SUPREME COURT OF NORWAY

J U D G M E N T

On 3 December 2010, the Supreme Court gave judgment in

HR-2010-2057-P, (case no. 2010/934), criminal case, appeal against judgment,

I.

A	(Counsel John Christian Elden) (Counsel Anders Løvlie)
v.	
The Public Prosecution Authority	(Counsel Tor-Aksel Busch)

II.

The Public Prosecution Authority	(Counsel Tor-Aksel Busch)
v.	
A	(Counsel John Christian Elden) (Counsel Anders Løvlie)

(1) Justice **Møse:** The case concerns whether the provisions on crime against humanity and war crime in chapter 16 of the Penal Code 2005, which entered into force on 7 March 2008, may be applied to acts committed in Bosnia-Hercegovina in 1992. The decisive points are whether the limitation period for criminal liability has expired, and whether application of the new provisions will contravene the prohibition against retroactivity in Article 97 of the Constitution.

(2) A was born 00.00.1966 in the former Yugoslavia. He lived in one of the country's six republics, Bosnia-Hercegovina, populated by three equal national groups: Bosniaks, who are Muslim, Serbs and Croats. A is a Bosniak from Stolac municipality, not far from the city of Mostar, southwest in Bosnia-Hercegovina.

(3) After the breakup of Yugoslavia in 1990, several multiparty elections were held in all the republics. In Bosnia-Hercegovina, there were three nationalist parties – one Serbian, one Croatian and one Bosniak. In the course of 1991, sharp differences arose between the three groups. The conflict relating to Bosnia-Hercegovina's future intensified after Croatia and Slovenia broke loose from Yugoslavia. A referendum on independence was held, and on 3 March 1992, the Bosnian parliament, without the presence of the Serbs, declared Bosnia-Hercegovina an independent state.

(4) After the international community had recognised Bosnia-Hercegovina as an independent state in early April 1992, a war broke out in the country between Serbian, Bosniak and Croatian forces.

(5) In the spring of 1992, A joined a paramilitary Croatian unit named Hrvatske Odbrambene Snage (HOS). Starting from the summer that year, HOS became increasingly connected to the Bosnian army. According to a final report 27 May 1994 from the UN's Commission of Experts, HOS was committing crimes against the Serbian civilian population in Bosnia-Hercegovina, including in the detention camp Dretelj in Capljina municipality. HOS operated the camp from April until October 1992.

(6) Our case deals with A's acts during this period. In 1993, he fled via Croatia to Norway, and became a Norwegian citizen in 2001.

(7) In August 2005, the National Criminal Investigation Service (Kripos) received information from Danish authorities that four previous guards in the Dretelj camp were probably residing in Scandinavia. Investigation was initiated, and on 2 May 2007, Kripos charged A with violation of the Penal Code, section 223 first and second subsection, section 231 first penal option, cf. section 232, section 192 subsection 1 second penal option and section 192 subsection 1 first penal option. On the same day, a search and arrest warrant was requested. Oslo District Court granted the request on 3 May 2007. The Public Prosecution Authority's request for a remand in custody on 9 May 2007 was also granted. The period of remand in custody was later prolonged.

(8) On 9 August 2007, Kripos extended the charge in accordance with the Penal Code 1902.

(9) After chapter 16 of the Penal Code 2005 had entered into force on 7 March 2008, A was indicted, on 11 March 2008, under the new provisions, alternatively under the Penal Code 1902. On 9 July 2008, the Norwegian Prosecution Authority – upon the decision of the Director of Public Prosecutions – indicted A on four counts:

> **"I**
>
> **<u>Section 102 subsection 1 (e) of the Penal Code 20 May 2005 no. 28</u> (cf. section 3 subsection 2 and section 223 subsections 1 and 2 of the Penal Code 22 May 1902 no. 10)**
> **for crimes against humanity, as part of a widespread or systematic attack on a civilian population, for having imprisoned or in some other serious manner deprived a person of liberty contrary to fundamental rules of international law.**
>
> **Grounds:**
> **During the approximate period from May to October 1992 in Hercegovina, in connection with an armed conflict between Serbian military forces on one side and Bosnian-Croatian and Croatian military forces on the other, Bosnian-Croatian and Croatian forces detained**

an unknown number of non-combatant civilians of Serbian origin. The persons were arrested and detained by force, without a decision from a competent authority and without a legal basis. The places of detention included an abandoned tobacco station and a previous clothing factory in Stolac municipality, and the military camp Dretelj in Capljina municipality. A was a soldier, and from May 1992 an officer, in the Croatian Defence Forces (HOS) that participated in the detention. During the period from June to October the same year, he himself arrested or participated in the arrest of the following civilians who were detained and treated as further described below or interrogated persons in detention; …"

(10) This was followed by a list of 18 incidents of deprivation of liberty. These acts also formed the basis for count II of the indictment:

"Section 103 subsection 1 (h) of the Penal Code 2005, (see section 3 subsection 2 and section 223 subsections 1 and 2 of the Penal Code of 22 May 1902 no. 10)
for war crimes in connection with armed conflict, contrary to international law, for unlawfully having confined a protected person.

Grounds:
In April 1992, the Serbian-dominated Yugoslavia National Army (YNA) attacked Bosnian-Croatian and Croatian military forces in Hercegovina, and gained control over areas south of Mostar. The attack was related to Croatia having declared itself an independent state in June 1991 and Bosnia in Hercegovina (BiH) having done the same in mars 1992. The new states were recognised by the EEC (currently the EU) among others, in January and April 1992 respectively. From around May the same year, YNA were chased out of the municipalities Capljina, Stolac and Mostar, which then became controlled by Bosnian-Croatian and Croatian military forces, including the Croatian Defence Forces (HOS). There was continuous shooting in the area, between Bosnian-Croatian and Croatian forces on one side and YNA on the other.

In the above situation, non-combatant civilian Serbs were arrested and detained as described in count I. During detention, they were subjected to repeated violence, including strokes, kicks, cigarette burning, use of needles under fingernails and sexual assault. As an officer in HOS, A acted as follows during the period June to October 1992: …"

(11) The indictment's count III concerned section 103 subsection 1 (b) of the Penal Code 2005 (cf. section 3 subsection 2 and section 231 first penal option of the Penal Code 1902, cf. section 232) on war crimes by the infliction of great suffering or considerable harm to the body or health of a protected person in connection with an armed conflict, particularly through torture or other cruel or inhuman treatment.

(12) Count IV concerned one incident of rape under section 103 subsection 1 (d) (cf. section 3 subsection 2 and section 192 subsection 1 second penal option of the Penal Code 1902 as the provision read before 1 January 1995).

(13) On 2 December 2008, the Oslo District Court ruled as follows:

"1. A born 000066 is convicted of eleven violations of section 103 subsection 1 (h) of the Penal Code 2005 , cf. section 223 subsections 1 and 2 of the Penal Code 1902, cf. section 62 of the Penal Code, and sentenced to 5 – five – years of imprisonment. A deduction of 294 – twohundredandninetyfour – days is granted for time spent in custody.

2. A born 000066 is acquitted on count I, counts II c, II d, II h, II i, II n, II o, II r and counts III a and III b and count IV.

…"

(14) A was also sentenced to pay damages for non-economic loss to eight aggrieved parties.

(15) The District Court acquitted A on count I, as it found that it would be incompatible with Article 97 of the Constitution to apply section 102 of the Penal Code on crimes against humanity. None of the offences was considered time-barred.

(16) The Public Prosecution Authority appealed against the application of the law in the question of guilt as concerned the acquittal of crimes against humanity, and against the findings of fact in the question of guilt in counts II h, II i and III a of the indictment.

(17) A appealed against the findings of fact and application of the law for all acts described in count II of which he had been convicted, and against the sentence. The appeal also concerned the award of damages for non-economic loss to the eight aggrieved parties.

(18) On 12 April 2010, Borgarting Court of Appeal ruled as follows:

"1. A, born 00.00.1966, is convicted of violations of section 103 subsection 1 (h) of the Penal Code 2005, cf. section 79 subsection 1 (a), cf. section 223 of the Penal Code 1902 subsection 2, cf. section 62 subsection 1, and sentenced to 4 – four – years and 6 – six – months of imprisonment. A deduction of 294 – twohundredandninetyfour – days is granted for time spent in custody.

2. A is acquitted on count III a of the indictment.

3. The Public Prosecution Authority's appeal against the application of the law in count I of the indictment is dismissed.

…"

(19) The Court of Appeal found that A was guilty of 13 incidents of war crimes. He was also ordered to pay damages for non-economic loss of NOK 120 000 to ten of the aggrieved parties and NOK 207 221 for permanent injury to one.

(20) Both the Public Prosecution Authority and A have appealed to the Supreme Court. The Prosecution Authority's appeal concerns the application of the law in the question of guilt – the question of unlawful retroactivity due to the application of section 102 of the Penal Code 2005 – and the sentence.

(21) A's appeal concerns the procedure, including whether the Higher Prosecuting Authority had jurisdiction to indict, the application of the law in the question of guilt and the sentence. The appeal against the application of the law concerns the questions of limitation and unlawful retroactivity due to the application of section 103 of the Penal Code 2005. In addition, A has requested a new hearing of civil claims. It was also contended that the Public Prosecution Authority's appeal had to be declared non-admissible as it was submitted too late.

(22) On 2 September 2010, the Supreme Court's Appeals Selection Committee decided:

”1. Leave to appeal is granted to the Public Prosecution Authority with regard to the question whether the application of section 102 of the Penal Code 2005 will constitute unlawful retroactivity.

2. Leave to appeal is granted to the convicted person with regard to the question whether the application of section 103 of the Penal Code 2005 will constitute unlawful retroactivity, and the question of limitation due to unspecified charge. The convicted person’s appeal concerning the Higher Prosecuting Authority’s jurisdiction is non-admissible.

3. There will be no new hearing of the civil claims together with the criminal case.

4. Apart from that, the Appeals Selection Committee’s decision with regard to the appeals is suspended until the Supreme Court has decided the issues in items 1 and 2.”

(23) On 2 September 2010, the Chief Justice decided that the parts of the appeals for which leave to appeal had been granted on the same day, were to be heard in plenary session, see section 5 subsection 4 final sentence and section 6 of the Courts of Justice Act.

(24) During the preparations, Justice Bruzelius raised an issue about her impartiality. A separate hearing was held at which the parties expressed their views. On 19 October 2010, the Supreme Court decided:

“Justice Bruzelius will step down in case no. 2010/934.”

(25) Justices Stabel and Indreberg are on leave. Thus, 17 of the Supreme Court’s justices have participated in the hearing of the case.

(26) *A* contends:

(27) The criminal liability is time-barred. A was originally charged under section 223 of the Penal Code 1902, which sets out a limitation period of 15 years. The Public Prosecution Authority did not take the necessary steps to interrupt the limitation period before it expired in October/November 2007, see sections 67 and 68, and any criminal liability has consequently lapsed.

(28) Violations of section 223 are individual offences against each aggrieved party. The charge of 2 May 2007 did not identify the aggrieved parties, and were therefore not sufficiently specified to interrupt the limitation period under section 69 subsection 1. This is supported in case law, see the Supreme Court judgment Rt. 1984 page 167, Rt. 1994 page 203 and Rt. 1996 page 353. The cases where the Supreme Court has found that the charge was sufficiently specified, are different from the one at hand.

(29) Application of sections 102 and 103 of the Penal Code 2005 would be contrary to Article 97 of the Constitution. The protection against retroactivity is absolute in the area of criminal law, see Rt. 2006 page 293. International rules, including Article 7 the European Convention on Human Rights, indicate that this prohibition must be interpreted strictly, since no states may derogate from the protection against retroactive punishment in time of war and crises, see for example Article 15 of the Convention.

(30) Article 97 of the Constitution must be read in context with Article 96 stating that no one may be sentenced except according law. Article 97 has been interpreted strictly also in legal literature. The legislature's view on the constitutional issue is of little relevance when, like in our case, it concerns the personal freedom and security of the individual.

(31) That any application in the case at hand of sections 102 and 103 of the Penal Code 2005 will be contrary to Article 97, also follows from case law to the effect that statements in preparatory works about stricter penalties cannot be accorded weight before the relevant amendments enter into force, see for example Rt. 2009 page 1412.

(32) Case law dealing with characteristics and applicability of criminal provisions illustrates that the constitutional norm is strict, see Rt. 1964 page 1418, Rt. 2004 page 306 and page 357, as well as Rt. 2005 page 1401.

(33) To fall outside the prohibition against retroactivity, the new provision must be positively and undoubtedly favourable to the person affected, and at least it must not be unfavourable. It is clearly a much heavier burden for A to be convicted of crimes against humanity and war crimes, see sections 102 and 103, than of deprivation of liberty under section 223 of the Penal Code 1902.

(34) According to case law, the prolongation of the limitation period, stricter rules on execution of sentences and certain temporary standard solutions are not violations of the prohibition against retroactivity in the Constitution, see Rt. 2004 page 645. However, there is no basis for limiting the constitutional protection with respect to international crimes. The Supreme Court judgment Rt. 1946 page 198 (*Klinge*) should not be given weight. The case concerned an extraordinary situation, the Supreme Court was split into several factions, and the ruling has been severely criticised.

(35) If one should find that the protection under Article 97 is not absolute, but rather a standardised rule, the provision may nonetheless only be departed from when there are strong public interests. That is not the case here. According to international law, no states are obliged to include special penal provisions on violations of international humanitarian law in their legislation. The considerations emphasised in the preparatory works to sections 102 and 103 of the Penal Code 2005, are not sufficient to limit the protection in the Constitution.

(36) A invites the Supreme Court to pronounce the following judgment:

> **"1. The appeal from the Higher Prosecuting Authority is dismissed.**
>
> **2. A is acquitted in whole or in part.**
>
> **3. <u>In the alternative</u>: The acts described in count II of the indictment are not punishable under section 103 of the Penal Code."**

(37) *The Public Prosecution Authority* contends:

(38) The limitation period for criminal liability under section 223 was interrupted before it expired. The indictment of 2 May 2007 was sufficiently specified. It explained the background of the acts, referred to a brief period of time, and stated where the crimes were committed. The indictment does not stand alone, but must be read in the light of the request for a search and arrest warrant sent to the District Court on the same day.

(39) The Supreme Court case law on the lack of specification concerns in particular the issue of whether a charge of one offence interrupts the limitation period for another. The specification requirement here is less strict than under section 38 of the Criminal Procedure Act on the relationship between indictment and judgment. The crucial factor is whether the person charged has been given sufficient notice, see Rt. 1986 page 260 and Rt. 1992 page 1141. During police interviews, A stated the names of some of the aggrieved parties. For efficiency purposes, an indictment without individualisation should be accepted at an early stage of a complex investigation.

(40) The Public Prosecution Authority primarily contends that the new rules in sections 102 and 103 of the Penal Code 2005 involve a retroactive applicability change of a criminal provision that is compatible with Article 97 of the Constitution, although a conviction thereunder is more burdensome than under section 223 subsections 1 and 2 of the Penal Code 1902. The prohibition against retroactivity is interpreted restrictively to a certain point, and the protection is relative. The statements in case law and legal literature that Article 97 is absolute in the area of criminal law aim at criminalisation of unpunishable acts and stricter penalties, see for instance Rt. 2009 page 1412 paragraph 24.

(41) Beyond this core, a closer in-depth analysis must be carried out in the light of the conflicting interests, including development in society and the need for foreseeability and the rule of law. Fairness and justice suggest that atrocities are called by their right name. Some importance must also be attached to the fact that the legislature has considered the constitutionality issue.

(42) What is decisive under Article 97 is whether retroactivity is to the detriment of the accused. The Supreme Court has not taken a stand with regard to retroactivity in connection with the applicability of a new criminal provision. Case law, including the Supreme Court judgment Rt. 2004 pages 306 and 357, does not provide guidance in the case at hand. As for section 103 on war crimes in the Penal Code 2005, the Court of Appeal has made a correct assessment.

(43) Alternatively, the Public Prosecution Authority contends that the application of the new provisions in chapter 16 of the Penal Code 2005 are not burdensome within the meaning of Article 97. The same result follows from universal rules of international law that applied already at the time of the acts. Although the states do not have an obligation under international law to incorporate such provisions into their respective national law, A had to realise that he risked prosecution under such stricter rules. This follows from the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and from the rules in his home country Bosnia-Hercegovina. Also, before Norway enacted the new provisions, the gravity of the acts would have been accorded weight in the reasoning of the judgment if there was a conviction under the Penal Code 1902.

(44) In reality, it would be more be more favourable for A to be convicted under chapter 16 of the Penal Code 2005 than under the Penal Code 1902. Among other things, the ICTY cannot, according to its rules on double jeopardy, prosecute persons who have been convicted of the same acts in national law. Moreover, the Norwegian maximum penalty is lower because it cannot be stricter than the maximum penalty prescribed in section 223 of the Penal Code 1902.

(45) In the Public Prosecution Authority's view, the Court of Appeal has erred when acquitting A of violation of section 102 of the Penal Code 2005 on crimes against humanity. Like section 103, the provision protects both individual and public interests, although the emphasis may

differ to some extent in the two penal provisions. It is not correct to consider section 103, but not 102, as a continuation of section 223 of the Penal Code 1902 – neither of them is. Nor does it matter that the same acts may be covered by both sections 102 and 103, so that A is convicted under two provisions instead of one. The sentence may not in any case exceed the sentence that would have been imposed under section 223 of the Penal Code 1902.

(46) The Public Prosecution Authority invites the Supreme Court to pronounce the following judgment:

> **"1. The convicted person's appeal – to the extent leave has been granted – is dismissed.**
>
> **2. The judgments from the District Court and the Court of Appeal are set aside as concerns the acquittal on count I of the indictment."**

(47) *My opinion*

(48) The questions that have been referred to a plenary hearing are whether the criminal liability is time-barred, and whether it would contravene the prohibition against retroactivity in Article 97 of the Constitution to apply the provisions in chapter 16 of the Penal Code 2005 instead of section 223 of the Penal Code 1902. If A prevails with his contention that limitation has occurred with regard to section 223, he must be acquitted of all criminal liability. I will therefore first address the limitation issue.

(49) *Limitation*

(50) A was initially charged under section 223 subsections 1 and 2 of the Penal Code 1902, prescribing a sentence of one to 15 years of imprisonment, see section 17 subsection 1 (a). According to section 67, the limitation period is 15 years. It is counted from the day the offence ceased, see section 68 subsection 1 first sentence. A's acts were described such that the offence ceased in October/November 1992. The limitation period therefore had to be interrupted within October/November 2007.

(51) The first charge was made on 2 May 2007. Count I concerned violation of section 223 subsections 1 and 2. The grounds were described as follows:

> **"During the period from May 1992 to September 1992 in Mostar, Capljina and Stolac in Bosnia and Hercegovina, in the capacity of member of Croatian Defence Forces, Hrvatske Odbrambene Snage (HOS), he caused or contributed to causing the deprivation of the liberty of persons with Serbian ethnicity and their being brought to the detention camp Dretelj in Capljina. In connection with the arrest and/or the stay in the Dretelj camp, the prisoners were held in unlawful confinement for over a month and/or systematically subjected to physical and mental abuse in the form of beating, kicking, humiliation and/or sexual acts."**

(52) This section specifies the time and place where punishable acts were committed. It is set out that A committed the acts in the capacity of a HOS member, and in connection with arrest and/or confinement in the Dretelj camp. The aggrieved parties are not specified, but described as "several civilian non-combatant persons of Serbian ethnicity".

(53) In the request for a search and arrest warrant sent to Oslo District Court on the same day as the charge was made, Kripos stated:

"As part of the investigation, Kripos has gathered documentation relating to the Dretelj detention camp, which during the period April/May 1992 to September 1992 was used by the Croatian military department HOS (Hrvatske Odbrambene Snage) for detention of up to 224 civilian women and men of Serbian ethnicity. Reference is made to the report "The suffering of Serbs in the Dretelj camp", see doc …, as well as witness statements submitted to the International Criminal Tribunal for the former Yugoslavia (ICTY), see doc …

The gathered documentation seems to document well that the sole purpose of detaining the Serbian prisoners was to use the prisoners for exchange of persons from own forces or of own ethnicity. It has also been well documented that the Serbian prisoners were systematically tortured during the stay in the camp. In addition to extensive use of aggravated violence, it seems clear that several of the detained women were raped, at the same time as homicide took place in the camp, see doc… . "

(54) Apart from the report describing the Serbs' ordeals in the camp, the investigation documents were exempt from inspection under section 242 subsection 1 of the Criminal Procedure Act.

(55) During a police interview in May 2007, A named – without admitting criminal liability – ten of the 13 aggrieved parties whom the Court of Appeal found that he had assaulted. He was presented with the witness statements of the remaining three. In addition, he mentioned some other names.

(56) Nor during the next steps of the investigation did Kripos name the aggrieved parties. This was first done in the charge of 11 March 2008.

(57) According to the indictment, several of the acts are covered by more than one penal provision. Then, the starting point is that the limitation period must be interrupted individually for each act. In the original charge, the acts were formulated as one continued offence, without a further identification of each violation. The question is therefore whether it was sufficiently specified to interrupt the limitation period.

(58) In several rulings, the Supreme Court has stated that the identification requirement in connection with limitation applies, as a starting point, with the same force as between indictment and judgment, see section 252 subsection 1 (3) and (4) and section 38 of the Criminal Procedure Act. Relevant here is Rt. 1982 page 513. However, as set out in Rt. 1986 page 260 on page 262 and Rt. 1996 page 353 on page 355, a less strict identification requirement applies with respect to section 69 of the Penal Code.

(59) In Rt. 1986 page 260, concerning violation of the Taxation Act and the Accounting Act, the Supreme Court found that limitation had not set in, even though the interrupting charge concerned incorrect information other than that of which the convicted person had later been found guilty of having given. The decisive factor was that he had been "duly notified" that other incorrect information in the tax return for the relevant year could also be taken into account. Moreover, tax cases would often involve "overly complex and disorganised accounts and transactions, where the offences are gradually disclosed during lengthy inquiries". This was relevant to which requirements to lay down for interruption of the limitation period. Also in Rt. 1992 page 1141 on non-licensed production plants for slaughter pigs, there existed in a previously issued fine "sufficient notification" of the prosecution of the new offence for which the defendant had been convicted.

(60) In my view, a similar approach must be taken in the case at hand, although it deals with violations of integrity. Admittedly, it has not been argued that it was impossible to identify at least some of the aggrieved parties in the charge of 2 May 2007. Nonetheless, A was duly notified that prosecution would be initiated against him for, among other things, deprivation of the liberty of civilian non-combatant Serbs in the Dretelj camp from April/May to September 1992. The adequacy of the notification is illustrated by the fact that he, in interviews shortly after, on his own accord stated the names of ten of the aggrieved parties, although he also stated other names without admitting that anything illegal might have been done to them. I add that investigation of acts that in international law may be characterised as serious violations of humanitarian law is time-consuming and complex. It will typically involve many victims – mass violations – and the crosschecking of statements that must be gathered from different countries, and where linguistic difficulties and cultural differences may impede the investigation.

(61) Against this background, the indictment of 2 May 2007 was sufficiently specified to interrupt the limitation period, which means that the criminal liability is not time-barred.

(62) *Article 97 of the Constitution*

(63) I will now turn to the issue whether conviction under sections 102 and 103 of the Penal Code 2005 is incompatible with Article 97 of the Constitution stating that ”No law must be given retroactive effect”.

(64) The Penal Code 1902 has no provisions on genocide, crime against humanity or war crime. Possible prosecution of such acts must therefore be based on the crimes mentioned in the Code, such as homicide, bodily harm, rape and coercion.

(65) The Court of Appeal found A guilty of 13 incidents of contribution to confinement. As an example, I refer to count II (a) of the indictment:

> **“[H]e arrested or ordered the non-combatant civilian B, as described in count I no. 1. B was deprived of his freedom as further described.”**
>
> **“1) On 6 August 1992 in Stolac municipality in Bosnia in Hercegovina, the civilian non-combatant ethnic Serb B, born 00.00.1935, was arrested. He was kept in detention, in the Dretelj camp among others, and released around 30 October the same year. During the confinement, he was repeatedly beaten by HOS soldiers, he was kicked and threated to drink urine and exposed to fictitious execution with a firearm. In addition, he was denied access to food and the possibility to maintain personal hygiene, and he had to sleep on a concrete floor. B inflicted permanent symptoms of post-traumatic stress.”**

(66) These acts were criminal under section 223 subsections 1 and 2 of the Penal Code 1902, reading:

> **“Anyone who unlawfully deprives the liberty of another or contributes to such deprivation of liberty is to be punished with imprisonment for a term not exceeding 5 years.**
>
> **If the deprivation of liberty has lasted for more than a month, or it has caused extraordinary suffering or considerable harm to body or health, or caused a person’s death, a sentence of at least 1 year of imprisonment will be passed.”**

(67) The provision covers any form of unlawful deprivation of liberty. The acts of which A is convicted imply that the maximum penalty under this provision is between one and 15 years, since several of the aggrieved parties were kept confined for more than one month, see section 223 subsection 2.

(68) As mentioned, the provisions on genocide, crimes against humanity and war crimes were added to chapter 16 in the Penal Code 2005 by Act of 7 March 2008 no. 4. According to section 411, chapter 16 could enter into force from the moment decided by the King in Council, and from then on, the first part of the Penal Code 2005 was to apply to this chapter instead of the general part of the Penal Code 1902. Chapter 16 entered into force on 7 March 2008 according to a royal decree issued on the same day.

(69) I will now turn to the two new provisions of relevance to the case. Section 102 of the Penal Code 2005 on crime against humanity, reads:

> **"Any person is liable to punishment for crimes against humanity who as part of a broad or systematic attack on a civilian population**
> **…**
> **(e) imprisons or in some other serious manner confines a person contrary to fundamental rules of international law,"**

(70) To be considered a crime against humanity under this provision, the deprivation of liberty must take place as part of a widespread or systematic attack on the civilian population, and be contrary to basic rules of international law. The maximum penalty is 30 years of imprisonment, and according to section 91, the criminal liability is not subject to limitation. The District Court and the Court of Appeal found, as mentioned, that it would be contrary to Article 97 of the Constitution to apply section 102.

(71) However, A was convicted under section 103 subsection 1 (h) of the Penal Code 2005:

> **"Any person is liable to punishment for a war crime who in connection with an armed conflict**
> **…**
> **h) contrary to international law … unlawfully confines a protected person„"**

(72) The provision uses the term "war crime", and the deprivation of liberty must be contrary to international law. Here, too, the maximum penalty prescribed is 30 years of imprisonment, and the criminal liability is not subject to limitation, see section 91.

(73) It follows from section 3 subsection 1, see section 1, of the Penal Code 2005 that when nothing else is decided, the criminal legislation at the time of the act applies; however, the legislation at the time of the decision applies when this gives a more favourable outcome for the person charged. This is in conformity with the state of the law according to section 3 of the Penal Code 1902. However, section 3 subsection 2 of the Penal Code 2005 contains a special rule with regard to chapter 16:

> **"The provisions in chapter 16 apply to acts committed before the entry into force if the act, at the time it was committed, was subject to criminal liability according to criminal legislation at that time and considered as genocide, crime against humanity or war crime under international law. The penalty may nonetheless not exceed the penalty that would have been imposed in accordance with the criminal legislation at the time of the act."**

(74) This provision was formulated with the aim to give chapter 16 retroactive effect without contravening Article 97 of the Constitution, see Proposition to the Odelsting No. 8 (bill) (2007–2008) pages 58 and 62–63.

(75) The prohibition against retroactivity in criminal law is a universal principle, which has been expressed in several human rights conventions, including Article 7 of the European Convention on Human Rights:

> **"*No punishment without law***
>
> **1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.**
>
> **2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."**

(76) Article 7 subsection 2 implies that the Convention does not prevent penal provisions from being given retroactive effect if the act was punishable according to general principles of law at the time it was committed. Article 15 of the UN Convention on Civil and Political Rights contains a similar rule. However, these provisions in themselves do not form a legal basis for punishment.

(77) Article 97 of the Constitution does not expressly mention its relationship with international law. To which extent the provision also prevents new legislation from becoming applicable to acts that were illegal under international law at the time they were committed, was a key issue in the Supreme Court judgment in Rt. 1946 page 198 (*Klinge*). The case concerned a German Gestapo member who, from November 1944 to April 1945, had tortured a number of Norwegians and thereby violated sections 228 and 229 of the Penal Code 1902. According to the rules applicable during that period, this suggested a penalty of up to 13 years and six months of imprisonment. A temporary decree of 4 May 1945 gave permission to use the death penalty with retroactive effect. Klinge was sentenced to death in the Court of Appeal. The Supreme Court found with a 9–4 vote that this did not amount to a violation of Article 97 of the Constitution.

(78) Justice Skau, who belonged to the majority, took as a starting point that the considerations behind Article 97 generally imply that it has the effect of an "absolute prohibition", regardless of whether the new provision criminalises acts that were previously not subject to punishment, or increases the penalty for previously punishable acts. An extraordinary situation did not, as such, permit a modified use of the provision (page 199). However, as the case stood, no violation of Article 97 was found – for two reasons:

(79) Firstly, Klinge was convicted of torture. Such acts were contrary to rules of international law relating to war crimes, and could be punished with the death penalty, see page 200. The effect of the decree of 1945 was that it, "out of consideration to the provision in Article 96 of the Constitution", permitted Norwegian courts to assert the already acquired claims for punishment ["*erververde straffekrav*"], see page 201. Secondly, Justice Skau found that the

facts of the case fell outside the scope that Article 97 intended to regulate. The provision's objective is to protect society, and could not be invoked by foreign assailants who had attacked this society, see pages 201–202.

(80) Justice Holmboe, representing the minority, based himself on the principle in Article 96 that Norwegian courts may not pass sentence without a basis in Norwegian formal law or in an equivalent decision by an administrative authority. It made no difference that there were international penal sanctions that could be applied by international law bodies. The consequence would in that case be that a legal provision permitting Norwegian courts to enforce sanctions according to international law could be given a retroactive effect if applied to acts committed before it was adopted, see page 205.

(81) Also Justice Holmboe referred to the undisputed fact that Article 97 of the Constitution created "an absolute barrier" against both criminalisation and stricter penalties, see page 206. It was therefore clear that it would be unconstitutional, at least under normal circumstances, to apply the death penalty to an act that, when committed, was punishable with merely a custodial sentence. The extraordinary circumstances brought about by the War and the Occupation did not imply that Article 97 could be "interpreted more freely" or be "set aside", see pages 206–210.

(82) The court was divided and opinions differed within the majority as well as within the minority. I do not consider it necessary to elaborate on this, but note that the majority's view formed the basis of a similar Supreme Court ruling in Rt. 1947 page 434.

(83) The ruling in the *Klinge* case was handed down under extraordinary conditions and with conflicting opinions. The majority's view on the retroactivity issue has been criticised. This was reflected already in the preceding decision regarding impartiality in Rt. 1946 page 196, citing a letter from Professors Frede Castberg and Johs. Andenæs to the Storting's Standing Committee on Justice in connection with the continuation of the death penalty provisions in the temporary Act of 6 July 1945, see also Johs. Andenæs, *Statsforfatningen in Norway* [The constitutional system in Norway], 10th edition 2006 by Arne Fliflet, pages 448–449. I also refer to Carsten Smith, *Folkerettens stilling ved norske domstoler* [The status of international law before Norwegian courts], published in the periodical *Tidsskrift for Rettsvitenskap* 1964, page 356 et seq., in particular pages 364 and 368, as well as Torstein Eckhoff, *Rettskildelære* [Sources of law theory], 5th edition 2001 by Jan E. Helgesen, page 315.

(84) In my view, the majority's reasoning in *Klinge* cannot be upheld. On the other hand, I believe I should emphasise Justice Holboe's statement regarding the paramount considerations behind Article 97 of the Constitution, and its linkage with Article 96, see pages 207–208:

> **"The objective of Article 97 of the Constitution is, as I see it, not only that the offender is to know in advance the penalty he risks. This, too, is an important consideration, but not decisive for the interpretation of the mentioned constitutional provision, and it is not an argument against using Article 97 that offenders of this kind were unlikely to have expected any other penalty than death if Germany lost the war. A different and equally important interpretation of Article 97 is that the branches of government – i.e. the legislature, the executive and the judiciary – may not impose any penalty according to their free discretion for an act already committed. In other words, Article 97 of the Constitution must be interpreted so as to complete the fundamental principle in Article 96 that no one may be sentenced except according to law. This principle requires that the provision has been adopted before the criminal act is committed, and this is the consequence our Constitution has included in its Article 97."**

(85) I agree.

(86) I will now turn to which norm to apply to determine whether retroactivity is unconstitutional. Two theories are normally mentioned. According to the "rule theory", one must investigate the various areas of law and try to lay down fixed rules for which type of retroactivity is permitted and which is prohibited. According to the "standard theory", one must consider, based on an overall assessment, whether the retroactivity in question is particularly unreasonable or unfair.

(87) It follows from Supreme Court case law that a strict norm applies in criminal law. I refer to the plenary judgment in Rt. 2006 page 293 (*Arve's traffic school*) on VAT, paragraphs 58–61, ultimately stating that "[an] absolute prohibition applies in criminal law". The judgment in Rt. 2009 page 1412 is also of interest. A grand chamber of the Supreme Court found that the legislature's statements on stricter penalties in the preparatory works to the Act 19 June 2009 no. 74, completing the special part of the Penal Code 2005, could not be given any independent weight for acts committed before it was adopted. The following is stated in paragraphs 24 and 25:

> **"It follows from Article 97 of the Constitution that no law must be given retroactive effect. In the area of criminal law, this implies that an act that was not criminal at the time it was committed, cannot be punishable because the legislature criminalises it later. And, with regard to the sentencing, Article 97 prevents the use of increased maximum penalties or stricter minimum penalties than those applicable at the time of the act …**
>
> **The provision in Article 97 of the Constitution contributes to creating foreseeability, security and the rule of law for the citizens. In the area of criminal law, these considerations are essential …"**

(88) A strict norm has also been assumed in legal theory. Already in 1939, Ragnar Knoph stated in *Rettslige standarder, Særlig grunnlovens § 97* [Standards of law, Particularly Article 97 of the Constitution], that standards should be banned in criminal law, see page 24. And, in Johs. Andenæs, *Statsforfatningen i Norway*, page 448, it is emphasised that the Constitution's prohibition against retroactivity is absolute, also if the legal provision prescribes a penalty for acts that is generally perceived to be too low. Finally, it is mentioned that Carl August Fleischer in the article "*Grunnlovens § 97*", published in the periodical *Jussens Venner* 1975, states on page 201 that it would be most correct to view Article 97 as a fixed rule prohibiting the application of penal provisions to old offences, not just as a legal standard, while at the same time explaining the *Klinge* ruling by the extraordinary situation that prevailed, see page 205.

(89) I also ought to say a few words on the intensity of constitutional review in this area. In Rt. 1976 page 1 (*Kløfta*), the Supreme Court divided constitutional review into three, distinguishing between constitutional provisions on the protection of the personal freedom or security of individuals, provisions on the protection of economic rights, and provisions on the procedure or internal competence of other state bodies. This tripartition has later been supported in the plenary rulings included in Rt. 1996 page 1415 (*Borthen*), Rt. 2007 page 1281 (*Øvre Ullern Terrasse*), Rt. 2010 page 143 (*shipping taxation*) and Rt. 2010 page 535 (*The Norwegian Church Endowment*).

(90) The issue at hand is to which extent Article 97 of the Constitution protects against retroactivity in criminal law. It addresses the safeguarding of the individual's personal freedom and security, where the Constitution's impact prevails according to the tripartition.

(91) In Rt. 1997 page 1821 (*Kjuus*), dealing with the Penal Code's prohibition against racial discriminatory statements versus Article 100 of the Constitution on the freedom of expression, the Supreme Court stated that the constitutional review here had to be particularly strong; any presumptions by the legislator regarding the constitutionality of penal provisions that limit the freedom of expression should not limit the constitutional protection (page 1831). In the light of what I have stated about the strict norm for assessment in the area of criminal law, and of the fact that we are now at the very core of the protection of integrity, a similar position must be taken in the case at hand.

(92) I will also give some remarks on the defence counsel's submission that Article 97 of the Constitution requires that a new legal provision must be favourable to the defendant, and that it is not sufficient that it is unfavourable to him. Reference has been made in particular to the draft motives to the Penal Code 1902, issued by the Penal Code Commission in 1896, which, out of consideration for the Constitution's prohibition against retroactivity, laid down as a main rule that the law at the time of the act must be applied, unless a provision adopted later is positively and undoubtedly more favourable to the person charged.

(93) This submission may clearly not prevail. As emphasised in Johs. Andenæs, *Alminnelig criminal law* [General criminal law], 5th edition 2004 by Magnus Matningsdal and Georg Fredrik Rieber-Mohn, page 576, the Commission's view was a result of exaggerated caution. Article 97 of the Constitution cannot be considered violated unless the new provision is stricter than the older. This was established already during the post-war trials, see Rt. 1945 page 26 on page 28 and 1945 page 43 on page 45. Subsequently, this legal approach has been assumed in the Supreme Court rulings in Rt. 2002 page 889 on page 890 and in Rt. 2004 page 306 paragraph 27, both concerning the conversion from the former criminal sanction against mentally ill offenders *sikring,* to the current *forvaring*.

(94) The two latter rulings also illustrate that the prohibition against retroactivity in Article 97 of the Constitution also applies outside those cases where the penalty is increased in a narrow sense. The *sikring*, applicable until the Penal Code was amended in 1997, was not considered as punishment. Instead, the Supreme Court decided based on the merits of each case whether the new reaction was stricter. A different matter is that, unhindered by the prohibition against retroactivity, new rules on the execution of sentences may be provided "within reasonable limits" also for sentences passed, see Rt. 2004 page 306 paragraph 25. However, unconstitutional retroactivity may occur also here. An example is included in Rt. 1964 page 1418, where the Supreme Court's Appeals Selection Committee endorsed the interpretation that it was not possible to replace the preventive sanction *hæfte* in Danish law by imprisonment in Norway. It was stressed that it was unclear whether the Norwegian imprisonment would have "the same social effects" as the Danish *hæfte*.

(95) It is not instructive to the case at hand that Article 97 of the Constitution permits application of new procedural rules in connection with prosecution of older acts, even if the amendments weaken the defendant's position. Here, other interests prevail, see Andenæs, *Statsforfatningen in Norway*, page 451. The same applies to the right to implement new limitation rules before the limitation period has commenced, see Rt. 1945 page 109 (*Quisling*) on page 117. Finally, I mention that the Supreme Court ruling in Rt. 2004 page 645, on the incorporation of an

amount corresponding to tax penalty into the convicted person's fine, has no relevance to the case at hand. That case dealt with a completely different issue, and it was crucial to find a solution during a transitional period.

(96) Against this background, with the specifications mentioned, I conclude that the protection against retroactivity is very strong in the area of criminal law, and that it is incumbent on the courts to perform a thorough constitutional review.

(97) I will now turn to the individual assessment of whether there is unconstitutional retroactivity in our case, and start with the crimes with which A is indicted – crimes against humanity and war crimes.

(98) Section 102 subsection 1 (a)–(k) of the Penal Code 2005 lists which acts are considered crimes against humanity. In Proposition to the Odelsting No. 8 (bill) (2007–2008) page 49 and 80, these crimes are described as homicide and other aggravated violations of integrity committed as a part of a widespread or systematic attack against a civilian population. The acts may have taken place in peacetime as well as in wartime.

(99) During the consultation round, some bodies asked whether the Norwegian term "*forbrytelser mot menneskeheten*" sufficiently reflected the international and long-standing "crimes against humanity" and "*crimes contre l'humanité*", see pages 80–81 of the bill. It was mentioned that it does not only cover crimes against humans as a species, but violations of the very fundamental humanness. The Ministry chose to keep "*forbrytelser mot menneskeheten*", among other things because it was well established, and held that both meanings had to be considered covered by the Norwegian wording. In that regard, the following is stated on page 81:

> **"It concerns crimes of an aggravated nature, and they do not include assaults against an individual without it being done as part of a 'widespread or systematic attack on a civilian population'. This is not reflected in the term 'crimes against the humanness'. Any form of torture and suffering inflicted on a single person is inhumane. The acts that are punishable as 'crimes against humanity', however, are so serious that they violate the human civilisation as such."**

(100) In my view, these statements alone illustrate that the crime category "crimes against humanity" differs greatly from general penal provisions on, for instance, deprivation of liberty. The application of section 102 of the Penal Code 2005 instead of section 223 of the Penal Code 1902 will therefore be clearly unfavourable to the offender.

(101) Section 103 of the Penal Code 2005 defines war crimes in subsections 1 (a)–(k). On page 87 of the bill, they are characterised as "serious violations of international humanitarian law, i.e. rules of international law applicable in armed conflicts. It concerns rules under customary law or rules laid down in treaties on banned warfare methods and on the protection of civilians, injured as well as sick, war prisoners and other special groups and objects".

(102) When the Court of Appeal found that Article 97 of the Constitution did not prevent the conviction of A under section 103 on war crimes, it emphasised that the penal provision – similar to section 223 of the Penal Code 1902 – aimed to protect individuals, and that section 103 subsection 1 (h) on confinement did not imply an extension of the spectrum of punishable acts. Deprivation of liberty under aggravated circumstances in section 223 subsection 2 was also a very serious offence, and when assessing the question of guilt under this provision's

condition that the deprivation of liberty must be "unlawful", it was significant how the act would be assessed under international law. The term war crime would probably – according to the Court of Appeal – be used in the sentencing and in the media, and the term would also have been used if A's case had been heard in Bosnia-Hercegovina or in an international court. The predictability consideration did therefore not preclude application of section 103.

(103) The Court of Appeal concluded:

> **"Against this background, the application of section 103 of the Penal Code 2005 is unlikely to have had a practical impact on how the offence is characterised. The application of the new Act may hardly be considered more burdensome for the defendant. The considerations on which Article 97 of the Constitution is based are thus not relevant. In the Court of Appeal's view, in such a situation, the fact that the new Act has a different term for the offence cannot alone be decisive."**

(104) I take as my starting point that, like section 102 subsection 1 (e) of the Penal Code 2005, section 103 subsection 1 (h) covers violations of international humanitarian law. They have been described in Article 7 no. 1 (e) and Article 8 no. 2 (a) (vii) of the ICC statute, and are a continuation of the rules on crimes against humanity and war crimes in the respective statutes of the Yugoslavia and Rwanda Tribunal, together with genocide, often referred to as "the crime of crimes". The maximum penalty prescribed in section 102 subsection 2 on crimes against humanity is, as mentioned, 30 years of imprisonment. The maximum penalty prescribed in section 103 subsection 4 is 15 years for war crimes, but 30 years if the act falls within subsection 1 (a)–(e) or is otherwise aggravated. Limitation does not occur if the offence is punishable with 15 years of imprisonment or more, see section 91. All this underlines the gravity of the provision.

(105) It is true that section 3 subsection 2 of the Penal Code 2005 states that the penalty under the new provisions in chapter 16 cannot exceed the penalty that would have been imposed under the criminal legislation at the time of the offence. Therefore, A cannot be punished more severely than what section 223 subsection 2 of the Penal Code 1902 prescribes. In my view, however, this does not mean that the new rules in chapter 16 thus fall outside the retroactivity prohibition. Here, I refer to Proposition to the Odelsting No. 8 (bill) (2007–2008) page 62–63, where the Ministry of Justice makes the following general statement:

> **"The wording of a penal provision may serve as an expression of society's assessment of the punishability. The legislative classification will, through the words used and the associations they give, express an evaluation of the punishability of an act. It may be argued that it is within the objective of Article 97 of the Constitution to protect the individual being convicted under a new legal provision that, with its characteristics, will harm a person's reputation, for example if its application expresses a stricter assessment of the punishability and thereby an increased social condemnation of the act.**
>
> **Since a genocide conviction has negative connotations beyond what is expressly set out in the homicide provision, this application – perhaps especially when expressed in the conclusion of the judgment – is perceived as more stigmatising, both by the convicted person himself and by the population in general."**

(106) I have no doubt that when the Penal Code 2005 characterises an act as genocide, a crime against humanity or a war crime, it will be more burdensome for the perpetrator than being convicted under the Penal Code 1902, although the penalty imposed under chapter 16 of the

Penal Code 2005 cannot be stricter than under the former provisions. Also in daily speech and in the media, indictment or conviction under chapter 16 will be clearly stigmatising.

(107) In my view, a distinction between these crime categories seems to be of little use. As I will revert to, they are all serious violations of international humanitarian law. The background to the new rules in chapter 16 supports this.

(108) Act of 15 June 2001 no. 65 on the implementation in Norwegian law of the ICC's statute 17 July 1998 (the Rome Statute) provided rules on Norwegian cooperation with the ICC. Its statute prohibits genocide, crimes against humanity and war crimes, but do not require that the member states take a similar stand in their respective laws. In connection with the amendments, the Ministry of Justice nonetheless made a comparison between the Statute and Norwegian criminal legislation. The Ministry found for several reasons that it was preferable that Norwegian law contain such provisions, but that such time-consuming work should be suspended pending the work of the Criminal Law Commission, see Proposition to the Odelsting No. 95 (bill) (2000–2001) pages 13–15.

(109) The Criminal Law Commission proposed in Norwegian Official Report 2002: 4 page 275–280 to introduce separate provisions into the Penal Code on war crimes, genocide and crimes against humanity. It stated that the "universal and extremely aggravate nature" of these crimes had been decisive for the proposal to place the chapter first in the special part of the Penal Code. The proposal was widely supported during the consultation. Proposition to the Odelsting No. 90 (bill) (2003–2004) on the Penal Code, which formed the basis for parts of the Penal Code 2005, stated the following on page 146 second column:

> **"The acts that will be comprised by the provisions on war crimes, genocide and crimes against humanity in the new Penal Code, are generally more aggravated than the most aggravated integrity violations against individuals. The most serious crimes affect a much larger number of persons than other offences. The crimes are also often committed by people with more sinister motives and criminal minds. Moreover, more interests are violated than usual when aggravated offences are committed. The most serious acts in this group may both be a series of violations of fundamental private interests, such as life and liberty, and violate basic general interests, because the acts are an attack on the common values on which a civilised, humane and democratic society is based. With reference to the discussion above, it is therefore correct to say that war crimes etc. are more serious than the offences that, under the current Penal Code, may give a penalty of up to 21 years of imprisonment, and that we, until now, have considered the most serious crimes. …"**

(110) These statements illustrate once more the special position of genocide, crimes against humanity and war crimes, compared to ordinary crimes. Nor do they suggest that one should distinguish between these crime categories, rather the opposite. In this context, it is also worth mentioning Proposition to the Odelsting No. 8 (bill) (2007–2008) page 49 first column, where the Ministry points out that the three crime categories partially overlap when it comes to which acts are covered.

(111) Statements on the international level suggest the same. Of interest is the Bagaragaza case, which raised the question whether one of the accused in the Rwanda Tribunal could be transferred to Norway for prosecution. In a ruling of 30 August 2006, the Tribunal's Appeals Chamber found that the conditions for a transfer were not met and stated:

> **"… Norway's jurisdiction over Mr. Bagaragaza's crimes would be exercised pursuant to legislative provisions dealing with the prosecution of ordinary crimes. The Appeals Chamber**

recalls that the basis of the Tribunal's authority to refer its cases to national jurisdictions flows from Article 8 of the Statute, as affirmed in Security Council resolutions. Article 8 specifies that the Tribunal has concurrent jurisdiction with national authorities to prosecute 'serious violations of international humanitarian law'. In other words, this provision delimits the Tribunal's authority, allowing it only to refer cases where the state will indictment and convict for those international crimes listed in its Statute.

… In addition, the Appeals Chamber appreciates fully that Norway's proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the 'ordinary crime' of homicide. That the legal qualification matters for referrals under the Tribunal's Statute and Rules is reflected *inter alia* in Article 9 reflecting the Tribunal's principle of *non bis in idem.* According to this statutory provision, the Tribunal may still try a person who has been tried before a national court for 'acts constituting serious violations of international humanitarian law' if the acts for which he or she was tried were 'categorized as an ordinary crime'. Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives."

(112) Although the Bagaragaza case concerned genocide, the Appeals Chamber's formulations are general and show that also the two other crime categories are significantly more stigmatising than ordinary crimes in national legislation. It should be noted that the Appeals Chamber did not consider it sufficient that the gravity of the acts would be reflected in the grounds for judgment and in the sentence.

(113) Also the Ministry of Justice found that the incorporation of the terms genocide, crimes against humanity and war crimes would imply a more burdensome application of the law, but concluded that no unconstitutional retroactivity had occurred. The following is stated in this regard on page 63 first column:

"However, already based on current law the court can consider in its grounds for judgment that an act must be judged as a war crime. This may take place as a step in the sentencing process. For sentencing aspects relating to the gravity or punishability of the acts, more or less the same standard of evidence is likely required as when one is to judge whether a penal provision has been violated. The court must thus find it proven beyond reasonable doubt that the act may be classified as a war crime, if this is to be emphasised in the sentencing process.

Because an act already based on present rules and standards of evidence may have the same legal characteristics as the proposed rules suggest, it may be said that a direct application of the new provision will not bring the convicted person in any markedly different and more difficult position. On an international level, the classification of the type of acts covered by the consultation paper has been firm for a long period of time. This also suggests that applying the new provision does not deteriorate the defendant's situation. The fact that the type of crime dealt with here is largely considered an international affair, strengthens the impact of this aspect.

The Ministry assumes that the application of the new provisions to acts committed before the provisions were incorporated, implies a more burdensome application of the law, but that retroactivity will nonetheless be compatible with Article 97 of the Constitution. Based on the

> ***Klinge*** **case and the development in international law described above, the Ministry has therefore concluded that a retroactive application within the current maximum penalties will not be in breach of Article 97 of the Constitution.**

(114) This is also addressed on page 61 second column, which directly concerns retroactivity with stricter penalties, which the Ministry, as mentioned, did not support:

> **"On the other hand, the Ministry emphasises that recent years' development in the general opinion of the law clearly suggests that international law should be emphasised to such an extent as was done in *Klinge* with regard to genocide, crimes against humanity and war crimes (although it may of course not justify the death penalty). This implies that the views stressed in the ruling must be judged based on their tenability in relation to the rules and principles otherwise applicable in Norwegian law and recent years' development in international law. In this perspective, the *Klinge* order serves to demonstrate that one is not dealing with unconstitutional retroactivity."**

(115) In addition, I refer to page 62 first column of the bill, where, in order to follow the opinion of the law in *Klinge*, it is submitted that the international criminal law system is currently far more enhanced than in 1946, both through descriptions of substantive rules and through various procedural practices.

(116) In my view, the arguments based on *Klinge* are not convincing. Klinge was convicted of acts that were war crimes according to "the laws and customs of war", see Rt. 1946 page 198 on page 200. Here, Justice Skau referred among other things to "the laws of humanity" and "the dictates of the public conscience" … (the Hague Convention IV, its preamble, Article 46 of the War on Land Convention and Article 61 of the Convention on Prisoners of War)" and to "the list of war crimes that was prepared for the Versailles Conference in 1919". Furthermore, he stressed on page 201 that the claim for punishment itself arose from international rules on the laws and customs of war. The majority's point was, exactly, that the rules on war crimes were firmly rooted in international law. However, as I have already stressed, the weakness of this position is that it disregards the absolute requirement of Norwegian law in Articles 96 and 97 of the Constitution. A legal basis in foreign or international law in this regard is not sufficient. A subsequent development in international law cannot diminish this rule of law requirement.

(117) The statement in the bill that there has been a significant development in international law since *Klinge*, is undoubtedly correct. I need only reiterate the four Geneva Conventions of 1949 with the two Additional Protocols of 1977, the Genocide Convention of 1948, as well as the statutes for a number of international tribunals from the 1990s, including the Yugoslavia Tribunal and the Rwanda Tribunal. The expediency of having this development reflected in Norwegian law was clearly formulated in the preparatory works to Act 15 June 2001 no. 65 on the reintroduction in Norwegian law of the International Criminal Court's statute 17 July 1998. Proposition to the Odelsting No. 95 (bill) (2000–2001) states the following on page 15:

> **"The Ministry agrees that incorporation of the statute's penal provisions into Norwegian criminal legislation will be a signal that Norway considers the relevant acts as crimes of a particularly aggravated nature. … It would also be in line with the intentions set forth in the statute's preamble that it is the main responsibility of each state to acknowledge the threat such crimes represent and to prosecute persons who commit them. If such specific penal provisions are inserted into Norwegian domestic criminal law one would avoid questions relating to Norwegian criminal legislation's suitability to punish the criminals satisfactorily."**

(118) These views, which are repeated in Proposition to the Odelsting No. 8 (bill) (2007–2008) page 51 first column, favour the incorporation of a prohibition against aggravated violations of humanitarian law into Norwegian law. Such provisions also make prosecution of assailants who have sought refuge in Norway more effective, see page 52 first column of the bill. Moreover, such provisions make it possible to assist international courts by having some of their cases transferred to our country, which was attempted in the Bagaragaza case. However, I do not find that these considerations justify giving new penal provisions on crimes against humanity and war crimes a retroactive effect contrary to the guarantees in Articles 96 and 97 of the Constitution, in view of how strongly these provisions differ from criminal legislation applicable at the time of the offence.

(119) It has been contended that persons guilty of genocide, crimes against humanity and war crimes do not have a legitimate expectation to be convicted under ordinary penal provisions, since they at any rate risk conviction under stricter rules in an international criminal court or in a third country, see page 58 of the bill. However, this factor may also not justify giving sections 102 and 103 of the Penal Code a retroactive effect. In our country, Article 97 of the Constitution gives absolute protection in the area of criminal law, and this protection must apply to everyone.

(120) Since the application of sections 102 and 103 contravenes the safeguards laid down in the Constitution, the fact that the Storting during its legislative preparations endorsed the constitutional perception assumed in bill cannot be accorded weight. I refer to my previous statements on the strict constitutional review in this area.

(121) I add that the retroactivity prohibition does not have the effect that criminals enjoying this protection cannot be punished in our country. They will be indicted under the normal penal provisions on crimes such as homicide, bodily harm, deprivation of liberty and rape. The fact that they have committed aggravated violations of humanitarian law will be expressed in the grounds for judgment and in the sentence.

(122) Against this background, I do not support the Public Prosecution Authority's contention that A must be convicted under section 102 of the Penal Code 2005 on crimes against humanity, and its appeal must therefore be rejected.

(123) A has prevailed with his contention that it would be incompatible with Article 97 of the Constitution to convict him of violation of section 103 of the Penal Code 2005 on war crimes. According to section 345 subsection 2 of the Criminal Procedure Act, the Supreme Court may pronounce a new judgment instead of setting aside the appealed judgment, if the necessary preconditions are fulfilled. In that case, Supreme Court case law demonstrates that it is possible to convict under a less strict penal provision. I refer to Rt. 1999 page 1008, concerning a shift from conviction under section 162 subsection 2 of the Penal Code 1902 to subsection 1, and Rt. 2005 page 1401 on a shift from section 192 to section 193.

(124) In the case at hand, the indictment mentions – in addition to section 103 of the Penal Code 2005 – section 223 subsections 1 and 2 of the Penal Code 1902. The questions to the jury in the Court of Appeal were formulated in such a way that they may also serve as a basis for conviction under section 223 subsection 2, and the Court of Appeal's conclusion refers to this provision because it was necessary to convict under section 103 of the Penal Code 2005.

(125) In the light of the Supreme Court's result, the Court of Appeal's judgment may only be upheld to the extent it refers to violation of section 223 of the Penal Code 1902.

(126) The hearing in the Appeals Selection Committee will continue in order to decide the issues excluded in the Committee's decision 2 September 2010.

(127) I vote for the following

J U D G M E N T :

1. The Public Prosecution Authority's appeal against the application of the law is dismissed.

2. The acts that in the Court of Appeal's conclusion are considered to fall under section 203 of the Penal Code 2005, must during the Supreme Court's continued proceedings be considered under section 223 subsection 2, cf. subsection 1, of the Penal Code 1902.

(128) Justice **Skoghøy**: As opposed to Justice Møse, I have arrived at the conclusion that the retroactivity prohibition in Article 97 of the Constitution does not preclude that the acts described in counts I and II of the indictment are prosecuted under sections 102 and 103 of the Penal Code 2005.

(129) Substantial work is carried out internationally to prosecute genocide, crimes against humanity and war crimes. The definition in international law of these crimes is long-standing and found among other places in the Rome Statute of the International Criminal Court (the Rome Statute) Part II Articles 6, 7 and 8. Acts in these crime categories are normally covered by ordinary penal provisions, and the three categories overlap considerably, as they largely concern acts of the same nature. What primarily separates these types of crime from ordinary crimes, and from each other, is the context in which they are committed. Genocide is homicide, aggravated bodily harm and similar committed with the intent of extinguishing, in whole or in part, a national, ethnic, racial or religious group. Crimes against humanity are homicide or other aggravated crimes as a part of large-scale or systematic attacks on a civilian population. War crimes are killings of civilians or other non-combatants and other serious violations of international humanitarian law in connection with an armed conflict. The case at hand concerns unlawful confinement of non-combatants in connection with an armed conflict and as part of systematic attacks on a civilian population. It is clear that unlawful confinement of this nature may be categorised with acts that for a long time have been punishable under rules of international law on war crimes and crimes against humanity.

(130) The Rome Statute is founded on the idea that the respective states are to prosecute genocide, crimes against humanity and war crimes. The International Criminal Court has jurisdiction only in cases where the relevant state is unable or unwilling to carry out the investigation or prosecution, see the Rome Statute Part 2 Article 17.

(131) Norway ratified the Rome Statute on 16 February 2000. Since the Statute does not impose any international law duty on the states to adopt separate penal provisions on genocide, crimes

against humanity and war crimes, Articles 6, 7 and 8 were not incorporated in Norwegian law. However, the Ministry pointed out that it was preferable that Norwegian law contain such provisions, primarily to signal that Norway considers such crimes particularly aggravated. Secondly, adopting separate penal provisions on genocide, crimes against humanity and war crimes would best comply with the Rome Statute's intent that the individual state must be the first to recognise the threat such crimes represent and to prosecute persons who commit them. Thirdly, if separate provisions were adopted, one would avoid doubt as to whether Norwegian criminal law was suited for satisfactory prosecution of persons who commit such crimes, see Proposition to the Odelsting No. 95 (bill) (2000–2001) on the reintroduction in Norwegian law of the International Criminal Court's statute (the Rome Statute), page 15.

(132) When the Penal Code 2005 was adopted, there was consensus that Norway should have separate penal provisions on genocide, crimes against humanity and war crimes, see Proposition to the Odelsting No. 90 (bill) (2003–2004), page 142–147 and Recommendation to the Odelsting No. 72 (2004–2005), page 32–33. In Proposition to the Odelsting No. 8 (bill) (2007–2008) on the Act relating to amendments to the Penal Code 20 May 2005 No. 28 etc., the Government proposed such penal provisions to the Storting. The following is stated about the background for this bill (on page 52):

> **"The need for a provision on genocide was emphasised in the Rwanda Tribunal's ruling in 2006 that the case against Michel Bagaragaza, who is indicted for genocide, could not be transferred to Norway. Despite the wish of Norwegian authorities, the prosecutor and the defence counsel, the Rwanda Court found that the case could not be referred since Norway does not have its own penal provision on genocide. The reason for the ruling was that the crimes for which Bagaragaza is indicted – genocide, conspiracy or contribution to genocide – have a different content than 'ordinary' homicide for which Bagaragaza would have been indicted in Norway. The genocide provision is meant to protect specific groups, not individual lives. The Appeals Chamber therefore found that transferring the case to Norway would be incompatible with the Rwanda Tribunal Statute. It is better to avoid that similar rulings in the future prevent a criminal case from being transferred to Norwegian courts when this is otherwise preferable. Nor should the International Criminal Court or the international community in general doubt that Norway has the ability and will to prosecute such crimes in a manner befitting their nature and gravity.**
>
> **Increased globalisation entails an increased risk that persons who have committed genocide, crimes against humanity or war crimes in other countries, reside in Norway. As the Director of Public Prosecutions writes in a report of 24 September 2004, due to the conditions in the home country, it will in many cases be impossible to return asylum seekers suspected of war crimes etc. to the country they came from. If they risk torture or the death penalty, it will be a violation of fundamental human rights to return them. It may also be that satisfactory proceedings are unlikely in the country of origin due to political conditions or a malfunctioning court system. Thus, the need to be able to prosecute such crimes in Norway is genuine.**
>
> **Norwegian soldiers participate to some extent in armed conflicts abroad. Should some of them should be suspected of having committed war crimes, they ought to be prosecuted in Norway based on provisions specifically aimed at such crimes."**

(133) It follows from Article 96 of the Constitution that "[n]o one may be sentenced except according to law". In the Supreme Court order Rt. 1946 page 198 (the *Klinge* order) the Supreme Court's majority leaves it open whether rules of international law and laws and

customs of war satisfy the requirement in Article 96. However, it has later been clarified that Norwegian courts may not apply international law directly without it having been incorporated in or transformed to Norwegian law (the dualistic principle). Even though the dualistic principle has been considerably modified by the presumption principle – which means that Norwegian law to the extent possible must be interpreted in conformity with international law – it is currently accepted among lawyers that Norwegian courts cannot convict a person directly under international law. This is partially why separate penal provisions on genocide, crimes against humanity and war crimes were adopted in 2008. Before that, Norwegian courts could only prosecute such crimes as ordinary offences (homicide, bodily harm, unlawful confinement mv.). However, the fact that genocide, crimes against humanity and war crimes had to be prosecuted as ordinary offences did not mean that the characteristics turning the acts into violations of international law could not be accorded weight in the sentencing process, see Proposition to the Odelsting No. 8 (bill) (2007–2008), page 63, see page 80. An example from case law is the Supreme Court ruling Rt. 1947 page 368.

(134) When the provisions on genocide, crimes against humanity and war crimes were adopted in 2008, they were to apply to acts committed before they entered into force, if the acts were punishable under criminal legislation in force at the respective times and considered genocide, crimes against humanity or war crimes under international law, see the Penal Code 2005 section 3 subsection 2 first sentence. Nonetheless, section 3 subsection 2 second sentence states that when the provisions are applied to acts committed before the provisions entered into force, the accused cannot receive a stricter penalty than that prescribed in criminal legislation at the time of the act. With these limitations, the Storting found that it would be in conformity with Article 97 of the Constitution to apply the provisions to acts committed before the provisions were adopted, see Recommendation to the Odelsting No. 29 (2007–2008) on the Act relating to amendments to the Penal Code 20 May 2005 No. 28 etc., page 20 and Odelsting Discussion (2008), page 236 et seq.

(135) As outlined by Justice Møse, the acts of which A is accused were committed in Bosnia-Hercegovina in June–October 1992. Based on the description of the acts in the indictment and the Court of Appeal's judgment, they are covered by the provisions on crimes against humanity and war crimes implemented in 2008 in sections 102 and 103 of the Penal Code 2005, but at the time they were committed, they could – in Norway – only have been prosecuted as unlawful confinement under section 223 of the Penal Code 1902. Nonetheless, when committed, the acts were covered by the definition in international law of crimes against humanity and war crimes, and they could thus have been treated as such in an international court.

(136) Like in Norway, the current penal code in Bosnia-Hercegovina has provisions on genocide, crimes against humanity and war crimes modelled on the Rome Statute. When the acts of which A is accused were committed, the penal code of the former Yugoslavia applied in Bosnia-Hercegovina. The code contained in chapter 16 provisions relating to genocide and war crimes. There was no separate provision on crimes against humanity, but the provisions on genocide and war crimes were referred to as "crimes against humanity and violations of international law" in the headline. Section 142 on war crimes against the civilian population included unlawful confinement. The penalty for war crimes against the civilian population was a minimum of five years of imprisonment or death.

(137) The question is whether the retroactivity prohibition in Article 97 of the Constitution means that A, despite what followed from international law and criminal legislation in Bosnia-Hercegovina at the time of the acts, can only be convicted of unlawful deprivation of liberty in a Norwegian court.

(138) If the interpretation of a constitutional provision for the protection of economic rights creates genuine doubt, it follows from Supreme Court case law that the courts must attach decisive importance to the Storting's constitutional interpretation, see Rt. 2010 page 535 (the *OVF* case) paragraph 146–148 with further references. The case at hands concerns the extent to which Article 97 of the Constitution permits the application of penal provisions to acts committed before the provisions were adopted. When deciding this issue, the Storting's constitutional interpretation cannot be accorded particular weight. On the other hand, at which level a penal provision within the scope of Article 97 is to apply to previously committed acts, is a question for the Storting to consider.

(139) Counsel for the defence have, with reference to Bernhard Getz's draft penal code of 1887 and Justice Holmboe's minority vote in Rt. 1946 page 198 (*Klinge*) submitted that Article 97 of the Constitution must be read in context with Article 96, and that Article 97 therefore prohibits conviction under a penal provision adopted after the act was committed, unless it gives a more favourable result than the provision applicable at the time of the act. However, this view was not supported by the Supreme Court's majority in the *Klinge* order. The accused was a German Gestapo officer who had been convicted of numerous incidents of severe torture in Norway during World War II. By a provisional decree 4 May 1945, the rules of international law were incorporated in Norwegian law and made applicable also to acts committed before the decree was adopted. The acts committed by the Gestapo officer were criminal in Norway at the time, but the issue was whether he, under the decree of 4 May 1945, could be sentenced to death for war crimes. The Supreme Court concluded with a 9–4 vote that Article 97 of the Constitution did not preclude conviction under the decree. The majority was split into two factions. The spokesperson for the biggest faction within the majority (seven justices), Justice Skau, stated among other things:

> **"The foreign war criminals convicted in Norway will not be convicted of an offence that was not criminal when committed or receiving a penalty that could not previously be given – although one assumes that a *Norwegian* court could not do so without the decree of 1945 …**
>
> **Against this background, I agree with the Court of Appeal that we are not dealing with unconstitutional retroactivity. The defendant in this case has been convicted of acts that, at the time they were committed, were crimes according to international law and could be punished with the most severe penalty. I can thus not see that there in fact is any conflict with Article 97 of the Constitution – or with the considerations forming the basis for this provision. The drafting of the decree of 1945 was a step in – or a consequence of – Norway's agreement with the allied nations on the punishment of war criminals and on the distribution of trials. The very claim for punishment from the allied nations – including Norway – arose by virtue of international rules on the laws and customs of war, and with a content based thereon, since war crimes had in fact been committed. Hence, the actual effect of the decree of 1945 is simply that it, in consideration of Article 96 of the Constitution, permits the Norwegian courts – in conformity with agreements entered into in that regard – to assert the already acquired claim for punishment."**

(140) In the *Klinge* case, the issue was whether Article 97 of the Constitution prevented a more severe penalty than that prescribed in Norwegian law at the time of the act. This question has been much debated, and the general opinion today differs from that assumed by the Supreme Court's majority in the *Klinge* order. In my view, it is incompatible with Article 97 of the Constitution to impose a more severe penalty than what Norwegian law prescribed at the time of the offence. However, it is generally accepted among lawyers that Article 97 does not preclude conviction under a penal provision adopted after the act was committed, unless it may be established that the new provision is stricter than that applicable at the time of the act, see the Supreme Court rulings Rt. 2002 pages 889–890 and Rt. 2004 page 306 paragraph 23, see paragraph 27 and Johs. Andenæs, *Alminnelig strafferett* [general criminal law], 5th edition 2004 by Magnus Matningsdal and Georg Fr. Rieber-Mohn, page 576. This shows that there is no immediate connection between Articles 96 and 97. In order for Article 97 to preclude application of the new penal provision, such application must either give a less favourable result for the accused, or a conviction under the new provision must be demonstrably more burdensome.

(141) It follows from section 3 subsection 2 second sentence of the Penal Code 2005 that when applying the provisions on genocide, crimes against humanity and war crimes to acts committed before these provisions entered into force, the penalty cannot be stricter than the one that would have been imposed under the provisions in force at time of the acts. Hence, a conviction under the provisions on crimes against humanity and war crimes in sections 102 and 103 of the Penal Code 2005 will not lead to a stricter penalty for A. However, this is not sufficient for a conviction under these provisions to comply with Article 97 of the Constitution. It must also be established, after an overall assessment of the prosecution and the consequences thereof, whether a conviction under sections 102 and 103 of the Penal Code 2005 will be demonstrably more burdensome than under the provisions applicable at the time of the acts.

(142) In my view, there can be no doubt that being convicted of crimes against humanity and war crimes, as a starting point, will be more burdensome than being convicted of unlawful deprivation of liberty. However, when assessing whether a conviction under the provisions on crimes against humanity and war crimes will breach the retroactivity prohibition in Article 97 of the Constitution, one cannot only consider which penal provision would have applied if the act had been prosecuted in Norway at the relevant time. Even if Norwegian law is based on the dualistic principle, one must, when establishing whether a conviction under the new provisions will be more burdensome for A, also consider under which penal provisions he could have been convicted in an international court.

(143) As I have already pointed out, the acts of which A is accused were criminal under international law on crimes against humanity and war crimes at the time they were committed, and could at that point have been treated as such in an international court. If Norway does not wish to prosecute crimes against humanity or war crimes committed before penal provisions covering such acts were adopted, the alternative is prosecution in an international court. It follows from Article 10 the Statute of the International Tribunal for the Former Yugoslavia (the Yugoslavia Statute) that a person who has been tried in Norway for an act characterised as an ordinary crime, may be subsequently tried in an international court under rules of international law. A similar provision is found in the Rome Statute Part II Article 20. Since the acts, when committed, were not only criminal under Norwegian legislation, but also according to the definition in international law of crimes against humanity and war crimes,

and could have been treated as such in an international court, I cannot see that a conviction in Norway is unconstitutional if the same characteristics would have been emphasised in an international court. The burden of being convicted of crimes against humanity or war crimes in Norway will not exceed the burden of being convicted of the same in an international court. On the contrary, A would benefit from being prosecuted under sections 102 and 103 of the Penal Code 2005 in Norwegian courts, as section 3 subsection 2 second sentence protects him from being punished more severely than he would have been under the Norwegian legislation applicable at the time of the acts. In addition, if A is convicted in Norway under the provisions on crimes against humanity or war crimes, he will also be protected against further international prosecution, see Article 10 of the Yugoslavia Statute.

(144) When assessing whether a conviction under a more recent penal provision is demonstrably more burdensome than a conviction under the provision applicable at the time of the act, one cannot focus exclusively on the relevant provisions. Importance must also be attached to whether the sentencing under the former penal provision may consider the aspects that characterise the act according to the new the provision. This is the case here. The characteristics of the acts that turn them into crimes against humanity and war crimes, will, if A is convicted of illegal deprivation of liberty under section 223 of the Penal Code 1902 be crucial for the sentence. The same applies to the very classification under international law, see Rt. 1947 page 368. The fact that the sentencing under section 223 of the Penal Code 1902 must take into account the classification under international law and the characteristics required, helps substantiating that a conviction under sections 102 and 103 of the Penal Code 2005 will not be demonstrably more burdensome than a conviction under section 223 of the Penal Code 1902, which will not protect A from further international prosecution based on a correct international law classification.

(145) As mentioned, the Rome Statute states that genocide, crimes against humanity and war crimes should be prosecuted in the relevant state. The most serious acts within these categories are not only fundamental assaults against individuals, but also serious attacks on the common values forming the basis of a civilised, humanitarian and democratic society. It was a key objective of adopting the provisions on genocide, crimes against humanity and war crimes in 2008 that Norway participate in the international work to prosecute such crimes, but it was also important to be able to offer our courts as venue to relieve the international law enforcement apparatus. It was also essential to prevent that persons guilty of genocide, crimes against humanity or war crimes evade prosecution by taking residence in Norway, see Proposition to the Odelsting No. 8 (bill) (2007–2008), page 52 and Proposition to the Odelsting No. 90 (bill) (2003–2004), page 147. The retroactivity prohibition in Article 97 of the Constitution cannot be "forced" in such a situation. The prohibition stems from general due process considerations to ensure predictability and protect against injustice and arbitrariness. It is difficult to see which interests worthy of protection are harmed by acts, when committed, being comprised not only by the definition of genocide, crimes against humanity or war crimes in international law, but also by Norwegian legislation if classified in line with the said definition. Whether our courts, within the scope of the Constitution, may be used as venue for international prosecution, is a political question that the courts do not have jurisdiction to review.

(146) Referencing the possibility that the same act may be punishable under both sections 102 and 103 of the Penal Code 2005, the Court of Appeal found that Article 97 of the Constitution precludes application of section 102 of the Penal Code 2005, but not section 103. I cannot see

that the issue of unconstitutional retroactivity differs under the two provisions. Both emphasise aspects of the act that are not part of the assessment of guilt under section 223 of the Penal Code 1902, which is more relevant to section 102 than to section 103. However, as I see it, this is irrelevant to the issue whether the provisions, unimpeded by Article 97, may be applied to acts committed before they entered into force. Crucial here is that the actual acts – the deprivations of liberty – were a crime under Norwegian law when committed and covered by the definition in international law of crimes against humanity and war crimes. The Storting should thus, without conflicting with Article 97, be free to offer our courts as venue for such trials in accordance with the international law classification when the penalty is not stricter than that prescribed in Norwegian legislation at the time of the acts.

(147) When the provisions on genocide, crimes against humanity and war crimes were adopted in 2008, it was simultaneously decided that criminal liability for such acts were not subject to limitation if the prescribed penalty was imprisonment for a term of 15 years or more, see section 91 of the Penal Code 2005. However, it was a condition for avoiding limitation under this provision that criminal liability was not already time-barred when the new rules entered into force. Thus, decisive for whether criminal liability is time-barred is whether the indictment of 2 May 2007 interrupted the limitation period. The considerations behind the indictment and those behind the formulation of the charge to interrupt the limitation period, differ. As we are dealing with multiple violations, and the indictment of 2 May 2007 was supplemented by a more specific request for search and arrest issued on the same day as the charge, I agree with Justice Møse that the charge was sufficiently specified to interrupt the limitation period, and on this point, I mainly support his reasoning. The fact that the interrupting charge concerns violation of section 223 of the Penal Code 1902 does not preclude prosecution and conviction under sections 102 and 103 of the Penal Code 2005, since the description of the deprivation of liberty in the charge and the request for a search and arrest warrant contain the required characteristics for the acts to be considered crimes against humanity and war crimes.

(148) Against this background, I find that the District Court's and the Court of Appeal's judgments should be set aside as concerns the acquittal on count I of the indictment, and that A's appeal should be dismissed to extent leave to appeal has been granted by the Supreme Court.

(149) Justice **Coward**: I agree with Justice Skoghøy in all material respects and with his conclusion.

(150) Justice **Matningsdal**: Likewise.

(151) Justice **Øie:** Likewise.

(152) Justice **Endresen**: Likewise.

(153) Justice **Noer:** Likewise.

(154) Justice **Gjølstad** : I agree with Justice Møse in all material respects and with his conclusion.

(155) Justice **Tjomsland**: Likewise.

(156) Dommar **Utgård**: Likewise.

(157) Justice **Tønder:** Likewise.

(158) Justice **Bårdsen**: Likewise.

(159) Justice **Webster**: Likewise.

(160) Justice **Matheson**: Likewise.

(161) Justice **Falkanger**: Likewise.

(162) Justice **Normann**: Likewise.

(163) Chief Justice **Schei** : Likewise.

(164) Following the voting, the Supreme Court gave this

D O M :

1. The Public Prosecution Authority's appeal against the application of the law is dismissed.

2. The acts that in the Court of Appeal's conclusion are considered to fall under section 203 of the Penal Code 2005, must during the Supreme Court's continued proceedings be considered under section 223 subsection 2, cf. subsection 1, of the Penal Code 1902.