Artykuły

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Prosecuting international crimes in Poland and Norway – a comparative perspective*

Introduction

Criminal law was, for centuries, strictly tied to the principle of State sovereignty. However, this perspective has gradually changed since the late 1990s. Indeed, we have observed a progressive internationalisation of national criminal law, alongside the rapid development of international criminal law. The latter has emerged as a distinct branch of legal research in contemporary penal science, influencing both substantive and procedural criminal law. Importantly, national criminal justice systems continue to be a matter of domestic jurisdiction[1]. In this regard, it was M. Cherif Bassiouni who aptly stated that "there is a dual track progression of international criminal justice at the international and national levels, both drawing reinforcement from one another, which in time will become truly »complementary«"[2].

The efforts of the international community to internationalise the national criminal justice systems became highly visible after the Second World War. Specifically, the establishment of the International Criminal Court (hereinafter: the ICC) in The Hague represents a clear internationalisation of the criminal justice system from both global and national perspectives[3]. As Markus

* This article is based on a research project undertaken by the author during her employment as a postdoctoral researcher ('Postdoktor') at the University of Bergen, Faculty of Law (2009–2012). It also reflects the practical expertise in international criminal law she acquired while working directly on the indictment against Slobodan Milošević at the Office of the Prosecutor of the ICTY in The Hague (2002).

1 K. Kittichaisaree, *International criminal law*, Oxford 2009, pp. 4–6.

2 M. Cherif Bassiouni, *International criminal justice in historical perspective: the tension between states' interests and the pursuit of international justice*, [in:] A. Cassese (ed.), *The Oxford companion to international criminal justice*, Oxford 2009, p. 141.

3 Ibidem. See also: Ph. Sands (ed.), *From Nuremberg to the Hague: the future of international criminal justice*, Cambridge 2003; J.B. Banach-Gutierrez, *Understanding international*

Benzing noted in his work entitled *Community Interests in the Procedure of International Courts and Tribunals*, these institutions have emerged as the most crucial guardians of community values in enforcing collective interests[4].

Despite the existence of numerous international human rights instruments, including those aimed at protecting victims of armed conflict in accordance with the principle of humanity (the Geneva and Hague Conventions) and the establishment of the ICC, we still witness serious breaches of international humanitarian law. Moreover, those responsible for such atrocities often evade accountability. Therefore, strengthening cooperation between States and international organisations is essential for more effective enforcement of international norms in judicial practice. It is impossible to forget the international crimes committed in many regions of the world, nor can we remain passive in the face of human rights violations in contemporary armed conflicts and during times of peace[5].

For example, Poland is involved in the work of the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA), while Norway has enacted specific legislation and case law when pursuing crimes committed during the Syrian Civil War. In this context, the internationalisation of national criminal justice systems become crucial, as it facilitates closer and more effective cooperation with the ICC[6].

International criminal justice and principle of complementarity

The emergence of international criminal justice is strictly associated with the developments in international criminal law. These norms are still

criminal law: notes on theoretical foundations and judicial practice, „Themis Polska Nova" 2012, No. 1(2), pp. 186–198; Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).

[4] M. Benzing, *Community interests in the procedure of international courts and tribunals*, „The Law and Practice of International Courts and Tribunals" 2006, Vol. 5, No. 3, p. 373.

[5] Y. Beigbeder, *Judging war criminals. The politics of international justice*, New York 1999; J.B. Banach-Gutierrez, *Problem odpowiedzialności jednostki za pogwałcenie norm międzynarodowego prawa wojennego*, „Opolskie Studia Administracyjno-Prawne" 2006, Vol. 23, No. 2, pp. 69–84; eadem, *Prawo do rzetelnego procesu w międzynarodowym prawie karnym*, „Studia Prawnicze KUL" 2007, Vol. 2–3(30–31), pp. 7–20; C. Ryngaert (ed.), *The effectiveness of international criminal justice*, Portland 2009; C.P.R. Romano, A. Nollkaemper, J.K. Kleffner (eds.), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford 2005; S.R. Ratner, J.S. Abrams, J.L. Bischoff, *Accountability for human rights atrocities in international law. Beyond the Nuremberg legacy*, Oxford 2009.

[6] S.A.E. Høgestøl, *A Norwegian perspective on the prosecution of international crimes*, „Scandinavian Studies in Law" 2020, Vol. 66, pp. 430–433; *International Centre for the Prosecution of the Crime of Aggression against Ukraine – ICPA*, https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine (accessed: 28.06.2026).

evolving, particularly in terms of their uniformity, owing to the lack of a comprehensive codification and inconsistent views regarding their applicability[7]. As M. Cherif Bassiouni truly argued: "The term international criminal justice is vague. What is contemporarily meant by it is the application of the principle of accountability for certain international crimes, whether before an international or national judicial body. Such body must be duly constituted and impartial, and its legal processes must be fair in accordance with international legal standards. Whether such a judicial body applies international or national laws and procedures is not a narrow legalistic question. Instead, what is crucial is whether international crimes, which have achieved the *jus cogens* status[8], are effectively criminally prosecuted irrespective of the type of legal forum before which these issues are adjudicated. (…). Whether these international crimes are charged in accordance with their international labels and elements or in accordance with any equivalent domestic crime is of lesser importance to the attainment of dual the goals of accountability and the elimination or reduction of impunity"[9].

In fact, two distinct areas of international criminal law have become increasingly visible: substantive international criminal law and procedural international criminal law. In the realm of substantive law, the principle of legality (*nullum crimen, nulla poena sine lege*) remains fundamental. Concurrently, much like national criminal justice systems, international criminal procedure must adhere to the key principles and rules governing proceedings before international and internationalised courts and tribunals, especially the legal guarantees of the rights of both the accused (e.g., the presumption of innocence) and the victims of crimes. In other words, fair trial guarantees, as commonly adopted international standards, are a necessary element of 'doing justice' from a global perspective[10].

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[7] D. Akande, *Sources of international criminal law*, [in:] A. Cassese (ed.), op. cit., pp. 41–53; E.S. Podgor, R.S. Clark, *Understanding international criminal law*, New York 2008.

[8] M.C. Bassiouni, *International crimes. Jus Cogens and Obligatio Erga Omnes*, „Law and Contemporary Problems" 1996, Vol. 59, No. 4, p. 63; idem, *The need for international accountability*, „International Criminal Law" 2008, Vol. 3, quoted after: idem, *International criminal justice in historical perspective: the tension between states interests and the pursuit of international justice*, [in:] A. Cassese (ed.), op. cit., p. 131, footnote 1. See also: K. Niewęgłowski, *The emergence of jus cogens in the Vienna Convention on the Law of Treaties*, „Zeszyty Prawnicze BAS" 2022, No. 2(74), pp. 49–65, DOI: 10.31268/ZPBAS.2022.22.

[9] M.C. Bassiouni, *International criminal…*, p. 131.

[10] D. Robinson, et al., *An introduction to international criminal law and procedure*, Cambridge 2024; G. Sluiter, et al. (eds.), *International criminal procedure: principles and rule*s, Oxford 2013, DOI: 10.1093/law/9780199658022.001.0001; W.A. Schabas, N. Bernaz (eds.), *Routledge handbook of international criminal law*, New York 2011; W.A. Schabas, *The International Criminal Court – a commentary on the Rome Statute*, series: Oxford Commentaries on International Law, Oxford 2010.

However, a critical issue in the process of pursuing international justice is that of global responsibility, namely: "Whatever individual responsibility the law establishes, it must be coupled with yet another form of responsibility – that of states and the rest of the international community. But here we mean not state responsibility in the international law sense of liability for the violations themselves, but rather in terms of a duty to achieve justice for victims through accountability of the offenders. This responsibility upon states and other relevant participants follows from moral, political and in many instances, legal considerations"[11].

To conclude, introducing international crimes into national legislation is an issue of particular interest for the proper functionality of the international criminal justice. It has gained a specific meaning in regard to the principle of complementarity enshrined in the Rome Statute of the International Criminal Court (ICC) which directly provides that the International Criminal Court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions"[12].

Generally, the ICC's complementarity principle means that the Court should be seized of a case only if the domestic criminal jurisdictions are unable or unwilling to investigate and prosecute it. This find its legal grounds in the well-known principle of international criminal law *aut dedere, aut punire*, introduced by Hugo Grotius[13]. States that have ratified the ICC Statute must possess the institutional capacity to investigate and prosecute international crimes within their domestic jurisdictions. These States must develop effective legislative measures to prosecute and adjudicate cases involving international crimes before domestic courts. Without criminalising international crimes such as genocide, crimes against humanity, or war crimes in national law, it may be impossible to bring these cases under domestic jurisdiction[14].

It is argued that without national investigations and prosecutions based on the principle of complementarity, the ICC will be overloaded with cases which, in practice, could be brought before national courts. In addition, without the engagement of national criminal justice systems, the idea expressed in the

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11 S.R. Ratner, J.S. Abrams, J.L. Bischoff, op. cit., p. 369.

12 Rome Statute, Article 1.

13 M. Bergsmo, O. Bekou, A. Jones, *Complementarity after Kampala: capacity building and the ICC's legal tools*, „Goettingen Journal of International Law" 2010, Vol. 2, No. 2, pp. 791–811; M.M. El Zeidy, *The principle of complementarity in international criminal law: origin, development and practice*, Leiden 2008.

14 M. Bergsmo, M. Harlem, N. Hayashi (eds.), *Importing core international crimes into national criminal law*, Oslo 2010, p. 3.

Preamble to the ICC Statute "to guarantee lasting respect for and the enforcement of international justice" will never be achievable[15]. Although a disconnect between international and national criminal justice persisted for a long time, these two systems are increasingly seen today as operating in tandem. This shift is largely attributed to the principle of complementarity under the ICC Rome Statute. In this sense, 'complementarity' functions as an organizing principle regulating concurrent jurisdictions under the Statute, while simultaneously evolving into a structural principle of a new system of justice. Moreover, a horizontal dimension of this principle is increasingly recognized[16].

As Luis Moreno-Ocampo observes, the Rome Statute has established a global criminal justice system for the repression of the most serious crimes of international concern. This system involves the complementary action of national authorities and the ICC, alongside the active engagement of external actors, including international organisations, development agencies, and civil society[17].

The Polish legal framework for prosecuting international crimes

The Polish Penal Code of 1997 introduced substantially revised regulations under its Special Part, specifically in Chapter XVI, entitled *Crimes against peace, humanity and war crimes* (Articles 117–126c)[18]. This approach is fully compatible with the vision of the international criminal justice system established by the ICC Statute[19]. The provisions criminalizing international crimes represent a significant innovation as an integral part of substantive criminal law, marking a crucial step towards the internationalisation of Polish criminal justice[20].

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15 Amnesty International, *International Criminal Court: Rome Statute implementation report card. Part one*, Campaign for International Justice, 2010, https://www.amnesty.org/en/documents/ior53/011/2010/en/ (accessed: 28.06.2026). Understanding the International Criminal Court, 2020, https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf (accessed: 28.06.2026).

16 C. Stahn, M.M. El Zeidy (eds.), *The International Criminal Court and complementarity: from theory to practice*, Vol. 1, Cambridge 2011, pp. 1–12.

17 L. Moreno-Ocampo, *A positive approach to complementarity: the impact of the office of the prosecutor*, [in:] C. Stahn, M.M. El Zeidy (eds.), op. cit., pp. 21–32. See also: J. Tillier, *The ICC prosecutor and positive complementarity: strengthening the rule of law?*, „International Criminal Law Review" 2013, Vol. 13, No. 3, pp. 507–591.

18 Act of 6 June 1997 – Penal Code (Journal of Laws No. 88, item 553, as amended).

19 The ICC Statute was signed by Poland on 9 April 1999 and ratified on 12 November 2001. Polish representatives actively participated in the preparatory work for the treaty, enabling the country to subsequently become a State Party.

20 Ł. Kułaga, *The implementation of international agreements in the Polish legal system: the selected aspects of practice in recent two decades*, „Polish Review of International and European Law" 2020, Vol. 9, No. 1, pp. 125–151, DOI: 10.21697/priel.2020.9.1.05.

Following the trends of the contemporary international criminal justice, the Polish legislator also introduced new provisions in Division XIII of the Code of Criminal Procedure, which governs criminal proceedings involving international elements. This division, alongside its highly specific provisions on interstate cooperation, includes a separate Chapter 66e, entitled *Cooperation with the International Criminal Court* (Articles 611g–611s)[21]. In turn, the provisions of Article 615 of the Code of Criminal Procedure regulate issues relating to the priority of international agreements and the principle of reciprocity[22].

Furthermore, pivotal provisions regarding the status of international norms in the national legal order were enshrined in the Polish Constitution of 1997[23]. Accordingly, Article 91 of the Constitution of the Republic of Poland provides that a ratified international agreement, upon its promulgation, becomes an integral part of the domestic legal order and takes precedence in the event of a conflict with statutes. Consequently, such agreements have a binding effect and prevail over statutes, provided that they are directly applicable (i.e., they contain self-executing norms that do not require further implementing legislation). Reference should also be made to Article 87(1) of the Constitution, which establishes that "the sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations"[24]. In these terms, the Polish legal system reflects a moderate monistic model, characterised by the incorporation of international law through the granting of direct applicability to ratified treaties[25].

When examining the Polish legal system, it is necessary to emphasize the significance of Article 9 of the Constitution, which declares *expressis verbis* that the Republic of Poland shall respect international law binding upon it. In this sense, it may be assumed that customary international law can be utilised as an interpretive guideline for domestic legal practitioners and the judiciary, even in a domain as sensitive as criminal law. This aspect is a logical consequence rooted in the principle of *pacta sunt servanda*[26].

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21 Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws 1997, No. 89, item 555, as amended).

22 Assembly of States Parties, *Plan of action for the ratification and full implementation of the Rome Statute: information submitted by Poland*, International Criminal Court, 2007, https://asp.icc-cpi.int/sites/asp/files/asp_docs/library/asp/plan_of_action_-poland-english-_2007.pdf (accessed: 28.05.2026).

23 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483), available at: https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm (accessed: 28.05.2026). See also: B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2012.

24 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483).

25 Ibidem.

26 K. Wójtowicz, *The position of customary international law in the Polish legal system in the light of Article 9 of the Constitution of 1997*, „Wrocław Review of Law, Administration & Economics" 2018, Vol. 8, No. 2, pp. 244–248, DOI: 10.1515/wrlae-2018-0045; M. Muszyński, *Konstytucja RP*

According to the principle of *pacta sunt servanda*, which is universally binding upon contracting parties, States have an absolute duty to observe the international instruments to which they have acceded. This fundamental maxim was famously conceptualized as the basic norm (*Grundnorm*) in the theoretical framework of the international legal order by Hans Kelsen[27]. Once an agreement is concluded, the corresponding international obligations must be fully respected and performed *bona fide* (in good faith)[28]. Consequently, Poland, as a State Party to the ICC Statute, was legally bound to introduce necessary amendments to its national legislation to ensure full compliance with the Statute's requirements. A parallel obligation to align national legal frameworks applies to all other States[29].

However, a contentious issue remains: the recognition of customary international law as a valid source of law within the Polish legal doctrine. Indeed, the domestic positivist approach, firmly rooted in a statutory law tradition, is strictly oriented towards the principle of legality (*nullum crimen sine lege*). Nevertheless, because customary law is a universally recognized source of international criminal law, its norms should theoretically also bind domestic jurisdictions[30].

Polish Soldiers in the Nangar Khel trial: a case study

The Nangar Khel trial is considered the first war crimes prosecution in the modern history of the Polish Armed Forces[31]. The Nangar Khel incident

a prawo międzynarodowe – spór o pierwszeństwo w pluralistycznym porządku prawnym, „Consilium Iuridicum" 2022, No. 1–2, pp. 34–69.

[27] Hans Kelsen argued that international law constitutes a unified normative system where primacy must be given to the international legal order. This normativist, positivist, and monist view is articulated in H. Kelsen, *Reine Rechtslehre*, Wien–Leipzig 1934 (2nd edn 1960); see also: idem, *The pure theory of law and analytical jurisprudence*, „Harvard Law Review" 1941, Vol. 55, No. 1, pp. 44–70; F. Rigaux, *Hans Kelsen on international law*, „European Journal of International Law" 1998, Vol. 9, No. 2, pp. 325–343.

[28] Its primary legal basis is found in Article 26, read in conjunction with Articles 27 and 46 of the Vienna Convention on the Law of Treaties (VCLT) (opened for signature 23 May 1969, 1155 UNTS 331, entered into force 27 January 1980). See also: J. Vervliet, *The Peace Palace Library Centennial: the collection as a mirror of the historical development of international law, 1904–2004*, The Hague 2004.

[29] See: M. Kałduński, *Zasada dobrej wiary w prawie międzynarodowym*, Warsaw 2017; L. Brodowski, *Zasada pacta sunt servanda a Konstytucja RP*, „Przegląd Prawa Konstytucyjnego" 2021, No. 5(63), pp. 471–488, DOI: 10.15804/ppk.2021.05.37.

[30] See: D. Akande, op. cit., pp. 41–53. The Preamble to the Vienna Convention on the Law of Treaties (1969) *expressis verbis* affirms that „the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention".

[31] For media coverage, see e.g., *SN utrzymał w mocy wyrok w sprawie ostrzelania afgańskiej wioski Nangar Khel*, https://polska-zbrojna.pl/home/articleshow/18524 (accessed: 25.07.2026); *Sąd utrzymał wyrok ws. Nangar Khel. Nie doszło do zbrodni wojennej*, https://www.gazetaprawna.pl/wiadomosci/artykuly/923347,wyrok-nangar-khel-zbrodnia-wojenna.html (accessed: 25.07.2026);

(also referred to by some commentators as the Nangar Khel massacre) occurred in an Afghan village on 16 August 2007, resulting in the deaths of six civilians, including women and children. Following the incident, which has been widely argued to be a tragic military mistake, Poland provided substantial assistance to the inhabitants of the village. For instance, seriously injured Afghan civilians were transported to Poland for specialized medical treatment, and the victims' families were subsequently paid financial compensation[32].

Regarding the criminal charges, the Military Prosecutor's Office in Poznań accused seven Polish soldiers from the elite 18th Airborne Assault Battalion, who were serving as part of the International Security Assistance Force (ISAF), of committing war crimes. According to the indictment, the soldiers opened fire with heavy machine guns and a 60 mm mortar targeting the village. The prosecution alleged that the accused violated both Polish military regulations and international humanitarian law (specifically the Geneva and Hague Conventions) by directing fire at a non-military objective, thereby causing civilian casualties. However, in June 2011, the Military District Court (Wojskowy Sąd Okręgowy) in Warsaw acquitted all seven soldiers of the war crimes charges, emphasizing that the gathered evidence was insufficient to demonstrate criminal intent (*animus*) on the part of the defendants to direct military action against the village[33].

In response to the verdict, the Military Prosecutor's Office appealed to the Supreme Court, seeking the annulment of the judgment and a re-examination of the case. In its decision of 14 March 2012, the Supreme Court upheld the acquittal of three of the defendants. Conversely, with regard to the remaining four soldiers, the Court overturned the lower court's decision and remanded the case back to the Military District Court for a retrial[34].

Sąd Najwyższy prawomocnie uniewinnił polskich żołnierzy z Nangar Khel, https://www.polityka.pl/tygodnikpolityka/kraj/1613087,1,sad-najwyzszy-prawomocnie-uniewinnil-polskich-zolnierzy-z-nangar-khel.read (accessed: 25.07.2026); *To nie zbrodnia, a źle wykonany rozkaz. Sąd Najwyższy o wydarzeniach w Nangar Khel*, https://www.newsweek.pl/swiat/to-nie-zbrodnia-a-zle-wykonany-rozkaz-sad-najwyzszy-o-wydarzeniach-w-nangar-khel/8qgxmhq (accessed: 25.07.2026); *Akt oskarżenia wobec 7 żołnierzy z Nangar Khel*, https://wydarzenia.interia.pl/kraj/news-akt-oskarzenia-wobec-7-zolnierzy-z-nangar-khel,nId,842647 (accessed: 25.07.2026).

[32] Military Chamber of the Supreme Court [Sąd Najwyższy], Judgment of 14 March 2012, Ref. No. WA 39/11; https://www.sn.pl/aktualnosci/SitePages/komunikaty_o_sprawach.aspx?ItemSID=4-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach&rok=2012 (accessed: 25.07.2026).

[33] Military Chamber of the Supreme Court [Sąd Najwyższy], Judgment of 14 March 2012, Ref. No. WA 39/1, https://www.sn.pl/sites/orzecznictwo/Orzeczenia2/WA%2039-11-2.pdf (accessed: 25.07.2026). See also: Polish Penal Code, Articles 122 (Employing prohibited methods or means of warfare) and 123 (Homicide of protected person); *Wyrok ws. Nangar Khel: uniewinniono wszystkich oskarżonych żołnierzy*, https://www.gazetaprawna.pl/wiadomosci/artykuly/519473,wyrok-ws-nangar-khel-uniewinniono-wszystkich-oskarzonych-zolnierzy.html (accessed: 25.07.2026).

[34] Military Chamber of the Supreme Court [Sąd Najwyższy], Judgment of 14 March 2012, Ref. No. WA 39/11, https://www.sn.pl/sites/orzecznictwo/Orzeczenia2/WA%2039-11-2.pdf (accessed: 25.07.2026).

In its judgment issued in March 2015, the Military District Court definitively ruled out the existence of war crimes under Articles 122 and 123 of the Polish Penal Code. Ultimately, the protracted proceedings concluded in February 2016, following a verdict by the Supreme Court in which the cassation appeals were dismissed. In doing so, the Supreme Court upheld the decision of the Military District Court in Warsaw. Both courts reviewing the issue of criminal liability determined that the incident involved the faulty execution of an order and a violation of the rules of engagement (ROE), rather than the commission of core international crimes, as had been asserted by the Military Prosecutor's Office[35].

The Norwegian legal framework for prosecuting international crimes

Norway signed the Rome Statute of the International Criminal Court on 28 August 1998, and ratified it on 16 February 2000. As a result, the ICC Act of 2001entered into force on 1 July 2001[36]. This statutory instrument primarily addressed the issues of complementarity and cooperation with the ICC. Nevertheless, a significant challenge arose regarding its direct applicability to international crimes; more precisely, the Act failed to criminalize domestic offenses parallel to the categories of crimes enumerated in the Rome Statute. Therefore, it became necessary to introduce substantive amendments to Norwegian legislation through separate provisions. In 2004, Norway's Penal Code Commission proposed that specific provisions on genocide, crimes against humanity, and war crimes be integrated into Norwegian criminal law. Following a public consultation held in April 2007, the Ministry of Justice drafted a formal proposal. This legislative effort culminated in March 2008 with the adoption of new penal provisions regarding the aforementioned international crimes. These crimes were incorporated into the Norwegian Penal Code under Chapter 16, entitled *Genocide, Crimes against Humanity and War Crimes* (Articles 101–110)[37].

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[35] Polish Supreme Court, Judgment of 17 February 2016, Ref. No. WA 16/15; https://www.sn.pl/aktualnosci/SitePages/komunikaty_o_sprawach.aspx?ItemSID=91-271e0911-7542-42c1-ba34-d1e945caefb2&ListName=Komunikaty_o_sprawach&rok=2016 (accessed: 25.07.2026); see also: A. Kleczkowska, *Judgment of the Supreme Court, dated 17 February 2016 (Ref. No. WA 16/15)*, „Polish Yearbook of International Law" 2016, Vol. 36, pp. 267–276, DOI: 10.7420/pyil2016n.

[36] Act No. 65 of 15 June 2001 relating to the implementation of the Rome Statute of the International Criminal Court in Norwegian law (The ICC Act). See also: Parliamentarians for Global Action, *Norway and the Rome Statute*, https://www.pgaction.org/rome-statute/norway.html (accessed: 28.05.2026); Permanent Mission of Norway to the United Nations, Note Verbale, 2008, https://www.un.org/en/ga/sixth/63/Addtl_Prot_TEXT/Norway.pdf (accessed: 28.05.2026).

[37] S.A.E. Høgestøl, op. cit., pp. 407–426. See also: The General Civil Penal Code (Act No. 28 of 20 May 2005), Chapter 16, English translation available at: https://lovdata.no/dokument/NLE/

The definitions of international crimes constituting Chapter 16 of the Norwegian Penal Code of 2005 are generally based on the provisions of the Rome Statute. Furthermore, these new provisions extend to acts recognized as war crimes under customary international law or treaty law, even if they are not explicitly enumerated in Article 8 of the Rome Statute. In principle, these international crimes are subject to universal jurisdiction, to the extent permitted under the norms of international law. Persons found guilty of genocide, crimes against humanity, or war crimes face a maximum penalty of 30 years of deprivation of liberty[38].

In a discourse about the status of the Rome Statute within Norwegian legislation, it is argued that pursuant to the country's dualistic tradition, national law takes precedence in the event of a conflict between national law and international obligations. Here, the principle of national presumption (*presumsjonsprinsippet*) serves as a fundamental rule of interpretation. This principle dictates that Norwegian legislation must be interpreted in compliance with international obligations as far as possible, thereby acting as a vital guideline for resolving potential legal conflicts[39].

Regarding the prosecution of international crimes under Norwegian jurisdiction, a landmark case decided by the Oslo District Court in December 2008 (Repak case) provides a critical illustration. In this matter, the defendant had fled via Croatia to Norway in 1993 alongside his wife, subsequently obtaining Norwegian citizenship several years later. He had served as a soldier, and from May 1992 as an officer, in the Croatian Defence Forces (HOS). The defendant was charged with war crimes and complicity in the unlawful confinement of 17 civilians, gross violence during interrogation, and rape[40]. In its judgment, the Oslo District Court observed that: "The Norwegian Constitution is the main pillar of Norwegian law. Article 97 of the Constitution

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lov/2005-05-20-28/KAPITTEL_2 (accessed: 28.05.2026); Royal Norwegian Embassy, https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP9/PoA/icc-rc-poa2010-nor-eng.pdf (accessed: 28.05.2026); IHL Databases, https://ihl-databases.icrc.org/en/national-practice/law-implement-statute-international-criminal-court-17-july-1998-rome-statute (accessed: 28.05.2026).

38 *Universal jurisdiction law and practice in Norway*, Briefing Paper, January 2019, https://www.justiceinitiative.org/publications/universal-jurisdiction-law-and-practice-in-norway (accessed: 28.05.2026); While the Norwegian Penal Code as a whole did not enter into force until 1 October 2015, Chapter 16 entered into force earlier, on 7 March 2008, pursuant to Act No. 28 of 20 May 2005. The text is available at: https://lovdata.no/dokument/NLE/lov/2005-05-20-28/KAPITTEL_2#KAPITTEL_2 (accessed: 28.05.2026). On the concept of universal crimes, see: T. Einarsen, *The concept of universal crimes in international law*, Oslo 2012.

39 S. Blix-Nilsen, et al., *Implementation of the Rome Statute in Norway*, Research Paper, June 2007, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=996523 (accessed: 28.05.2026).

40 Oslo District Court (Oslo tingrett), Judgment of 2 December 2008, case No. 08-018985MED-OTIR/08 (*The Repak case*), https://www.legal-tools.org/doc/19cd6d (accessed: 28.05.2026). See also: Supreme Court of Norway (Høyesterett), Judgment of 3 December 2010, Rt-2010-1445 (*Mirsad Repak case*), IHL Databases, https://ihl-databases.icrc.org/en/national-practice/misrad-repak-case-supreme-court-3-december-2010 (accessed: 28.05.2026).

provides that »No law must be given retroactive effect«. This provision was included to safeguard individuals, ensure predictability, protect against arbitrariness, and to further trust in the legal order in Norway. The provision is intended to ensure that new burdens are not attached to acts already committed"[41].

Consequently, the Court held in its sentencing decision that the defendant was to be partly convicted and partly acquitted. He was found guilty of eleven counts of war crimes in the form of unlawful deprivation of liberty of civilian non-combatants, with subsequent internment in the Dretelj camp[42]. In this respect, the Court concluded that: "The internment lasted substantially longer than one month and/or the detainees were subjected to abnormal suffering. As regards violence and/or torture of particular importance for the sentencing, the defendant is linked directly to two instances in connection with interrogations headed by him. (…) There is limited relevant legal precedent in Norway in this field. Rulings from international courts of justice mainly deal with more serious cases; besides, the penalty ranges differ from those that apply pursuant to the 1902 Penal Code – which are applicable in the case at hand. Norwegian legal precedent includes some decisions linked to the post-World War II trials, and some decisions linked to deprivation of liberty in combination with gross violence, in cases concerning drugs or debt-collecting thugs, amongst others"[43].

In assessing comparable international jurisprudence, the Court made reference to the case of a Swedish mercenary who had been convicted both by the Supreme Court in Mostar (Bosnia and Herzegovina) and later by the Stockholm District Court to eight years of imprisonment for violations of international law. In that case, the individual had served as a prison guard and committed extensive acts of violence himself, including the gross mistreatment of eleven detainees, torture, and complicity in the deprivation of liberty of numerous civilians. In that instance, significant weight was attached to his youth (as he was 20 years old at the time of the offenses) as a mitigating circumstance[44]. In light of these factors, the Oslo District Court imposed a sentence of five years of imprisonment, with a deduction of 294 days for the time the defendant had already spent in custody. Furthermore, the Court placed significant emphasis on victims' remedies, ordering the defendant to pay financial compensation to the victims for non-pecuniary

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41 See also: S.A.E. Høgestøl, op. cit.; *Universal jurisdiction…*; J. Selman-Ayetey, *Universal jurisdiction: conflict and controversy in Norway*, [in:] K. Heller, G. Simpson (eds.), *The hidden histories of war crimes trials*, Oxford 2013.

42 Oslo District Court (*Oslo tingrett*), Judgment of 2 December 2008, case No. 08-018985MED-OTIR/08 (*The Repak case*), para. 258.

43 Ibidem, paras. 258–259.

44 Ibidem, para. 260.

damages resulting from their profound psychological and physical suffering[45]. The Repak case was ultimately decided by the Norwegian Supreme Court. Pursuant to its judgment, the conviction was based on Section 223 of the Penal Code of 1902, and he was sentenced to eight years of imprisonment[46].

The impact of the Bagaragaza precedent on the Norwegian legal framework

The direct catalyst for incorporating the modern provisions on international crimes into Chapter 16 of the Norwegian Penal Code was the landmark Bagaragaza case before the International Criminal Tribunal for Rwanda (ICTR)[47].

In this matter, the Tribunal underscored the fundamental necessity of codifying international crimes within national legal systems to reflect their distinct nature, which cannot be equated with ordinary domestic offenses. Specifically, the ICTR Appeals Chamber dismissed the Prosecution's appeal to transfer the case to the Kingdom of Norway under Rule 11 *bis*. The Chamber based its refusal on the grounds that Norwegian national legislation at the time lacked a specific definition of genocide aligned with international standards. This case clearly demonstrates that the explicit legal characterization of international crimes at the national level is indispensable for the functional operation and interpretation of the principle of complementarity under the Rome Statute framework[48].

The indictment against Mr. Bagaragaza was confirmed on 28 July 2005, charging him with three counts: genocide, conspiracy to commit genocide, and, in the alternative, complicity in genocide. As part of a plea agreement

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45 Ibidem, paras. 269–282.

46 S.A.E. Høgestøl, op. cit., p. 426. See also: Supreme Court of Norway [Høyesterett], Judgment delivered on 13 April 2011, HR-2011-808-A, case No. 2010/934; criminal appeal against conviction. The Court noted *inter alia* that: „The case concerns sentencing for 13 crimes perpetrated in 1992 during the war in Bosnia-Herzegovina, see the Penal Code section 223 subsections 1 and 2. The crimes were extremely serious, perpetrated against defenceless people and solely motivated by their ethnic background. The criminal acts included assault in connection with arrest and assault of persons after they were placed in a prison camp. The offences were committed over a period of approximately 4 1/2 months. Although nearly 19 years had passed since the crimes were committed, the Supreme Court held that the punishment had to be increased even beyond the plea entered by the Director General. The Supreme Court fixed the penalty to 8 years of imprisonment" – https://lovdata.no/register/avgjørelserEngelsk?sort=alpha&offset=1040&dir=desc (accessed: 17.05.2026).

47 S.A.E. Høgestøl, op. cit., pp. 412–413; *The Prosecutor v. Michel Bagaragaza*, case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal, 30 August 2006, available: https://hrlibrary.umn.edu/instree/ICTR/BAGARAGAZA_ICTR-05-86/BAGARAGAZA_ICTR-05-86-AR11bis.htm (accessed: 17.05.2026).

48 Compare: M.M. El Zeidy, op. cit., pp. 291–292; S.A.E. Høgestøl, op. cit., pp. 412–415.

concluded between the Prosecution and the accused, the Prosecution undertook not to prosecute him directly before the Tribunal, promising instead to request the transfer of his case to a national jurisdiction outside the African continent. On 15 February 2006, the Prosecution formally requested the referral of Mr. Bagaragaza's case to the Kingdom of Norway for trial – a motion that received the full support of the accused. Following this, the President of the Tribunal referred the matter to Trial Chamber III for substantive consideration, and Norway was subsequently invited to submit its observations regarding its domestic jurisdiction over the charged offenses[49].

After reviewing the submissions from the parties and the Norwegian authorities, the Trial Chamber rejected the Prosecution's referral request. In response, the Prosecution lodged an appeal against this decision, petitioning the Appeals Chamber to reverse the lower court's ruling and transfer the case to Norway. In its subsequent judicial assessment, the Appeals Chamber firmly emphasized that: "Rule 11 *bis* allows a designated Trial Chamber to refer a case to a competent national jurisdiction for trial if it is satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out"[50].

Furthermore, the Chamber underscored that Rule 11 *bis*(A) explicitly "contemplates possible referral to either the state where the crimes occurred, the state of the accused's arrest, or any other state having jurisdiction and being willing and adequately prepared to accept such a case"[51]. Even though Norway was fully willing to assume jurisdiction over the case, the Appeals Chamber observed that Norwegian criminal law did not explicitly codify the crime of genocide. In describing the state's legal position, the Chamber noted that Norway: "Submits that on ratifying the 1948 Genocide Convention, its Parliament considered it unnecessary to enact implementing legislation as all conduct prohibited under [the] convention was already criminal under existing provisions of its criminal law. Norway explains that, according to its legal tradition, its laws are drafted in a general manner, but interpreted in light of both its international legal obligations as well as relevant legislative history"[52].

Theoretically, Norway could indeed exercise domestic jurisdiction over Mr. Bagaragaza's criminal conduct perpetrated in Rwanda in 1994. Nevertheless, as the Trial Chamber correctly reasoned, Norway lacked jurisdiction within the precise meaning of Rule 11 *bis* because it could not prosecute the conduct specifically as the crime of genocide as defined in the ICTR Statute.

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[49] *The Prosecutor v. Michel Bagaragaza*, case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal, 30 August 2006.

[50] Ibidem, para. 8.

[51] Ibidem.

[52] Ibidem, para. 13.

The Chamber explicitly noted that the domestic crime of homicide did not require proof of genocidal intent, which is an essential and defining element of the international crime of genocide[53].

It is worth quoting the Appeals Chamber's crucial observations regarding the conceptual distinction between ordinary domestic offenses and serious violations of international humanitarian law, namely that: "The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives"[54].

In its final conclusion, the Appeals Chamber, rejecting the referral of Mr. Bagaragaza's case to Norwegian criminal jurisdiction, ruled as follows: "The Appeals Chamber recognizes that this decision may have a practical impact on Mr. Bagaragaza's situation who, according to the Prosecution's submissions to the President of the Tribunal, faces security risks if detained in the UNDF in Arusha. It also notes that it may limit future referrals to similar jurisdictions which could assist the Tribunal in the completion of its mandate. However, the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law. This is particularly so when the accused has been charged with genocide, an offense that – unlike murder – is designed to protect a »national, ethnical, racial or religious group, as such«"[55].

Here, the pivotal issue identified by the Tribunal directly concerns the distinct material scope of genocide that is a term famously coined in 1944 by Raphael Lemkin, a Polish-Jewish lawyer. Lemkin first introduced and conceptualized this term in his seminal work *Axis Rule in Occupied Europe*, published under the auspices of the Carnegie Endowment for International Peace[56]. Driven by a profound sense of urgency, Lemkin, alongside a dedicated coalition of international legal scholars and diplomats, actively lobbied during the inaugural sessions of the United Nations (UN) to ensure that genocide would be formally recognized as an independent crime under international law. These collective diplomatic and academic efforts directly culminated in the adoption of the landmark Convention on the Prevention and Punishment of the Crime of Genocide by the UN General Assembly on 9 December 1948[57].

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53 Ibidem, para. 15.

54 Ibidem, para. 17.

55 Ibidem, para. 18.

56 R. Lemkin, *Axis rule in occupied Europe*, Washington 1944.

57 C. de Than, E. Shorts, *International criminal law and human rights*, London 2003, p. 65. D. Bloxham, A. Dirk Moses (eds.), *The Oxford handbook of genocide studies*, Oxford 2010; See also the resources provided by the United Nations Holocaust International Program, https://www.un.org/en/holocaustremembrance and the United States Holocaust Memorial Museum, *Holocaust encyclopedia*, https://encyclopedia.ushmm.org/ (accessed: 1.06.2026); *What is genocide?*, https://www.ushmm.org/genocide-prevention/learn-about-genocide-and-other-mass-atrocities/what-is-genocide (accessed: 1.06.2026).

Conclusions

The comparative analysis of the Polish and Norwegian legal frameworks, focusing on the question of how national legislation and judicial practice of both states respond to today's demand for "doing justice", leads to the following conclusions.

First, it clearly illustrates the profound efforts made by both states to align their national legislation with the imperatives of international criminal law. This commitment underscores the seriousness with which they approach their international obligations under the Rome Statute of the International Criminal Court.

Second, while domestic courts in both jurisdictions have had to adapt their legal reasoning to international criminal justice standards, they have simultaneously succeeded in preserving and leveraging their distinct national legal traditions.

Third, through their legal frameworks and landmark judicial precedents, such as the Nangar Khel jurisprudence in Poland and the Repak case in Norway, both states demonstrate a true readiness to fulfill their obligations in the pursuit of international criminal justice in accordance with international norms.

In summary, the approaches taken by Poland and Norway to prosecuting international crimes ensure that perpetrators of international crimes are held criminally liable while fully respecting the right to a fair trial. Indeed, both states remain highly active in international fora and deeply engaged in the advancement of global accountability.

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Summary

Prosecuting international crimes in Poland and Norway – a comparative perspective

Keywords: international criminal law, international criminal justice, global accountability, principle of complementarity, Polish criminal law, Norwegian criminal law.

This article focuses on the prosecution of international crimes through a comparative analysis of the Polish and Norwegian legal frameworks. It aims to examine how national legislation and judicial practice of both states respond to today's demand for "doing justice", especially as we continue to witness the commission of such crimes as genocide, crimes against humanity, or war crimes. First, the discussion addresses the essence of international criminal justice in relation to the principle of complementarity enshrined in the Rome Statute of the International Criminal Court (ICC). Second, the study explores how Poland and Norway, representing two distinct constitutional traditions, integrate supranational obligations into their domestic legal frameworks. Consequently, the author points out that the internationalisation of national criminal justice systems is crucial to facilitating closer and more effective cooperation with international tribunals. Indeed, we can assert that both states demonstrate a readiness to fulfil their duties to the global community and combat impunity.

Streszczenie

Ściganie sprawców zbrodni międzynarodowych w Polsce i w Norwegii – perspektywa porównawcza

Słowa kluczowe: prawo międzynarodowe karne, międzynarodowy wymiar sprawiedliwości w sprawach karnych, globalna odpowiedzialność, zasada komplementarności, polskie prawo karne, norweskie prawo karne.

Niniejszy artykuł dotyczy ścigania sprawców zbrodni międzynarodowych, w oparciu o analizę porównawczą polskich i norweskich rozwiązań prawnych. Celem pracy jest zbadanie, w jaki sposób ustawodawstwo krajowe i praktyka orzecznicza obu państw odpowiadają na współczesne zapotrzebowanie „wymierzania sprawiedliwości", zwłaszcza w obliczu ciągłego popełniania zbrodni, takich jak ludobójstwo, zbrodnie przeciwko ludzkości czy zbrodnie wojenne. W pierwszej kolejności przedstawiono istotę międzynarodowego wymiaru sprawiedliwości w sprawach karnych w kontekście zasady komplementarności, zapisanej w Statucie Rzymskim Międzynarodowego Trybunału Karnego (MTK). Następnie przeanalizowano, w jaki sposób

Polska i Norwegia, reprezentujące odmienne tradycje konstytucyjne, włączają zobowiązania ponadnarodowe do swoich krajowych porządków prawnych. Autorka podkreśla, że internacjonalizacja krajowych systemów wymiaru sprawiedliwości ma kluczowe znaczenie dla usprawnienia ściślejszej i skuteczniejszej współpracy z trybunałami międzynarodowymi. W istocie można postawić tezę, że oba państwa wykazują gotowość do wypełniania swoich zobowiązań wobec społeczności międzynarodowej i zwalczania bezkarności.