68 See Article 7(1) of the Rome Statute.

69 See Article 7(2)-(3) of the Rome Statute. The Ministry of Justice decided to forge incorporating these legal definitions into Norwegian law, arguing that some of the definitions simply reflected diplomatic 'compromises between states', and did not necessarily reflect customary international law. See Ot.prp. nr. 8 (2007-2008), p. 82.

70 See Article 7(2)(a) of the Rome Statute.

71 See Ot.prp. nr. 8 (2007-2008), p. 82.

72 See Article 5 of the ICTY Statute and Article 3 of the ICTR Statute.

73 See § 102(1) of the General Civil Penal Code.

74 See Article 3 of the ICTR Statute.

75 It must be noted however, that the Commission did not actually articulate the content of such a unified paragraph on war crimes. See the proposed § 16-1 in NOU 2002: 04, p. 279.

criminalizes war crimes against civil rights and property, section 105 criminalizes war crimes against distinctive signs or humanitarian missions, section 106 criminalizes war crimes 'committed using prohibited methods of warfare', and section 107 criminalizes war crimes 'committed using prohibited means of warfare'.[76]

The structure of the war crimes sections in chapter 16 therefore departs quite markedly from Article 8 on war crimes in the Rome Statute.[77] This departure was intentional, as the Ministry felt that the structure of Article 8, was somewhat disordered.[78] They therefore chose to model the Norwegian penal code after the German approach to criminalizing war crimes.[79] In this approach, the different types of war crimes are grouped together based on the prohibited acts or types of legal goods which are to be protected. Hence, the war crimes against persons were grouped into one section, and the war crimes tied to prohibited means of warfare were divided into another section.[80]

In addition to departing from the structure of Article 8, the war crimes contained in chapter 16 of the Norwegian penal code, also go beyond the war crimes enshrined in the Rome Statute. The idea that Norwegian law would stretch beyond the categories of war crimes outlined in the Rome Statute, to also include war crimes deriving from customary international law, gained widespread acceptance with the bodies that were consulted when the law was drafted.[81] For one, the war crimes defined in chapter 16 have a tendency to simply criminalize acts that have been committed in 'armed conflict'.[82] Chapter 16 therefore places an emphasis on the need for the acts to have been committed in the context of an armed conflict, but not necessarily in the midst of an *international* armed conflict. As such, Baumann and Stigen conclude that the Norwegian penal code goes further in criminalizing war crimes that have taken place as a part of an *internal* armed conflict, than what the Rome Statute does.[83]

Another example of where the sections of chapter 16 depart from the Rome Statute is with regards to the crime of using child soldiers. Section 103(1)(f) prohibits the conscription or recruitment of child soldiers under the age of 18.[84] Article 8(2)(e)(vii) on the other hand, makes it a crime to recruit child soldiers under the age of 15.[85] The Ministry justified the choice of also criminalizing the use of child soldiers who are between the ages of 15-17, with Norway's ratification of the Optional Protocol on the Involvement of Children in Armed

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[76] See §§ 103 – 107 General Civil Penal Code.

[77] See Article 8 of the Rome Statute.

[78] See Ot.prp. nr. 8 (2007-2008), p. 88.

[79] *Id*.

[80] See §§ 103 and 107 of the General Civil Penal Code.

[81] *Id*, p. 92.

[82] See by example §§ 104(1) and 106(1) of the General Civil Penal Code.

[83] See Baumann & Stigen, 2018, p. 77.

[84] See § 103(1)(f) of the General Civil Penal Code.

[85] See Article 8(2)(e)(vii) of the Rome Statute.

Conflict.[86] Article 1 of said protocol obliges state parties to take "measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities."[87] Hence, the sections on war crimes in chapter 16 of the Norwegian penal code, have been constructed in such a way that they also reflect Norway's other treaty obligations aside from the Rome Statute, as well as war crimes deriving from customary international law.

3.4 A Few Words on Modes of Liability and Sentencing

Finally, chapter 16 also includes two sections on special modes of responsibility for international crimes, and one on the minimum penalty to be incurred for the crimes enumerated in the chapter. The latter, as provided for in section 110 of the code, stipulates the rules for how the minimum penalty should be set for crimes prosecuted under chapter 16.[88] Most of the crimes provided for in chapter 16 carry a maximum sentence of 30 years, which is the longest prison sentence provided for under Norwegian law.[89]

The sections on the modes of liability meanwhile, are largely the same as those proposed by the Criminal Law Commission in 2002. Section 108 introduces conspiracy ('forbund') as a mode of liability for those who incite or commit war crimes, crimes against humanity and genocide.[90] With the exception of the chapter on terrorism offences, conspiracy is not a common form of liability in the Norwegian penal code.[91] Rather, Norwegian criminal law does not contain a general criminalization of preparatory acts, and conspiracy is a mode of liability that tends to also encompass acts of preparation.[92] For this reason, the Ministry of Justice felt that it was important to introduce conspiracy into chapter 16, in order to ensure that preparatory acts of international crimes could also be prosecuted due to their serious nature.[93]

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[86] See Ot.prp. nr. 8 (2007-2008), p. 92 and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2002.

[87] See Article 1 of *id*.

[88] See § 110 of the General Civil Penal Code.

[89] In addition to certain crimes that are covered by chapter 16 of the criminal code, certain acts of terror under chapter 17 also carry a maximum sentence of 30 years imprisonment. The most serious ordinary crimes, for example homicide, carry what used to be the maximum penalty under Norwegian law, namely 21 years in prison. See chapter 18 and § 275 of the General Civil Penal Code.

[90] See § 108 of the General Civil Penal Code.

[91] Indeed, conspiracy has largely been used to criminalize acts of terrorism, and acts that seek to violate the Norwegian state or Norwegian interests. By example see §§ 127, 133, 193, and 198 of the General Civil Penal Code.

[92] The Criminal Law Commission discussed whether to introduce a general criminalization of preparatory acts into the new penal code. However, the Commission ultimately decided against it. See NOU 2002:04, pp. 90-98.

[93] See Ot.prp. nr. 8 (2007-2008), pp. 94-95.

In the same vein, the mode of liability of superior responsibility did not exist in the Norwegian civil criminal code prior to 2008.[94] In light of how military and civilian leadership often orchestrate and commit international crimes through the acts and omissions of others, superior responsibility is an important mode of liability in international criminal law.[95] Section 109 was therefore introduced, in order to penalize the responsibility of superiors for the international crimes set out in the chapter 16.[96] While the drafters considered drawing inspiration from the Swedish criminal code when drafting the section on superior responsibility, they ultimately decided to model it after Article 28 Rome Statute.[97] Having said that, section 109 is notably structured somewhat differently than Article 28, in that it does not divide the responsibility of civilian and military leaders into two separate categories.[98] This structural difference aside, the Ministry of Justice attempted to model section 109 of the Norwegian penal code in close alignment with Article 28, in order to secure a high degree of harmony between the superior responsibility provisions of the Rome Statute and Norwegian law.[99] This once again underscores what an important legal source the Rome Statue has been for the Norwegian legislature in implementing international criminal law into its domestic code. One can therefore reasonably expect the Rome Statute and ICC case law to act as important sources of law when interpreting the statutory provisions of chapter 16.

Having surveyed the content and structure of chapter 16 of the Norwegian penal code, the analysis can now proceed to examine Norwegian case law pertaining to the prosecution of international crimes. Or rather, the case law that explains why Norway has *yet* to prosecute anyone under chapter 16 of its criminal code.

4 The Norwegian Case Law, or Rather the Lack Thereof

As stated in the introduction, Norway has, with the notable exception of historical World War II cases,[100] a rather tepid record of prosecuting

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94 Superior orders is however, naturally a form of liability that has long existed in the Norwegian Military Penal Code of 1902. For more on the relationship between the Military Penal Code and the Rome Statute with regards to superior responsibility: Johansen, Sigrid, *Ordre om å begå en internasjonal forbrytelse*, Tidsskrift for strafferett, 2005, vol. 5, no. 3, p. 259.

95 For a thought provoking book on the modes of liability in international criminal law and the importance of them in the context of indirect perpetrators see: Steer, Cassandra, *Translating Guilt: Identifying Leadership Liability for Mass Atrocity Crimes*, The Hague: T.M.C. Asser Press, 2017.

96 See § 109 of the General Civil Penal Code.

97 See Ot.prp. nr. 8 (2007-2008), p. 96 and Article 28 of the Rome Statute.

98 See § 109 of the General Civil Penal Code and Article 28 of the Rome Statute.

99 See Ot.prp. nr. 8 (2007-2008), p. 97.

100 Norwegian authorities did of course prosecute a rather large number of cases following the Nazi occupation of Norway during the Second World War. Andenæs estimates that around 92 000 cases were investigated following the occupation, resulting in approximately 50 000 persons being prosecuted for having committed crimes during the occupation. See Andenæs, Johs., *Det vanskelige oppgjøret: rettsoppgjøret etter okkupasjonen*, 3rd edition, Oslo: Tano

international crimes. As of July 2020, there have only been two prosecutions for acts that stem from international crimes, before Norwegian courts. The first of these is the so called '*War Crimes* case' of 2010,[101] which was a case based on crimes committed in the former Yugoslavia; and the second case is a 2015 case based on crimes committed during the Rwandan genocide ('*Rwanda* case').[102] Still, neither one of these cases were prosecuted on the basis of the international crimes that are set out in chapter 16 of the penal code.

The reason for this is both simple and somewhat complicated. The short answer is that because Norway only introduced core international crimes into its penal code in 2008, we have been unable to prosecute potential cases of international crimes from the Rwanda and Yugoslav conflicts, as these crimes were committed during the 1990s. The long answer however, is somewhat more complicated. Norway did in fact try to give the crimes in chapter 16 some retroactive effect, precisely so that one could use the crimes in this chapter to prosecute cases from Rwanda and Yugoslavia. The legality of this retroactive application was however challenged in the *War Crimes* case; which was as stated above, the first of the two international crimes cases that Norway has prosecuted thus far. As will be shown, the Norwegian Supreme Court found that it would be unconstitutional to give the crimes set out in chapter 16, retroactive effect. The *War Crimes* case is therefore an important element in understanding why Norway has yet to prosecute any cases based on chapter 16 of the penal code. Hence, this part will begin by examining the question of retroactive law that was raised in the *War Crimes* case. Part 4.3 and 4.4 will then move on to analyze the consequence of the legal findings in the *War Crimes* case, and how it affected subsequent prosecutions like the *Rwanda* case.

4.1 The Question of Characterization and Retroactive Application

When the Norwegian Ministry of Justice first drafted chapter 16 of the penal code, they had not given any thoughts as to whether the new international crimes in the chapter should be given retroactive effect.[103] The primary reason for this is that the Norwegian Constitution contains an explicit prohibition on the use of

Aschenhoug, 1998, p. 187. These cases are immensely interesting and some of them also explicitly touch upon the international crimes that were crystalizing at the time of their prosecution. By example, in a case from 1947, the Norwegian Supreme Court emphasized that the defendant was indicted for murders that had been committed under very serious circumstances, as "they in reality were also a war crime – a crime against 'the laws of mankind'." See Rt. 1947, s. 368, at p. 370. Nevertheless, this chapter will not be focusing on these historical cases from World War II, but rather on the case law that has followed the introduction of chapter 16.

[101] See Rt. 2010 s. 1445. This case is often referred to as 'Krigsforbrytersaken' in Norwegian, or alternatively as the 'Repak case'.

[102] See Borgarting lagmannsretts dom 16. januar 2015 (LB-2013-41556). This case is also sometimes referred to as the 'Bugingo case'.

[103] Ot.prp. nr. 8 (2007-2008), p. 57.

retroactive laws.[104] Nevertheless, during the hearing of the legislative proposal, several institutions raised the question of whether it would still be possible to give chapter 16 a certain degree of retroactive effect. These institutions emphasized that without retroactive application, Norway would be unable to prosecute cases from Rwanda or Yugoslavia, on the basis of this chapter.[105] Keeping in mind that the hearing and drafting of chapter 16 was happening shortly after the ICTR had denied the transfer of Bagaragaza to Norway, as accounted for in part 2.[106] Some of the institutions that had been asked to give their thoughts on the draft proposal of chapter 16, therefore suggested that giving the legal *characterization* of the international crimes retroactive effect, would not violate the prohibition on retroactive laws in Article 97 of the Constitution.[107]

The Ministry of Justice was swayed by these suggestions and in their legislative proposal to Parliament, they recommended that the crimes in chapter 16 be given partial retroactive effect.[108] Specifically, the Ministry proposed what can best be described as a limited hybrid model of making chapter 16 retroactive.[109] The model is hybrid, because it essentially only makes the legal characterization or classification of the crimes retroactive. The other elements of the criminal code would apply as they were at the time of the offence. This retroactive provision was implemented in 2008 by amending section 3 of the penal code to include the following:

> The provisions of Chapter 16 apply to acts committed before their entry into force, if at the time of the act, the offense was punishable under the current criminal laws and considered to be genocide, crimes against humanity or war crimes under international law. However, the penalty cannot exceed the penalty that would have been sentenced under the penal code at the time of the offense.[110]

The model for retroactive application that is articulated in this amendment has at least three components. Firstly, it gives crimes provided for in chapter 16

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[104] See Article 97 of the Norwegian Constitution: "No law must be given retroactive effect". For a thorough analysis of this article see: Høgberg, Benedikte, *Forbud mot tilbakevirkende lover*, Oslo: Universitetsforlaget, 2010.

[105] Examples of this were the Norwegian Red Cross, the National Authority for Prosecution of Organised and Other Serious Crime and the Norwegian Ministry of Foreign Affairs. See Ot.prp. nr. 8 (2007-2008), pp. 57-58.

[106] See part 2 of this article and *Prosecutor v. Bagaragaza*, ICTR AC, Decision on Rule 11bis Appeal, ICTR-05-86-AR11bis, 30 August 2006.

[107] See Article 97 of the Norwegian Constitution. Many referenced World War II cases in support of the idea that there might be some room for retroactive application of chapter 16, in particular Rt. 1946 s. 198.

[108] For a good analysis of the amendment, at the time it was proposed, see: Frøberg, Thomas, *Kan den strafferettslige klassifikasjonen av en handling gis tilbakevirkende kraft?*, Lov og Rett, 2008, vol. 47, no. 5-6, p. 342 (herafter 'Frøberg, 2008').

[109] The Ministry called it a type of retroactive application of the law that is nevertheless within the confines of the existing criminal code ("tilbakevirkende kraft innenfor dagens strafferammer"). See Ot.prp. nr. 8 (2007-2008), p. 63.

[110] See § 3(2) of the of Norwegian General Civil Penal Code of 2005, as it was when it was introduced in 2008 (as translated by the author). This paragraph was then removed in 2015, following the 2010 Supreme Court case that will be discussed in the next part.

retroactive effect, *if* the criminal acts alleged to have taken place were classified as genocide, crimes against humanity or war crimes under international law at the time they were committed. Secondly, this retroactive application of international crimes is contingent on the underlying *act(s)* having been criminalized in the Norwegian penal code at the time the offence was committed. Lastly, for sentencing purposes, an individual would still receive a penalty that was in line with the penalties that were in place at the time the offence was committed.[111]

In order to unpack this model, it is helpful to use the *Bagaragaza* case as an example of how this retroactive provision would have worked in practice. Bagaragaza had been accused *inter alia* of taking part in the Rwandan genocide in 1994, by participating in acts of homicide.[112] Under the 2008 amendment to section 3 of the penal code, Bagaragaza could potentially have been prosecuted for genocide as per section 101 of chapter 16.[113] This is because the act itself could be classified as constituting genocide under international law at the time of its commission in 1994, and the underlying act of homicide was likewise a crime under Norwegian law at the time.[114] However, Bagaragaza could only have been sentenced to a maximum prison term of 21 years (and not the 30-year maximum that is set out in section 101 of chapter 16);[115] as this was the sentencing range for homicide under the criminal code in 1994. Had such a model been in place in 2006, it is conceivable that the judges of the ICTR could have been more amenable to transferring Mr. Bagaragaza to Norway, given that he could potentially have been prosecuted for the crime of genocide. Still, the implementation of this kind of retroactive provision was not without controversy,[116] and it was predictably challenged at the very first attempt to use it.

4.2 The War Crimes Case

As stated earlier, the so-called *War Crimes* case, was the first international criminal law case, to be prosecuted in Norway after the introduction of chapter 16. The case initially started in 2007, when the Norwegian police arrested a former national of Bosnia and Herzegovina, who was suspected of having participated in the internment of prisoners of war, as a soldier in the Croatian Defence Forces (HOS).[117] As he was arrested prior to the implementation of

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[111] This last component was considered important by the Ministry, as they pointed to case law from the Norwegian Supreme Court that indicated that giving retroactive effect in sentencing questions, would be a breach of Article 97 of the Constitution. See Ot.prp. nr. 8 (2007-2008), p. 60 and Rt. 2002 s. 889.

[112] See count II of *Prosecutor v. Bagaragaza*, Prosecutor, Amended Indictment, ICTR-05-86-I, 1 December 2006.

[113] See §§ 3 and 101 of the Norwegian General Civil Penal Code of 2005.

[114] See § 233 of the Norwegian General Civil Penal Code of 1902.

[115] See § 101 of the Norwegian General Civil Penal Code of 2005.

[116] See Frøberg, 2008.

[117] Rt. 2010 s. 1445, paras. 3-9.

chapter 16, he was initially charged with a series of ordinary crimes, including deprivation of liberty, bodily harm, and sexual offences.[118] When the criminal code was amended to include international crimes in 2008, the charges against him were however expanded to also include crimes against humanity and war crimes, for the acts he was believed to have committed in these internment camps.[119]

His defense team challenged the legality of charging him with international crimes, on the grounds that it breached the ban on retroactive laws in Article 97 of the Norwegian Constitution.[120] Their appeal eventually made its way to a plenary hearing in the Norwegian Supreme Court in 2010, where a majority of eleven Supreme Court justices ruling in favor of the defense, with six justices dissenting. The majority opinion was written by Supreme Court Judge Erik Møse, who served as the president of the ICTR from 2003 to 2007.[121] Møse is therefore someone who is well versed in international criminal law. In his majority opinion, Møse argued that the prohibition on retroactive laws had to be seen in context of Article 96 of the Constitution, which enshrines the principle of legality, namely that no one may be prosecuted "except according to law".[122] In support of this, he cited a minority opinion in a controversial Supreme Court case from 1946, the so-called *Klinge* case.[123] This case had also raised difficult questions about the constitutionality of retroactive criminal laws, where the Supreme Court had ultimately allowed such retroactive application, for crimes of torture that had been committed during World War II. Still, a dissenting minority had concluded that:

> Article 97 of the Constitution must be construed as complementing the fundamental principle stated in Article 96, that no one can be convicted except by law. This principle presupposes that the law is enacted even before the criminal act is committed, and this consequence is what our Constitution has drawn in its Article 97.[124]

Møse agreed with this conclusion.[125] Hence, a majority of the Supreme Court found in 2010, that Articles 96 and 97 of the Constitution must be interpreted in such a fashion that a law has to have been enacted by Parliament *before* a crime has been committed, in order for it not to violate the prohibition on retroactive laws. Moreover, the principle of legality cannot be satisfied in reference to an international legal obligation alone. Rather a legal basis in "foreign law or public

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[118] *Id*, para. 7.

[119] *Id*, paras. 9-10.

[120] As the Supreme Court case shows, the defense team also made a series of other challenges. However, the challenge that is of the most interest to this article, is the challenge against the retroactive application of chapter 16. See *id*, paras. 26-36.

[121] See Gisle, Jon, *Erik Møse*, Store Norske Leksikon, 31 Januar 2019 < https://snl.no/Erik_M%C3%B8se>, checked 30 April 2020.

[122] See Article 96 of the Constitution and Rt. 2010 s. 1445, para. 84.

[123] See Rt.1946 s. 198.

[124] *Id*, p. 208.

[125] Rt. 2010 s. 1445, para. 85.

international law is not sufficient in this regard".[126] A law has to have been *enacted* in Norwegian law in order for it to meet the principle of legality.[127]

Møse also argued that Article 97 gives a particularly 'strong protection' when it comes to retroactive application in the field of criminal law.[128] In applying this strong protection standard to the 2010 case, the Supreme Court found that it would clearly be more 'stigmatizing' or 'burdensome' for a defendant to be convicted of a crime that was characterized as an act of genocide or crime against humanity.[129] Hence, the question of whether a crime is characterized as an ordinary crime like homicide, or as an act of genocide – is not a trivial one. One cannot therefore argue that there is no retroactive effect in characterizing an 'ordinary crime', as an international crime. Møse also rejected the idea that the defendant should have been aware that he could be prosecuted for international crimes, given the conduct that he had been engaging in.[130] Rather, a majority of the Supreme Court concluded that a retroactive application of chapter 16 would be unconstitutional; as the rights enshrined in Article 96 and 97 of the Constitution are applicable to all persons regardless of what acts they might have committed.[131]

For the reasons given above, a majority of the Supreme Court rejected the retroactive application of the international crimes provided for in chapter 16 of the penal code.[132] As shown in part 2 of this article, Norway initially underplayed the importance of legally characterizing a particular conduct as an international crime, when seeking to have Mr. Bagaragaza extradited to Norway from the ICTR in 2006.[133] The irony then, is perhaps that the drafters of chapter 16 in some ways *also* underplayed the importance of the legal characterization of international crimes, by thinking that one could give this aspect of the legislation retroactive effect.

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[126] *Id*, para. 116.

[127] This conclusion is a marked departure from what the Norwegian Supreme Court had allowed in the *Klingen* case. In this case, the Supreme Court had concluded that international crimes deriving from customary international law, like the war crime of torture, could be given retroactive application. See Rt.1946 s. 198, p. 200.

[128] Rt. 2010 s. 1445, para. 96.

[129] In support of this position, he looks to the drafting history of chapter 16, as well as to international case law from the ICTR. See Rt. 2010 s. 1445, paras. 106-113.

[130] *Id*, para. 119.

[131] *Id*, paras. 119-122.

[132] As stated, a minority of six Supreme Court justices did conclude that one could apply the characterization of the crimes in chapter 16 retroactively. See the dissenting opinion written by Justice Skoghøy in Rt. 2010 s. 1445, from paras. 128-148. Members of the Norwegian Parliament also proposed a constitutional amendment of § 97, as a result of the 2010 judgment. The constitutional amendment proposed that there be an explicit exception on the prohibition of retroactive laws, for crimes under international law. However, this constitutional amendment was ultimately rejected by Parliament in 2014. See Innst. 261 S (2014–2015): Innstilling fra kontroll- og konstitusjonskomiteen om grunnlovsforslag fra Per-Kristian Foss, Martin Kolberg, Marit Nybakk, Jette F. Christensen, Hallgeir H. Langeland og Per Olaf Lundteigen om endring i Grunnloven § 97 (unntak fra tilbakevirkningsforbudet for handlinger som var straffbare etter folkeretten).

[133] See part 2 of this article on the *Bagaragaza* case.

4.3 The Legal Ramifications of the Supreme Court Decision and the War Crimes Case

In light of the 2010 Supreme Court decision, there were no more attempts to prosecute cases in Norway, based on a retroactive application of chapter 16. Rather, section 3 of the penal code was amended in 2015, in order to remove the portion that opened for a retroactive application of the crimes in chapter 16.[134] The legal ramifications of the 2010 decision are also visible in the fact that Norway has as of 2020, not prosecuted any cases on the basis of international crimes. The two cases that have involved international crimes, the *War Crimes* case and the *Rwanda* case, have rather resulted in convictions based on 'ordinary' domestic crimes in the Norwegian penal code.

With regards to the defendant in the *War Crimes* case, he was as a result of the 2010 Supreme Court judgment, convicted solely on the basis of section 223 of the old penal code of 1902.[135] Section 223 criminalized the deprivation of liberty, and the defendant in this case was convicted of having committed 13 offences of depriving persons of their liberty during the war in Bosnia and Herzegovina in 1992.[136] As stated earlier, the defendant had been a commander in the Croatian Defence Forces ('HOS'), where he had participated in the detention of ethnic Serbs in 'Dretelj Prison', in the municipality of Čapljina[137] More specifically, the Appeals Court found that the defendant had been an active and leading participant in the detention of prisoners:

> The Court of Appeal held that A participated in the arrest of seven of the victims, and one of the victims, I, testified that she perceived A to be the person in charge. Five of the other victims were told when they were arrested that A had given the order for their arrest. The Court of Appeal's judgment also states that most of the arrestees were interrogated at Stolac before they were transferred to Dretelj Prison, and that A led or at least played a central role during the interrogations. Several of the arrestees were driven to Dretelj Prison by A. The Court of Appeal has found it proven that many of the victims were subjected to serious abuse already during arrest and questioning before they were brought to Dretelj Prison – i.e. during the stage of the detention where A played a central role[138]

The Appeals Court had also heard testimony from a victim that linked the defendant to an interrogation which led to a female prisoner being subject to sexual abuse,[139] and they concluded as follows:

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[134] See Lov om ikraftsetting av straffeloven 2005 (straffelovens ikraftsettingslov) av 19. juni 2015.

[135] See Rt. 2011 s. 514 and § 223 of the Norwegian General Civil Penal Code of 1902.

[136] See a detailed account of these acts in the Appeals Court judgment, which heard a full appeal of the case: Borgarting lagmannsretts dom 12. april 2010 (LB-2009-24039).

[137] See Rt. 2011 s. 514, paras. 42-47.

[138] *Id*, paras. 63-64. The Appeals Judgment from 2010 is not available in English. However, the Supreme Court judgment on sentencing has been translated into English, and it contains longer quotes from the factual findings of the Appeals Court.

[139] *Id*, para. 68.

> The Court of Appeal finds beyond all reasonable doubt that both the objective and subjective conditions to convict A of aiding and abetting D's continued incarceration are satisfied. … The Court of Appeal further notes that it is clear from A's position in HOS and his role during the interrogation that action from A was required in order for D to be released. He was at least in a position to influence her release. Furthermore, there is also no doubt that A was aware that D was being sexually abused. A was also aware that there was no justifiable reason for detaining D at the prison. She was imprisoned because she was an ethnic Serb, and A was aware that she was a civilian and a non-combatant Serb. In these circumstances, he is guilty of criminal complicity – pursuant to both Norwegian and international law – when he failed to take action to obtain her release after the interrogation[140]

On this factual basis, the defendant was found guilty of having committed 13 offences of depriving persons of their liberty in the Dretelj Prison. The Appeals Court sentenced the defendant to 4 years and 6 months in prison in 2010.[141] However, the question of sentencing was also brought before the Supreme Court in 2011, following their ruling that the characterization of the crimes in chapter 16 could not be applied retroactively.[142]

The issue of sentencing is interesting, as a unanimous Supreme Court found 8 years imprisonment to be the appropriate sentence for the acts that had been committed in the *War Crimes* case.[143] That is almost twice as long as the prison sentence that was handed down by the Appeals Court. The reason this is interesting, is because the Court of Appeal had come to the conclusion that the crimes in chapter 16 *could* be applied retroactively. The Appeals Court had therefore convicted the defendant for *war crimes* for his conduct in the Dretelj Prison, as per section 103 of the penal code of 2005,[144] and not just based on the ordinary crime of deprivation of liberty under section 223 of the penal code of 1902. Thus, the 4 year and 6 month sentence was based on a conviction for war crimes. However, the war crimes conviction was effectively overturned in 2010, when the Supreme Court concluded that one could not give retroactive effect to section 103, for the reasons that were outlined earlier.[145]

When the Supreme Court was presented with the question of sentencing in the *War Crimes* case in 2011, they were therefore determining a sentence based solely on the conviction of the 13 offences of depriving persons of their liberty, under section 223 of the penal code of 1902. Nevertheless, the Supreme Court decided to sentence the defendant to a significantly longer term of imprisonment than what the Appeals Court had done. In addressing the question of sentencing the Supreme Court emphasized that:

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[140] *Id*, para. 72.

[141] Borgarting lagmannsretts dom 12. april 2010 (LB-2009-24039).

[142] See Rt. 2011 s. 514.

[143] *Id*, para. 109.

[144] See Borgarting lagmannsretts dom 12. april 2010 (LB-2009-24039). The conviction on the basis of war crimes is the reason that the case has come to be known as the 'War Crimes case'.

[145] Rt. 2010 s. 1445.

> When sentencing, the Court must take as its starting point the fact that the crimes in question are altogether extremely grievous crimes committed against defenceless people. According to the Court of Appeal, the abuse was solely motivated by the victims' ethnic background – a fact of which A was fully aware. This is clearly an aggravating circumstance. And although I will not go into the question whether the crimes in the present case satisfy the requirements for war crimes as laid down in international law, I stress that the abuse is clearly contrary to the rules that apply in wartime. I find it sufficient to refer to Article 147 of the Geneva Convention of 12 August 1949.[146]

Hence, while the Supreme Court had concluded that the defendant could not be prosecuted for war crimes, as it would breach the prohibition on retroactive laws, they nevertheless explicitly underscored that the crimes that had been committed were contrary to the rules of war. The Supreme Court also stressed that the ethnically motivated nature of the crimes were an 'an aggravating circumstance'. In light of these factors, the Supreme Court ended up setting a longer sentence than what had even been suggested by the prosecution:

> In his plea, the Director General [of Prosecutions] has alleged that the sentence should be increased and fixed at six years imprisonment. I agree with the Director General that the sentence must be increased, but I find that a prison term of eight years reflects more correctly the gravity of the acts for which A has been found guilty.[147]

When reading the sentencing judgment from the Supreme Court, one therefore gets the impression that the judges had given a great deal of weight to the fact that the defendant was being convicted of criminal acts that had been committed in the context of war. Thus, while the conduct the defendant was ultimately convicted of, was not legally *characterized* as a war crime, the Supreme Court nevertheless considered the fact that the acts of deprivation of liberty were "contrary to the rules that apply in wartime" when sentencing the defendant.[148]

4.4 The Rwanda Case

In a similar fashion, while the defendant in the *Rwanda* case was convicted of homicide, the judgments against him placed a great deal of emphasis on the fact that his crimes had been committed in the context of genocide.[149] The *Rwanda* case is the second of the two international criminal law cases that have been prosecuted in Norway. Yet as a result of the Supreme Court judgment in the *War Crimes* case, the *Rwanda* case has also been prosecuted on the basis of ordinary domestic crimes, and not on the basis of chapter 16 of the penal code.

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[146] Rt. 2011 s. 514, para. 89.

[147] *Id*, para. 104.

[148] Rt. 2011 s. 514, para. 89

[149] See both the conviction in the first instance: Oslo tingrett dom 14. februar 2013 (TOSLO-2012-106377) and the Appeals Court judgment: Borgarting lagmannsretts dom 16. januar 2015 (LB-2013-41556).

The case was initially investigated as a result of cooperation between prosecutors in Rwanda and Norway. In 2006, Norwegian police officers and prosecutors had traveled to Rwanda in order to meet with the Rwandan Prosecutor General. The meeting had been set up after prosecutors in Rwanda suspected that persons who had participated in the Rwandan genocide, had taken up residence in Norway.[150] During the meeting, the Norwegian prosecutors were given a list of names, including that of the defendant in the *Rwanda* case. This triggered the opening of an investigation, which resulted in Norwegian police conducting over 150 interviews of witnesses in Rwanda.[151] In 2011, the defendant was arrested and charged with "participation in the premediated murder under extremely aggravating circumstances of a large number of people in the period from 6 to 23 April 1994 in Kibungo in Rwanda."[152] Specifically, the indictment alleged that the suspect had participated in the planning and ordering of murders which had taken place in three different locations in Kibungo, and that these killings were thought to have resulted in the deaths of over 2,000 persons.[153]

While the defendant had denied all the charges, the Oslo District Court who heard the case in the first instance, concluded that:

> The court finds beyond all reasonable doubt that the defendant contributed to the murder of around 1,000 persons who had sought refuge at the Birenga municipal building, that he assisted in the killing of several hundred persons who had sought refuge at Economat and that he contributed to the murder of at least eight people who had sought refuge at the Kibungo hospital.
>
> The killings were carefully planned and the defendant undoubtedly acted deliberately. He was one of several local leadership figures in Kibungo who supported and took part in the genocide. The defendant came with the other attackers to the three scenes, and he helped to ensure that the killings of the refugees were carried out in accordance with what was planned in advance.
>
> The court further agrees with the prosecuting authority that the killings must be considered a continuing crime. The killings were committed at short intervals and were part of the Rwanda genocide.[154]

On this basis he was convicted for premediated murder as per section 233 of the penal code of 1902, and sentenced to the maximum prison sentence of 21 years.[155] Both the sentence and conviction was upheld on appeal. However, in the Appeals Judgment, the judges found the defendant guilty of having participated in the murders of "more than 2,000 people", during the Rwandan

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[150] For more on this aspect of the investigation see part 3 of the judgment of the Oslo District Court: Oslo tingrett dom 14. februar 2013 (TOSLO-2012-106377).

[151] *Id*.

[152] *Id*, part 4 «Generelt om tiltalebeslutningen».

[153] *Id*.

[154] *Id*, part 5.7 «Oppsummering og konklusjon vedrørende skyldspørsmålet».

[155] *Id*.

genocide.[156] In determining the appropriate sentence for these crimes, the Appeals Court was careful to state that the nature of the crimes that had been committed by the defendant were that of participating in a genocide. The Court also specifically referenced the crime of genocide articulated in section 101 of chapter 16 of the penal code, and emphasized that this crime could not be used in the *Rwanda* case, because of the Supreme Court ruling in the *War Crimes* case.[157] The judges were therefore careful to recognize that the defendant had participated in the acts of homicide as a part of the Rwandan genocide.[158]

In this way, both the *War Crimes* case and the *Rwanda* case, show that Norwegian courts have been careful to recognize the international criminal law context of these cases. While both defendants were ultimately prosecuted based on ordinary domestic crimes, the judgments and sentences they received, emphasized that these ordinary crimes had been committed in the context of serious international crimes. Nevertheless, these cases were not prosecuted on the basis of international crimes, and this means that as of July 2020, there have been no proper international criminal law cases that have been prosecuted based on the crimes in chapter 16. Norway has therefore been unable to develop its own domestic case law on the prosecution of international crimes, in the same manner as many of the other Scandinavian countries.

5 The National System for Prosecuting International Crimes and the Potential for Syrian Cases

While Norway has yet to prosecute any cases on the basis of the international crimes in chapter 16 of the penal code, it does have a dedicated office of prosecutors who work on these types of cases. The National Authority for Prosecution of Organised and Other Serious Crime ('NAST'),[159] was created in 2005, and is responsible for investigating and prosecuting cases pertaining to international crimes in Norway.[160] In the Norwegian criminal justice system, the prosecutorial authority is not only responsible for the indictment and prosecution of criminal cases, they also supervise the police investigation itself. Hence, it is the prosecutorial authority who is responsible for leading the police in their criminal investigations.[161] NAST is therefore aided by two branches of the Norwegian police in their work: (i) the National Criminal Investigation Service ('Kripos') and (ii) the Police Security Service ('PST'). Together, the police officers and prosecutors in NAST, Kripos and PST are responsible for

[156] See Borgarting lagmannsretts dom 16. januar 2015 (LB-2013-41556), part 3 «Straffutmålingen».

[157] *Id*.

[158] The Appeals Court even begins their judgment by describing the context of the Rwandan genocide. See *id*, part 1 'Kort om konflikten i Rwanda og folkemordet'.

[159] NAST is known in Norwegian as 'Det nasjonale statsadvokatembetet for bekjempelse av organisert og annen alvorlig kriminalitet'.

[160] For more on the work of this office, see their official webpage: https://www.riksadvokaten.no/oversikt-over-statsadvokater-og-embeter/.

[161] See Kjelby, Gert, *Mellom rett og plikt til straffeforfølgning*, Oslo: Cappelen Damm Akademisk, 2013, p. 94.

investigating and prosecuting cases of international crimes in Norway.[162] Indeed, the NAST were involved in both the *War Crimes* case and the *Rwanda* case.[163]

As mentioned in the introduction, when compared to their track record on international crimes, Norway has taken a much more proactive approach to criminalizing and prosecuting individuals who have participated in the Syrian Civil War. As of 2020, Norway had prosecuted a sizeable number of cases against individuals who have been accused of participating in terrorist groups in Syria and Iraq. These cases have been spearheaded by the NAST, and have thus far been prosecuted using terrorism legislation.[164] For unlike Sweden, Norway has made it a crime to *participate* in a terrorist organization.[165] The act of participating in a terrorist organization was criminalized as early as 2013,[166] and this crime has been used as the basis for prosecuting foreign fighters who have travelled from Norway to Syria in order to participate in organizations like the so-called Islamic State and the Al-Nusra Front.[167] In 2016, Norway also took the additional step of criminalizing participation "in military activities in an armed conflict abroad".[168] The effect of this new section 145 of the penal code, is to make it illegal to participate in armed conflicts abroad, for Norwegians who are not participating in the conflict as a part of a regular state military.[169] Hence,

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[162] It must be noted however, that like all other prosecutorial bodies, the NAST reports to The Director of Public Prosecutions in Norway. In addition, as per the Criminal Procedure Act, indictments that concern crimes which carry a prison sentence over 21 years, have to be issued by the Director of Public Prosecutions. The international crimes set out in chapter 16, tend to carry a prison sentence of 30 years. In practice this therefore means that it will be the Director of Public Prosecutions who approves and issues indictments based on most of the crimes in chapter 16. However, this will be done after the NAST investigates and prepares the case for prosecution, before sending the indictment to the Director of Public Prosecution. See § 65 of the Norwegian Criminal Procedure Act of 1981.

[163] See part 3 on the investigation of the *Rwanda* case in Oslo tingrett dom 14. februar 2013 (TOSLO-2012-106377), and Borgarting lagmannsretts dom 12. april 2010 (LB-2009-24039).

[164] The head of the NAST has recently written a book chapter where he accounts for the prosecution of these cases. See Glent, 2019.

[165] The Swedish government made a proposal to the Swedish Parliament in 2019, to expand its terror legislation to include the crime of participating in a terrorist organization. However, the proposal was rejected by the Swedish Parliament in January 2020. Having said that, the Swedish Parliament did vote to make conspiring ('samröre') with a terrorist organization a crime. See Justitieutskottets betänkande 2019/20: JuU13 'Ett särskilt straffansvar för samröre med en terroristorganisation' and Prop. 2019/20:36 Ett särskilt straffansvar för samröre med en terroristorganisation.

[166] See § 136 a of the General Civil Penal Code and Prop. 131 L (2012–2013) Endringer i straffeloven 1902 og straffeloven 2005 mv. (forberedelse av terror m.m.).

[167] For a selection of these cases see: HR-2016-1422-A, HR-2018-1650-A, Borgarting lagmannsretts dom 18. januar 2016 (LB-2015-108037) and Borgarting lagmannsretts dom 30. desember 2019 (LB-2019-78359).

[168] See § 145 of the General Civil Penal Code and Prop. 44 L (2015–2016) Endringer i straffeloven mv. (militær virksomhet i væpnet konflikt m.m.).

[169] For an analysis of § 145 see: Høgestøl, Sofie, En generell kriminalisering av fremmedkrigere: den norske modellen og påtaleskjønn i straffeloven § 145 in Andersson, Anna, Høgestøl, Sofie & Lie, Anne (ed.s), *Fremmedkrigere: forebygging, straffeforfølgning og rehabilitering i Skandinavia*, Oslo: Gyldendal Juridisk, 2018, p. 27.

Norway has produced both interesting legislation and case law when pursuing Syrian cases thus far.

Nevertheless, the Syrian cases have primarily been prosecuted based on these participation crimes,[170] and not on the basis of the international crimes set out in chapter 16. In light of the gravity of the international crimes that have been committed during the Syrian Civil War, there have been public calls on the NAST to ensure that they are also investigating individuals who have travelled to Syria, for international crimes as well, and not simply on the basis of terror participation.[171] This effort intensified in late 2019, when five Syrian torture victims submitted formal complaints against named members of the Syrian army, to Norwegian police. These five victims, who all reside in Norway, hope that they can persuade Norwegian police and prosecutors to investigate their cases and ultimately bring war crimes charges against leaders in the Syrian army, who they believe are responsible for the torture they endured in Syria.[172] These cases have been coordinated by the Norwegian Helsinki Committee and the European Centre for Constitutional and Human Rights ('ECCHR').[173] The ECCHR are also behind a similar effort in Germany, which has already resulted in the prosecution of two individuals for acts of torture that were committed in Syria.[174] Whether the Norwegian cases will ultimately result in prosecutions, as they have done in Germany, is too soon to say at the time of writing this article in the spring of 2020.[175] However, the efforts to bring these cases before Norwegian courts, underscores that cases deriving from Syria, could mark a new start for the prosecution of international crimes in Norway.

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[170] See chapter 18 of the General Civil Penal Code.

[171] The act of participating in a terrorist group only carries a 6-year prison sentenced, compared to the 30-year prison sentence that is attached to the international crimes in chapter 16. For this reason, some have argued that it is imperative that suspected perpetrators are also punished for the more serious international crimes in chapter 16, and not simply for participation, which carries a lesser penalty and does not accurately reflect the gravity of the crimes committed. See Harlem, Mads, Høgestøl Sofie & Langford, Malcolm, Verdens Gang, *Norske IS-krigere må også straffeforfølges for krigsforbrytelser*, 17 June 2019, < https://www.vg.no/nyheter/meninger/i/op1j3V/norske-is-krigere-maa-ogsaa-straffeforfoelges-for-krigsforbrytelser>, checked 30 April 2020.

[172] For more on these cases see: Johnsen, Nilas, Mikalsen, Helge & Andreassen, Thomas, Verdens Gang, *Torturert av Assad: Søker rettferdighet i Norge*, 12 November 2019, < https://www.vg.no/nyheter/utenriks/i/8mVko1/torturert-av-assad-soeker-rettferdighet-i-norge>, checked 30 April 2020.

[173] Graham-Harrison, Emma, The Guardian, *Syrian refugees ask Norway police to investigate war crimes*, 13 November 2019, < https://www.theguardian.com/world/2019/nov/13/syrian-refugees-ask-norway-police-to-investigate-war-crimes>, checked 30 April 2020.

[174] The trial in this case was still ongoing when this article was being finalized. See: Hubbard, Ben, The New York Times, *Germany Takes Rare Step in Putting Syrian Officers on Trial in Torture Case*, 23 April 2020, < https://www.nytimes.com/2020/04/23/world/middleeast/syria-germany-war-crimes-trial.html>, checked 1 May 2020.

[175] Prior to the complaints that were made in late 2019, it had been publicly known that Norwegian police had been investigating potential cases of international crimes stemming from the Syrian Civil War since 2016. However, these investigations had as of July 2020 not resulted in any prosecutions. See Skjetne, 2016.

6 Conclusion

This article has attempted to give an overview of (i) how international crimes have been integrated into Norwegian law, (ii) a brief look at the structure of the investigation and prosecution of international crimes in Norway, and (iii) an analysis of the relevant Norwegian case law. As the examination has shown, the late criminalization of international crimes has meant that Norway has been unable to prosecute cases from the Yugoslavia and Rwanda conflicts on the basis of these crimes. For this reason, Norway has yet to prosecute a case based on the international crimes that were introduced in its penal code in 2008. Still, over the past few years, Norway has taken a much more forward leaning approach to prosecuting cases stemming from the Syrian Civil War. While these cases have thus far been prosecuted using terrorism legislation, 2019 saw a push for prosecuting Syrian cases on the basis of international crimes as well. The ongoing investigation of potential Syrian war crimes cases, might mean that Norway is finally poised to develop its domestic case law on international crimes in the near future.

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