THE SUPREME COURT OF NORWAY

On 13 April 2011, the Supreme Court delivered the following judgment in

HR-2011-00808-A (case no. 2010/934), criminal appeal against judgment

I.	
A	(Counsel John Christian Elden)
v.	
The Public Prosecution	(Director General Tor Aksel Busch)
II.	
The Public Prosecution	(Director General Tor Aksel Busch)
v.	
A	(Counsel John Christian Elden)

V O T I N G :

(1) Justice **Matningsdal**: The case before us concerns sentencing for deprivation of liberty committed in 1992 during the war in Bosnia and Herzegovina, see the Penal Code section 223 (1) and (2).

(2) On 9 July 2008, following an order from the Director General, the Norwegian Prosecuting Authority took out an indictment in Oslo District Court against A, who was born on 29 August 1966, for crimes punishable pursuant to the Penal Code 2005 section 102 (1) (e) (crime against humanity) and section 103 (1) (b), (d) and (h) (war crimes against individuals).

(3) On 2 December 2008, Oslo District Court pronounced the following judgment in the penal proceedings:

> **"1. A, born 29.08.66, is convicted of eleven crimes in breach of the Penal Code 2005 section 103 (1) (h) cf. Penal Code 1902 section 223 (1) and (2) cf. Penal Code section 62, and is sentenced to imprisonment for a term of 5 – five - years. 294 – twohundredandninetyfour – days – shall be deducted from the sentence for time served in custody on remand pending trial.**

2. A, born 29.08.66, is acquitted of crimes in breach of the provisions stated in item I, items II c, II d, II h, II i, II n, II o, II r and items III a and III b and item IV."

(4) In addition, A was ordered to pay compensation for non-economic loss of NOK 40,000 to each of six victims, and NOK 60,000 and NOK 100,000 respectively to two other victims.

(5) In the proceedings before the District Court, one of the key questions was whether the provisions of the Penal Code 2005 concerning crimes against humanity and war crimes against individuals could be applied, or whether this would violate the prohibition against retroactive legislation in Article 97 of the Constitution in view of the fact that these penal provisions were first enacted by Act of 7 March 2008 No. 4. The District Court concluded that this would be the case for section 102 concerning crimes against humanity, but not for section 103 concerning war crimes against individuals. The acquittal in the District Court of crimes in breach of section 102 of the Penal Code was therefore due to the prohibition against retroactive legislation, while the acquittal for the other items in the indictment was because the District Court did not find the facts to be sufficiently proven.

(6) The Public Prosecution filed an appeal with Borgarting Court of Appeal against the District Court's ruling. Firstly, the appeal concerned the District Court's application of the law in relation to the question of guilt in its acquittal for crimes against humanity. Secondly, it concerned the assessment of evidence in relation to the question of guilt for two items in the indictment regarding breach of the Penal Code 2005 section 103 (1) (h) and one item regarding breach of section 103 (1) (b).

(7) A's appeal concerned the District Court's assessment of evidence and application of the law in relation to the question of guilt with regard to all of the offences for which he was convicted, and sentencing. He also appealed against the compensation orders that were made against him.

(8) The Public Prosecution's appeal against the application of the law with regard to breach of the Penal Code 2005 section 102 was determined by the three professional judges. Like the District Court, the Court of Appeal held that Article 97 of the Constitution prohibited application of this penal provision and that part of the Public Prosecution's appeal was therefore dismissed. However, the Court of Appeal accepted the Public Prosecution's appeal concerning the two acquittals for breach of the Penal Code 2005 section 103 (1) (h). The jury also found A guilty of the 11 offences of which he had been convicted in the District Court, and he was therefore convicted in the Court of Appeal of 13 crimes in breach of the Penal Code section 103 (1) (h). However, the Court of Appeal also acquitted him of the offences that were subsumed under the Penal Code section 103 (1) (b).

(9) The Court of Appeal's judgment in the criminal proceedings, which was pronounced on 12 April 2010, reads as follows:

"1. A, born 29.06.66, is convicted of crimes in breach of the Penal Code 2005 section 103 (1) (h), cf. section 79 (1) (a), cf. the Penal Code 1902 section 223 (2), cf. section 62 (1), and sentenced to imprisonment for a term of 4 – four – years and 6 – six – months. 294 –

twohundredandninetyfour – days shall be deducted from the sentence for time served in custody on remand pending trial.

2. A is acquitted of the offences in item III (a) of the indictment.

3. The Public Prosecution's appeal against the application of the law with regard to item I of the indictment is dismissed."

(10) In addition, A was ordered to pay NOK 120,000 in compensation to each of ten victims, and NOK 207,221 in compensation to one victim.

(11) The judgement contains an error – A was born on 29 August 1966.

(12) A has filed an appeal against the Court of Appeal's judgment to the Supreme Court. The appeal concerns the Court of Appeal's application of the law in relation to the question of guilt, the procedure before the Court of Appeal and the sentence. A also alleges that prosecution for the offences is time barred. Seven of the errors referred to in the appeal are allegedly procedural errors, whilst the other ten alleged errors concern the application of the law in relation to the question of guilt. In addition, A has petitioned for a retrial of the civil claims for compensation.

(13) The Public Prosecution appealed against the judgment of the Court of Appeal with regard to the question whether Article 97 of the Constitution prohibits prosecution pursuant to the Penal Code 2005 section 102, and with regard to the sentence.

(14) On 2 September 2010, the Appeals Selection Committee of the Supreme Court ruled as follows:

"1. The Public Prosecution is granted leave to appeal in so far as its appeal concerns the question whether application of the Penal Code 2005 section 102 would constitute unlawful retroactive legislation.

2. A is granted leave to appeal in so far as his appeal concerns the question whether application of the Penal Code 2005 section 102 would constitute unlawful retroactive legislation, and the question whether prosecution is time barred because the charge was unspecified. A's appeal is dismissed in so far as it concerns the prosecuting competence of the Director of Public Prosecutions.

3. Consent to a retrial of the civil claims together with the criminal case is refused.

4. In all other respects, the Appeals Selection Committee's decision on the appeals is postponed until the Supreme Court has passed judgment in the matters referred to in items 1 and 2 above."

(15) On the same day, the Chief Justice decided to refer those parts of the appeals for which the Appeals Selection Committee had so far granted leave to appeal to the Supreme Court sitting in plenary, see the Courts of Justice Act section 5 (4) last sentence and section 6 (2). Thereafter, on 3 December 2010, the Supreme Court passed judgment in the case, see the case reported in Rt-2010-1445. The Supreme Court held – with dissenting votes (11-6) – that sections 102 and 103 of the Penal Code 2005 could not be applied because this would contravene Article 97 of the Norwegian Constitution,

which prohibits laws from being given retroactive effect. A's appeal against the Court of Appeal's ruling with regard to the statute of limitations was therefore rejected.

(16) The Supreme Court judgment reads as follows:

> **"1. The appeal by the Public Prosecution against the application of law is dismissed.**
>
> **2. Those matters which, pursuant to the ruling of the Court of Appeal, were subsumed under section 103 of the Penal Code 2005 shall, in the remaining appeal proceedings before the Supreme Court, be subsumed under section 223(2) cf. section 223 (1) of the Penal Code 1902."**

(17) As soon as the plenary judgment was pronounced, the parties were requested to clarify which errors they still invoked as grounds for appeal.

(18) By letter dated 10 December 2010, A's counsel informed the Court that A maintained his appeal against sentence, three alleged procedural errors, and five different errors regarding the application of the law in relation to the question of guilt. By letter dated 16 December 2010, the Director of Public Prosecutions informed that it waived the appeal against sentence as an independent ground for appeal, but amended this to an ancillary cross-appeal.

(19) On 23 December 2010, the Supreme Court Appeals Selection Committee ruled as follows:

> **"1. Leave to appeal is granted for the appeals against sentence filed by both the defendant and the prosecution.**
>
> **2. In all other respects, the defendant's application for leave to appeal is rejected.**
>
> **3. Consent to a retrial of the civil claims together with the criminal case is refused."**

(20) The ruling of the Supreme Court Appeals Selection Committee is reported in Rt-2010-1655.

(21) With regard to item 3 of the ruling, I mention that item 3 of the Appeals Selection Committee's ruling of 2 September 2010 only implies that A was not granted consent to a retrial of the civil claims together with the matters that had originally been separated out for separate appeal proceedings. On 23 December 2010, the Appeals Selection Committee granted A leave to appeal in civil proceedings regarding the question whether the civil claims should be determined pursuant to Norwegian law or Bosnian law. This appeal, case no. 2010/1100, has been dealt with in conjunction with the present case.

(22) Since A was acquitted in the District Court of two of the offences for which he was convicted in the Court of Appeal, Article 14 no. 5 of the International Covenant on

Civil and Political Rights requires that leave to appeal to the Supreme Court could only be refused if the Appeals Selection Committee found that the appeal undoubtedly would not succeed. In addition, the Appeals Selection Committee had to give a reason for its decision. Since most of the errors that were invoked were also relevant to the two said offences, the Appeals Selection Committee explained why it found that the appeal undoubtedly could not succeed.

(23) A has subsequently petitioned twice for item 2 of the ruling of the Appeals Selection Committee to be partially set aside. These petitions have been rejected in rulings of the Appeals Selection Committee dated 16 February 2011 (HR-2011-395-U) and 18 March 2011 (HR-2011-577-U). I will revert to these rulings shortly.

(24) *I find that* A's appeal must be dismissed, but that the Director of Public Prosecution's appeal against sentence must be allowed and that the sentence shall be increased.

(25) Allegations that fall outside the scope of the permitted appeal

(26) Before I proceed to deal with the appeals against sentence, I will comment on some of the allegations that A's counsel has raised and that fall outside the scope of the appeal that has been referred to the Supreme Court. Some of these are allegations in respect of which the Appeals Selection Committee has refused leave to appeal, and some are allegations that have been made for the first time in the appeal proceedings before the Supreme Court.

(27) The question in the first category is whether the Supreme Court has power to deal with the grounds of appeal altogether – a question which was raised in a number of cases during the 1990s: see Matningsdal: To-Instansreformen (*The Two-Instance Reform*) at pages 70-72. Apart from one case where new information had come to light, see the case reported in Rt-1992-574, the Supreme Court held that it did not have power to deal with the grounds of appeal that were invoked outside the scope of the appeal. In the case reported in Rt-1994-1564, the justice delivering the leading opinion said that "it is inherent in the screening system laid down in section 349 [now section 323] of the Criminal Procedure Act that refusal by the Appeals Selection Committee to grant leave to appeal shall be final" (page 1565). This view is reiterated in the case reported in Rt-2000-15 (page 18-19). The case in hand does not give reason to deliberate on whether an exception to this rule must be made in very special cases.

(28) Admittedly, the decisions I refer to above concerned procedural errors, while the errors alleged by A in the present case concern the application of the law in relation to the question of guilt. However, in my opinion, the reason given by the Supreme Court in the two cited decisions, are equally valid in such cases.

(29) With regard to the second category of allegations – those grounds of appeal which have been raised by the appellant in the course of the appeal proceedings and which the Appeals Selection Committee has not considered - I remark that section 342 (2) of the Criminal Procedure Act provides that the court "may" try the issue. The law thus provides that whether or not the Supreme Court shall try the issue depends on an assessment of the specific circumstances of the case. This is a natural consequence of the fact that the Court's review of the appeal pursuant to section 323 is based on a concrete review of each ground for appeal. In order not to undermine section 323, the

assessment pursuant to section 342 (2) can obviously not be less strict than the ordinary assessment of a ground for appeal pursuant to section 323.

(30) I will now first consider the allegations that were dealt with by the Appeals Selection Committee and for which leave to appeal was refused.

(31) Firstly, A alleges that the jury direction given by the presiding judge in the Court of Appeal is incorrect with respect to what is required for conviction pursuant to section 223 of the Penal Code. The Appeals Selection Committee considered and rejected this argument in its decision of 23 December 2010 at paragraphs 27 and 28. A petitioned to have this part of the decision set aside. However, the Appeals Selection Committee rejected the petition in its decision of 16 February 2011 and elaborated on its earlier decision in paragraphs 8 and 9. Despite this, A filed a new petition to set aside the decision in which he alleged that the three judges who had made the original decision were disqualified from deciding the petition on the grounds of partiality. In accordance with the provisions of the Courts of Justice Act section 116, three difference judges decided on 14 March 2011 that the allegations of disqualification were groundless (HR-2011-539-U). Thereafter, on 18 March 2011, the three original judges ruled that the petition was dismissed (HR-2011-577-U). The Supreme Court therefore does not have power to consider this allegation.

(32) Secondly, A has alleged that that the courts do not have power to convict A for breach of the Penal Code section 223 since the King in Council has not decided to institute prosecution, see the Penal Code section 13 (1). In its decision of 2 September 2010, the Appeals Selection Committee held, at paragraph 16, that section 13 of the Penal Code does not apply in cases pursuant to Chapter 16 of the Penal Code 2005. However, when the Supreme Court sitting in plenary decided that the acts for which A is found guilty should be resubsumed under section 223 of the Penal Code 1902, A's defense counsel again raised the issue in the further appeal proceedings that A could not be convicted if the King in Council has not made a decision to prosecute. The Appeals Selection Committee had the following to say about this in its conclusion at paragraph 18 of its decision of 23 December 2010 (HR-2010-2223-U):

> **"However, section 17 [of the decision of 2 September 2010] states expressly that the power to indict does not depend on how the issue relating to retroactive effect is decided. Paragraph 2 of the judgment also implies that a majority of the Supreme Court found that the indictment was valid notwithstanding the changed subsumption."**

(33) Thus, not only was this objection dismissed by the Appeals Selection Committee, but the Supreme Court in plenary session also held that section 223 of the Penal Code can be applied notwithstanding that the matter has not been submitted to the King in Council. There are therefore two independent grounds which preclude the Supreme Court from trying this question now.

(34) I add, however: Today, the law is clear that if the court finds it necessary to resubsume an offence to an offence for which power to prosecute belongs to a higher ranking prosecuting authority, this can be done without presenting the question of indictment to the otherwise competent prosecuting authority, see Bjerke/Keiserud: Straffeprosessloven med kommentarer (*Commentary to the Criminal Procedure Act*), 3rd Edition at page 146, Matningsdal in Jussens Venner (*Friends of the Law*) 2002,

page 89-132 at page 108 and Andenæs/Tor-Geir Myhrer: Norsk straffeprosess (*Norwegian Criminal Procedure*), 4th Edition at page 383.

(35) Thirdly, A has submitted that the decision of the Supreme Court sitting in plenary to amending the subsumption to breach of the Penal Code section 223 violates ECHR Article 6 (1). I understand that A is alleging that his right to contradiction has thereby been disregarded. This allegation must be regarded as a new grounds for appeal, and it should be dealt with pursuant to the provisions of the Criminal Procedure Act section 342 (2) no. 3.

(36) I find without doubt that this submission cannot succeed, and refer to the Penal Code 2005 section 3 (2), which states that Chapter 16 of the Penal Code does not apply to criminal acts perpetrated before the Penal Code 2005 entered into force unless "the act was punishable when it took place pursuant to the criminal legislation in force at the time". This is why the indictment refers to section 223 (1) and (2) in brackets. Further, the indictment states at the end that "(i)f, despite everything, the court should find that the new legislation does not apply, it shall consider whether the acts described above constitute breach of the relevant provisions of the old Penal Code." In his direction to the jury, the presiding Court of Appeal judge explicitly emphasized that the jury could not convict for breach of the Penal Code 2005 section 103 (1) (h) unless the jury found it proven that section 223 had been violated.

(37) Accordingly, A must have been prepared that section 223 could be applied, and the jury's verdict shows that they found it proven beyond all reasonable doubt that A was guilty of the acts which are penalized in section 223. True enough, A's objections to the Court of Appeal's application of the law were not tried in the plenary proceedings. However, his objections have been considered and rejected by the Supreme Court Appeals Selection Committee in the decisions referred to above after the plenary judgment was pronounced.

(38) Given that A must have been prepared all along that section 223 could be applied, and that the jury has determined the necessary evidential questions in that connection, and that all of A's objections against the application of the law have now been tried, an amendment to subsume the offences under section 223 of the Penal Code can clearly not constitute a violation of ECHR Article 6 (1).

(39) Outside the scope of the appeal and the questions that have been tried by the Appeals Selection Committee, counsel for the defence has also referred to an amnesty law that was adopted by the Parliamentary Assembly of the Federation of Bosnia and Herzegovina in 1999. A has argued that this law means that he can no longer be prosecuted in Bosnia and Herzegovina for the acts for which he has been convicted in Norway. In conjunction with this, reference was made to ECHR Protocol 7 Article 4. I take no position on whether it is correct that A cannot be prosecuted in Bosnia and Herzegovina. In any event, this law has no legally binding effect which, pursuant to ECHR Protocol 7 Article 4, prevents prosecution in Norway. Firstly, the basic requirement in Article 4 is not satisfied because criminal proceedings have not previously been brought against him. Article 4 also requires that both prosecutions must have taken place in the same country. Any prosecution in Bosnia and Herzegovina would thus not have been an obstacle to subsequent prosecution of A in Norway. Furthermore, the criminal case in Norway has been brought pursuant to section 12 (1) no. 4 (a) of the Penal Code, so that prosecution in Norway is not

conditional on the acts being punishable in Bosnia and Herzegovina. I will revert to this matter during sentencing.

(40) Outside the scope of the appeal, A has also alleged, as an alternative argument, that if the Supreme Court does not set aside the Court of Appeal's judgment on the grounds that the presiding judge's direction to the jury on the application of the Penal Code section 223 is wrong, the jury direction is in any event so unclear that the judgment must be set aside for that reason. In other words, it is alleged that there is a procedural error. In this regard, I stress that the Appeals Selection Committee, as a result of the many petitions that have been made to set aside, has reviewed the disputed question regarding the interpretation of the law no less than three times. For this reason, this new ground for appeal will not be dealt with.

(41) *The background of the case*

(42) As I have already mentioned, the case before us concerns sentencing for unlawful deprivation of liberty committed during the war in Bosnia and Herzegovina. The crimes in question were committed between the middle of June 1992 and about 1 November 1992, some 40 kilometres south of the city of Mostar.

(43) When the crimes were committed, A was a member of HOS[1], which was created in Croatia in June 1991 as a military wing of the HSP[2] party. HSP was an ultra-nationalist party founded in 1990. It was established in Bosnia and Herzegovina in early 1991 and was led from Zagreb. In December 1991, a division of HOS was also established in Bosnia and Herzegovina.

(44) In the spring of 1992, the Serbs gained military control over the whole of the east bank of the Neretva River from Mostar and several tens of kilometres south. However, in early June 1992, Bosnian Muslim and Croat forces led a powerful counter-offensive and drove the Serb forces out of most of the area within a few weeks. HOS forces also participated in these battles. The Court of Appeal found that, in the summer of 1992, HOS became affiliated to the Bosnian Army, and that in August 1992 the leader was appointed a member of the General Staff. Following this offensive, the Serbs lost control of several areas, including the municipality of Stolac, which is A's home municipality. They also lost control of the town of Čapljina which is situated on the banks of the Neretva River about 40 kilometres south of Mostar.

(45) The Dretelj concentration camp (Dretelj Prison), which is central to this case, lies in the municipality of Čapljina. From April until October 1992, it was run by HOS and, during the period of time that is relevant to this case, approximately 130 male detainees and 90 female detainees were detained there. Most of the detainees were ethnic Serbs interned by HOS.

(46) In June 1992, HOS established itself in the town of Stolac, about ten kilometres east of the town of Čapljina. The headquarters of the military police were initially located at the tobacco station there. Somewhat later, the headquarters were moved to the Inkos clothing factory.

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[1] *Hrvatske Obrambene Snage, the Croation Defence Forces*
[2] *Hrvatska stranka prava, the Croation Party of Rights.*

(47) As a result of the offensive from the non-Serb forces, a large portion of the Serbian population fled from the Stolac and Čapljina area. Only a small minority of the Serbian population remained behind. These were mainly people who had not been active in the conflict. The Court of Appeal found that the people who this case is about were detained "solely because they were ethnic Serbs". The Court of Appeal said the following about the reason for this:

> **"There may have been several different reasons why these ethnic Serbs were arrested and detained. HOS had a goal - at least an implicit goal - to drive ethnic Serbs from the area, and the arrest of innocent Serbs helped to realize this goal. But revenge was also a motive for the members of HOS. They wanted to take revenge on the Serbs for previous atrocities committed by Serbs against Muslims and Croats. Another motive for detaining ethnic Serbs was to have detainees who could be used for exchange. Many Croats and Muslims were trapped in Serbian prison camps, and HOS wanted Serb detainees with whom they could barter."**

(48) *A's* position within HOS

(49) A is a Bosniak from Stolac, where he lived until the war broke out in April 1992. He was not politically active. In April 1992, he joined the Croatian forces, but shortly after he joined HOS.

(50) It appears from the judgment of the Court of Appeal that A disputed that he held a position of command within HOS. However the Court of Appeal found as follows with regard to his position:

> "**The Court of Appeal is in no doubt that A had a more important position within HOS than he has explained. There are a number of witness statements and written documentation to support this. Right from the very start of his service in HOS, A had close contact with Blaž Kraljević [the leader of HOS], and was clearly given a position of trust by him. There is no doubt that A quickly received a position of command within the organization.**
>
> **When A was stationed at Stolac, he immediately became head of military police at HOS-Stolac."**

(51) The Court of Appeal continued:

> **"The totality of the evidence leaves no doubt that A held a position of command in HOS as early as June 1992. He was replaced as head of the military police at HOS-Stolac at the end of June-July, and was given a higher position within HOS. This position covered a larger area. Whether he was actually 'the Commander', or whether he held a more subordinate officer position, may be doubtful and is not decisive to the case. Nor is it decisive whether his appointment as lieutenant was formally correct. *In real terms*, there is no doubt that he held a central position with command responsibilities within HOS in the relevant part of Herzegovina, namely, among others the Stolac and Capljina area."**

(52) *The criminal acts – a summary*

(53) The Supreme Court is to pass sentence for 13 crimes pursuant to the Penal Code section 223 (1) and (2). Section 223 (2) reads as follows:

> **"If the deprivation of liberty has lasted for more than one month or has caused any person abnormal suffering or serious injury to body or health or has resulted in the death of any person, imprisonment for a term of not less than one year shall be imposed."**

(54) In order for section 223 (2) to be applicable, section 43 of the Penal Code provides that it is sufficient, with regard to all of the alternatives listed in section 223 (2) that A "could have foreseen the possibility of such a consequence", see inter alia Kjerschow: Almindelig borgerlig straffelov med kommentar (*General Civil Penal Code with commentary*) at page 566.

(55) With regard to two of the crimes of which A was found guilty, the Court of Appeal found that the first three alternatives in section 223 (2) are satisfied – that is to say that not only did the deprivation of liberty last for a period of more than one month, but the two victims also endured "abnormal suffering" and "serious injury to body or health". These two victims were a man who, in 1992, was 57 years old, and a woman who was then 36 years old. A Danish medical report on the 57 year old man described his condition as follows:

> **"Severely maltreated man with serious psychological effects as a consequence thereof, and a series of physical consequences to the locomotor system, both on his trunk and extremities."**

(56) Further, a statement from a Danish specialist in psychiatry dated July 1995 states:

> **"C ... was referred for the first time on 23.4.93, but was at that time too badly injured from the torture he had suffered to respond to psychotherapy and, after three consultations, he was referred to physiotherapy. ... Diagnosis: Severe posttraumatic stress disorder."**

(57) I will revert to the woman, D, shortly.

(58) Five of the victims have endured "abnormal suffering" in addition to being deprived of their liberty for a period of more than one month. These victims are a 46 year old woman, and four men aged 53, 51, 50 and 46 respectively. Four of the victims were held only to have been deprived of their liberty for a period of more than one month. These four victims were two women aged 70 and 55, and two men aged 54 and 42. With regard to the 42 year old man, the Court of Appeal held that he endured "considerable suffering, but the Court of Appeal does not find it necessary to conclude whether the suffering can be described as abnormal". The abuse to which the Court of Appeal refers to here is as follows:

> **"During his imprisonment, E was subjected to abuse. Witness F, who was himself a detainee at Dretelj Prison, testified that he knew M and saw him at Dretelj. E lay battered and bruised on the floor, and could not stand up. E asked F if F could end E's life for him. F has testified that E lay on the floor for several days before he could stand up. G has also testified that he saw E lying motionless, and that it was E's strong constitution that kept him alive. Also H, who was a detainee at Dretelj Prison, has testified to the Court of Appeal that E was abused. The Court of Appeal finds this to be**

proven beyond all reasonable doubt, and also finds it proven that A was aware that E was being abused."

(59) This example shows that the Court of Appeal has applied strict criteria for finding that the alternative "abnormal suffering" is satisfied.

(60) The Court of Appeal held that two of the victims, a 37 year old woman and her 65 year old father, had endured "abnormal suffering".

(61) Thus, altogether 11 people were deprived of their liberty for a period of more than one month. One of these victims was deprived of his liberty for approximately two months, while the others were deprived of their liberty for periods of just less than four months to almost five months. Nine victims endured "abnormal suffering".

(62) *The criminal acts – A's role in the arrests and interrogations etc.*

(63) The Court of Appeal held that A participated in the arrest of seven of the victims, and one of the victims, I, testified that she perceived A to be the person in charge. Five of the other victims were told when they were arrested that A had given the order for their arrest. The Court of Appeal's judgment also states that most of the arrestees were interrogated at Stolac before they were transferred to Dretelj Prison, and that A led or at least played a central role during the interrogations. Several of the arrestees were driven to Dretelj Prison by A.

(64) The Court of Appeal has found it proven that many of the victims were subjected to serious abuse already during arrest and questioning before they were brought to Dretelj Prison - i.e. during the stage of the detention where A played a central role. The most grievous assault that took place at the tobacco station seems to have been perpetrated against J, a 37 year old woman, when she was arrested on 21 June 1992. The Court of Appeal's judgment states as follows about the treatment that she was exposed to then:

> **"J has further explained that on 21 June 1992, several HOS soldiers with rifles arrived and ordered her and her father to accompany them to the tobacco station in Stolac. They read out an arrest warrant with the names of J and her father. At the tobacco station, A sat in uniform in an office in the administration building. He gave her a document which stated that A had command authority within HOS. A behaved as the leader in the room. She was shown photographs of a ceremony the previous year, where a memorial service was held for Serbs who were killed in 1941 at Metkovic. She was asked to tell A who was in the photos. A then ordered her to go into another room, and added, 'Now you will see what a real interrogation means', or something like that. Two soldiers were present in the room. They removed her blouse and bra, and 'played' with her breasts with a knife. She did not dare to cry out for help from her father, who was in the next room. J was then taken into another room and ordered to remove her clothes. She was order to suck the soldiers' penises and was subjected to two vaginal rapes. She was then taken back to A's office, where her father sat. A asked her several times in an ironical tone whether everything was alright, and she answered yes because she felt she had no choice.**

On the same day, both J and her father were beaten with a stick by a soldier. She also had a ring taken from her, which was removed from her finger. The soldiers took money from her father. Her father was taken down into the basement, while J was taken to an office on the second floor, where she was alone with a soldier and was raped yet again. J had to spend the night in an office on the same floor, and during the night she was met with demands for sex. She asked to be given poison in order to end her life, and she also thought about jumping out the window. J was exhausted and found it terrible to live in uncertainty about how her mother and two children [4 and 12 years old] were managing at home. The city was under grenade attack.»

(65) J was released the same morning, but she was brought back to the tobacco station again on 24 June. She was told that A had given the order for her arrest, and she was taken to him at his office. She and her father, who had also been rearrested, were sent down to the basement under orders from A, and while she was there she was raped during the night. The Court of Appeal held that A did not physical assault her, but stated as follows regarding A's role in the two arrests and his knowledge of the physical abuse that she was subjected to:

"The Court of Appeal does not believe A's explanation. It is proven beyond all reasonable doubt that A interrogated J on 21 June 1992, and that he at least strongly suspected that she had been subjected to sexual abuse after the interrogation. Despite this, he left J at the mercy of the soldiers again. He did nothing to obtain her release until the following morning, when he gave J and her father the certificate which he said would prevent their re-arrest. As is apparent from the comments above, he also played an active role in the new deprivation of liberty on 25 June."

(66) As stated in the citations above, K, who at that time was 65 years old, was arrested together with his daughter. Referring to how he was treated at the tobacco station in June 1992, the Court of Appeal stated that he was

"subjected to repeated and considerable violence, see in this connection J's testimony that he looked like 'a piece of meat without any strength'. He was also aware that his daughter was being sexually abused, but was unable to do anything to help her. The Court of Appeal refers in this regard to L's testimony that, while they were detained in the basement of the tobacco station, he and K heard J screaming to soldiers to keep away from her. This situation must have imposed a considerable mental strain on K."

(67) Another victim, M, was arrested on 10 June 1992 and taken to Dretelj Prison, where he was detained until 31 October 1992. In its judgment, the Court of appeal stated:

"M has also explained that he was arrested when armed soldiers came to his house. A was among them. M was forced down onto the floor and was kicked, including being kicked in the face with a boot. The soldiers ransacked the apartment but found nothing of interest, although they reacted strongly when they found that M had the flag of the Belgrade Red Star football club in his apartment. The soldiers took M's money and his watch, and then took him to Dretelj Prison where he was interrogated. M

has testified that A led the interrogation. During the interrogation, a soldier threatened M with a sharp object, some kind of needle, which was held against his neck, and they also threatened to kill him."

(68) I will now return to D, who was arrested and taken to Dretelj Prison on 5 May 1992. During her detention there until 18 August 1992, she was raped several times. The Court of Appeal found that A had nothing to do with D's arrest. However, the Court of Appeal found it proven that A was in charge of an interrogation of D during the first half of June 1992. With regard to this interrogation, the Court of Appeal stated as follows:

> **"D has testified that, during the interrogation, A ordered her to undress and that he struck her face once with his hand. She sat naked on the chair. There were five people in the interrogation room, and D perceived A to be the soldier with the highest rank. One of the soldiers had a knife, which he used to touch her breasts and face. She has testified that she was also beaten with a stick in several places on her body. She was forced to lay her hands on the table and her hands were then beaten, and a safety pin was inserted under her fingernails. A continued to interrogate her. She denied being a member of SDS [the Serbian Democratic Party]. After a while, A said to the other soldiers 'Now she is all yours' or something like that. One of the soldiers dragged her into the bathroom and forced her to perform oral sex. She remained imprisoned, and was subjected to further sexual abuse."**

(69) The Court of Appeal found the content of these testimonies proven.

(70) *The criminal acts – the victims' treatment at Dretelj Prison*

(71) Whilst they were detained at Dretelj Prison, the victims were subjected to a number of grievous assaults. This applies to all of the victims except for two in respect of whom the Court of Appeal has not described any particular assault except for the unlawful deprivation of liberty. It is illustrative that, despite the fact that the Court of Appeal appears to have applied a strict standard to the alternative "abnormal suffering", it has found without doubt that nine victims were subjected to such abuse.

(72) In addition to J, who was *raped* several times at the tobacco station in Stolac, D was also raped many times at Dretelj Prison, as I have already mentioned. With regard to A's responsibility for the abuse which took place after the interrogation referred to above, the Court of Appeal stated the following:

> **"The Court of Appeal finds beyond all reasonable doubt that both the objective and subjective conditions to convict A of aiding and abetting D's continued incarceration are satisfied. His behaviour during her interrogation in the first half of June contributed mentally to her continued detention. His promptings undoubtedly contributed significantly to D being kept in detention. The Court of Appeal further notes that it is clear from A's position in HOS and his role during the interrogation that action from A was required in order for D to be released. He was at least in a position to influence her release. Furthermore, there is also no doubt that A was aware that D was being sexually abused. A was also aware that there was no justifiable reason for**

detaining D at the prison. She was imprisoned because she was an ethnic Serb, and A was aware that she was a civilian and a non-combatant Serb. In these circumstances, he is guilty of criminal complicity – pursuant to both Norwegian and international law - when he failed to take action to obtain her release after the interrogation."

(73) In addition to the rapes described above, several of the male detainees were subjected to *sexual abuse*. Two of the victims, G and N, were forced to suck the penis of a fellow detainee, while another, M was forced to have sex with a fellow detainee.

(74) Several of the victims were subjected to *brutal violence*. With regard to one of the victims, O, the Court of Appeal held that on the first day he was detained at Dretelj Prison, he was "beaten on the head and in the stomach by an HOS soldier with a stick, and he bled as a result of the blows. Two of his ribs were also broken." Apart from this, he was not beaten, but at a later date, a soldier threatened to stick a knife through his tongue. Although he lost 20 kg in weight during the four months that he was detained, the Court of Appeal held that his suffering was not "abnormal".

(75) The Court of Appeal judgment describes the offences committed against another victim, N, as follows: "He was hit around his head and several other places on his body. One of the soldiers also cut him up with a knife". A medical examination which appears to have taken place in 1994 reports: "His condition is a consequence of injuries sustained during torture in prison, when his chest wall was knocked out and his left II, III and IV ribs were fractured, and long-term reactive psychological syndrome." And with regard to a third victim, G, the Court of Appeal held that "[s]hortly after he arrived at Dretelj Prison, soldiers placed a chair on his head and hit the seat of the chair so that the screws of the chair went through his scalp." The soldiers also drew swastikas on his back with a sharp object so that it drew blood. During his detention, he lost 40 kg of body weight. A further example is the treatment that E was exposed to, and which is described above.

(76) Other examples of brutal treatment are that the victims were forced to stand outside in the midsummer heat, and that they were forced to sleep on concrete floors.

(77) Several of the victims were also subjected to *intimidating or threatening treatment*. One example mentioned in the Court of Appeal's judgment is that a soldier threatened to kill the victim L, and that a soldier on that occasion pulled out his bayonet and said he would kill him. The Court of Appeal judgment also states that he was

"singled out for liquidation. At that point, L was unable to stand up on his own legs, and was dragged around the hangar. He was forced to kneel, and a gun was aimed at his temple. The soldier said L had to confess, but L did not understand what it was that he had to confess. He heard a bang and did not know if he was still alive or not. L was then taken to the hangar where the female detainees lived, so that the male detainees would think he was dead. L was unable to walk for a long time afterwards."

(78) Another detainee, N, observed the murder of a fellow detainee, and that detainees died as a result of the treatment they received. Other detainees also witnessed grievous brutality against fellow detainees, and they lived in uncertainty as to whether they would survive the prison camp.

(79) Part of the mental harassment of the detainees involved lining them up against a wall, where they were forced to stand for several hours while the soldiers aimed machine guns at them and said that they would shoot them.

(80) Several of the victims suffered exceedingly *degrading treatment*. The victim C was forced to drink urine and to eat grass, while the victim, N, in addition to having to suck a fellow detainee's penis, was forced to drink urine and eat faeces. Furthermore, the victim G, in addition to being forced to suck a fellow detainee's penis, was also forced to eat grass.

(81) Another example of a combination of degrading and brutal treatment is that two of the victims were forced to participate in beating and being beaten by a fellow detainee.

(82) Finally, I mention that there was an insufficient supply of food, and many detainees lost a considerable percentage of their body weight during their detention. The largest weight loss among the victims in this case was suffered by G, who lost 40 kg in weight.

(83) *A's subjective guilt*

(84) It follows from the jury's verdict that A is guilty of deprivation of liberty with intent, or complicity in such offence. Furthermore, some of the citations above also show that A acted intentionally with respect to some of the atrocities that the victims were exposed to before they were brought to Dretelj Prison.

(85) As mentioned above, in order to convict pursuant to the Penal Code section 223 (2), it is sufficient that A "could have foreseen the possibility of such a consequence". Above, I have given several examples which show that A's subjective guilt, even if he did not act with intent, displayed a guilt which in part far exceeds the minimum requirements in the Penal Code section 43. In addition to these examples, I refer to the Court of Appeal's general discussion of A's knowledge:

> **"A was also familiar with the conditions under which the detainees at Dretelj Prison lived and was aware that they were being abused. Several witnesses testified that A was often present at Dretelj Prison, and also that he visited the area where the detainees lived. … The victim I has testified that when she was being transported to Dretelj Prison, A had said that he was taking her to a 'place from which no one had returned'. ... The Court of Appeal also recalls that several victims have explained that it was well known among the general public what happened at Dretelj Prison. It is completely unlikely that A could not have been aware of the conditions under which the detainees were living."**

(86) When summarizing the abuse to which victim C was subjected, the Court of Appeal stated that it found it proven that it must have appeared "to A to be likely that incarceration [of C] would have such consequences." C is one of the victims who the Court of Appeal found it proven had endured "abnormal suffering" and suffered "serious injury to body or health", in addition to having been detained for nearly four months. With regard to the second victim in respect of whom the Court of Appeal found these three conditions to be satisfied, victim D, it is clear from the description given above that A's guilt with respect to the abuse that D suffered after the interview with him goes far beyond the requirements in the Penal Code section 43. And as

regards victim J, I recall the citation above that he at least eventually, "at least strongly suspected that she had been subjected to sexual abuse" by the soldiers to whom she was abandoned.

(87) *Sentencing*

(88) The Supreme Court shall now pass sentence for 13 offences against the Penal Code section 223 (1) and (2). Since the minimum penalty for violation of section 223 (2) is 12 months of imprisonment, the maximum sentence for a single violation is imprisonment not exceeding 15 years. Where there are concurrent offences, as in the present case, the maximum penalty is imprisonment not exceeding 20 years, cf. section 17 (1) (a).

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

> **"Grave breaches to which the preceding Articles relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."**

(90) The overall impression from the evidence is that A has played a central role in allowing the extensive and sometimes extremely brutal atrocities against the 13 victims to take place. Furthermore, in light of the Court of Appeal's finding on the evidence, it must, as mentioned, be assumed that A's guilt sometimes goes significantly beyond the minimum requirement in section 43 of the Penal Code.

(91) These conditions justify a long sentence.

(92) However, an important question in this case is what weight should be attached to the fact that almost 19 years have now passed since the offences were committed. In this connection, I stress that there is no reason to criticize anyone for the time that has passed since August 2005, when the Norwegian Prosecution Authority received notice that persons who had committed serious crimes during the war in Bosnia-Herzegovina were possibly living in Norway, until now when the matter is being heard in proceedings before the Supreme Court. The very nature of a case like this explains why it necessarily took some time before charges could be brought on 2 May 2007. Given the complexity of the case, in which almost all the people involved lived

abroad, primarily in Bosnia and Herzegovina, the matter has progressed satisfactorily since the indictment was issued on 9 July 2008 and the District Court passed its judgment on 2 December 2008. The obvious reason why it then took in excess of 16 months before the Court of Appeal passed its judgment is again the complexity of the case - which is illustrated by the fact that the appeal hearing lasted over 33 court days. The fact that it has taken an additional year before the Supreme Court is now in a position to pronounce judgment is also a natural consequence of the many legal questions that have been raised in the case.

(93) As for the passage of time in general, I recall that the weight given to the time that has elapsed since an offence was committed varies depending on the nature of the crime and its gravity. This is perhaps best illustrated by the case law of the Supreme Court in cases concerning incest. I refer to the case reported in Rt-2001-408, where the justice delivering the leading opinion stated (at page 410):

> **"The long period of time that often passes in incest cases before the offence is reported to the police, is a consequence of the nature of the abuse to which the victim is subjected. The Supreme Court has held in a number of cases that the relevance of the passage of time in incest cases depends on the gravity of the case, that is, among other things, how serious and how frequent the abuse was, and the length of the period of time over which the abuse took place, see the case reported in Rt-1999-745. In my opinion, only limited weight can be given to the passage of time in this case where, as a result of massive abuse over a long period of time, the defendant has caused his grandchild debilitating mental injury."**

(94) Although the abuse in this case ceased in 1989, the Supreme Court rejected the appeal brought by the defendant, a man of about 73 years of age, against a five-year prison sentence.

(95) The general views expressed in this judgment are clearly transferable to the present case. Although some of the locals must have been aware of the crimes that took place, and of who was the perpetrator, it is in the nature of the case that it could take a long time before A was discovered so that Norway could start an investigation and subsequent prosecution against him. Moreover, as noted in the quoted passage from the judgment reported in Rt-2001-408, it is highly relevant that A has been found guilty of 13 crimes, some of which are very serious crimes, pursuant to the Penal Code section 223 (1) and (2), each of which carries a minimum penalty of 12 months imprisonment. This means that a fully or partially suspended sentence, much less a postponement of sentencing as pleaded by counsel for the defence, is out of the question.

(96) It follows from this that the passage of time can only be given limited weight. Notwithstanding, almost 19 years have passed since the criminal acts were committed, and the necessary steps to interrupt the statute of limitations were taken relatively shortly before the statute of limitations would have expired. The sentence that will be passed will therefore clearly be lower than it would have been if the crimes had been prosecuted in the first years after they were committed. I revert to the specific sentence shortly.

(97) When sentencing, another question is the relevance to be given to the fact that the Parliamentary Assembly of Bosnia and Herzegovina passed a law on amnesty in 1999., Section 1 of the Act, in a Norwegian (sic) translation presented to the Court, has the following wording:[3]

> **"This Law shall relieve from criminal prosecution or completely relieve from the imposed sentence or the non-served part of the sentence (hereinafter: amnesty) all persons who in the period between 1 January, 1991 and 22 December, 1995 committed any of the criminal acts laid down in the appropriate Criminal Codes which were applicable in the territory of the BiH Federation (hereinafter: the Federation), except for criminal acts against humanity and international law under Chapter XVI of the adopted Criminal Code of the SFRJ, crimes defined under the Statute of the International Tribunal for the Former Yugoslavia, and the crimes of: murder under Article 36, rape under Article 88, crimes against personal dignity and morality under Article 90, 91 and 92, as well as aggravated cases of theft in the nature of robbery and robbery under Article 151, and Article 186, Paragraph 2 in conjunction with Article 182 of the Criminal Code of the Republic of Bosnia and Herzegovina, if that law or any other appropriate law which was applicable in the territory of the Federation stipulates the punishment of these persons for those criminal acts."**

(98) Counsel for the defence has argued that this law would have prohibited prosecution of A in Bosnia and Herzegovina, and that this must in any event be relevant to the sentence in Norway. The provision gives rise to certain questions of interpretation, but it is not necessary to discuss these further since I cannot agree with this point of view: the crucial issue must in any event be that there is no requirement of dual criminality for crimes against the Penal Code section 223 when the legal authority for criminal liability in Norway is section 12 (1) no. 4 (a) of the Penal Code. The acts in question could thus have been prosecuted in Norway even if they had not been criminalized in Bosnia and Herzegovina at the date when they were committed. The same must apply if criminal liability for an act is repealed in the country where the acts were committed. I conclude therefore that no weight should be given to the Bosnian amnesty law when sentencing.

(99) In order to cast light on the sentencing level, reference has been made to certain judgments of the UN International Criminal Tribunal for the Former Yugoslavia (ICTY). In my opinion, these decisions provide limited specific guidance. Firstly, the cases concern war crimes, while in the present case the crimes are adjudicated as deprivation of liberty committed in time of war, without applying the aggravating term war crime. In addition, specific comparison is difficult – a fact which the Appeals Chamber of the Tribunal underlined in a sentence dated 28 February 2005 in Case IT-98-30/1-A against MK et. al. Paragraph 681 of this judgement states as follows:

> **"Sentences of like individuals in like cases should be comparable and, in this regard, the Appeals Chamber 'does not discount the assistance that may be drawn from previous decisions rendered'. Indeed, The Appeals Chamber has observed that a sentence may be considered 'capricious or excessive if it is out of reasonable proportion with a line of sentences**

[3] The English translation here is an unofficial translation from the homepage of the UNHCR, the UN Refugee Agency, see http://www.unhcr.org/refworld/docid/3ae6b528c.html

passed in similar circumstances for the same offences'. The underlying question is whether the particular offences, the circumstances in which they were committed, and the individuals concerned can truly be considered 'like'. Any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual. Often, too many variables exist to be able to transpose the sentence in one case mutatis mutandis to another. ... Thus, while comparison with other sentences may be of assistance, such assistance is often limited. For these reasons, previous sentences imposed by the Tribunal and the ICTR are but one factor to be taken into account when determining the sentence."

(100) The problems highlighted here also apply in the present case. The decisions are first and foremost of interest because they give a general impression of the level of sentences that have been applied by the court.

(101) There is little guidance in the case law of the Supreme Court for the sentencing level in the present case. Notwithstanding, two decisions should be mentioned:

(102) In the case reported in Rt-2009-435, a man was sentenced to three years and six months imprisonment pursuant to section 223 (1) and (2) of the Penal Code, and for threats and coercion in connection with a prison escape that was disguised as a fictitious kidnapping. The victims suffered permanent psychological harm as a result of the acts.

(103) The second case is the case reported in Rt-2004-1355, where a man was subjected to bodily harm in the form of maltreatment perpetrated over a period of several hours which had been planned. The acts were committed by four men acting together and were subsumed under section 229 second sentencing alternative, cf. section 232 of the Penal Code. Since the victim had endured "abnormal suffering", the contemporaneous deprivation of liberty was subsumed under section 223 (1) and (2) of the Penal Code. Three of the convicted persons appealed against the four year prison sentence passed by the Court of Appeal, but the appeals were rejected by the Supreme Court.

(104) When the present case is compared with these cases, I find without doubt that the sentence should be considerably longer. In his plea, the Director General has alleged that the sentence should be increased and fixed at six years imprisonment. I agree with the Director General that the sentence must be increased, but I find that a prison term of eight years reflects more correctly the gravity of the acts for which A has been found guilty, also taking into account the intervening passage of time.

(105) A has alleged that his confession must justify a sentencing discount, see the Penal Code section 59 (2). In this context, he has particularly emphasized the fact that when he was arrested by the Norwegian police in May 2007, he wrote a list of the names of the people whose arrest he had participated in. According to A, he also provided names of people who the police at the time were not aware of.

(106) I find it clear that the sentence should not be reduced on this basis. Application of section 59 (2) assumes that the defendant has given a "full confession" - a condition which has the same material content as the corresponding condition in section 248 of the Criminal Procedure Act on confessional pleas, see among others the judgment

reported in Rt-2007-1677. This condition is clearly not satisfied for any single one of the offences in the present case.

(107) Although statements to the police that do not satisfy these requirements can in the circumstances be a relevant factor when sentencing, there is no basis for attaching weight to the confessional statements in this case: A has in part denied any dealings with some of the victims. And with regard to those people with whom he has admitted to having had dealings, he has - without being believed - invoked circumstances in an attempt to legitimize his actions. He has alleged both that the victims were detained to protect them against abuse, and that they had roles that justified their apprehension. He has also denied that he held such a key position in HOS as the Court of Appeal found proven. As a consequence, the trial proceedings in the District Court and Court of Appeal were prolonged and complex. When, in addition, there is no proof that the information he originally gave about the arrested persons was necessary in order for the police to trace of some of the victims I have, as mentioned, found it clear that the information that A gave to the police in 2007 cannot justify a sentencing discount.

(108) During the appeal hearing, it has also been argued that A has gradually developed certain psychological problems. I find no reason to discuss the problems that have been raised further. Any mental health problems that A might have must be considered by the Correctional Services in conjunction with his serving the sentence, see the case reported in Rt-1996-10, which is representative of the jurisprudence of the Supreme Court.

(109) I vote for the following

J U D G M E N T :

The judgment of the Court of Appeal shall be amended so that the conviction of A, born on 29 August 1966, shall be for crimes in breach of the Penal Code section 223 (1) and (2), and that the sentence is fixed at imprisonment for a term of 8 – eight – years.

(110) Justice **Utgård**: I agree on the whole and with the result of the justice delivering the leading opinion.

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

(112) Justice **Møse**: Likewise.

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

(114) After the passing of votes, the Supreme Court pronounced the following

J U D G M E N T :

The judgment of the Court of Appeal shall be amended so that the conviction of A, born on 29 August 1966, shall be for crimes in breach of the Penal Code section 223 (1) and (2), and that the sentence is fixed at imprisonment for a term of 8 – eight – years.