

A stylized graphic of the Norwegian flag, featuring a blue field with a white cross and red quadrants. The graphic is positioned in the upper left and center of the page, with a dark gradient background.

BRIEFING PAPER

**UNIVERSAL JURISDICTION  
LAW AND PRACTICE IN NORWAY**

January 2019

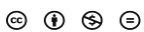
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## Introduction

This briefing paper was written by the Open Society Justice Initiative in partnership with TRIAL International. It provides an overview of the Norwegian national legal framework on universal jurisdiction, including statutory and case law, and its application in practice.

The briefing paper intends to contribute to a better understanding of domestic justice systems among legal practitioners who operate in the field of universal jurisdiction, to support the development of litigation strategies. It forms part of a series of briefing papers on selected countries.<sup>1</sup>

The content is based on desk research with the support of pro bono lawyers from the relevant jurisdiction. In addition, interviews with national practitioners were conducted on the practical application of the law. Respondents are not named in order to protect their identity and affiliation with certain institutions or organizations.

Universal jurisdiction in this briefing paper is understood to encompass investigations and prosecutions of crimes committed on foreign territory by persons who are not nationals of the investigating and prosecuting jurisdiction. This briefing paper focuses on the international crimes of genocide, war crimes, crimes against humanity, torture and enforced disappearance.

The authors would like to thank Fiona McKay, Valérie Paulet, and Jennifer Triscone, for their contribution to the research and drafting as well as all experts and practitioners who agreed to be interviewed for their invaluable contribution to this briefing paper.

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<sup>1</sup> All briefing papers are available at: <https://trialinternational.org/latest-post/prosecuting-international-crimes-a-matter-of-willingness/> and at <https://www.justiceinitiative.org/search?q=universal+jurisdiction>.

## Crimes that invoke universal jurisdiction

Sections 5 and 6 of the Norwegian Penal Code (Penal Code)<sup>2</sup> enumerate which crimes can be prosecuted in Norway if they are committed abroad, and what requirements attach to their prosecution (see below under [Universal Jurisdiction Requirements](#)).<sup>3</sup>

According to Section 5, first paragraph, of the Penal Code, the following acts, among others, can be prosecuted if committed outside of Norwegian territory:

- Acts that are also punishable under the law of the country in which the crimes were committed;<sup>4</sup>
- Acts that are deemed to constitute a war crime, genocide or a crime against humanity;<sup>5</sup> and
- Acts that are deemed to constitute a breach of the laws of war.<sup>6</sup>

In addition to these acts listed in Section 5, first paragraph, of the Penal Code, Section 6 of the Penal Code allows for prosecution of crimes committed abroad that Norway has a right or an obligation to prosecute pursuant to agreements with foreign states or otherwise pursuant to international law. The purpose of this jurisdictional provision is to ensure that the Penal Code does not need to be amended when Norway enters into new international treaties.<sup>7</sup>

Torture and enforced disappearance as stand-alone crimes as well as conspiracy or incitement to genocide, crimes against humanity, war crimes, and breach of responsibility of superiors are all crimes that are not explicitly listed in Section 5, first paragraph, of the Penal Code. They could arguably be covered by other provisions within Section 5, first paragraph, or by Section 6 of the Penal Code. This question, however, is not settled due to the lack of jurisprudence at the time of writing.

Section 5, first paragraph, of the Penal Code also allows for the prosecution of other crimes committed abroad, such as terrorism-related acts or genital mutilation. These fall outside of the scope of this report, which focuses on universal jurisdiction for core international crimes, i.e. genocide, war crimes and crimes against humanity, and torture and enforced disappearance as stand-alone crimes.

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<sup>2</sup> In the original statutory provisions, the paragraphs of each Section are not numbered. In the interests of facilitating reference to the Penal Code, for the purpose of this report, the paragraphs of each Section will be numbered sequentially. Where the Penal code sub-divides paragraphs, these will be referred to as "Number" for numeric listings (same term as used the Penal Code) or "lit." for alphabetic listings.

<sup>3</sup> The Penal Code, published in I 2005 hefte 6, 20 May 2005 (hereinafter: **Penal Code**), available at: <https://lovdata.no/dokument/NL/lov/2005-05-20-28>, translation provided by the Ministry of Justice and Public Security.

<sup>4</sup> Penal Code Section 5, first paragraph, Number 1.

<sup>5</sup> Penal Code Section 5, first paragraph, Number 2.

<sup>6</sup> Penal Code Section 5, first paragraph, Number 3.

<sup>7</sup> Interview with police prosecutor on 29 November 2019.

# 1. Genocide

Genocide is criminalized and defined in Section 101 of the Penal Code in a way that mirrors Article 6 of the Rome Statute and Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1951).<sup>8</sup> Genocide is defined as:

“Any person is liable to punishment for genocide who with the intention of wholly or partly destroying a national, ethnic, racial or religious group

- a) kills one or more members of the group,
- b) causes considerable harm to the body or health of one or more members of the group,
- c) subjects one or more members of the group to living conditions that are intended to cause physical destruction of all or part of the group,
- d) implements measures with respect to one or more members of the group that are intended to prevent births within the group, or
- e) forcibly transfers one or more children from the group to another group.”

According to the preparatory documents to Section 101 of the Penal Code, the interpretation of individual elements of the crime of genocide, such as the categories of protected groups, follow the jurisprudence established by international criminal tribunals, such as International Criminal Tribunal for Rwanda.<sup>9</sup> The preparatory documents explains in detail how the Penal Code definitions differ as compared with the Rome Statute definitions. The following are among the differences:<sup>10</sup>

- One of the differences is the reference to the destruction of a protected group “as such” which appears both in the Rome Statute and the Genocide Convention, but not in the Penal Code. The omission of the affix “as such” is not intended to entail a different meaning of genocide as compared to that contained in the Genocide Convention.<sup>11</sup>
- Another difference can be found in the wording of the underlying act of causing “serious bodily or mental harm” which appears in Article 6(b) of the Rome Statute. Section 101, first paragraph, lit. b, of the Penal Code includes the causing of “considerable harm to the body or health” as a genocidal act instead. The Norwegian formulation follows the wording used in other sections of the Penal Code, and might in its interpretation result in variations to that of the International Criminal Court.<sup>12</sup>
- The underlying act of inflicting conditions of life calculated to bring about physical destruction, as defined in Article 6(c) of the Rome Statute, includes the

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<sup>8</sup> *Om lov om endringer i straffeloven 20. mai 2005 nr. 28 mv. - Tilråding fra Justis- og politidepartementet av 9. november 2007, godkjent i statsråd samme dag* (unofficial translation: Act on Amendments to the Penal Code of May 20, 2005 No. 28 – Recommendations from the Ministry of Justice and the Police of 9 November 2007, approved by the Cabinet on the same day), Ot.prp. nr. 8 (2007-2008) (hereinafter: **Preparatory Documents 2005**), Chapter 12.2.1.3, p. 279, available at: <https://www.regjeringen.no/contentassets/380dda240b3f47a0a2d8e4151d4f4ca9/no/pdfs/otp200720080008000dddpdfs.pdf>.

<sup>9</sup> See Preparatory Documents 2005, Chapter 12.2.1.3, p. 279-280.

<sup>10</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 279-281.

<sup>11</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 280.

<sup>12</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 280.

requirement of “deliberately” whereas the Norwegian Penal Code does not contain such a requirement. This is because the general rules on *mens rea* under Norwegian law already require intentional or deliberate actions.<sup>13</sup>

With regard to the element of genocidal intent to wholly or partly destroy a protected group, Section 101, second paragraph, of the Penal Code explicitly states that “intent with respect to the main perpetrator’s destructive purpose is sufficient to be penalized for contribution”. According to the preparatory works, this provision serves as a reiteration of the jurisprudence of the International Criminal Tribunal for Rwanda according to which a contributor, which includes anyone who aided or abetted, co-perpetrated or ordered a crime (see below under [Modes of Liability](#)), does not need to share the genocidal intent of the principal perpetrator, as long as the contributor knew or considered it reasonably likely that the principal perpetrator acted with genocidal intent.<sup>14</sup>

## 2. Crimes against humanity

Section 102, first paragraph, of the Penal Code sets out crimes against humanity. The Norwegian definition of crimes against humanity contains the same contextual elements of widespread or systematic attack against a civilian population as required under Article 7(1) of the Rome Statute.<sup>15</sup> The interpretation of each of these elements follows the jurisprudence established by international criminal tribunals, such as the International Criminal Tribunal for Rwanda.<sup>16</sup> However, departing from the Rome Statute, which requires a state or organizational policy for an attack, the Norwegian definition does not require such a policy on the basis that this is not a condition established under international law.<sup>17</sup>

Section 102, first paragraph, of the Norwegian Penal Code enumerates the same list of underlying crimes as the Rome Statute in Article 7(1). Even though Section 102, first paragraph, of the Penal Code does not set out the elements of crimes for each underlying crime and uses slightly different formulations for some of them, the elements for each are the same as required by Article 7(1) and (2) of the Rome Statute and its Elements of Crimes, with the exception of persecution.<sup>18</sup>

According to Article 7(1)(h) of the Rome Statute, the crime of persecution requires that it is committed in connection with another crime against humanity, an act of genocide or a war crime. This is not a requirement under Section 102, first paragraph, lit. h, of the Penal Code, although the preparatory documents require that persecutorial acts are of the same seriousness as other international crimes.<sup>19</sup>

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<sup>13</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 280.

<sup>14</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 281.

<sup>15</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 281.

<sup>16</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 281-282.

<sup>17</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 281.

<sup>18</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 282-284.

<sup>19</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 284.

Torture as a crime against humanity under Section 102, first paragraph, lit. f of the Penal Code differs from the stand-alone crime of torture under Section 174 of the Penal Code, which can be committed irrespective of a widespread or systematic attack (see below under [Torture](#)), in that the former does not require the involvement of a public official, nor does it require a specific purpose.<sup>20</sup> Thus, the crime against humanity of torture is defined according to the Rome Statute, whereas the separate crime of torture follows the definition in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987) (CAT). Even though Section 102, first paragraph, lit. f of the Penal Code does not explicitly allow for any exceptions, according to the preparatory documents, pain arising from legal sanctions does not constitute torture in parallel to Article 7(2)(e) of the Rome Statute.<sup>21</sup>

### 3. War crimes

Provisions related to war crimes are contained in Sections 103 to 107 of the Penal Code and divided into:

- War crimes against a person (Section 103 Penal Code);
- War crimes against property and civil rights (Section 104 Penal Code);
- War crimes against humanitarian missions or distinctive signs (Section 105 Penal Code);
- War crimes committed using prohibited methods of warfare (Section 106 Penal Code); and
- War crimes committed using prohibited means of warfare (Section 107 Penal Code).

As under Article 8 of the Rome Statute, war crimes under the Penal Code require an armed conflict, which is understood as the use of weapons between states or long-standing armed violence between a state and organized armed groups that rises beyond internal disturbances or single violent incidents.<sup>22</sup>

In contrast to the Rome Statute, which distinguishes between acts committed in an international armed conflict and those committed in a non-international armed conflict, the Penal Code criminalizes the same conduct for both types of armed conflict with the exception of three crimes.<sup>23</sup> Section 103, second paragraph, of the Penal Code stipulates that the following crimes only apply in an international armed conflict:

- 1) Transfer by the occupying State of part of its own civilian population to an occupied area;<sup>24</sup>
- 2) Forcing a citizen of the opposing party to the armed conflict to participate in acts of war against his/her own country;<sup>25</sup> and

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<sup>20</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 283.

<sup>21</sup> Preparatory Documents 2005, Chapter 12.2.1.2, p. 283.

<sup>22</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 284 and Chapter 5.10.6, p. 89.

<sup>23</sup> Preparatory Documents 2005, Chapter 5.10.3, p. 88.

<sup>24</sup> Corresponds to Article 8(2)(b)(viii) Rome Statute.

<sup>25</sup> Corresponds to Article 8(2)(b)(xv) Rome Statute.



3) Forcing a protected person to serve in the armed forces of a hostile power.<sup>26</sup>

The reason for this different treatment is stated to be that these three crimes can by their nature only be committed in international conflicts.<sup>27</sup> For Section 103, second paragraph, lit. a, of the Penal Code, the crime is tied to a situation of occupation, which, according to the Geneva Conventions, is equivalent to an international armed conflict.<sup>28</sup> For Section 103, second paragraph, lit. b, and lit. c, of the Penal Code, the crimes are connected to citizenship or membership in armed forces.

Section 103, third paragraph of the Penal Code describes a protected person as “a person who is not, or is no longer, actively participating in hostilities, or who is otherwise protected by international law” which applies to both categories of armed conflict. This combines the respective definitions of protected persons used in the Rome Statute for international and non-international armed conflicts.<sup>29</sup>

With regard to the underlying acts, the preparatory documents set out the definitions for each crime listed in Sections 103 to 107 of the Penal Code and compare them to the respective Articles in the Rome Statute.<sup>30</sup> The following summarizes that extensive analysis.

All war crimes against persons listed in Section 103, first and second paragraph of the Penal Code have a corresponding provision and definition in the Rome Statute, with the following variations:

- **Definition of torture:** Whereas the Rome Statute requires a specific purpose for the commission of torture, following the elements set out in Article 1 of the CAT, torture as listed in Section 103, first paragraph, lit. b, of the Penal Code is understood in the same manner as torture as a crime against humanity, which does not require a specific purpose.<sup>31</sup>
- **Enslavement:** Section 103, first paragraph, lit. c of the Penal Code criminalizes enslavement of a protected person as a war crime, whereas the Rome Statute does not contain such a crime.<sup>32</sup>
- **Child soldiers:** Whereas the age for the crime of conscripting or enlisting children is 15 years or younger in the Rome Statute,<sup>33</sup> the Penal Code in Section 103, first paragraph, lit. f, sets the age at 18 years or younger.
- **Physical mutilation:** Whereas the Rome Statute specifically lists physical mutilation of persons in the power of the adverse party as a crime,<sup>34</sup> the Penal

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<sup>26</sup> Corresponds to Article 8(2)(a)(v) Rome Statute.

<sup>27</sup> Preparatory Documents 2005, Chapter 5.10.3, p. 88.

<sup>28</sup> See Article 2 common to all four Geneva Conventions of 1949.

<sup>29</sup> For international armed conflicts, Article 8(2)(a) Rome Statute defines protected persons by referring to those who are protected under the Geneva Conventions. For non-international armed conflicts, Article 8(2)(c) Rome Statute defines protected persons as those who are taking no active part in the hostilities.

<sup>30</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 282-299.

<sup>31</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 285.

<sup>32</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 285.

<sup>33</sup> Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) Rome Statute.

<sup>34</sup> Article 8(2)(b)(x) and Article 8(2)(e)(xi) Rome Statute.

Code considers it to be included under the crime of inflicting great suffering or torture under Section 103, first paragraph, lit. b.<sup>35</sup>

The underlying acts listed in Section 104, first paragraph, of the Penal Code as war crimes against property and civil rights each correspond to those for their corresponding crimes in the Rome Statute, with the following difference:

- **Pillage:** Whereas the Rome Statute only criminalizes pillaging of a town or place,<sup>36</sup> Section 104, first paragraph, lit. a, of the Penal Code does not contain such a limitation. However, the preparatory works state that only a series of thefts of single objects can be considered pillaging.<sup>37</sup>

Section 105, first paragraph, of the Penal Code enumerates all of the crimes against humanitarian missions or distinctive signs that are found in the Rome Statute, but with the following difference:

- **Attack against protected signs:** Whereas the Rome Statute requires that the protected sign is carried by the target of the attack,<sup>38</sup> Section 105, first paragraph, lit. b, of the Penal Code only requires that the target is entitled to use it and that the perpetrator knows about this entitlement.<sup>39</sup>

The underlying crimes listed in Section 106, first paragraph, of the Penal Code, concerning prohibited methods of warfare, correspond to war crimes in the Rome Statute with the following divergences:

- **Environmental damage:** For the war crime of a disproportionate attack, the Rome Statute requires long-term and severe damage to the natural environment which would be excessive in relation to the military advantage.<sup>40</sup> For Section 106, first paragraph, lit. c, of the Penal Code, on the other hand, any damage to the environment that is excessive in relation to the military advantage is sufficient to constitute a war crime.<sup>41</sup>
- **Cultural monuments:** For the war crimes of attacking non-military targets, Section 106, first paragraph, lit. f, of the Penal Code adds cultural monuments to the listed protected buildings, which the Rome Statute does not cover.<sup>42</sup>

All crimes listed in Section 107, first paragraph, of the Penal Code on prohibited means of warfare correspond to Rome Statute crimes with the exception of the catch-all crime of using means of warfare that are contrary to international law in Section 107, first

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<sup>35</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 286.

<sup>36</sup> Article 8(2)(b)(xvi) Rome Statute.

<sup>37</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 289.

<sup>38</sup> Article 8(2)(b)(xxiv) and Article 8(2)(e)(ii) Rome Statute.

<sup>39</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 291.

<sup>40</sup> Article 8(2)(b)(iv) Rome Statute.

<sup>41</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 293.

<sup>42</sup> Article 8(2)(b)(ix) and Article 8(2)(e)(iv) Rome Statute.

paragraph, lit. d, of the Penal Code, which does not exist in this form in the Rome Statute.<sup>43</sup>

## 4. Breach of Laws of War

Section 5, first paragraph, Number 3, of the Penal Code lists breach of the laws of war as a crime that can be prosecuted in Norway if committed abroad. However, due to the lack of jurisprudence on the application of this provision, it remains unclear which crimes are covered beyond the war crimes in Section 103 to 107 of the Penal Code.<sup>44</sup> Some practitioners are of the view that the inclusion of breaches of the laws of war is intended to allow the prosecution of crimes that are not currently listed as war crimes in Section 101 to 107 of the Penal Code but may develop under customary international law in the future.<sup>45</sup>

## 5. Conspiracy and incitement

According to Section 108 of the Penal Code, any person who enters into a conspiracy with another person to commit genocide, crimes against humanity or war crimes commits a separate crime. Conspiracy in that sense requires an agreement between one or more persons but the actual crime does not need to happen.<sup>46</sup> There is no corresponding crime in the Rome Statute.

In addition, Section 108 criminalizes any person who directly and publicly incites any person to commit genocide, crimes against humanity or war crimes. Inciting means some form of encouragement to commit any of these crimes.<sup>47</sup> For the purposes of this provision, an act is committed publicly when it is committed in the presence of a sizable number of persons or when it could easily have been observed and has been observed from a public place. If the act consists of making a statement, it is public if the statement is made in a way that makes it likely to reach a sizable number of persons.<sup>48</sup>

Compared to Article 25(3)(c) of the Rome Statute, which deals with incitement to genocide as a mode of liability, Section 108 of the Penal Code establishes incitement as a separate crime and extends it to crimes against humanity and war crimes.

Due to the lack of jurisprudence on this question, it remains unclear whether or not these two crimes can be prosecuted when they are committed abroad by a foreign national. Conspiracy and incitement are not listed specifically under Section 5, first paragraph, of the Penal Code, which establishes which crimes are subject to universal jurisdiction. However, they could fall under Section 5, first paragraph, Number 1, of the Penal Code, according to which acts can be prosecuted in Norway if they are also punishable in the

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<sup>43</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 298: Article 8(2)(b)(xx) Rome Statute is similar in that it prohibits the use of weapons not explicitly listed in the other Rome Statute provisions, but these need to be listed in an annex to the Rome Statute whereas the Penal Code does not require an annexed list.

<sup>44</sup> Interview with public prosecutor on 2 July 2019; interview with police prosecutor on 29 November 2019.

<sup>45</sup> Interview with a staff person of an NGO on 1 July 2019.

<sup>46</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 298.

<sup>47</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 298.

<sup>48</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 298.

country where they are committed. In addition, the crimes of conspiracy and incitement could be covered by Section 5, fifth paragraph, of the Penal Code, which allows for universal jurisdiction, if the maximum sentence of imprisonment is 6 years or more. Both crimes carry a maximum sentence of 10 years.<sup>49</sup>

The application of Section 5, first paragraph, Number 1 or Section 5, fifth paragraph, of the Penal Code would have differing requirements with regard to the presence of the suspect or the victim (see below under [Universal Jurisdiction Requirements](#)). This question cannot be answered with certainty at the time of writing, as there is no jurisprudence so far on the question which of these provisions applies.<sup>50</sup>

## 6. Breach of superior responsibility

Section 109 of the Penal Code provides for an additional crime that can be perpetrated by a military or civilian leader separately from the direct perpetrator(s). In essence, it punishes superiors who failed to prevent, stop or report genocide, crimes against humanity or war crimes committed by their subordinates.

The cumulative elements for this crime of “breach of superior responsibility” are as follows:<sup>51</sup>

- 1) The perpetrator is a military or civilian leader or any person effectively acting as such with effective control over subordinates;
- 2) One or more subordinates committed an international crime;
- 3) The crime is a result of the leader's failure to exercise due control over them;
- 4) The leader knew or should have known that the subordinates had embarked on such a crime or that the crime was imminent;
- 5) The leader failed to implement necessary and reasonable measures in his/her power to prevent or stop the crime, or to report the offence to a competent authority for prosecution.

To show the causal link between the failure of the superior and the crimes committed by the subordinates, it is sufficient to prove that the risk of the crimes increased as a result of the superior's failure to intervene.<sup>52</sup>

This crime corresponds to Article 28 of the Rome Statute, which deals with command responsibility. However, the Rome Statute provision sets out different standards for military versus civilian superiors whereas the Penal Code treats them equally. In addition, command responsibility under the Rome Statute is a mode of liability whereas Section 109 of the Penal Code creates a separate crime committed by the superior.

Similar to conspiracy and incitement above, it is unclear if the crime of breach of responsibility of superiors can be prosecuted when it is committed abroad by a foreign national, due to the lack of jurisprudence on that matter. The breach of responsibility of superiors is not listed specifically under Section 5, first paragraph, of the Penal Code, but could be covered by Section 5, first paragraph, Number 1, of the Penal Code if it is a

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<sup>49</sup> Penal Code Section 108.

<sup>50</sup> Interview with public prosecutor on 2 July 2019.

<sup>51</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 299.

<sup>52</sup> Preparatory Documents 2005, Chapter 12.2.1.3, p. 299.

crime in the country where it was committed, or by Section 5, fifth paragraph, of the Penal Code as it carries a maximum sentence of 10 years.

The application of Sections 5, first paragraph, Number 1, or Section 5, fifth paragraph, of the Penal Code would have differing requirements with regard to the presence of the suspect or the victim (see below on [Universal Jurisdiction Requirements](#)). This question cannot be answered with certainty at the time of writing, as there is no jurisprudence so far on the question which of these provisions applies.<sup>53</sup>

## 7. Torture

Section 174 of the Penal Code criminalizes torture as a stand-alone crime committed not in the context of an armed conflict or as part of a widespread or systematic attack. Torture under Section 174, first paragraph, of the Penal Code is understood to be acts of any public official who causes another person injury or serious physical or mental pain:

- 1) with intent to obtain information or a confession;
- 2) with intent to punish, threaten or compel another person; or
- 3) because of such person's religion or life stance, skin color, national or ethnic origin, homosexual orientation, reduced functional capacity or gender.

According to Section 174, third paragraph, of the Penal Code, torture can also be committed by any person who acted in response to the incitement or express or implicit consent of a public official.

In contrast to torture as a crime against humanity or war crime, the elements of the stand-alone crime set out in Section 174 of the Penal Code correspond, for the most part, to Article 1 of the CAT. In contrast to the CAT, however, the Penal Code spells out specific bases of discriminatory rather than simply referring to any reason based on discrimination.

In addition, Section 175 of the Penal Code contains provisions related to aggravated forms of torture which may result in more severe penalties.

Whether torture under Section 174 and 175 of the Penal Code committed abroad by a foreign national can be prosecuted in Norway is unclear at the time of writing, due to the lack of jurisprudence on the application of the current Penal Code rules on universal jurisdiction. Section 5, first paragraph, of the Penal Code, which lists crimes that are subject to universal jurisdiction, does not explicitly list the stand-alone crime of torture as a crime.

However, torture could fall under Section 5, first paragraph, Number 1, of the Penal Code, which establishes universal jurisdiction for crimes that are also punishable under the law of the country in which they are committed.<sup>54</sup> Torture could also fall under Section 5, fifth paragraph, of the Penal Code according to which crimes committed abroad by a foreign national can be prosecuted if the act carries a maximum penalty of more than 6 years. The maximum sentence for torture under Section 174 of the Penal Code is 15 years.

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<sup>53</sup> Interview with public prosecutor on 2 July 2019.

<sup>54</sup> Interview with police prosecutor on 29 November 2011.

In addition, torture could be covered by Section 6, first paragraph, of the Penal Code which provides that acts committed abroad which carry an obligation to prosecute pursuant to international law can be prosecuted in Norway. Such an obligation could stem from Norway's ratification of the CAT in 1986 which contains an obligation to prosecute torture in Article 4 of the CAT.<sup>55</sup>

The application of Section 5, first paragraph, Number 1, or Section 5, fifth paragraph, or Section 6, first paragraph, of the Penal Code would have differing requirements with regard to the presence of the suspect or the victim (see below under [Universal Jurisdiction Requirements](#)). This question cannot be answered with certainty at the time of writing, as there is no jurisprudence so far on the question which of these provisions applies.<sup>56</sup>

## 8. Enforced Disappearance

Section 175a of the Penal Code criminalizes enforced disappearance as an independent crime from crimes against humanity. According to Section 175a, first paragraph, of the Penal Code, an arrest, imprisonment, abduction or other deprivation of liberty, done on behalf of a state or with the state's permission, support or consent, constitutes the crime of enforced disappearance when the deprivation of liberty is denied, or what has happened to the detainee or where the detainee is located have been concealed, so that the detainee is removed from the protection of the law. This definition follows Article 2 of the Convention for the Protection of All Persons from Enforced Disappearance (2010) (CED).

Compared to enforced disappearance as a crime against humanity listed in Section 102, first paragraph, lit. i, of the Penal Code, Section 175a of the Penal Code does not require that the victim is deprived of the protection of law for a prolonged period of time. This corresponds to the difference between enforced disappearance as stipulated in Article 7(2)(i) of the Rome Statute, on the one hand, and Article 2 of the CED on the other.

Section 175b of the Penal Code deals with aggravated forms of enforced disappearance due to the serious consequences for the victim, the vulnerability of the victim or the treatment of the victim.

Like the stand-alone crime of torture, it is unclear at the time of writing whether or not enforced disappearance as a separate crime, when committed abroad by a foreign national, can be prosecuted in Norway. There is no jurisprudence yet on this fairly new crime. It could be argued that enforced disappearance could be prosecuted under universal jurisdiction if it falls under Section 5, first paragraph, Number 1, of the Penal Code (if enforced disappearance is a crime in the country where it was committed) or Section 5, fifth paragraph, of the Penal Code (because it carries a maximum sentence of imprisonment of more than 6 years, namely 15 years) or Section 6, first paragraph, of the Penal Code (because Norway ratified the CED in 2007 and is therefore bound by the

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<sup>55</sup> See ratification by Norway in: United Nations Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mdsg\\_no=IV-9&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mdsg_no=IV-9&chapter=4&clang=en).

<sup>56</sup> Interview with public prosecutor on 2 July 2019.

international obligation to prosecute set out in Article 3 of the CED).<sup>57</sup> However, at the time of writing, this question has not been answered by the courts.

## Modes of liability

According to the Norwegian Penal Code, crimes subject to universal jurisdiction can be committed through direct perpetration or through contributing to the perpetration of the crime in one of the proscribed ways (Section 15 Penal Code).

### 1. Contribution

According to Section 15 of the Penal Code, a person may be held responsible for a crime if s/he contributes to the violation, unless otherwise provided, under the following conditions:

- The contributor must perform the contributing act before or during the time the principal crime was committed, but not after the completion of the crime.<sup>58</sup>
- The contributor must have physically contributed to the actual execution of the principal crime, positively encouraged the action or strengthened the principal perpetrator's intention (which is termed psychological contribution).<sup>59</sup> The latter can also be perpetrated through counselling or providing information.<sup>60</sup>
- The contributor's action must have a connection with the principal crime; for physical contribution this requires that the contributing act actually assists in the execution of the principal crime; for psychological contribution this requires that the main principal is influenced and his/her intent strengthened.<sup>61</sup>
- The contributor must know that the principal perpetrator will commit the crime.<sup>62</sup>

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<sup>57</sup> See ratification by Norway in: United Nations Treaty Collection, International Convention for the Protection of All Persons from Enforced Disappearance, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq\\_no=IV-16&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-16&chapter=4&clang=en).

<sup>58</sup> *Om lov om straff (straffeloven) - Tilråding fra Justis- og politidepartementet av 2. juli 2004, godkjent i statsråd samme dag* (unofficial translation: The Penal Code – Recommendations from the Ministry of Justice and the Police of 2 July 2004, approved by the Cabinet on the same day), Ot.prp. nr. 90 (2003-2004) (hereinafter: **Preparatory Documents 2004**), Chapter 30.1, p. 410.

<sup>59</sup> Supreme Court of Norway, Case No. 2014/957, HR-2014-2009-A, 14 October 2014, Rt. 2104, p. 930, para. 11.

<sup>60</sup> Preparatory Documents 2004, Chapter 30.1, p. 411.

<sup>61</sup> Preparatory Documents 2004, Chapter 30.1, p. 411.

<sup>62</sup> Preparatory Documents 2004, Chapter 30.1, p. 411.

Contribution under Norwegian law encompasses the concepts of aiding and abetting, instigation and ordering, and joint perpetration between several people.<sup>63</sup>

## 2. Corporate liability

According to Section 27, first paragraph, of the Penal Code, an “enterprise” can be held criminally accountable if a person who has acted on behalf of the enterprise commits a crime. Enterprises include companies, cooperative societies, associations or other organizations, sole proprietorship, foundations, estates or public bodies.<sup>64</sup> A guilty verdict against an enterprise results in a fine or the loss of the right to operate, a prohibition to operate in certain ways or confiscation.<sup>65</sup>

Section 28 of the Penal Code grants the adjudicator a discretion whether or not to impose the aforementioned penalties, and provides a list of criteria that shall be taken into consideration when making this decision, namely:

- “the preventive effect of the penalty,
- the severity of the offence, and whether a person acting on behalf of the enterprise has acted culpably,
- whether the enterprise could have prevented the offence by use of guidelines, instruction, training, checks or other measures,
- whether the offence has been committed in order to promote the interests of the enterprise,
- whether the enterprise has had or could have obtained any advantage by the offence,
- the financial capacity of the enterprise,
- whether other sanctions arising from the offence are imposed on the enterprise or a person who has acted on its behalf, including whether a penalty is imposed on any individual person,
- whether agreements with foreign states prescribe the use of enterprise penalties.”

In 2007, Amnesty International filed a torture complaint against *Aker Kvaerner*, a Norwegian company which was alleged to have supplied construction and maintenance services to the military base in Guantanamo Bay where the United States detained and abused prisoners.<sup>66</sup> The investigations were dropped because the prosecuting authority was of the view that the services were provided by a subsidiary of *Aker Kvaerner* that was not under the full control of the parent company.<sup>67</sup>

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<sup>63</sup> Interview with public prosecutor on 2 July 2019.

<sup>64</sup> Penal Code Section 27, second paragraph..

<sup>65</sup> Penal Code Section 27, third paragraph.

<sup>66</sup> Reuters, Norway rejects Guantanamo probe of Aker Kvaerner, 20 September 2007, available at: <https://uk.reuters.com/article/akerkvaerner-guantanamo/norway-rejects-guantanamo-probe-of-aker-kvaerner-idUKL2086557220070920>.

<sup>67</sup> Ibid; Interview with a staff person of an NGO on 1 July 2019.



# Temporal application

## 1. Beginning of temporal application

The beginning of temporal application differs between the universal jurisdiction crimes discussed in this report.

### 1.1. Crimes under Chapter 16 of the Penal Code

Chapter 16 of the Penal Code, which criminalizes genocide, crimes against humanity, war crimes, conspiracy, incitement and responsibility of superiors passed into law on 7 March 2008.<sup>68</sup> Therefore, these international crimes can be prosecuted in Norway if committed after that date.

If such crimes were committed before 7 March 2008, they cannot be prosecuted because of the prohibition on retroactive application of the law in Article 97 of the Norwegian Constitution.<sup>69</sup> In the case against *Mirsad Repak*, a member of the paramilitary Croatian Defense Forces, who was accused of detaining, interrogating and torturing civilian Serbs in Bosnia Herzegovina in 1992 and later fled to Norway and became a Norwegian citizen, the Supreme Court ruled that the aforementioned crimes in Chapter 16 of the Penal Code are not retroactively applicable.<sup>70</sup> However, he was found guilty of other crimes, namely illegal deprivation of liberty and detention of civilians.<sup>71</sup>

The same reasoning as was applied in the Supreme Court decision in *Mirsad Repak* was applied in the case against *Sadi Bugingo*, a Rwandan national residing in Norway who was accused of committing murders during the Rwandan genocide.<sup>72</sup> As a result, the accused was found guilty of contribution to murder (as opposed to a crime under Chapter 16 of the Penal Code).<sup>73</sup>

### 1.2. Torture

Sections 174 and 175 of the Penal Code, which establish torture as a separate crime, came into force on 25 June 2004.<sup>74</sup> Consequently, torture committed after this date can be prosecuted in Norway.

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<sup>68</sup> *Lov om endringer i straffeloven 20. mai 2005 nr. 28 mv.* (unofficial translation: Act on Amendments to the Criminal Code 20 May 2005 No. 28 etc.), published in I 2008 hefte 3 s 443, Journal No. 2008-0181, 7 March 2008, available at: <https://lovdata.no/dokument/LTI/lov/2008-03-07-4>.

<sup>69</sup> Constitution of the Kingdom of Norway, 17 May 1814.

<sup>70</sup> Supreme Court of Norway, Public Prosecuting Authority v. Misrad Repak, HR-201-2057-P, 12 March 2010; see summary of the case by TRIAL International at <https://trialinternational.org/latest-post/mirsad-repak/>.

<sup>71</sup> Ibid.

<sup>72</sup> Borgating Court of Appeal, Prosecuting National Authority v. Sadi Bugingo, Case No. 13-041556AST-BORG/02, 16 January 2015, p. 25, available at: [file:///C:/Users/bye/Downloads/bugingo%2013-041556ast-borg-rwanda-saken\\_2015.01.16.pdf](file:///C:/Users/bye/Downloads/bugingo%2013-041556ast-borg-rwanda-saken_2015.01.16.pdf).

<sup>73</sup> Ibid, p.31.

<sup>74</sup> *Lov om endringer i straffeloven, straffeprosessloven og sjøloven mv. Section I* (unofficial translation: Section 1 of the Act on Amendments to the Penal Code, the Criminal Procedure Act and the Maritime Act, etc), published in I 2004 hefte 10 s 1402, Journal No. 2004-0796, 25 June 2004, available at: <https://lovdata.no/dokument/LTI/lov/2004-06-25-52>.

As regards acts of torture committed prior to 25 June 2004, some practitioners argue that due to Norway's ratification of the CAT on 9 July 1986,<sup>75</sup> prosecution could be possible of acts committed as far back as that date.<sup>76</sup> However, as of the time of writing, there has been no jurisprudence on this point.

### **1.3. Enforced disappearance**

Sections 175a and 175b of the Penal Code, which establish the crime of enforced disappearance as a stand-alone crime, came into force on 7 June 2019.<sup>77</sup> Thus, acts committed after this date can be prosecuted.

Norway ratified the CED on 21 December 2007.<sup>78</sup> Whether enforced disappearance can be prosecuted as far back as that date has not been decided as of the time of writing this report.

## **2. Statute of limitations**

Under Norwegian law, there are two types of statutes of limitations. The first limitation prohibits prosecution if a certain amount of time has elapsed between the completion of the crime and the indictment, and is referred to as a statute of limitation for criminal liability.<sup>79</sup> The second form of limitation is called a statute of limitation for imposed sentences, and prohibits the enforcement of a sentence if a certain time has passed between the day of the judgment and the beginning of its enforcement.<sup>80</sup>

### **2.1. Statute of limitation for criminal liability**

#### **2.1.1. Crimes under Chapter 16 Penal Code**

According to Section 91 of the Penal Code, genocide, crimes against humanity and war crimes with a minimum sentence of 15 years of imprisonment are not subject to the statute of limitations for criminal liability. All crimes listed in Sections 101 to 109 of the Penal Code fall under this category, with the exception of the following crimes.

War crimes against property or civil rights (if not aggravated)<sup>81</sup> and war crimes against humanitarian missions or use of distinctive signs (if not aggravated)<sup>82</sup> only carry a

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<sup>75</sup> See ratification by Norway in: United Nations Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=en).

<sup>76</sup> Interview with a staff person of an NGO on 1 July 2019.

<sup>77</sup> *Lov om endringer i straffeloven og straffeprosessloven (tvungen forsvinning)* (unofficial translation: Act on Amendments to the Penal Code and the Criminal Procedure Act (Enforced Disappearance)), Journal No. 2019-0326, 7 June 2019, available at: <https://lovdata.no/dokument/LTI/lov/2019-06-07-19>.

<sup>78</sup> See ratification by Norway in: United Nations Treaty Collection, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-9&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=en).

<sup>79</sup> Penal Code Sections 85 to 92.

<sup>80</sup> Penal Code Section 94 to 96.

<sup>81</sup> Penal Code Section 104, second paragraph.

<sup>82</sup> Penal Code Section 105second paragraph.

maximum sentence of 10 years. Likewise, conspiracy and incitement<sup>83</sup> and breach of superior responsibility (if not aggravated)<sup>84</sup> only carry a maximum term of 10 years. In these cases, the limitation period is 10 years according to Section 86, first paragraph, lit. c, of the Penal Code.

If a person commits an act that constitute several offences which would have different limitation periods, then the longest limitation period applies to all the offences.<sup>85</sup>

### **2.1.2. Torture**

The maximum penalty for torture as a separate crime is 15 years of imprisonment,<sup>86</sup> and the maximum penalty for aggregated torture is 21 years.<sup>87</sup> This means that the limitation periods for criminal liability are 15 years,<sup>88</sup> and 25 years, respectively.<sup>89</sup>

### **2.1.3 Enforced disappearance**

The maximum sentence for enforced disappearance as a stand-alone crime is 15 years of imprisonment,<sup>90</sup> and 21 years for aggravated enforced disappearance.<sup>91</sup> This means that the limitation periods for criminal liability are 15 years,<sup>92</sup> and 25 years, respectively.<sup>93</sup>

## **2.2. Statute of limitation for imposed sentences**

### **2.2.1. Crimes under Chapter 16 Penal Code**

According to Section 96 of the Penal Code, sentences imposed in connection with genocide, crimes against humanity, and war crimes which have a maximum imprisonment term of 15 years or more, are not subject to limitation.

For the crimes listed above that carry a maximum term of 10 years of imprisonment (see above under [Statute of Limitations for Criminal Liability](#)), the limitation period for imposed sentences increases based on the length of the actual sentence imposed by the judgment. For instance, if the judgment imposes a sentence of up to four years, the limitation period would be 10 years; for an imposed sentence of up to eight years, the limitation period would be 15 years, etc.<sup>94</sup>

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<sup>83</sup> Penal Code Section 108.

<sup>84</sup> Penal Code Section 109, second paragraph.

<sup>85</sup> Penal Code Section 86, third paragraph.

<sup>86</sup> Penal Code Section 174, first paragraph.

<sup>87</sup> Penal Code Section 175, first paragraph.

<sup>88</sup> Penal Code Section 86, first paragraph, lit. d.

<sup>89</sup> Penal Code Section 86, first paragraph, lit. e.

<sup>90</sup> Penal Code Section 175a, first paragraph.

<sup>91</sup> Penal Code Section 175b, first paragraph.

<sup>92</sup> Penal Code Section 86, first paragraph, lit. d.

<sup>93</sup> Penal Code Section 86, first paragraph, lit. e.

<sup>94</sup> Penal Code Section 93, first paragraph.

### 2.2.2. Torture and enforced disappearance

Both for torture and enforced disappearance as stand-alone crimes, the limitation period for the imposed sentence depends on the actual sentence in the judgement.<sup>95</sup>

## Universal jurisdiction requirements

For crimes committed abroad by a foreign national, Sections 5 and 6 of the Norwegian Penal Code set out certain requirements that need to be met before investigations and prosecutions can take place.<sup>96</sup> Section 5 of the Penal Code requires some link between the perpetrator and Norway (see below under [Presence/Domicile of Suspect](#)).

Section 6 of the Penal Code does not explicitly mention the need for a link to Norway. However, some practitioners are of the view that in practice, crimes falling under Section 6 of the Penal Code will only be investigated and prosecuted in practice if there is a link to Norway similar to those listed in Section 5 of the Penal Code.<sup>97</sup> There is no jurisprudence on this question at the time of writing.

Any investigation and prosecution of crimes committed abroad by foreigners requires a finding that it is in the public interest (see below under [Prosecutorial Discretion](#)).<sup>98</sup>

## 1. Presence/domicile of suspects

### 1.1. Genocide, crimes against humanity, war crimes

Genocide, crimes against humanity and war crimes are explicitly listed in Section 5, first paragraph, Number 1, of the Penal Code and can therefore be prosecuted when committed abroad. However, the exercise of universal jurisdiction for foreign perpetrators<sup>99</sup> requires additional conditions with regard to the perpetrator's or victim's link to Norway. These requirements are:

- (1) The alleged perpetrator is **domiciled in Norway** (Section 5, first paragraph, lit. b, Penal Code); or
- (2) The alleged perpetrator is a national of or domiciled in another Nordic country and is **present in Norway** (Section 5, second paragraph, lit. b, Penal Code); or
- (3) The alleged perpetrator is **present in Norway** (Section 5, third paragraph, Penal Code).

Where the alleged foreign perpetrator is neither domiciled nor present in Norway, s/he can only be investigated and prosecuted if the victim is a Norwegian national or

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<sup>95</sup> Penal Code Section 93, first paragraph.

<sup>96</sup> According to Penal Code Section 5, first paragraph, Number a and fifth paragraph of the Penal Code, Norway has jurisdiction when international crimes are committed by a Norwegian national or against a Norwegian national.

<sup>97</sup> Interview with police prosecutor on 29 November 2011.

<sup>98</sup> Penal Code Section 5, seventh paragraph and 6, second paragraph.

<sup>99</sup> According to Penal Code Section 5, first paragraph, Number a Penal Code, nationals of Norway can be prosecuted for international crimes without any further requirements (active personality jurisdiction).

domiciled in Norway (Section 5, fifth paragraph, Penal Code), which is referred to as passive personality jurisdiction.

### **1.1.1. Domiciled in Norway**

Domicile under Section 5, first paragraph, lit. b, of the Penal Code means that the alleged perpetrator has stayed in Norway for a certain duration of time, normally not less than one year.<sup>100</sup> In practice, this requires the identification of an address where the alleged perpetrator lives.<sup>101</sup> Where a person has been in Norway for less than a year but has already been granted a formal residence permit according to the applicable immigration laws, this person is also considered to be domiciled.<sup>102</sup>

The alleged perpetrator has to be domiciled in Norway at the time an investigation is opened (see below under [Initiation of Investigations](#)).<sup>103</sup> Section 5, second paragraph, lit. a, of the Penal Code makes it clear that universal jurisdiction can be invoked if the alleged perpetrator has become domiciled in Norway after the crime was committed abroad. Norway retains jurisdiction even if the alleged perpetrator leaves Norway after an investigation is opened.<sup>104</sup> The absence of that person, however, could lead to practical obstacles in ensuring his/her arrest or extradition, so the authorities might consider ceding prosecution to the country s/he moves to.<sup>105</sup>

### **1.1.2. Presence in Norway**

Both Section 5, second paragraph, lit. b, and Section 5, third paragraph, of the Penal Code require that if an alleged perpetrator is not domiciled in Norway, s/he is present in Norway. This applies to people who have no connection to Norway but are only visiting, for instance, for vacation or business, or who are applying for asylum.<sup>106</sup>

The alleged perpetrator has to be present in Norway when investigations are opened.<sup>107</sup> As noted above (see above [Domiciled in Norway](#)), if s/he leaves Norway afterwards, Norway retains jurisdiction but a practical assessment will be made as to where the person should be prosecuted.<sup>108</sup>

In addition to presence, Section 5, third paragraph, of the Penal Code requires that the maximum penalty for the alleged crime must be more than one year. For genocide, crimes

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<sup>100</sup> Preparatory Documents 2004, Chapter 30.1, p. 402.

<sup>101</sup> Interview with a staff person of an NGO on 2 July 2019.

<sup>102</sup> Preparatory Documents 2004, Chapter 30.1, p. 402.

<sup>103</sup> Preparatory Documents 2004, Chapter 30.1, p. 403.

<sup>104</sup> Preparatory Documents 2004, Chapter 30.1, p. 403; interview with police prosecutor on 29 November 2019.

<sup>105</sup> Preparatory Documents 2004, Chapter 30.1, p. 403.

<sup>106</sup> Preparatory Documents 2004, Chapter 30.1, p. 403.

<sup>107</sup> Preparatory Documents 2004, Chapter 30.1, p. 404.

<sup>108</sup> Preparatory Documents 2004, Chapter 30.1, p. 404; interview with police prosecutor on 29 November 2019.

against humanity and war crimes, which incur a maximum sentence of 10 years or more,<sup>109</sup> this requirement is always met.

### 1.1.3. Corporate liability

In cases of corporate liability (see above under [Corporate Liability](#)), Section 5, first paragraph, lit. c, of the Penal Code only allows for the prosecution of crimes committed abroad when they were committed on behalf of an enterprise registered in Norway. This provision only applies when the enterprise as such is being investigated and prosecuted.<sup>110</sup> To investigate and prosecute a foreign individual who acted on behalf of the enterprise, that person must be either domiciled (Section 5, first paragraph, lit. b, of the Penal Code) or present (Section 5, second paragraph, lit. b, and Section 5, third paragraph, of the Penal Code) in Norway.<sup>111</sup> To investigate and prosecute the enterprise as such, the whereabouts of the individual perpetrator is irrelevant.<sup>112</sup>

Registration in the sense of Section 5, first paragraph, lit. c, of the Penal Code means entry in the business register of Norway, which requires that the head office is located in Norway.<sup>113</sup> The enterprise has to be registered in Norway at the time of the opening of investigations.<sup>114</sup> Section 5, second paragraph, lit. c, of the Penal Code states that enterprises which were foreign at the time the crime was committed, but later transfer their entire operation to an enterprise in Norway, will be considered an enterprise registered in Norway. The test for the transfer of its entire operation asks whether there is so much of the business left in the home country that prosecution there is a realistic alternative.<sup>115</sup>

## 1.2. Torture, enforced disappearance

As set out above, it is unclear at the time of writing which legal regime governs universal jurisdiction over torture and enforced disappearance as stand-alone crimes (see above under [Torture](#) and [Enforced Disappearance](#)).

If torture and enforced disappearance are also punishable under the law of the country in which they were committed, Section 5, first paragraph, Number 1, of the Penal Code would allow universal jurisdiction. This would mean that the same requirements for foreign perpetrators as for genocide, crimes against humanity and war crimes would apply, namely, the alleged perpetrator would need to be domiciled (Section 5, first paragraph, lit. b of the Penal Code) or present (Section 5, third paragraph, of the Penal Code) in Norway.

If these crimes are considered to fall under Section 5, fifth paragraph, of the Penal Code, an alleged perpetrator of foreign nationality can be prosecuted if the crimes were directed

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<sup>109</sup> Penal Code Section 101, second paragraph, Section 102, second paragraph, Section 103, fourth paragraph, Section 104, second paragraph, Section 105, second paragraph, Section 106, second paragraph, Section 107, second paragraph.

<sup>110</sup> Preparatory Documents 2004, Chapter 30.1, p. 402 and 403.

<sup>111</sup> Preparatory Documents 2004, Chapter 30.1, p. 403.

<sup>112</sup> Interview with public prosecutor on 2 July 2019.

<sup>113</sup> Preparatory Documents 2004, Chapter 30.1, p. 402.

<sup>114</sup> Preparatory Documents 2004, Chapter 30.1, p. 403.

<sup>115</sup> Preparatory Documents 2004, Chapter 30.1, p. 403.

against a Norwegian national or a foreign national domiciled in Norway (passive personality jurisdiction). Under this provision, the domicile or presence of the alleged perpetrator in Norway would be irrelevant.

As set out above, the argument could be made that torture and enforced disappearance fall under Section 6 of the Penal Code due to the international obligations imposed by the CAT and the CED. In this case, no additional requirements as to the location of the alleged perpetrators would apply, since Section 6 of the Penal Code does not impose any additional conditions other than that the investigation and prosecution has to be in the public interest.

### **1.3. Conspiracy, incitement, responsibility of superiors**

As set out above, it is unclear at the time of writing which legal regime governs universal jurisdiction over conspiracy, incitement and breach of superior responsibility (see above under [Conspiracy and Incitement](#) and [Responsibility of Superiors](#)).

If the country in which these crimes are committed has also criminalized these crimes, Section 5, first paragraph, Number 1, of the Penal Code would allow universal jurisdiction to be exercised. The requirements of domicile (Section 5, first paragraph, lit. b, of the Penal Code) or presence (Section 5, third paragraph, Penal Code) in Norway would apply.

If these crimes are considered to fall under Section 5, fifth paragraph, of the Penal Code, an alleged perpetrator of foreign nationality can be prosecuted if they are directed against a victim who is a Norwegian national or a foreign national domiciled in Norway, and the domicile or presence of the alleged perpetrator in Norway would be irrelevant.

## **2. Prosecutorial discretion**

According to Section 5, seventh paragraph, and Section 6, second paragraph, of the Penal Code, a precondition for invoking universal jurisdiction for any crime is that the prosecution of the case is in the public interest. This means that the prosecution has broad discretion whether to prosecute these crimes or not when they are committed abroad.<sup>116</sup>

In considering whether prosecution is in the public interest, the following criteria are relevant:<sup>117</sup>

- Seriousness of the act;
- Any connections of the crime, perpetrator and victim(s) to Norway;
- Extent of effect on Norwegian interests;
- Jurisdiction of other countries with well-functioning justice systems, in particular, countries neighboring Norway;
- Possibility of extraditing alleged perpetrator to such countries.

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<sup>116</sup> Preparatory Documents 2004, Chapter 30.1, p. 404.

<sup>117</sup> Preparatory Documents 2004, Chapter 30.1, p. 404.

In practice, the prospect of achieving a conviction is the essential criteria which has presented the main challenge to prosecuting universal jurisdiction crimes.<sup>118</sup>

According to Section 65 of the Criminal Procedure Act (CPA), the decision whether or not to prosecute crimes subject to universal jurisdiction is made by the Director of Public Prosecutions (DPP).<sup>119</sup> According to Sections 59a(1) and (2) of the CPA, a decision by the prosecutor not to prosecute can be challenged to the immediately superior prosecuting authority by persons with a legal interest, unless the decision is made by the DPP. Since the prosecution of crimes subject to universal jurisdiction is decided by the DPP, the decision can therefore not be challenged.<sup>120</sup>

### 3. Political approval

There is no requirement that a political body approves the opening of investigations or the prosecution of crimes subject to universal jurisdiction, as the prosecuting authorities are independent.<sup>121</sup>

### 4. Subsidiarity

Investigations or prosecutions underway in another country or before the International Criminal Court against the same alleged perpetrator do not prevent the Norwegian authorities from investigating or prosecuting.<sup>122</sup> A decision will be made on a case-by-case basis as to whether or not the proceedings should take place in Norway or elsewhere, based on discussions with the other jurisdiction.<sup>123</sup>

### 5. Double criminality

Genocide, crimes against humanity and war crimes are explicitly listed as crimes subject to universal jurisdiction in Section 5, first paragraph, Number 2, of the Penal Code, whereas Section 5, first paragraph, Number 1, of the Penal Code covers crimes that are criminalized in the country in which they were committed and thereby require double criminality. This separation of the two provisions make it clear that double criminality is not required for genocide, crimes against humanity and war crimes.<sup>124</sup>

Moreover, according to Section 5, sixth paragraph, of the Penal Code, any penalty imposed by Norwegian courts may not exceed the maximum statutory penalty for a corresponding act in the country in which it has been committed.

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<sup>118</sup> Interview with public prosecutor on 2 July 2019.

<sup>119</sup> *Lov om rettergangsmåten i straffesaker* (unofficial translation: The Criminal Procedure Act), ISBN 82-504-1306-7, 1 January 1986, last amended on 1 July 2019 (hereinafter **CPA**), available at: <https://lovdata.no/dokument/NL/lov/1981-05-22-25>.

<sup>120</sup> Interview with public prosecutor on 2 July 2019.

<sup>121</sup> Section 55 CPA; interview with police prosecutor on 29 November 2019.

<sup>122</sup> Interview with police prosecutor on 29 November 2019.

<sup>123</sup> *Ibid.*

<sup>124</sup> Preparatory Documents 2004, Chapter 30.1, p. 402.



For torture and enforced disappearance as stand-alone crimes as well as conspiracy, incitement and breach of superior responsibility, double criminality would be a requirement for universal jurisdiction to be exercised in Norway according to Section 5, first paragraph, Number 1, of the Penal Code. If the relevant crimes are covered by other provisions in Section 5 or 6 of the Penal Code (see above under [Crimes that Invoke Universal Jurisdiction](#)), double criminality would not be required.

## 6. Pending extradition

Where another country has requested extradition of a suspect, the court will decide whether the legal requirements for an extradition are met, and if so, the Ministry of Justice will decide whether to extradite or not.<sup>125</sup> Pending extraditions do not per se block investigations and prosecutions in Norway, but a case-by-case decision will be made as to whether to proceed in Norway or extradite the person.<sup>126</sup>

## Key steps in criminal proceedings

### 1. Investigation Stage

At the time of writing, the number of cases under investigation is confidential, but all on-going investigations are believed to deal with past conflicts such as Rwanda, rather than currently active conflicts.<sup>127</sup>

#### 1.1. Initiation of investigations

The prosecuting authority in Norway consists of three levels. The first level is prosecutors who are embedded with the police (referred to as police prosecutors) and who lead investigations. The second level is public prosecutors who prosecute the case at trial. The third level is the DPP, who leads the prosecuting authority.<sup>128</sup>

Pursuant to Section 224(1) of the CPA, a criminal investigation shall be carried out when as a result of a report or other circumstances, there are “reasonable grounds” (unofficial translation) to inquire whether any criminal matter requiring prosecution by the public authorities subsists.

A report in the sense of this provision can be made by anyone, either in writing or orally, to the police or the prosecuting authority.<sup>129</sup> This can include victims and non-governmental organizations (NGOs). The police will take steps to verify the information

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<sup>125</sup> Interview with police prosecutor on 29 November 2019.

<sup>126</sup> Ibid.

<sup>127</sup> Interview with public prosecutor on 2 July 2019.

<sup>128</sup> Government of Norway, The Prosecution Authority in Norway – An overview of the organization of the prosecution and connection with the police authority, available at: [https://nettsteder.regjeringen.no/norlam/files/2017/07/574150\\_en\\_jogeir\\_prosecut.pdf](https://nettsteder.regjeringen.no/norlam/files/2017/07/574150_en_jogeir_prosecut.pdf), last accessed on 14 August 2019, p. 1.

<sup>129</sup> Section 223 CPA.

presented.<sup>130</sup> Victims have the right to participate during the investigations and trial as aggrieved persons (see below under [Victim Rights and Participation](#)).

Information on alleged crimes can come from many different sources, including news articles.<sup>131</sup> The police can also receive information from the Norwegian Directorate of Immigration which routinely informs the police when asylum applications are rejected based on Article 1F of the Convention and Protocol Relating to the Status of Refugees (1951), where there are serious reasons to believe that the applicant has committed war crimes, crimes against humanity or serious non-political crimes.<sup>132</sup>

Under Sections 225(1) and (2) of the CPA, criminal investigations are opened by the police, but the DPP and public prosecutors concerned may order an investigation to be initiated. In practice, so far as crimes attracting universal jurisdiction are concerned, the Head of the National Criminal Investigation Service (KRIPOS) decides whether or not an investigation will be opened, after considering a recommendation from police prosecutors.<sup>133</sup> KRIPOS is the specialized unit within the National Police Directorate in charge of organized and serious crimes, including international crimes.<sup>134</sup> The Section on International Crimes within KRIPOS is staffed by 11 police officers, including the Head of the Section, and two police prosecutors are supporting the Section.<sup>135</sup>

According to Section 224(1) of the CPA, investigations must be carried out when there are “reasonable grounds” (unofficial translation)<sup>136</sup> to inquire whether any criminal matter requiring prosecution by the public authorities persists. This is a low evidentiary threshold.<sup>137</sup> In practice, additional factors are considered when deciding whether or not to open an investigation in relation to a crime committed in another country, including the type of crime, its severity, the location where it was committed, access to evidence, the investigative steps that would be necessary to obtain more evidence, access to the territory, possible cooperation by other states, the security situation in that country, location of witnesses, etc.<sup>138</sup>

These factors are considered in a preliminary assessment carried out before the decision whether or not to investigate is made.<sup>139</sup> In practice it is considered necessary, in light of

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<sup>130</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>131</sup> Interview with police prosecutor on 29 November 2019.

<sup>132</sup> Stabell & Co, Exclusion from Refugee Status – Rules and practices in Norway, Canada, Great Britain, The Netherlands and Denmark – A comparative Study, Commissioned by the Norwegian Directorate of Immigration (UDI), 2013, available at: [https://www.udi.no/globalassets/global/forskning-fou\\_i/beskyttelse/exclusion-from-refugee-status.pdf](https://www.udi.no/globalassets/global/forskning-fou_i/beskyttelse/exclusion-from-refugee-status.pdf), p. 99.

<sup>133</sup> Interview with public prosecutor on 2 July 2019.

<sup>134</sup> Government of Norway, The Prosecution Authority in Norway – An overview of the organization of the prosecution and connection with the police authority, available at: [https://nettsteder.regjeringen.no/norlam/files/2017/07/574150\\_en\\_iogeir\\_prosecut.pdf](https://nettsteder.regjeringen.no/norlam/files/2017/07/574150_en_iogeir_prosecut.pdf), last accessed on 14 August 2019, p. 4.

<sup>135</sup> E-mail from KRIPOS official on 17 December 2019.

<sup>136</sup> There is no translation of the CPA by the Norwegian government at the time of writing this report.

<sup>137</sup> Interview with police prosecutor on 29 November 2019.

<sup>138</sup> Ibid.

<sup>139</sup> Ibid.

limited resources, to select a case that is likely to prove to be viable at later stages.<sup>140</sup> A decision not to open an investigation cannot be challenged by victims, but if circumstances change, the KRIPOS can review its decision.<sup>141</sup>

Even without opening an investigation, KRIPOS accepts information on alleged crimes, suspects and witnesses for future use, for instance if a suspect is not domiciled or present in Norway yet but may be at a future date.<sup>142</sup>

## 1.2. Conducting investigations

Sections 226(1)(a) and (b) of the CPA stipulate that investigations serve the purpose of obtaining information going to whether an indictment should be issued, and as preparation for a trial in court to determine culpability and determine sanctions. During an investigation, evidence both against and in favor of the suspect should be pursued.<sup>143</sup>

Regarding core international crimes, KRIPOS, and more specifically, the Section for International Crimes within KRIPOS, is in charge of genocide, crimes against humanity, war crimes, and other serious crimes committed abroad by foreigners or that have an international link.<sup>144</sup> In addition to police officers, specialized police prosecutors who lead the investigations are embedded within this unit.<sup>145</sup>

Investigation measures can include visits to other countries, depending on the cooperation of the other state, crime scene examinations, open source investigations, witness and victim interviews - preferably in person or via video-link - and obtaining materials from NGOs.<sup>146</sup> Where civil society organizations are in possession of relevant information, KRIPOS will contact them but generally does not disclose how such information is used.<sup>147</sup>

The investigations must be carried out as quickly as possible, and in a way that results in no one being under unnecessary suspicion or inconvenience.<sup>148</sup> This requirement does not contain a specific time limit.

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<sup>140</sup> Ibid.

<sup>141</sup> Interview with police prosecutor on 29 November 2019.

<sup>142</sup> Interview with police prosecutor on 29 November 2019.

<sup>143</sup> Section 226(3) CPA.

<sup>144</sup> Website of the police, How the NCIS investigates international crime, available at: <https://www.politiet.no/en/om/organisasjonen/specialist-agencies/kripos/key-roles-of-ncis/international-crimes/>, last visited 14 August 2019.

<sup>145</sup> Interview with public prosecutor on 2 July 2019; see also Government of Norway, The Prosecution Authority in Norway – An overview of the organization of the prosecution and connection with the police authority, available at: [https://nettsteder.regjeringen.no/norlam/files/2017/07/574150\\_en\\_iogeir\\_prosecut.pdf](https://nettsteder.regjeringen.no/norlam/files/2017/07/574150_en_iogeir_prosecut.pdf), last accessed on 14 August 2019, p. 5.

<sup>146</sup> Interview with police prosecutor on 29 November 2019.

<sup>147</sup> Interview with a staff person of a NGO on 1 July 2019.

<sup>148</sup> Section 226(4) CPA.

### 1.3. Completion of the investigation

#### 1.3.1. Possible outcomes

Once an investigation has been completed, KRIPOS forwards cases of universal jurisdiction crimes to the National Authority for Prosecution of Organized and Other Serious Crimes (NAPO), which consists of specialized public prosecutors who handle these type of crimes.<sup>149</sup> NAPO is the specialized unit for international crimes within the Norwegian Prosecution Authority.<sup>150</sup> The NAPO public prosecutors assess the case and send a proposal to the DPP, who makes the final decision on whether or not indict a person.<sup>151</sup>

In relation to the crimes discussed in this report, the DPP may issue the following decisions:

- **Indictment (*tiltale*):** According to Section 249(1) of the CPA, an indictment is issued when the case is “sufficiently prepared” (unofficial translation). This occurs when the prosecuting authority believes that a conviction can be achieved by proving the crime beyond reasonable doubt with evidence that can be used at trial.<sup>152</sup> The charges laid out in the indictment can be withdrawn at any stage until the first instance judgment if the prosecuting authority finds that the requirements of indictment are not met.<sup>153</sup>
- **Dismissal based on prosecutorial discretion:** For crimes subject to universal jurisdiction, the DPP issues the indictment but can exercise prosecutorial discretion not to prosecute even if the evidentiary threshold for an indictment is met (see above under [Prosecutorial Discretion](#)).
- **Dismissal based on substantive or procedural grounds:** If the prosecution authorities do not have enough evidence to prove a crime or to prove who committed the crime, the case can be dismissed.<sup>154</sup> The same happens if the perpetrator is unknown or the acts are not punishable under the law.<sup>155</sup> If there

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<sup>149</sup> Interview with public prosecutor on 2 July 2019; see also Government of Norway, The Prosecution Authority in Norway – An overview of the organization of the prosecution and connection with the police authority, available at: [https://nettsteder.regjeringen.no/norlam/files/2017/07/574150\\_en\\_iogeir\\_prosecut.pdf](https://nettsteder.regjeringen.no/norlam/files/2017/07/574150_en_iogeir_prosecut.pdf), last accessed on 14 August 2019, p. 6.

<sup>150</sup> Government of Norway, The Prosecution Authority in Norway – An overview of the organization of the prosecution and connection with the police authority, available at: [https://nettsteder.regjeringen.no/norlam/files/2017/07/574150\\_en\\_iogeir\\_prosecut.pdf](https://nettsteder.regjeringen.no/norlam/files/2017/07/574150_en_iogeir_prosecut.pdf), last accessed on 14 August 2019, p. 3.

<sup>151</sup> Interview with public prosecutor on 2 July 2019; interview with police prosecutor on 29 November 2019; see also Government of Norway, The Prosecution Authority in Norway – An overview of the organization of the prosecution and connection with the police authority, available at: [https://nettsteder.regjeringen.no/norlam/files/2017/07/574150\\_en\\_iogeir\\_prosecut.pdf](https://nettsteder.regjeringen.no/norlam/files/2017/07/574150_en_iogeir_prosecut.pdf), last accessed on 14 August 2019, p. 2.

<sup>152</sup> Interview with public prosecutor on 2 July 2019.

<sup>153</sup> Section 72(1) CPA.

<sup>154</sup> Interview with police prosecutor on 29 November 2019.

<sup>155</sup> Government of Norway, The Prosecution Authority in Norway – An overview of the organization of the prosecution and connection with the police authority, available at: [https://nettsteder.regjeringen.no/norlam/files/2017/07/574150\\_en\\_iogeir\\_prosecut.pdf](https://nettsteder.regjeringen.no/norlam/files/2017/07/574150_en_iogeir_prosecut.pdf), last accessed on 14 August 2019, p. 5-6.

are procedural defects, such as a previous conviction on the same matter, the case will also be dismissed.<sup>156</sup>

### **1.3.2. Challenges by victims or NGOs**

According to Sections 59a(1) and (2) of the CPA, a decision by a prosecutor (in KRIPOS or in NAPO) to dismiss a case or waive prosecution can be challenged by persons with a legal interest to the immediately superior prosecuting authority, unless the decision is made by the DPP. Since the prosecution of crimes subject to universal jurisdiction is decided by the DPP, the decision can therefore not be challenged.<sup>157</sup>

### **1.4. Arrest warrant**

Under Norwegian law, all levels of the prosecuting authority, including police prosecutors and public prosecutors, can issue an arrest warrant pursuant to Section 175(1) of the CPA. Once arrested by the police, a person must be brought before the District Court within three days in order to remand him or her in custody upon application by the prosecuting authority.<sup>158</sup>

The grounds for an arrest warrant and remand in custody are set out in Section 171 of the CPA:

- A person who with just cause is suspected of a crime with a sentence of more than 6 months; and
- Reason to fear that s/he will evade prosecution; or
- There is imminent risk that s/he will interfere with evidence in the case; or
- It is deemed necessary to prevent him/her from committing the crime again; or
- The alleged perpetrator requests it.

For the universal jurisdiction crimes considered in this report, which carry sentences of 10 years and more, Section 172 of the CPA stipulates additional grounds. According to this provision, the suspect can be arrested or remanded in custody if:

- S/he made a confession; or
- Other circumstances strengthen the suspicion to a considerable degree; or
- It offends a general sense of justice if the person remains at liberty; or
- It creates insecurity if the person remains at liberty.

Arrest warrants can be issued at any time during the investigations, and generally, before an indictment is issued.<sup>159</sup>

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<sup>156</sup> Johs. Andenæs and Tor-Geir Myhrer, *Norsk straffeprosess* (unofficial translation: Norwegian Criminal Process), 4th edition, 2010, p. 341; see also Government of Norway, The Prosecution Authority in Norway – An overview of the organization of the prosecution and connection with the police authority, available at: [https://nettsteder.regjeringen.no/norlam/files/2017/07/574150\\_en\\_jogeir\\_prosecut.pdf](https://nettsteder.regjeringen.no/norlam/files/2017/07/574150_en_jogeir_prosecut.pdf), last accessed on 14 August 2019, p. 5-6.

<sup>157</sup> Interview with public prosecutor on 2 July 2019; interview with Norwegian lawyer on 6 September 2019.

<sup>158</sup> Section 183(1) CPA.

<sup>159</sup> Interview with public prosecutor on 2 July 2019.

### 1.5. Victims' rights and participation at the investigation stage

The Norwegian CPA does not use the term “victim” but rather the term “aggrieved person” and “injured person”.<sup>160</sup> An aggrieved person is anyone whose interests are affected by the criminal act and where those interests are protected by the relevant crime.<sup>161</sup> The term injured person is wider and includes anyone who has been indirectly injured.<sup>162</sup>

Legal entities can also be aggrieved persons if the applicable criminal offense is protecting their interest, such as the commission of a war crime against property.<sup>163</sup> In this report, the terms victims and aggrieved persons are used interchangeably.

According to Section 93a(2) of the CPA, certain relatives, including the spouse or cohabitee, children and parents, are entitled to the same rights as the aggrieved person if the direct victim is killed as a result of the crime.

Formally the aggrieved person is not party to the criminal proceedings. During the investigation stage, the aggrieved person have the following rights. They do not need to reside in Norway to be entitled to these rights.<sup>164</sup>

- **Right to information:** The police have a duty to inform victims of their rights<sup>165</sup> and of any developments in the case, unless this is unreasonable considering the investigations or other reasons.<sup>166</sup> This includes information regarding when an indictment is issued, a case is closed, or the perpetrator has been fined and agreed to pay compensation.<sup>167</sup> If the victim reported the crime s/he will also be told if a decision is made not to bring criminal charges.<sup>168</sup> In cases of universal jurisdiction crimes, however, victims cannot challenge such a decision as it is issued by the highest prosecuting authority, the DPP (see above under [Completion of Investigations](#)). In practice, the police share information with the lawyers of the victims who pass it on to their clients (see right to a lawyer below).<sup>169</sup>
- **Right to a lawyer:** Any victim can be represented by a lawyer if they are able to bear the costs.<sup>170</sup> For certain crimes, in particular sexual offences, courts can appoint a lawyer paid by the State.<sup>171</sup> In addition, according to

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<sup>160</sup> See Section 3(1) CPA; interview with Norwegian lawyer on 6 September 2019.

<sup>161</sup> Fredrik Bockman Finstad et al., Norwegian Law Commentary on Criminal Procedure Act, L22.05.1981 No. 25, 1981 (hereinafter referred to as: **Norwegian Law Commentary**), Note 16 on Section 3 CPA.

<sup>162</sup> Norwegian Law Commentary, Note 17 on Section 3 CPA.

<sup>163</sup> Interview with Norwegian lawyer on 16 December 2019.

<sup>164</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>165</sup> Section 93e(1) CPA.

<sup>166</sup> Section 93e(2) CPA.

<sup>167</sup> Website of the Police of Norway, Your rights as a victim or next of kin, available at: <https://www.politiet.no/en/rad/legal-rights-in-criminal-proceedings/victim-or-next-of-kin/>, last accessed on 15 August 2019.

<sup>168</sup> Ibid.

<sup>169</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>170</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>171</sup> Section 107a(1) CPA.

Section 107a(1) of the CPA, the court may upon application appoint counsel for the aggrieved person if there is reason to believe that as a result of the criminal act the said person incurred considerable harm to body or health and there is need for counsel. The costs of the appointed counsel are paid by the State.<sup>172</sup> In practice, the lawyer chosen by the victim will file an application to the court asking to be appointed, referencing on-going investigations or the possibility of an investigation to be opened.<sup>173</sup> In urgent cases where waiting for a court appointed counsel would be detrimental, the police can temporarily appoint counsel for a victim and seek formal appointment by the court later.<sup>174</sup> In practice, the police retains a list of possible lawyers and informs the victims about the list when they report a crime.<sup>175</sup>

The court will appoint the lawyer chosen by the aggrieved person, unless the appointment of the desired lawyer would lead to significant delays in the case or it is impossible to appoint this lawyer.<sup>176</sup> For international crimes, it is very likely that a lawyer will be appointed for victims.<sup>177</sup> Where many aggrieved persons have appointed lawyers, such as in cases of terrorist attacks, the court can appoint a small number of lead lawyers to coordinate with the other lawyers.<sup>178</sup>

A lawyer appointed to represent a victim has the duty to protect the victim's interest in connection with the investigation (see following points) and during trial (see below under [Victims' Rights at the Trial Stage](#)).<sup>179</sup> The CPA provides that counsel for a victim shall provide such additional support as is natural and reasonable to the victim.<sup>180</sup>

- **Right to a support person during interview:** When victims are interviewed by the police, they have the right to be accompanied by someone they trust.<sup>181</sup> If a lawyer has been appointed during investigations, that counsel can be present during the examination of the victim by the police, and is entitled to put further questions or object to questions that are not relevant or are asked in an improper manner.<sup>182</sup>

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<sup>172</sup> Section 107a(4) and 107d CPA.

<sup>173</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>174</sup> Section 107b(2) CPA.

<sup>175</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>176</sup> Section 107b(2) CPA.

<sup>177</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>178</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>179</sup> Section 107c(1) CPA.

<sup>180</sup> Section 107c(1) CPA.

<sup>181</sup> Website of the Police of Norway, Your rights as a victim or next of kin, available at <https://www.politiet.no/en/rad/legal-rights-in-criminal-proceedings/victim-or-next-of-kin/>, last accessed on 15 August 2019.

<sup>182</sup> Section 107c(2) and (3) CPA.

- **Right to access case file:** Victims can be permitted to access the documents in the case file if this can be done without detriment or risk to the investigations or to another person.<sup>183</sup> If they are permitted to do so, victims can access the entire case file.<sup>184</sup> In practice, lawyers representing victims access the case file and may disclose it to their clients but not to others.<sup>185</sup>
- **Right to remain silent:** Victims do not have the duty to provide information to the police.<sup>186</sup>
- **Right to suggest investigative measures:** During an investigation, counsel for a victim can present information to the police and suggest specific investigative measures, which the police can decide whether or not to pursue.<sup>187</sup> For example, if counsel for a victim is aware of a potential witness, they can gather preliminary information about this person by speaking to him or her before informing the police about the witness.<sup>188</sup>

Whether a person is considered an aggrieved person and thereby entitled to the rights listed above is determined by the court as soon as an application by that person to exercise his or her rights reaches the court, which could for instance be when an application for the appointment of a lawyer is made.<sup>189</sup>

## 2. Trial Stage

At the time of writing, there have been no trials and judgments using the current law on universal jurisdiction crimes.<sup>190</sup> Previous convictions have been based on crimes other than international crimes due to the prohibition of retroactive application (see above under [Beginning of Temporal Application](#)).

### 1.1. Possible outcomes

The courts with competence to deal with criminal trials at first instance are the District Courts.<sup>191</sup> As regards alleged crimes that were committed abroad, the District Court of the place where the charged person is staying or residing is locally competent.<sup>192</sup> The Court of Appeal deals with appeals against the judgments of District Courts<sup>193</sup> and the

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<sup>183</sup> Section 242(1) CPA.

<sup>184</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>185</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>186</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>187</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>188</sup> *Ibid.*

<sup>189</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>190</sup> Interview with public prosecutor on 2 July 2019.

<sup>191</sup> Section 5 CPA.

<sup>192</sup> Section 11 CPA.

<sup>193</sup> Section 6 CPA.



Supreme Court is the final instance deciding on appeals against decisions of the Court of Appeal.<sup>194</sup>

The charges laid out in the indictment can be withdrawn at any stage until the first instance judgment if the prosecuting authority finds that the requirements for indictment are not met.<sup>195</sup> At the end of the trial, the District Court either convicts or acquits the accused.<sup>196</sup>

Victims cannot appeal the verdict, but can informally let the prosecutor know if they would like to see the verdict appealed.<sup>197</sup> If victims filed a civil claim during the criminal proceedings, they can appeal the decision on the civil claim either together with the appeal of the judgment or separately on its own (see below under [Reparations](#)).

## 1.2. Victims' rights and participation at the trial stage

Victims have the following rights during trial:

- **Right to information:** Victims must be informed about hearings.<sup>198</sup>
- **Right to attend trial:** Victims have the right to be present at all court hearings, including closed hearings, unless the court orders them to leave on specific grounds provided by law.<sup>199</sup>
- **Right to a lawyer:** For certain crimes, in particular sexual offences, and otherwise if there is a need, courts can appoint a lawyer who will be paid by the State and can exercise certain rights listed below.<sup>200</sup> The appointed counsel is entitled to be present at the trial hearings.<sup>201</sup> The same rules regarding appointment and duties of the counsel apply as during investigation stage (see above under [Victims' Rights and Participation at the Investigation Stage](#)).
- **Right to testify:** Victims can testify at the trial hearing either before or after the accused.<sup>202</sup> The accused can be ordered to leave the courtroom during this time, or the hearing can be closed to the public, to protect the victim.<sup>203</sup>

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<sup>194</sup> Section 7 CPA.

<sup>195</sup> Section 72(1) CPA.

<sup>196</sup> Section 30(1) CPA.

<sup>197</sup> Website of the Courts of Norway, The Offended, available at: <https://www.domstol.no/en/the-criminal-court-proceedings/who-is-involved/den-krenka/>, last accessed on 15 August 2019.

<sup>198</sup> Section 93b CPA.

<sup>199</sup> Section 93c(1) CPA.

<sup>200</sup> Section 107a(1) CPA.

<sup>201</sup> Section 107c(2) CPA.

<sup>202</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>203</sup> Ibid.

- **Right to be questioned by victim’s counsel:** During the examination of the victim at the trial hearing, the victim’s counsel has the right to ask further questions in addition to the prosecution and the defense.<sup>204</sup>
- **Right to object to questions:** During the examination of the victim at the trial hearing, the victim’s counsel is entitled to object to questions put to the victim that are not relevant or are asked in an improper manner.<sup>205</sup>
- **Right to consult counsel:** During the examination of the victim at the trial hearing, victims are entitled to consult their counsel before answering questions, with the court’s permission.<sup>206</sup>
- **Right to examine evidence:** During the trial hearing, victims can put questions to the accused, witnesses and experts through their counsel.<sup>207</sup> In practice, counsel for victims tend to coordinate with the public prosecutor and play a minor role during the examination.<sup>208</sup>
- **Right to present evidence:** Counsel for victims have the right to present evidence, such as documents, during the trial hearing; in practice this is done in coordination with the public prosecutor.<sup>209</sup>
- **Right to comment on evidence:** During the hearing, victims can comment on the evidence presented and make final comments through their counsel.<sup>210</sup> In their final comments, counsel for victims can also make submissions regarding the sentence.<sup>211</sup>
- **Right to comment on procedural issues:** Through their counsel, victims are allowed to comment on procedural issues that concern the victim.<sup>212</sup> This is usually done orally during the hearing.<sup>213</sup>
- **Right to claim compensation:** Victims have the right to make a civil claim against the alleged perpetrator (see below under [Reparations](#)).

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<sup>204</sup> Section 107c(3) CPA.

<sup>205</sup> Section 107c(3) CPA.

<sup>206</sup> Section 107c(3) CPA.

<sup>207</sup> Interview with Norwegian lawyer on 6 September 2019; website of the Courts of Norway, Counsel for the injured party, available at: <https://www.domstol.no/en/the-criminal-court-proceedings/who-is-involved/counsel-for-the-injured-party/>, last accessed on 15 August 2019.

<sup>208</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>209</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>210</sup> Website of the Courts of Norway, Counsel for the injured party, available at: <https://www.domstol.no/en/the-criminal-court-proceedings/who-is-involved/counsel-for-the-injured-party/>, last accessed on 15 August 2019.

<sup>211</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>212</sup> Section 107c(4) CPA.

<sup>213</sup> Interview with Norwegian lawyer on 6 September 2019.

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- **Right to court records:** Victims have the right to obtain copies of the court records after the conclusion of the case.<sup>214</sup>

Victims can be called as witnesses to testify at trial.<sup>215</sup> If they are entitled to a lawyer, their testimony will be heard before the accused's testimony.<sup>216</sup>

### 3. Private prosecution

Generally, the prosecution of crimes falls within the domain of the prosecuting authorities.<sup>217</sup> Exceptionally, aggrieved persons may initiate or take over prosecution themselves through a private prosecution.<sup>218</sup> This is only possible where the prosecuting authority refuses to pursue the case or waives prosecution.<sup>219</sup> In theory, this also applies to crimes attracting universal jurisdiction, but to date private prosecution has not been used in relation to such crimes.<sup>220</sup>

A private prosecution can be initiated by an application to the court signed by the aggrieved party or his/her attorney. Such an application must contain the same information as an indictment by the prosecuting authority, in particular the name and residence of the defendant and a description of what is alleged to have happened, with details of time and place.<sup>221</sup> The time limit for filing the private prosecution is six months from the moment the aggrieved party knows about the offence and who the defendant is.<sup>222</sup>

The court can decide to either summarily dismiss the private prosecution, or proceed to hearing evidence, including parties, witnesses and experts.<sup>223</sup> During the proceedings, the aggrieved party has the same role as the public prosecutor would have had, and the trial will proceed according to the general rules of a criminal case as far as possible.<sup>224</sup> The aggrieved party must be represented by a lawyer.<sup>225</sup>

Where the prosecuting authority decides to pursue the case itself, the aggrieved party may join the prosecution with the same rights as a private prosecutor.<sup>226</sup> Private prosecutors acting in parallel to public prosecutors have the right to make submission on

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<sup>214</sup> Section 28 CPA.

<sup>215</sup> Website of the Courts of Norway, The Offended, available at: <https://www.domstol.no/en/the-criminal-court-proceedings/who-is-involved/den-krenka/>, last accessed on 15 August 2019.

<sup>216</sup> Section 289a(1) CPA; Website of the Courts of Norway, Counsel for the injured party, available at: <https://www.domstol.no/en/the-criminal-court-proceedings/who-is-involved/counsel-for-the-injured-party/>, last accessed on 15 August 2019.

<sup>217</sup> Section 62a(1) CPA.

<sup>218</sup> See Sections 402 to 425 CPA.

<sup>219</sup> Section 402(1) No. 3 CPA; interview with Norwegian lawyer on 16 December 2019.

<sup>220</sup> Interview with Norwegian lawyer on 16 December 2019.

<sup>221</sup> Section 412(1) and 252 CPA.

<sup>222</sup> Section 403(1) CPA.

<sup>223</sup> Section 412(2), 412(3) and 417 CPA.

<sup>224</sup> Section 409(1) CPA; interview with Norwegian lawyer on 16 December 2019.

<sup>225</sup> Section 410(1) CPA.

<sup>226</sup> Section 404 CPA.

the sentence (which aggrieved persons who do not join as private prosecutors are not entitled to do -for the rights of aggrieved persons, see above under [Victims' Rights and Participation at the Trial Stage](#)).<sup>227</sup> Where the prosecuting authority decides to abandon a prosecution before the trial hearing has begun, the aggrieved party can take over prosecution as the case stands.<sup>228</sup>

A new Criminal Procedure Act has been proposed, which would abolish the private prosecution scheme altogether.<sup>229</sup> To date, this has not yet been enacted.

## Rules of evidence

### 1. At the investigation stage

#### 1.1. Necessary information for a complaint

A complaint can be submitted to the police or to the prosecution authority in writing or orally.<sup>230</sup> There are no other legal requirements as to the content or form of a complaint.<sup>231</sup>

Practitioners generally aim to include in the complaint a strong factual basis for the alleged crimes and for the individual responsibility of the alleged perpetrator.<sup>232</sup> The authorities are most interested in cases where a suspect or suspects reside in Norway.<sup>233</sup> Police prosecutors recommend that a complaint contains a description of the crime, information about the suspect, potential evidence and its location, and suggestions for investigative steps that can be taken by the authorities.<sup>234</sup>

#### 1.2. Necessary evidence to open an investigation

Investigations must be carried out when there are “reasonable grounds” (unofficial translation) to inquire whether any criminal matter requiring prosecution by the public authorities persists.<sup>235</sup>

#### 1.3. Necessary evidence for an indictment

When an investigation is concluded, the prosecuting authority must decide whether or not there is a legal basis for criminal liability. A decision to issue an indictment is made when the case is found to be “sufficiently prepared” (unofficial translation) for this

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<sup>227</sup> Interview with Norwegian lawyer on 16 December 2019.

<sup>228</sup> Section 406(1) and (3) CPA.

<sup>229</sup> CPC Proposal, Chapter 3.3.12, p. 113.

<sup>230</sup> Section 223(1) and (2) CPA.

<sup>231</sup> Interview with police prosecutor on 29 November 2019.

<sup>232</sup> Interview with a staff person of an NGO on 1 July 2019.

<sup>233</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>234</sup> Interview with police prosecutor on 29 November 2019.

<sup>235</sup> Section 224(1) CPA.

purpose.<sup>236</sup> This is the case if the prosecuting authority is convinced that they can prove the accused's guilt beyond reasonable doubt.<sup>237</sup>

The indictment shall be signed and dated, and it shall contain:<sup>238</sup>

- The competent court;
- The name and place of residence of the person indicted;
- A reference to the penal provisions that are considered applicable, with the provisions most likely to be significant for the case quoted; and
- A short description, as accurate as possible, of the matter to which the indictment relates, with details of the time and place.

## 2. At the trial stage

### 2.1. Admissibility of evidence

#### 2.1.1. General principles

The general rule is that a criminal case can be established by any means of proof, subject to limitations on the admissibility of evidence as set out in the law.<sup>239</sup> This principle of freedom of evidence is not regulated in the CPA itself.<sup>240</sup>

According to Section 292(2) of the CPA, evidence is not admissible if it:

- a) Relates to matters that are of no significance for the judgment;
- b) Relates to matters that have already been proven; and
- c) Obviously has no probative value.

There are also certain rules, provided under the CPA and through jurisprudence, that prohibit certain evidence from being presented in criminal trials in order to protect important interests.<sup>241</sup> For example, Section 119 of the CPA prohibits evidence being presented through the testimony of certain professions, such as lawyers and doctors, in order to protect these type of relations.<sup>242</sup> A full discussion of the exclusionary rules, other than those related to unlawfully obtained materials (see below), are beyond the scope of this report.

#### 2.1.2. Unlawfully obtained materials

Certain actions by the authorities require a warrant, notably the obtaining of evidence through the use of hidden surveillance cameras<sup>243</sup> and searches of a person's residence.<sup>244</sup>

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<sup>236</sup> Section 249 CPA.

<sup>237</sup> Interview with public prosecutor on 2 July 2019.

<sup>238</sup> Section 252 CPA.

<sup>239</sup> Supreme Court of Norway, Case No. 136B/1990 and 143/1990, Rt-1990-1008, 26 October 1990, p. 1010.

<sup>240</sup> CPC Proposal, Chapter 13.2.3., p. 257.

<sup>241</sup> CPC Proposal, Chapter 13.3.1., p. 265-266.

<sup>242</sup> Ibid.

<sup>243</sup> Section 202a CPA.

<sup>244</sup> Section 192 CPA.

However, if measures such as these are taken without meeting the requirements required by law, they are not automatically inadmissible as evidence.<sup>245</sup>

Rather, according to the Supreme Court, the courts must assess whether the presentation of the evidence in court would represent a repetition or continuation of the violation that was committed when the material was obtained. Where that is not the case, the right that was infringed upon must be considered, with particular regard to the seriousness of the violation, the importance of the case, and the evidentiary value of the material.<sup>246</sup> The court will generally be more likely to admit evidence to the defendant's advantage than to the defendant's disadvantage.<sup>247</sup>

Where evidence is obtained unlawfully by non-state actors, it can be used as evidence if sufficient information is presented about how it was discovered, who discovered it, and the chain of custody.<sup>248</sup> The main question considered will be the value of such evidence, which also depends on what other evidence is available and which fact at issue this piece of evidence is intended to prove (for instance, whether it is only a marginal factual allegation or a major one).<sup>249</sup>

### **2.1.3. Open source materials**

According to the principle of freedom of evidence, open source materials, including social media content, can be used as evidence at trial.<sup>250</sup> The court can freely decide on the probative value of such evidence.<sup>251</sup> To increase its probative value, it is necessary to show the authenticity of such materials by producing information regarding who captured it, who up-loaded it and where it was captured.<sup>252</sup> To what extent the authenticity of open source materials needs to be demonstrated will depend on the extent to which the defendant challenges it (for instance, whether the defense claims it to be fake or denies that the person shown in the materials is him/her).<sup>253</sup>

## **2.2. Introduction of evidence**

As to how (admissible) evidence is introduced at trial, the 'best evidence' rule dictates that generally, the court should examine the evidence directly by listening to testimonies of defendants, witnesses and experts, or viewing documents and other pieces of evidence.<sup>254</sup> There are, however, exceptions to the 'best evidence' rule in the CPA, for instance it is possible to read out prior recorded testimonies of the accused instead of live

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<sup>245</sup> CPC Proposal, Chapter 13.3.4.4., p. 271.

<sup>246</sup> Supreme Court of Norway, Case No. 30/1999, Rt-1999-1269, 7 September 1999, p. 1272.

<sup>247</sup> CPC Proposal, Chapter 13.3.7., p. 276.

<sup>248</sup> Interview with police prosecutor on 29 November 2019.

<sup>249</sup> Ibid.

<sup>250</sup> Interview with police prosecutor on 29 November 2019.

<sup>251</sup> Ibid.

<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> CPC Proposal, Chapter 5.3.4., p. 137.

testimony if there are contradictions (Section 290 CPA). A wider discussion of the exceptions to the ‘best evidence’ principle goes beyond the scope of this report.

Evidence is introduced by the prosecuting authority and the defense, while the court’s task is to ensure that the evidence is presented in a manner permitted by law, and to intervene if the parties’ evidence is insufficient to prove the case.<sup>255</sup> Through their counsel, victims have the right to present evidence which, in practice, is done in coordination with the public prosecutor.<sup>256</sup> If the victim has made an application for a civil claim (see below under [Reparations](#)), s/he must provide evidence relating to the basis and size of the claim (Section 427(1) of the CPA).

As regards the introduction of new evidence at trial, pursuant to Section 294 of the CPA, the court can decide to receive new evidence and adjourn the hearing. This is very common in longer trials.<sup>257</sup>

## Witness and victim protection

### 1. In-court protection

People summoned to testify as witnesses are compelled to appear and to give evidence before the court.<sup>258</sup> In principle, the defendant has a right and an obligation to be present during the giving of testimony.<sup>259</sup> However, there are a number of rules that allow for protection measures inside the courtroom during trial, including the following (which is not a comprehensive list).

#### 1.1. Accused or others leaving the court

The court can decide that an accused, or other individual, shall leave the courtroom while another accused or witness is questioned, if there is a particular reason to fear that the accused or the witness would not otherwise speak freely, or if an anonymous witness (see below) is to be heard.<sup>260</sup> The court can make the same order when the victims, next of kin or a witness who is a minor are questioned, if there are special reasons.<sup>261</sup>

#### 1.2. Anonymous testimony

At the request of the public prosecutor, the court can decide to allow anonymous testimony and base its conviction on such testimony.<sup>262</sup> This can be done during trials of certain serious crimes, including genocide, crimes against humanity, war crimes and

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<sup>255</sup> See Section 278 CPA.

<sup>256</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>257</sup> Interview with Norwegian lawyer on 16 December 2019.

<sup>258</sup> Section 109(1) CPA.

<sup>259</sup> Section 280 CPA.

<sup>260</sup> Section 284(1) CPA.

<sup>261</sup> Section 284(1) CPA.

<sup>262</sup> Section 130a CPA; interview with Norwegian lawyer on 16 December 2019.

other crimes set out in Chapter 16 of the Penal Code, as well as torture under Section 174 and 175 of the Penal Code.<sup>263</sup>

A court may decide to order anonymous testimony under the following circumstances: there is a risk of a serious crime against the life, health or freedom of the witness or certain relatives; or the ability of the witness to conduct undercover investigations in future will be hampered.<sup>264</sup> Furthermore, anonymous testimony must be shown to be strictly necessary, and not pose a significant concern for the accused's defense.<sup>265</sup>

When the court orders anonymous testimony, it can order that the witness's identity is not revealed, or that technical measures are set up to protect the witness's identity.<sup>266</sup> As a consequence of such an order, the witness's identity is protected vis-a-vis the public, but generally not vis-a-vis judges, prosecutors, defendants and their lawyers, and counsel for victims, who are given access to this information.<sup>267</sup> However, the court can decide to limit the circle of people to whom a witness's identity is disclosed further by excluding lay judges, counsel for victims or defense lawyers from receiving this information.<sup>268</sup> In other words, the court can order either partially or fully anonymous testimony.<sup>269</sup>

In practice, the giving of fully anonymous testimony, where not even defense lawyers are permitted to know the witness's identity, are only ordered for reasons of national security and for the protection of police sources.<sup>270</sup>

### 1.3. Closed court

The court may rule that its sessions are closed to the public.<sup>271</sup> This may be ordered, for example, where required to protect privacy, where public disclosure will be detrimental to the case, where an accused is under the age of 18, where an accused or a witness makes a request with good reason, or where a witness is testifying anonymously.<sup>272</sup>

### 1.4. Testimony given remotely

During a trial, a witness may appear and be questioned remotely via video- or audio-link, if geographical restrictions or special circumstances make this desirable.<sup>273</sup> Testifying remotely will not be permitted if the testimony is particularly important, unless there is

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<sup>263</sup> Section 130a(1) CPA.

<sup>264</sup> Section 130a(1) CPA.

<sup>265</sup> Section 130a(2) CPA.

<sup>266</sup> Section 130a(3) CPA.

<sup>267</sup> Section 130a(4) CPA.

<sup>268</sup> Section 130a(4) CPA.

<sup>269</sup> Interview with Norwegian lawyer on 16 December 2019.

<sup>270</sup> Interview with Norwegian lawyer on 16 December 2019.

<sup>271</sup> *Lov om domstolene (domstolloven)* (unofficial translation: Act on the Courts, ISBN 82-502-1023-8, 1 July 1997, available at: <https://lovdata.no/dokument/NL/lov/1915-08-13-5> (hereinafter: **Courts Code**), Section 125.

<sup>272</sup> Section 125(1) lit. b, c, d,e Courts Code.

<sup>273</sup> Section 109a(1) CPA.



concern that the witness would not otherwise be in a position to speak freely or it is in the interests of a witness who is a minor.<sup>274</sup>

## 2. Protection outside the court

The protection of witnesses and of certain victims outside the courtroom falls within the responsibility of the National Police Directorate, which has developed national guidelines for witness protection.<sup>275</sup> Witnesses, their immediate family members and victims of domestic violence are entitled to protection measures at all stages of the criminal proceedings.<sup>276</sup> Victims of universal jurisdiction crimes discussed in this report who are not called as witnesses do not fall under this category.<sup>277</sup> The police and prosecuting authority must assess the potential for threats and reprisals that the person may be exposed to.<sup>278</sup>

Protection measures can consist of any practical or legal measures, or a combination thereof, which can reduce or eliminate the threat.<sup>279</sup> In addition, the National Police Directorate runs a witness protection program, which can provide relocation and change of identity in cases where the most serious threats arise.<sup>280</sup> The District Police can request that a person be placed in the witness protection program if other protection measures are insufficient.<sup>281</sup>

## Reparation for victims in criminal proceedings

Any civil claim that the aggrieved person has against the charged person may be pursued in connection with the criminal case, provided that the said claim arises from the same act that the criminal case is concerned with.<sup>282</sup> Civil claims can consist of financial compensation for economic losses, such as medical expenses, loss of income and moral compensation for the suffering resulting from the crime.<sup>283</sup> They can also include other non-monetary measures, such as restoration of property.<sup>284</sup>

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<sup>274</sup> Section 109a(1) CPA.

<sup>275</sup> National Police Directorate, National Guidelines for Witness Protection, Circular RPOD-2003-13, 23 May 2015 (hereinafter: **Witness Protection Guidelines**).

<sup>276</sup> Witness Protection Guidelines, p. 4.

<sup>277</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>278</sup> Witness Protection Guidelines, p. 7.

<sup>279</sup> Witness Protection Guidelines, p. 8.

<sup>280</sup> Witness Protection Guidelines, p. 8-9.

<sup>281</sup> Witness Protection Guidelines, p. 9.

<sup>282</sup> Section 3(1) CPA.

<sup>283</sup> Interview with Norwegian lawyer on 6 September 2019

<sup>284</sup> Norwegian Law Commentary, Note 15 on Section 3 CPA.

The claim can be submitted to the court through the prosecuting authority or, where a lawyer was appointed for the victim (see above under [Victims' Rights at the Trial Stage](#)), through this counsel, or directly by the victim at the trial hearing.<sup>285</sup> A private prosecutor can also present such a claim.<sup>286</sup> The victim must provide detailed information and evidence regarding the basis for and the size of the claim.<sup>287</sup>

The court can reject the claim if:

- it is manifestly unjustified,<sup>288</sup> or
- would cause disproportionate inconvenience for the hearing of the criminal case,<sup>289</sup> or
- if the claim is better pursued in civil proceedings.<sup>290</sup>

In rare cases, compensation claims have been awarded despite the fact that the accused was acquitted, because of the different evidentiary thresholds for a civil claim and a conviction.<sup>291</sup>

If the judgement is appealed, the victim may also demand a re-examination of the civil claim during the appeal proceedings.<sup>292</sup> Such a request has to be filed together with the appeal.<sup>293</sup> The prosecuting authority has the duty to inform victims and their appointed counsel of the appeal and of its content.<sup>294</sup> The decision on the civil claim can be appealed to the civil courts, separately from the judgment in the criminal case.<sup>295</sup>

In the case against *Mirsad Repak*, a member of the paramilitary Croatian Defense Forces who was accused of detaining, interrogating and torturing civilian Serbs in Bosnia Herzegovina in 1992, the accused was convicted of the crimes of illegal deprivation of liberty and detention of civilians outside the list of international crimes contained in Chapter 16 of the Penal Code.<sup>296</sup> In the first instance judgment, the District Court

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<sup>285</sup> Section 427(1) and (2), 428 CPA.

<sup>286</sup> Section 429 CPA.

<sup>287</sup> Section 427(1) CPA.

<sup>288</sup> Section 427(2) CPA.

<sup>289</sup> Section 427(2) CPA.

<sup>290</sup> Section 428(4) CPA.

<sup>291</sup> Interview with Norwegian lawyer on 6 September 2019.

<sup>292</sup> Section 434(1) CPA.

<sup>293</sup> Section 434(3) CPA.

<sup>294</sup> Section 434(4) CPA.

<sup>295</sup> Section 435 CPA; interview with Norwegian lawyer on 6 September 2019

<sup>296</sup> Supreme Court of Norway, Public Prosecuting Authority v. *Mirsad Repak*, HR-201-2057-P, 12 March 2010; see summary of the case by TRIAL International at <https://trialinternational.org/latest-post/mirsad-repak/>. This case falls under active personality jurisdiction rather than universal jurisdiction as understood in this report. However, in the absence of judgments in cases of universal jurisdiction, this case serves as an example for court-ordered compensation.

awarded compensation of between approximately 4,500 USD and 11,000 USD to a total of eight victims.<sup>297</sup>

## Immunities

According to Section 4 of the CPA and Section 2 of the Penal Code, the rules on criminal procedure and criminal legislation are subject to limitations recognized by international law or which derive from international treaties.

Norway ratified the Vienna Convention on Diplomatic Relations (1961),<sup>298</sup> and the Vienna Convention on Consular Relations (1963).<sup>299</sup> In addition, Norway is party to the Convention on Privileges and Immunities of the United Nations (1946).<sup>300</sup> The types of immunities these treaties cover are therefore applicable in Norway. Norway is not a party to the Convention on Special Missions (1969).

In addition to treaty law on immunities, customary international law on immunities applies in Norway.<sup>301</sup> The question of existing immunities is taken into consideration during the preliminary assessment before opening an investigation.<sup>302</sup> The existence of a valid immunity would usually lead to a decision not to open an investigation.<sup>303</sup>

Immunities have not been raised in universal jurisdiction cases so far.<sup>304</sup>

## Amnesties

Formally, Norwegian authorities are not bound by amnesties issued by other countries.<sup>305</sup> If an amnesty might possibly apply to a potential suspect, KRIPOS would make an assessment before opening an investigation as part of considering the public interest requirement.<sup>306</sup>

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<sup>297</sup> Oslo District Court, Public Prosecuting Authority v. Mirsad Repak, Case No. 08-018985MED-OTIR/08, 2 December 2008, unofficial translation available at: <https://www.legal-tools.org/doc/19cd6d/pdf/>.

<sup>298</sup> See ratification by Norway in: United Nations Treaty Collection, Vienna Convention on Diplomatic Relations, available at: [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iii-3&chapter=3&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en).

<sup>299</sup> See ratification by Norway in: United Nations Treaty Collection, Vienna Convention on Consular Relations, available at: [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-6&chapter=3](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-6&chapter=3).

<sup>300</sup> See ratification by Norway in: United Nations Treaty Collection, Convention on the Privileges and Immunities of the United Nations, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-1&chapter=3&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-1&chapter=3&clang=en).

<sup>301</sup> Interview with police prosecutor on 29 November 2019.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

<sup>304</sup> Interview with police prosecutor on 29 November 2019.

<sup>305</sup> Interview with police prosecutor on 29 November 2019.

<sup>306</sup> Ibid.

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