OSLO DISTRICT COURT

JUDGMENT

Delivered: 2nd December 2008

Case No: 08-018985MED-OTIR/08

Judge:

District Court Judge Finn Haugen

Lay judges (drawn from the ordinary pool of lay judges)**:**

Psychologist Annette Marfjord
Web designer Jostein Gyrd Holte

The Public Prosecuting Authority	Public Prosecutor Pål Kulø Lønseth Police Attorney Jan Eirik Thomassen
vs.	
Mirsad Repak	Advocate Heidi Bache-Wiig Advocate Brynjulf Risnes

Victim's counsel: Advocate Eva Frivold

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JUDGMENT

1) **SUMMARY** (paragraphs 1 – 28)

2) Because of the special nature of the case at hand the Court finds reason to emphasise that Norwegian courts operate with complete independence from Norwegian and foreign authorities; nor have such authorities had any influence on the Court's composition or the present judgment.

3) The background of this case being prosecuted in Norway is that the defendant in 1993 fled via Croatia to Norway together with his wife, and that he after some years became a Norwegian citizen.

4) What this Court is to deliberate on are the concrete acts described in the indictment, which thus provides the framework of this case. The defendant is – following the amendment of the indictment – charged with crimes against humanity, war crimes against persons upon their arrest and/or complicity in the confinement of 17 civilians, gross violence during one interrogation, and one rape.

5) The defendant was born in 1966, he is a special education teacher currently with sick leave, married, he has two children aged 13 and 15 years respectively, no wealth, no prior convictions or fines.

6) The Norwegian Constitution is the main pillar of Norwegian law. Article 97 of the Constitution provides that

> "No law must be given retroactive effect".

This provision was included to safeguard individuals, ensure predictability, protect against randomness and to further trust in the legal order in Norway. The provision is intended to ensure that new burdens are not attached to acts already committed.

7) The acts described in the indictment date back to 1992, and Norway did not have any legal provisions concerning war crimes prior to the 2005 Penal Code, where the relevant provisions entered into force on 7 March 2008. A central question for the Court has been to reach a conclusion on whether any and all applications of the war crime provisions would amount to a breach of Article 97 of the Constitution.

8) The Court has concluded that Article 97 of the Constitution does not bar the application of the new provisions concerning war crimes as long as they concern the same acts, the same penalty, the same prescription period, and the penal provisions protect the same interests when applying the new provisions as when applying the 1902 Penal Code that was in force when the acts were committed. Section 223 of the 1902 Penal Code, which concerns crimes against personal liberty, protects the same interest as that found in section 103 of the 2005 Penal Code, "war crime against person". The District Court's conclusion is that applying

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9) However, applying section 102 of the Penal Code, ”crime against humanity”, would in this concrete case amount to a breach of the Constitution. A change from the one penal provision, section 223, which protects personal liberty, to two new war crime provisions, of which only one protects the same interest as section 223, would according to the Court’s application of the law amount to a breach of the Constitution. That a penal provision addressing acts committed ”against humanity” protects another interest than a penal provision that addresses acts committed ”against personal liberty” is evident from Proposition to the Odelsting[1] No. 8 (2007-2008), concerning terminology in connection with the use of the expression ”mot menneskeheten”. In English the corresponding expression is ”against humanity” and in French ”contre l`humanité”. The Ministry of Justice stated that this expression applies to acts that are “of such a serious nature that they are an offence to human civilisation as such”. In 1992, Norway did not have penal provisions protecting such interests. Thus, applying section 103 of the 2005 Penal Code would in this case amount to giving this provision retroactive effect.

10) Furthermore, it is a basic condition for applying a war crime provision that the sentencing should be the same independently of whether the old or new Penal Code is applied. This has been explicitly expressed in section 3 second subsection of the 2005 Penal Code, which states:

> ”The punishment can however not exceed the punishment that would have been imposed pursuant to the penal provisions [in force] at the time the crime was committed”.

11) In addition, the limitation periods that follow from the 1902 Penal Code still apply, which for most of the acts in the case at hand entail a limitation period of 15 years, even if the most serious war crimes under the 2005 Penal Code are not subject to any limitation period. It would amount to a retroactive effect and a breach of Article 97 of the Constitution if the new limitation provisions were to resuscitate criminal liability for acts that were already time-barred when concrete investigations were initiated. In this respect, reference is made to [the judgment reported in] Norsk Retstidende 1945 (the Quisling judgment), where this opinion on the point of law concerned was expressed.

12) The state of Yugoslavia was a federation of six constituent republics. Under Tito’s communist rule it was emphasised that all were Yugoslavs, and ethnic and religious differences were consciously pushed into the background. Bosnia-Herzegovina was inhabited by Bosniaks, Serbs and Croats – partly living side by side. The Bosniaks are Muslims, the Serbs are Orthodox and the Croats are Catholics. Among the ordinary

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population these groups generally respected each other. There were numerous mixed marriages. After the death of Tito in 1980 the federation gradually fell apart. Nationalist parties linked to the different ethnic groups came to power in the regions. Around 1990 there was political disagreement whether Bosnia-Herzegovina should become an independent state, unite with Serbia or be split between Croatia and Serbia. Bosnia-Herzegovina was recognised as an independent state in April 1992. This was not accepted by Serb leaders. It immediately led to war.

13) Based on the statements in the case and documentary evidence, the Court finds that during the period comprised in the indictment the defendant was attached to the HOS, an abbreviation of Croatian Defence Forces, which was a newly established paramilitary unit. HOS was not a military well-organised unit of trained soldiers, but a unit recruited among volunteers, idealists, nationalists, mercenaries, foreigners and criminals. The leader of HOS, Blaz Kraljevic, did not himself have any military background; as a consequence, the unit lacked a pervading military structure. Not least because of the unit's composition and lack of structure and discipline, individual HOS members could commit atrocities against civilians without Kraljevic's approval. Such atrocities took place especially at the Dretelj camp, but also during some arrests.

14) The Court finds it has been proved that the defendant was not one of Kraljevic's ordinary bodyguards, nor was he an ordinary HOS soldier; but he held a kind of middle leader position in the unit, with leadership responsibilities linked to the HOS military police. For some time he was the head of the HOS-MP in Stolac. He did not have any leadership responsibilities linked to the Dretelj camp, nor was he a prison guard at the camp. In the earliest stage with the HOS he recruited Bosniaks for the unit; later he contributed to getting an overview of the civilian Serbs remaining in Stolac. The field of work was later expanded to comprise the entire district.

15) In August 1992 there were some 130 male and some 90 female detainees in the camp, with an average age of about 50 years. Many of the detainees in the camp were subjected to very serious physical and psychological abuse. At least two killings took place. Several of the female detainees were subjected to rape – some of them a number of times. There was also sexual abuse committed against male detainees. A number of detainees were subjected to torture and other kinds of abuse during their stay there. Many suffered persistent injury.

16) Following a concrete assessment of each count of the indictment, the Court concludes that the defendant is guilty of eleven counts of war crimes consisting in the deprivation of liberty of civilian noncombatant Serbs followed by internment in the Dretelj camp. For all eleven detainees their internment lasted substantially longer than one month and/or they

[1] Propositions to the Odelsting are used when the Government proposes new legislation or cancellation of or amendments to existing legislation. When the Storting (the Norwegian parliament) processes legislative issues, it is split into the Odelsting and the Lagting. Translator's remark.

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As regards violence, the defendant is linked to one incident in particular: during an interrogation that lasted about one hour and that was headed by the defendant, the woman concerned had to undress completely and was subjected to beating and different kinds of torture (paragraphs 240 and 245).

17) As regards the sentencing, there is limited relevant precedence in Norway in this field. Rulings from international courts of justice mainly deal with more serious cases; besides, the penalty ranges differ from those that apply pursuant to the 1902 Penal Code – which are applicable in the case at hand..

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18) As far as the defendant is concerned, the Court considers it an aggravating circumstance that he had middle leadership responsibilities that included, *inter alia*, finding civilian Serbs and taking the most important of them to Dretelj – primarily with the purpose of subsequent detainee exchanges with Croats and Bosniaks that were kept in internment by Serbs. The rank of lieutenant may be used as an illustration of his level within the organisation. His execution of his tasks resulted in innocent persons being taken to Dretelj, were they were subjected to long-term internment and in a number of cases to violence, other kinds of abuse and degrading treatment. The defendant did however not at any time perform any tasks as a prison guard or leadership tasks linked directly to Dretelj. However, because of the defendant's knowledge of the area and the activities there it must be presumed that more persons were detained and some arrived earlier at Dretelj than would have been the case without the defendant's complicity. A significant aggravating circumstance is the torture to which the woman was subjected during the interrogation that the defendant was in charge of. The fact that independent criminal liability for this instance of violence is time-barred does not prevent the Court from attaching significant importance to the said violence for the purpose of sentencing when applying section 223 second subsection of the 1905 Penal Code, which is not time-barred.

19) Although the defendant has no independent criminal liability for the individual acts that civilian Serbs were subjected to in Dretelj, it is of significance for the sentencing how the deprivation of liberty he contributed to was carried out, cf. section 223 second subsection of the 1902 Penal Code. Thus, he shall not be sentenced as if he personally had contributed to the individual acts that took place in Dretelj, but the consequences for those persons that he contributed to bringing to Dretelj are important aggravating circumstances.

20) As regards the time factor – the fact that 16 years have passed from when the acts were committed until they are adjudged – the Court has found it difficult to assess. During his entire time in Norway, the defendant has behaved exemplary, he has had a permanent job and has not received any convictions. On the other hand, it is often chance that decides when persons responsible for war crimes and who live in another country are discovered and investigated. The Court finds – after some doubt – no reason to attach decisive importance to the time factor. Had the Court done so, a significant part of the punishment would have been suspended.

21) As a mitigating circumstance the Court attaches some importance to the fact that the defendant to a certain degree has contributed towards the investigation, including that he during the early stages named most of the persons mentioned in the indictment, thus associating himself with them, and that he has given statements during a total of 17 police interviews. The circumstance that he refrained from arresting certain Serbs is also somewhat mitigating.

22) Additionally, the Court notes that during one interrogation he only pretended to be exercising violence, while in reality he did not touch the woman being questioned. The

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23) Upon an overall assessment, the Court finds that a sentence of five years of imprisonment is to be imposed.

24) It is the opinion of the Court that there are no fundamental differences between the judgment and the prosecuting authority's claim for ten years of imprisonment as regards the assessment of the punishability of the various acts. The difference between the said claim for judgment and the actual judgment is mainly due to the counts of which the defendant is acquitted.

25) The District Court presumes there is a legal basis for granting compensation for non-pecuniary damage in the case of deprivation of liberty that comes under section 223 second subsection of the Penal Code, and that the same must apply to the 2005 Penal Code, section 103, although the said legal provision is not mentioned in the Compensation Act. The defendant is not convicted pursuant to any provisions concerning violent crime; however, in fixing the amount of the compensation for non-pecuniary damage awarded, the Court attaches importance to the violence exercised by the defendant and instances of violence where he was directly responsible. The defendant shall however not be economically liable for abuses committed by others in Dretelj. This means that the defendant shall not pay compensation for non-pecuniary damage for the rapes committed in Dretelj.

26) For the woman who in addition to suffering deprivation of liberty to which the defendant was an accomplice, also suffered torture during an interrogation where the defendant was in charge, the compensation for non-pecuniary damage is set to NOK100,000. For the other victims who have submitted claims, the amount is set to NOK 40,000 for each of them; however, the person that was subjected to the use of needles during one interrogation headed by the defendant is awarded NOK 60,000. Thus, the total compensation awarded for non-pecuniary damage amounts to NOK 400,000.

27) The Court finds no grounds for compensation for economic loss.

28) The judgment is unanimous, except for one dissenting vote concerning causal relationship as regards persistent injury for one woman.

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29) THE COURT'S INDEPENDENCE

30) Because of the special nature of the case at hand the Court finds reason to emphasise that Norwegian courts operate with complete independence from Norwegian and foreign authorities; nor have such authorities had any influence on the Court's composition or the present judgment. The Court has not been approached by any foreign authorities – or by Norwegian authorities.

31) WHAT THE COURT IS TO DELIBERATE ON

32) The background of this case being prosecuted in Norway is that the defendant in 1993 fled via Croatia to Norway together with his wife, and that he after some years became a Norwegian citizen.

33) What this Court is to deliberate on are the concrete acts described in the indictment, which thus provides the framework of this case. The defendant is – following the amendment of the indictment – charged with crimes against humanity, war crimes against persons upon arrests and/or complicity in the confinement of 17 civilians, gross violence during one interrogation, and one rape.

34) The Court shall not decide on guilt and innocence in relation to the armed conflicts in the former Yugoslavia. This case concretely concerns one Bosniak's acts or complicity in acts towards civilian Serbs. The Court is aware that to a substantial degree there were also abuses perpetrated by Serbs towards Bosniaks, but that is not the topic of the case at hand, which is limited to the acts of the defendant.

35) The Court furthermore points out that the case follows Norwegian rules in terms of procedure, requirements for a legal basis if someone is to be adjudged, and strict evidence requirements before a defendant can be convicted. The Court shall consider only what has been presented to it during the main hearing, which in its entirety took place in open court.

36) SHORT BACKGROUND OF THE CASE

37) The state of Yugoslavia, which was a federation of six constituent republics, gradually fell apart in the period 1980-1990. Nationalist parties linked to the different ethnic groups came to power in the regions.

38) Under Tito's communist rule – until his death in 1980 – it was emphasised that all were Yugoslavs, and ethnic and religious differences were consciously pushed into the background.

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Bosnia-Herzegovina was inhabited by Bosniaks, Serbs and Croats – partly living side by side. The Bosniaks are Muslims, the Serbs are Orthodox and the Croats are Catholics. Among the ordinary population these groups generally respected each other. There were numerous mixed marriages.

39) Around 1990 there was political disagreement whether Bosnia-Herzegovina should become an independent state, unite with Serbia or be split between Croatia and Serbia. Bosnia-Herzegovina was recognised as an independent state in April 1992. This was not accepted by Serb leaders. It immediately led to war in the Neretva Valley, which extends from the inland to the Adriatic Sea, and which was considered strategically important. Serb units advanced through this area. Croatian units supported by Bosnian units engaged in battles with the Serbs.

40) During the first part of the war, Bosnian and Croatian units were successful. Serb units returned with large forces, occupying the entire left bank of the Neretva River. Croats and Bosniaks prevented Serbs from taking the largest cities in the country. In Sarajevo the Serbs did not succeed in capturing the city, but the city's defenders were unable to break the siege. During the peace negotiations many Serbs and Croats were willing to split Bosnia-Herzegovina between Serbia and Croatia, but the Bosniaks – supported by some Serbs and Croats among the ordinary population – wanted an independent state. This gradually led to a division also between Bosniaks and those Croats who wanted to split Bosnia-Herzegovina in two.

41) The defendant, who lived in the town of Stolac east of the Neretva Valley, associated with the HOS, which was a paramilitary unit emanating from the extremist right party in Bosnia-Herzegovina. HOS, which had no prior military basis, recruited idealists, nationalists, mercenaries and criminals. To begun with, HOS cooperated with Croatian units against the Serbs.

42) In Serb-dominated areas prisoners of war and civilian noncombatant detainees were taken. HOS responded by detaining civilian noncombatant Serbs. The idea was to exchange detainees. Some of them were taken to the Dretelj camp. Due to a lack of discipline in many parts of the HOS, abuses were committed against Serb detainees. The abuses included torture and other kinds of gross violence.

43) The head of the HOS was the charismatic Blaz Kraljevic. He fought for an independent Bosnia-Herzegovina. After some time the relationship between him and the Croats turned antagonistic, since the Croats favoured a division of the country. Kraljevic and his bodyguards were killed in an ambush – presumably by someone with ties to a Croat unit. The HOS then fell apart.

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44) THE FRAMEWORK OF THE CASE

45) The defendant is Mirsad Repak, born 290866, he is a special education teacher currently with sick leave, married, he has two children aged 13 and 15 years respectively, no wealth, no prior convictions or fines.

46) On 09 July 2008, the public prosecutors at the National Public Prosecuting Authority indicted Repak for violation of:

I
UUThe Penal Code of 20 May 2005 no. 28, section 102 first subsection (e) (cf. section 3 second subsection and the Penal Code of 22 May 1902 no. 10, section 223 first and second subsections)
for crime against humanity, as part of a widespread or systematic attack aimed at a civilian population, having imprisoned or in any other serious way having deprived a person of his liberty in breach of fundamental rules of international law.

Basis of the charges:
During the period from approximately May to October 1992 in Herzegovina, in connection with an armed conflict between Serb military forces on the one hand and Bosnian-Croat and Croatian military forces on the other, Bosnian-Croat and Croatian forces interned an unknown number of noncombatant civilians of Serb origin. These persons were arrested and interned by force without any decision issued by any competent authority and without any legal basis. The internment took place, *inter alia*, at a closed-down tobacco station and a former textile factory in Stolac municipality and in the Dretelj military camp in Capljina municipality. Mirsad Repak was a soldier, and from May 1992 an officer, of the Croatian Defence Forces (HOS) that participated in the internment. During the period from June to October of that same year he personally arrested or ordered the arrest of the following civilians who were interned and treated as detailed below, or he interrogated persons in captivity, as follows:

1) On 6 August 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb *Milan Stanisavic*, born 17.04.1935, was arrested. He was held in captivity at, *inter alia*, the Dretelj camp, and was released around 30 October the same year. During the captivity the HOS soldiers repeatedly beat and kicked him, threatened him to drink urine and subjected him to a mock execution involving a firearm. He was furthermore denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor. Stanisavic acquired lasting symptoms of post-traumatic stress.

2) On 6 August 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb Draginja Duka, born 22.12.1922, was arrested. She was held in captivity at, inter alia, the Dretelj camp, and was released on 31 October the same year. During the captivity in Dretelj, Duka was denied sufficient access to food, not given the opportunity to take care of her personal hygiene and had to sleep on a concrete floor.

3) On 6 August 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb Scepo Pjaca, born 02.08.1934, was arrested. He was

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held in captivity at the Dretelj camp for approximately 10 days. During the captivity Pjaca was beaten, denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

4) On 6 August 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb Zdravka Birkic, born 09.10.1931, was arrested. She was held in captivity at, inter alia, the Dretelj camp, and was released on 30 October the same year. During the captivity in Dretelj, Birkic was denied sufficient access to food, not given the opportunity to take care of her personal hygiene and had to sleep on a concrete floor.

5) On 6 August 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb *Biljana Trninic-Medan*, born 18.11.1946, was arrested. She was held in captivity at, *inter alia*, the Dretelj camp, and was released on 31 October the same year. During the captivity in Dretelj she was ordered together with other detainees to line up along a wall, after which they were told they would be shot. Trninic-Medan was furthermore denied sufficient access to food, not given the opportunity to take care of her personal hygiene and had to sleep on a concrete floor.

6) On 6 August 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb *Boro Medan*, born 01.01.1938, was arrested. He was held in captivity at, *inter alia*, the Dretelj camp, and was released on 31 October the same year. Medan was denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

7) During the period from 21 to 26 June 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb *CC*, born 29.09.1955, was arrested twice. Repak was in charge of interrogating her at the HOS premises at a tobacco station where she was held in captivity for a total of 4 days. Repak did nothing to release her. During her captivity she was subjected to repeated rapes by several HOS soldiers.

8) During the period from 21 June to 18 August 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb *RC*, born 17.07.1927, was arrested numerous times. He was held in captivity at, *inter alia*, a tobacco station and at the Dretelj camp, and was released around 18 August the same year. C was denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

9) Around 09 July 1992 in Stolac municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb *Dragan Rudan*, born 04.10.1956, was arrested. He was held in captivity at, *inter alia*, the Dretelj camp, and was released around 1 October the same year. During the captivity he was repeatedly beaten and kicked by HOS soldiers, and together with other detainees he was ordered to line up along a wall, after which they were told they would be shot. Rudan was furthermore denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

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10) Around 17 June 1992 in Capljina municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb *Milivoje Elezovic*, born 11.09.1942, was arrested. He was held in captivity at, *inter alia*, the Dretelj camp, and was released around 31 October the same year. During the captivity he was repeatedly beaten and kicked by HOS soldiers. Elezovic was denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

11) Around 12 June 1992 in Capljina municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb EE, born 02.03.1941, was arrested. He was held in captivity at, inter alia, the Dretelj camp, and was released around 31 October the same year. During the captivity he was repeatedly beaten and kicked by HOS soldiers. EE was denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

12) Around 12 June 1992 in Capljina municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb Vera Brstina, born 10.10.1937, was arrested. She was held in captivity at, inter alia, the Dretelj camp, and was released around 31 October the same year. During the captivity she was repeatedly beaten and/or kicked by Repak and other HOS soldiers. Brstina was denied sufficient access to food, not given the opportunity to take care of her personal hygiene and had to sleep on a concrete floor.

13) Around 10 June 1992 in Capljina municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb DD, born 11.10.1939, was arrested. He was held in captivity at, inter alia, the Dretelj camp, and was released around 31 October the same year. During the captivity in Dretelj he was, among other things, repeatedly beaten and kicked by HOS soldiers. DD was denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

14) Around 30 June 1992 in Capljina municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb BB, born 27.08.1939, was arrested. She was held in captivity at, inter alia, the Dretelj camp, and was released around 30 October the same year. B was denied sufficient access to food, not given the opportunity to take care of her personal hygiene and had to sleep on a concrete floor.

15) Around 30 June 1992 in Capljina municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb *MB*, born 08.10.1937, was arrested. He was held in captivity at, *inter alia*, the Dretelj camp, and was released around 30 October the same year. During the captivity in Dretelj he was beaten and kicked by HOS soldiers. B was denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

16) Around 6 June 1992 in Capljina municipality in Bosnia and Herzegovina, the civilian noncombatant ethnic Serb Rade Bulut, born 01.10.1950, was arrested. He was held in captivity at, inter alia, the Dretelj camp, and was released around (17 August the same year amended by the appearing prosecutor to) 30 October. During the captivity in Dretelj he was beaten and kicked by HOS soldiers, and they inserted needles or similar objects under his fingernails. Bulut was denied

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sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

17) In June 1992 at the Dretelj camp in Capljina municipality in Bosnia and Herzegovina, together with other HOS soldiers, he interrogated the captive noncombatant ethnic Serb *AA*, born 17.07.1956. After the interrogation she was still held in captivity until she was released on (*31 October the same year amended by the appearing prosecutor to) 18 August 1992*. During the captivity she was repeatedly raped by HOS soldiers, denied sufficient access to food, not given the opportunity to take care of her personal hygiene and had to sleep on a concrete floor.

18) *(Waived by the appearing prosecutor)*
Around June 1992 at the Dretelj camp in Capljina municipality in Bosnia and Herzegovina, together with other HOS soldiers, he interrogated the captive noncombatant ethnic Serb Mica Bajic, born 27.07.1947. After the interrogation Bajic was still held in captivity until he was released around 31 October the same year. During the captivity Bajic was denied sufficient access to food, not given the opportunity to take care of his personal hygiene and had to sleep on a concrete floor.

The arrests and internments described were an extensive and planned attack aimed at a noncombatant part of the Serb population, both men and women, executed solely because they were Serbs.

II
<u>The 2005 Penal Code, section 103 first subsection (h)</u> (cf. section 3 second subsection and the Penal Code of 22 May 1902 no. 10, section 223 first and second subsections)
for war crime, in connection with an armed conflict, in breach of international law, having unlawfully confined a protected person.

Basis of the charges:
In April 1992 the Serb-dominated Yugoslavia National Army (JNA) attacked Bosnian-Croat and Croatian military forces in Herzegovina, gaining control of areas south of Mostar. The attack was related to Croatia declaring its independence in June 1991 and Bosnia and Herzegovina (BiH) doing the same in March 1992. The new states were recognised by, *inter alia*, the EC (the current EU) in January and April 1992, respectively. From around May that same year the JNA were driven out of the municipalities of Capljina, Stolac and Mostar, amongst others, which then came under the control of Bosnian-Croat and Croatian military forces, including the Croatian Defence Forces (HOS). In this area there was a continuous exchange of fire between Bosnian-Croat and Croatian forces on the one hand and the JNA on the other hand.

In the above-mentioned situation, noncombatant civilian Serbs were arrested and interned as described under count I. During their captivity they were repeatedly subjected to violence, including being beaten, kicked, scarred with burning cigarettes, having needles inserted under their fingernails, and sexual abuses. As an officer of the HOS, Mirsad Repak acted as follows during the period from June to October 1992:

a)

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He arrested or ordered the arrest of the noncombatant civilian *Milan Stanisavic*, as described in count I no. 1. Stanisavic was deprived of his liberty as described in further detail therein.

b)

He arrested or ordered the arrest of the noncombatant civilian *Draginja Duka*, as described in count I no. 2.

Duka was deprived of her liberty as described in further detail therein.

c)

He arrested the noncombatant civilian *Scepo Pjaca*, as described in count I no. 3. Pjaca was deprived of his liberty as described in further detail therein.

d)

He arrested the noncombatant civilian *Zdravka Brkic*, as described in count I no. 4. Brkic was deprived of her liberty as described in further detail therein.

e)

He arrested or ordered the arrest of the noncombatant civilian *Biljana Trninic-Medan*, as described in count I no. 5. Trninic-Medan was deprived of her liberty as described in further detail therein.

f)

He arrested or ordered the arrest of the noncombatant civilian *Boro Medan*, as described in count I no. 6. Medan was deprived of his liberty as described in further detail therein.

g)

He did not procure the release of the noncombatant civilian *CC*, as described in count I no. 7. C was deprived of her liberty as described therein.

h)

He arrested the noncombatant civilian *RC*, as described in count I no. 8. RC was deprived of his liberty as described in further detail therein.

i)

He arrested or ordered the arrest of the noncombatant civilian *Dragan Rudan*, as described in count I no. 9. Rudan was deprived of his liberty as described in further detail therein.

j)

He arrested the noncombatant civilian *Milivoje Elezovic*, as described in count I no. 10. Elezovic was deprived of his liberty as described in further detail therein.

k)

He arrested the noncombatant civilian *EE*, as described in count I no. 11. EE was deprived of his liberty as described in further detail therein.

l)

He arrested the noncombatant civilian *Vera Brstina*, as described in count I no. 12. Brstina was deprived of her liberty as described in further detail therein.

m)

He arrested the noncombatant civilian *DD*, as described in count I no. 13. DD was deprived of his liberty as described in further detail therein.

n)

He arrested the noncombatant civilian *BB*, as described in count I no. 14. BB was deprived of her liberty as described in further detail therein.

o)

He arrested the noncombatant civilian *MB*, as described in count I no. 15. MB was deprived of his liberty as described in further detail therein.

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p)
He arrested the noncombatant civilian *Rade Bulut*, as described in count I no. 16. Bulut was deprived of his liberty as described in further detail therein.
q)
He interrogated the noncombatant civilian *AA* in the Dretelj camp in Capljina municipality in Bosnia and Herzegovina. After the interrogation, AA was subjected to such continued deprivation of her liberty as described in count I no. 17.

r) (waived by the appearing prosecutor)
He interrogated the noncombatant civilian Mica Bajic in the Dretelj camp in Capljina municipality in Bosnia and Herzegovina. After the interrogation, Bajic was subjected to such continued deprivation of her liberty as described in count I no. 18.

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III
<u>The 2005 Penal Code, section 103 first subsection (b)</u> (cf. section 3 second subsection and the Penal Code of 22 May 1902 no. 10, section 231 first penalty alternative, cf. section 232)
for crime of war, in connection with an armed conflict, having inflicted upon a protected person great suffering or considerable bodily or health injury, in particular by torture or other cruel or inhuman treatment.

Basis of the charges:
In the summer of 1992 in Dretelj camp in Capljina municipality in Bosnia and Herzegovina, during the international armed conflict and the situation described under count II, Mirsad Repak, as an officer of the Croatian Defence Forces (HOS), acted as follows:

a)
In June 1992, together with other HOS soldiers, he interrogated the captive noncombatant civilian *AA*. During the interrogation she was beaten with a baton in different parts of her body, scratched with a knife in her face and on her breasts, burnt with cigarettes and had needles or similar objects inserted under her fingernails. After the interrogation AA was still held in captivity without medical treatment. She suffered serious psychological health problems, including long-term depressions and anxiety.

b) (waived by the appearing prosecutor)
In June 1992, together with other HOS soldiers, he interrogated the captive noncombatant civilian Mica Bajic. During the interrogation he was beaten, burnt with cigarettes and had needles or similar objects inserted under his fingernails. After the interrogation Bajic was still held in captivity without medical treatment. He suffered serious psychological health problems and has been diagnosed with post-traumatic stress disorder.

IV
<u>The (2005) Penal Code, section 103 first subsection (d)</u> (cf. section 3 second subsection and the Penal Code of 22 May 1902 no. 10, section 192 first subsection, second penalty alternative, this provision's wording prior to 1 January 1995)
for crime of war, in connection with an armed conflict, having exposed a protected person to rape.

Basis of the charges:
Around 30 June 1992 in Capljina municipality in Bosnia-Herzegovina, during the international armed conflict and the situation described under count II, in connection with him as an officer of the Croatian Defence Forces (HOS) arresting the noncombatant civilian BB at her home X in Y, he had sexual intercourse with her by force. He threatened/pushed her down onto a sofa, pulled off her underpants and introduced his penis into her vagina. Mirsad Repak was heavily armed and BB was because of her fear unable to resist his actions.

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47) THE MAIN HEARING

48) The main hearing of the case took place between 27 August 2008 and 22 October 2008. The defendant, two appointed counsels for the defence, two prosecutors and one victim's counsel appeared.

49) Significant parts of the main hearing were audio and video recorded. Such evidence was presented as recorded in the court record and the audio/video recordings.

50) Four expert witnesses appeared before the Court: one expert witness on the topic of the conflict in Bosnia-Herzegovina 1992, one expert witness on the topic of witness psychology and memory, and two expert witnesses concerning the extent of the injury inflicted upon two of the victims in the case.

51) The defendant's statement and the communication with him were in Norwegian. In connection with witness statements three interpreters were appointed. In the case, statements were heard from 43 witnesses, of which 19 appeared before the Court, 19 were examined by video link from Serbia, Bosnia, the USA and Australia, and 5 gave evidence by telephone.

52) Prior to the main hearing the Court had decided that the court hearing would start by the defendant being presented with the indictment, followed by the parties arguing the overarching legal issues linked to the application of the new war crime provisions in relation to the questions of retroactive effect and limitation of action (time-barring).

53) Then followed the prosecutor's opening statement and the defence counsel's statement. Professor Svein Mønnesland gave the Court an introduction to the conflict in 1992, and Professor Tim Brennen spoke on witness psychology and memory.

54) The defendant gave his statement and the witnesses were heard by the Court. Such documentary evidence was presented as recorded in the court record, [video/audio] recordings and markings in the court document bundles.

55) The court rulings made during the main hearing are recorded in the court record and included the following:

56) Firstly, the Court concluded that Article 97 of the Constitution does not prevent any and all application of the new provisions concerning war crimes – however, there are important conditions and limitations. In relation to this, reference is made to the discussion under the chapter titled The War Crime Provisions – the Relationship to the Constitution (paragraphs 63 to 85).

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57) Secondly, the Court decided to allow the prosecuting authority to confront the defendant with the minutes of his police interviews. The defence counsels had objected to this, arguing that the minutes from the police interviews are imprecise and incorrect, and that the interviews were not concluded in the right way, as it was decided to do new interviews instead. The Court's grounds were as follows:

> *"The Court finds that it will allow the prosecuting authority to confront the defendant with statements recorded in the police interviews concerned, but the Court points out firstly, that a main reason why permission is granted is that audio recordings of the defendant's statements exist, making it possible to establish what was said, and that it has been stated that this will not be decisive evidence in the case;*
> *secondly, that the defence counsels at any stage of the main hearing will be allowed to revert to statements from the police interview minutes that have been used, to provide such supplementary information as the audio recordings may warrant;*
> *thirdly, that it is unfortunate that the provisions of the Prosecution Instructions concerning the conclusion of police interviews were not complied with, especially since it has turned out that the prosecuting authority wants to use these police interviews in connection with the defendant's statement in court. This concerns in particular section 8-1 fourth subsection of the Prosecution Instructions, which provides that any amendments to the report shall be done by additions to the report and that police interviews to the extent possible should be presented [to the interviewee] for signature. In the case at hand, all of this was doable, but was not done – presumably because the police preferred new interviews instead. As a result, the interviews are left without any amendments and amplifications – which the defendant evidently would have added – and without signature. In addition, there is the question of whether important nuances were lost by recording [the defendant's statements] in a concentrated form. Section 8-5 fifth subsection of the Prosecution Instructions provide that police interviews "must not aim to exhaust the interviewee".*
> *The Court notes that approximately 30 hours of police interviews took place in the space of three days without the presence of a defence counsel.*
> *The Court makes reference to Norsk Retstidende 2003 page 549 and Norsk Retstidende 2003 page 1511.*
> *Upon the Court's final assessment of the evidence in the case, the Court will if necessary perform a concrete and overall assessment of the evidentiary value of what he has been confronted with in terms of minutes from the first police interviews. In this respect, it is important to the Court that the trial as a whole should be perceived to be fair.*

58) Thirdly, the Court reached the following decision concerning statements given during the period 1992 – 1995:

> *The prosecuting authority has petitioned to be allowed to submit in evidence 12 statements given during the period 1992 – 1995 by some of the victims. It has been*

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argued, inter alia, that the statements were not made in relation to this case, and that as a result they can be submitted in evidence in their entirety.
The defence counsels have objected to the submission in evidence and any other use of the statements. It has been argued, inter alia, that they were made in relation to the case and that any use thereof would be contrary to the European Convention on Human Rights (ECHR).
The Court notes by way of introduction that the Human Rights Act establishes that the ECHR takes precedence over ordinary Norwegian legislation and that the ECHR thus is of central importance for the interpretation of Norwegian legislation with a view to obtaining the highest possible degree of harmony between Norwegian law and the ECHR.
The statements concerned were partly given before Serb courts while there still was war in the region, they were partly given before other bodies than courts or the police, and partly given without any identification of the person giving the statement or the person writing it down. During none of these interviews was there any defence counsel present to defend the interests of possible perpetrators.
The Court points out that judgments concerning Article 6 of the ECHR establish that the right of contradiction, that is, the right of defence counsels to examine the witness, is a pillar of fair trial, especially as regards decisive or central witness evidence. Furthermore, the Court finds that the statements were made in relation to the case. It is not necessary that the defendant be accused or any investigation commenced and aimed at him for the statements to be covered by this concept. The statements concern war crimes linked to the Dretelj camp and concern, amongst other things – according to what has been stated – abuses mentioned in the indictment. The Court cannot see that these statements in principle differ from a police statement concerning a crime reported to the police whose perpetrator has either not been identified or not accused. Had the statements been given before Norwegian police or courts, they would have been considered to have been given in relation to the case; that is, the case that in the end would become the result of the ensuing investigation – this would apply even if the subsequent investigation were to take place several years later. The Court makes reference to certain similarities with the ruling reported in Norsk Retstidende 1994 page 610, in particular page 619.
This means that both Article 6 of the ECHR and an interpretation of sections 296 and 297 of the Criminal Procedure Act yield the result that sections 296 and 297 of the Criminal Procedure Act are applicable to the said statements. Consequently, the statements cannot be submitted as documentary evidence or as seized evidence.
As regards the statements, there are three different situations:

1. *The witness appears and gives evidence directly before the Court, either by personal appearance at Oslo District Court or by video link.*
   In that case, the concern for contradiction is fully satisfied. It means that the parties – within the scope established by section 296 second subsection, including when there are contradictory statements – can confront the witness with what was registered in the prior statement. The Court finds no reason to

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attach any importance to the fact that the statements were given before different authorities and bodies; cf. section 296 second subsection, last sentence, which provides a similar rule for ordinary written statements. There shall be a confrontation in the case of contradictory statements and not a confirmation in the case of coinciding statements.

2. *The witness will neither appear before the Court nor in any other way provide a statement directly before the Court.*
   Thus, contradiction is not possible. If the statement will amount to decisive evidence, Article 6 of the ECHR does not permit the reading out of the statement concerned.

3. *The witness is dead. Thus, contradiction is not possible. If the statement will amount to decisive evidence, Article 6 of the ECHR does not permit the reading out of the statement concerned.*

Since substantial parts of the evidence in the case at hand remain to be submitted, it is too early for the Court to decide whether the statements are decisive evidence. Concerning points 2 and 3, the Court will postpone its decision until the question of reading out the said statements arises. If the statement is decisive or central evidence, the reading of it will not be allowed.
It is not allowed to present the contents of the statements by for instance calling the investigator as a witness.

Conclusion:

1. *None of the statements are allowed to be read into evidence or submitted.*
2. *In the case of appearing witnesses, confrontation is allowed in the case of contradiction.*
3. *As regards other witnesses, the Court's ruling on the possible reading out of statements is postponed."*

59) Fourthly, the Court reached the following decision concerning the reading out of the witness statement of the witness Elec:

"The victim in count IV has named Repak as the perpetrator based on her having heard the name from others. She did not know him from before and she has not identified him in any other way. There is no objective evidence. Consequently, the assessment of evidence must be based on an overall evaluation of the existing statements. Statements from witnesses who were present at the scene may constitute central or decisive evidence.
The witness Elec was supposedly at the scene. She has given a statement to Norwegian police. For the main hearing an attempt was made at having the witness participate in an examination by video link, but the witness opposed this. During the main hearing, contact by telephone was established between the Presiding Judge and

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the witness, but she refused to cooperate. She threatened to call the police unless the Court ended the call – in spite of there being local plainclothes police present in her apartment at the time, together with Norwegian police.
Following the above, contradiction has not been possible.
It will not be a fair trial in agreement with Article 6 of the ECHR if her police statement is read out without the possibility of asking follow-up questions linked to both facts and her memory. This is particularly true when taking into consideration that 16 years have passed since the alleged actions took place, as well as her reaction during the telephone call at the main hearing.
Conclusion: Reading out is not allowed."

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60) The defendant pleaded not guilty, but confirmed that he had carried out several of the arrests.

61) The prosecutor submitted the following demand for judgment:

1. Mirsad Repak b. 29.08.66, is to be convicted of violation of

The Penal Code of 20 May 2005 no. 28, section 102 first subsection (e), cf. section 3 second subsection and the Penal Code of 22 May 1902 no. 10, section 223 first and second subsections.
The 2005 Penal Code, section 103 first subsection (h), cf. section 3 second subsection and the Penal Code of 22 May 1902 no. 10, section 223 first and second subsections.
The 2005 Penal Code, section 103 first subsection (b), cf. section 3 second subsection and the Penal Code of 22 May 1902 no. 10, section 231 first penalty alternative, cf. section 232.
- The Penal Code of 22 May 1902 no. 10, section 192 first subsection, second penalty alternative (this provision's wording prior to 1 January 1995)
to a sentence of ten (10) years of imprisonment.

He shall be entitled to a deduction from this sentence of 294 days for time spent in custody.

2. Mirsad Repak is to be acquitted of counts II r) and III b) of the indictment.

3. Mirsad Repak is to be sentenced to pay compensation for non-pecuniary damage and ordinary compensation[1] *as follows:*

a) to Biljana Trninic Medan, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- to be fixed at the Court's discretion.
b) to Vera Brstina, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- to be fixed at the Court's discretion.
c) to CC, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- to be fixed at the Court's discretion.
d) to Milevoeje Elezovic, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- to be fixed at the Court's discretion.
e) to EE, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- to be fixed at the Court's discretion.
f) to Draginja Duka, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- to be fixed at the Court's discretion.
g) to Dragan Rudan, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- to be fixed at the Court's discretion.
h) to DD, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- to be fixed at the Court's discretion.
j) to BB, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- and ordinary compensation in an amount not exceeding NOK 322,326.- to be fixed at the Court's discretion.

[1] For economic loss/damage. Translator's remark.

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k) to AA, compensation for non-pecuniary damage in an amount not exceeding NOK 300,000.- and ordinary compensation in an amount not exceeding NOK 2,268,207.- to be fixed at the Court's discretion.

62) The defence counsel submitted the plea that the defendant should be acquitted; in the alternative, that the defendant should by treated as leniently as possible.

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63) THE WAR CRIME PROVISIONS – THE RELATIONSHIP TO THE CONSTITUTION

64) Article 97 of the Constitution states:

> ”No law must be given retroactive effect”.

65) Norway did not have any war crime provisions prior to the 2005 Penal Code, where the said provisions entered into force on 7 March 2008. Prior to this, the 1902 Penal Code contained only war-related provisions concerning crimes against Norway and the Norwegian Constitution. In the indictment in the case at hand, it is primarily the new war crime provisions of the 2005 Penal Code that have been cited. The Court has found it necessary to assess the scope of the Constitution’s Article 97 in relation to the new war crime provisions, since according to the indictment the acts took place in 1992.

66) The Ministry of Justice originally did not intend to let the war crime provisions be applicable to acts committed before their entry into force. Following initiatives from some of the entities consulted during the public hearing [of the proposed legislation], the question was examined further. This resulted in a new provision on the temporal scope of the war crime provisions. The Ministry’s assessments are detailed in the Proposition to the Odelsting No. 8 (2007-2008).

67) At the time the acts were committed the Penal Code’s section 3 read as follows:

> "If the criminal legislation has been amended in the period following the commission of an act, the penal provisions in force at the time of its commission shall be applicable to the act unless otherwise provided."

68) In connection with the new war crime provisions being passed, section 3 was amended with respect to the said crimes. Thus, the new section 3 second subsection reads:

> ”The provisions in chapter 16 [*that is, the war crime provisions*] apply to acts committed before their entry into force if the act at the time of its commission was punishable under the criminal legislation in force at the time and considered to be genocide, a crime against humanity or a war crime according to international law. The punishment can however not exceed the punishment that would have been imposed pursuant to the penal provisions [in force] at the time the crime was committed.”

69) The Court must then first assess whether the new section 3 second subsection holds up in the light of Article 97 of the Constitution and, if so, with what limitations.

70) As with all interpretation of legislation, it is necessary to start with the purpose of the legal provision concerned – what is the purpose of Article 97 of the Constitution?

71) This provision was included to safeguard individuals, ensure predictability, protect against randomness and to further trust in the legal order in Norway. The provision is intended to ensure that new burdens are not added to acts already committed. Within the field of criminal law this means, firstly, that nobody is to be punished for an act that the person concerned could not know was punishable when committed, and secondly, that nobody

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”To give an act retroactive effect is unjust”.

72) The Norwegian Constitution is the main pillar of Norwegian law. Amendments to the Constitution require lengthy and extensive procedures. The purpose is to ensure that amendments are well-considered, and not impulsive populist decisions based on national or international currents.

73) During the post-World War II trials in Norway, the majority of the judges that handed down the ruling in the Klinge case (reported in Norsk Retstidende 1946 p. 198) went a long way towards accepting a retroactive effect, of a provisional ordinance introducing capital punishment. The majority agreed that as a point of departure, Article 97 of the Constitution is absolutely mandatory in the field of criminal law. However, the majority found that in the case concerned there was no violation of Article 97; moreover, it was outside the scope of what the said constitutional provision pretends to regulate. Decisive importance was attached to the fact that by their nature the acts were war crimes that violated international law rules on the laws and customs of war. The issuance of the 1945 provisional ordinance concerning capital punishment for such acts in fact amounted to allowing Norwegian courts to enforce already existing claims for punishment. The increase of the maximum penalty to capital punishment was approved, the argument being that no one had thought of such circumstances as those giving origin to the post-World War II trials. The dissenting judges stated that it always has been considered beyond doubt that Article 97 is an absolute barrier to applying a criminal provision to acts committed prior to the entry into force of the provision concerned in a way that would be detrimental to the defendant, nor is it possible to increase the penalty for prior crimes by applying a new act. The dissenting judges found they could not attach decisive importance to the circumstance that there was an extraordinary situation – also because that might contribute towards making calm and just deliberations more difficult. The dissenting judges furthermore stated that the fact that capital punishment was permitted under international law, could not justify applying new legal provisions in violation of the Constitution.

74) Opinions differ on the Klinge ruling. The professors of constitutional law Frede Castberg and Johs. Andenæs were highly critical of the rationale cited by the majority judges, and others have argued that the ruling is diffuse on the question of the relationship to international law. In the opinion of this District Court, the Klinge ruling today has limited importance when Article 97 of the Constitution is to be interpreted. The ruling’s rationale is incongruent and was conceived in an extraordinary situation for the country.

75) The District Court presumes that no one can be sentenced in Norway solely on the basis of a rule of international law. Such a rule must first be made part of Norwegian legislation before it can be used to sentence someone. Article 96 of the Constitution stipulates that no

[1] Cradle of the Norwegian Constitution. Translator’s remark.

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one may be convicted except according to “law”; by this is meant a Norwegian act[1] or regulations issued with a legal basis in a Norwegian act. Furthermore, it is not a correct treatment of the Constitution to base a review of constitutionality on current arguments of reasonableness.

[1] Enacted by the Storting (Norway’s parliament). Translator’s remark.

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76) The Court has concluded that Article 97 of the Constitution does not bar the application of the new provisions concerning war crimes as long as they concern the same acts, the same penalty, the same prescription period, and the penal provisions protect the same interests when applying the new provisions as when applying the 1902 Penal Code that was in force when the acts were committed. Thus, the District Court concludes that neither the new Penal Code's section 3 second subsection nor its section 103, "war crime against person", is unconstitutional. Consequently, in principle the said provision may be applied in this case. However, applying section 102 of the Penal Code, "crime against humanity", would in this concrete case be unconstitutional.

77) The Court's rationale for its conclusion is mainly based on the following:

78) Firstly, the descriptions in the indictment of the acts concerned are fully covered by section 223 of the ordinary Penal Code that was applicable in 1992, regarding deprivation of liberty.

Thus, if the defendant is found guilty he will be convicted of acts that were punishable even in 1992. The difference is the legal provision that is applied, and such a change of applicable section(s) is a change of subsumption[1] that enjoys no constitutional protection , as long as the act was punishable under the former legislation. This is however conditional upon there being the same act treated in the old and new legal provision, and the said legal provisions must aim to protect similar interests. Section 223 of the 1902 Penal Code is a provision that addresses unlawful deprivation of liberty and intends to protect personal liberty. Section 103 (h) of the 2005 Penal Code concerns war crime against persons and unlawful confinement of protected persons. This war crime provision addresses the same act and protects the same interest as section 223, but it relates to war crime in particular, thus establishing certain additional criteria as compared to the requirements in section 223. The Court will revert to these requirements below in paragraphs 80 to 85.

79) However, as regards the application of section 102 of the 2005 Penal Code, the Court finds that applying that provision would be contrary to section 97 of the Constitution. The said provision concerns crime " against humanity" …… "as part of a widespread or systematic attack aimed at a civilian population". The interests protected by this provision differ altogether from those protected by sections 103 and 223. At the time the acts were committed in 1992, Norway did not have any legal provisions of a corresponding content or protecting such interests. When the prosecuting authority alleges that sections 102 and 103 in this case may be used side by side, this must be understood as meaning that even the prosecuting authority is of the opinion that these provisions protect different interests. If the punishable act had been committed after the war crime provisions entered into force, the Court agrees it would be possible to apply the said provisions side by side, as each of the two provisions contains a unique element not found in the other provision. Section 223 of the 1902 Penal Code, which addresses crime against personal liberty, does however protect only the interest that

[1] Subsumption is the question of which penal provision(s) should be applied to a punishable act. Translator's remark.

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is also found in section 103 of the 2005 Penal Code, concerning war crime against persons. Following the above, it would be a violation of Article 97 of the Constitution to apply section 102 in the case at hand in addition to section 103. Said in another way: a change of subsumption from the one penal provision, section 223, which protects personal liberty, to two new war crime provisions, of which only one addresses crime against persons, would be unconstitutional. The fact that a penal provision addressing acts ”against humanity” protects another interest than a penal provision that addresses acts committed ”against personal liberty” is evident from Proposition to the Odelsting No. 8 (2007-2008) concerning terminology in connection with the use of the expression ”mot menneskeheten”. In English the corresponding expression is ”against humanity” and in French ”contre l`humanité”. The Ministry of Justice stated that this expression applies to actions that are “of such a serious nature that they are an offence to human civilisation as such”. In 1992, Norway did not have penal provisions that protected such interests. Thus, applying section 103 of the 2005 Penal Code would in this case amount to giving the provision retroactive effect. By way of conclusion on this topic, the Court also notes that the prosecuting authority has invoked the application of section 102 as to a single comprehensive crime, while the application of section 103 is invoked individually for each victim. This too indicates that section 103 should be applied, and not section 102, as 223 presupposes an individualisation of each deprivation of liberty. This leads to the conclusion that applying section 102 of the 2005 Penal Code would be a breach of Article 97 of the Constitution. Following the conclusion reached by the Court, it is unnecessary to decide whether the acts were committed intentionally as part of ”a widespread or systematic attack aimed at a civilian population”, which is an additional basic requirement pursuant to section 102 concerning crime against humanity.

80) As regards section 103 of the 2005 Penal Code, it too establishes some additional requirements not stipulated by section 223 of the 1902 Penal Code. These requirements represent additional conditions for the application of section 103. These additional requirements are, firstly, that the act must have been committed in connection with an ”armed conflict”. This is undisputed. The Court makes reference to the description of the conflict. Secondly, it is required that the deprivation of liberty must concern a ”protected person”. This will be the case with civilian noncombatant persons and will be assessed concretely. Thirdly, the confinement must be ”contrary to international law”. In the opinion of the Court, this must apply to international law as it was in 1992 if one is to avoid another problem arising in relation to retroactive effect. Written international law at the time consisted mainly of the 1949 Geneva Convention and some Additional Protocols. The Geneva Convention is a convention regarding the protection of civilian persons in time of war. The Convention stipulates different requirements, depending on whether there is an international conflict or an armed conflict not of an international character. The Court finds that the requirements for both alternatives are fulfilled in the case at hand. The Court finds that at the time in question an international conflict existed. Reference is made to the main passage regarding the conflict in Bosnia-Herzegovina. Both rump Yugoslavia (Serbia), Croatia and Bosnia-Herzegovina were in different ways involved in the conflict. The Geneva Convention requires at least two countries to be involved. Articles 41 to 43 of the

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81) For the case that the conflict were to be considered a conflict not of an international character, the Court points out that the acts would still be contrary to the Geneva Convention. Article 3 stipulates that during such internal conflicts, civilians

> "shall in all circumstances be treated humanely, without any adverse distinction founded on race, … religion or faith, … , or any other similar criteria".

82) In addition, Article 3 prohibits the taking of hostages. Depriving civilian Orthodox Serbs of their liberty, when an important purpose of this deprivation of freedom was to intern them to use them for exchanges with Croats and Bosniaks that had been interned by the Serbs, would be contrary to Article 3, both because of the ethnic selection and because there was a hostage situation in that the detainees were intended used for exerting pressure and/or for exchanges during the conflict. The defendant was aware of the unlawful purpose.

83) Secondly, it is a basic condition for applying the war crimes provision that the sentencing should be the same independently of whether the old or new Penal Code is applied. This has been explicitly expressed in the new section 3 second subsection, which states:

> "the punishment can however not exceed the punishment that would have been imposed pursuant to the penal provisions [in force] at the time the crime was committed".

84) Thirdly, the limitation periods that follow from the 1902 Penal Code still apply, which for most of the actions in the case at hand entail a limitation period of 15 years, even if the most serious war crimes under the 2005 Penal Code are not subject to a limitation period. It would amount to retroactive effect and a breach of Article 97 of the Constitution if the new limitation provisions were to resuscitate criminal liability for actions that were already time-barred when concrete investigations were initiated. In this respect, reference is made to [the judgment published in] Norsk Retstidende 1945 (the Quisling judgment), where this opinion on the point of law concerned was expressed (cf. page 117 of the judgment). Consequently, the assessment of whether there is limitation (time-barring) must be done in accordance with the limitation periods stipulated by the 1902 Penal Code. This understanding of the legal situation is confirmed by the travaux préparatoires of section 91 of the 2005 Penal Code, cf. Proposition to the Odelsting No. 90 (2003-2004) in the travaux préparatoires of the war crime provisions, cf. Proposition to the Odelsting No. 8 (2007-2008).

85) Fourthly, the defence counsels have argued that war crime provisions cannot be applied, because they provide a far more defamatory description than that of deprivation of liberty. The Court finds that Article 97 of the Constitution is not applicable in this context. The fact that we are concerned with a war crime would, in the case of a conviction, have to be clearly stated in the rationale of the judgment – even if the 1902 Penal Code were to be applied. The Court finds no concerns of decisive importance in applying a war crime section to acts that amount to a war crime insofar as the provisions protect similar interests.

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86) GEOGRAPHICAL JURISDICTION

87) As regards the criminal legislation's application to acts committed abroad, section 5 of the 2005 Penal Code provides that criminal proceedings may be initiated in Norway against a person who after the time the acts were committed has become a Norwegian citizen or has become resident in Norway. Also pursuant to section 12 of the 1902 Penal Code, the acts could be adjudicated in Norway even if they were committed abroad by a person who was a foreign national at the time, because section 223 regarding deprivation of freedom is specifically mentioned in section 12 first subsection point 4 (a). In the meantime, the rules of prosecution have been amended, cf. section 13 of the 1902 Penal Code; however, it is merely a change linked to the organisation of the Norwegian prosecuting authority. Such organisational changes are not of such a nature that they are protected by Article 97 of the Constitution.

88) LIMITATION (TIME-BARRING)

89) As regards limitation, many of the acts described in the indictment have a limitation period of 15 years pursuant to the 1902 Penal Code. As indicated earlier, it is the limitation period pursuant to this Code that applies. This means that the limitation period expired in the summer of 2007 unless the running of the limitation period had been interrupted by then. The applicable rules are found in section 69 of the 1902 Penal Code. The suspect must be charged with the acts before the limitation period expires if limitation is to be avoided. The charges against the defendant in this case were issued on 08 May 2007. The charge document cited the 1902 Penal Code and stated the correct legal provisions, the correct time, the correct place, the role of the defendant, the nature of the acts and that the acts concerned were committed against "civilian noncombatant persons of Serb ethnicity". The only element not contained in the charges was an identification of each individual detainee. This was added later and figures in the indictment. Through the charges issued in May 2007, the defendant was made aware that he would have to count on being subjected to criminal prosecution on grounds of any acts committed by him as a member of HOS during the months of May to September 1992 and which concerned deprivation of liberty, gross violence and rape. Following the indictment, it is precisely these acts that are the subject matter of the case at hand. Consequently, the Court finds that the charges issued in May 2007 were sufficiently informative and concrete to cause an interruption of the running of the limitation period. Thus, none of the counts of the indictment are time-barred – this being dependent, however, on the application of the law cited in the indictment. The Court will later revert to the specific elements relating thereto.

90) THE EVIDENCE

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91) As regards the concrete acts covered by the indictment, the evidence mainly consists in statements from victims, from the defendant and from others who were wholly or partly present. Since there has not been any formal duty to give evidence in the case, only voluntary witnesses have been heard by the Court. Moreover, more than 16 years have passed since the alleged acts took place, and this is bound to reduce the credibility of the statements. Firstly, there are issues relating to memory; secondly, witnesses may in the course of the years have been influenced by others – either by contact or by their own information-gathering on the Internet; and thirdly, Norwegian investigations have not generally been focused on abuses committed in the region at the time in question, but on any acts committed by the defendant.

92) On the basis of the presentation given by the expert witness on witness psychology and memory – together with scientific literature on the subject – the Court finds reason to point out that time's mitigating effect on the dependability of memory is undisputed in professional circles. Additionally, there is little in the scientific literature to indicate that memories that are lost at some point in time return later. Even memories of stark events are modified as the years pass by, but this applies to details in particular and may lead to false memory. In the case of trauma-related events, the main element is often remembered in great detail, but the details are often erroneous and incomplete. Details may also unconsciously be influenced by motive. If a witness has suffered several traumatic experiences in the course of a short period of time, it will often be difficult for the witness to separate the different events. Research has shown that memory is guided by a number of factors that result in unconscious systematic or random errors in statements given before the court. This may also apply to witnesses that in general are highly trustworthy and reliable. As a consequence, the Court must be careful in applying general credibility as a basis for concluding that a witness is credible in relation to specific events. Research has shown that the erroneous identification of innocent persons seems to be the main cause of incorrect convictions. In its assessment of the evidence in this case, the Court has tried to be conscious of the risk of unconscious and/or conscious errors in the statements.

93) THE CONFLICT IN BOSNIA-HERZEGOVINA

94) Bosnia-Herzegovina was a contested area as early as the late 19th century. It was inhabited by three ethnic groups, each having their own religion. There are Bosniaks, who are mainly Muslims and make up nearly half the country's population. There are Serbs, who are mainly Orthodox and make up one-third of the population, and there are Croats, who are mainly Catholics and make up one-sixth of the population. In principle, they speak the same language. For a long time, Bosnia-Herzegovina was part of Yugoslavia. In the 1920ies there was political chaos. During World War II, Ustasa operated in this area, supported by the Axis powers. The Ustasa members were extreme fascists who defined the Serbs as their main enemy, driving them out and killing large numbers of them.

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95) Around the end of World War II the communists came to power in Yugoslavia, with Tito as their leader. He established a federation of six constituent republics, of which Bosnia-Herzegovina was one. After he died in 1980 the federation gradually fell apart. Nationalism surfaced in the different parts of Yugoslavia. Milosevic became the party leader and president of Serbia and had the ambition of becoming the head of a Serb-dominated Yugoslavia. Slovenia, Croatia and Macedonia wanted to break away from the Yugoslav federation. Kosovo already had an independent position. In Croatia, Tudjman came to power; he too was a nationalist.

96) In Bosnia-Herzegovina there were three dominant political parties after the 1990 elections: one Serb political party led by Karadzic with ties to Milosevic, one Croat political party that was later headed by Boban with links to Tudjman, and one Bosniak party headed by Izetbegovic. As early as in 1991 animosities arose among the three parties. Military units that became involved in these animosities were the JNA, which was a continuation of Tito's old People's Army, which gradually became more Serb-dominated, and TO, a sort of home guard that after a while was placed under the command of the JNA, thus turning more Serb-dominated. These units were well-equipped in military terms. Croatia established its own army, the HVO.

97) The Neretva Valley, which for centuries had been a central route from the Adriatic Sea into the Balkans, was a strategically important area in Herzegovina. The Neretva River had also been a line of separation between population groups, with many Croats on the west side and many Serbs on the east side, with Bosniaks spread around in the different areas, especially in towns like for instance Stolac.

98) In June 1991, Slovenia and Croatia declared themselves independent states and no longer linked to the Serb-dominated Yugoslavia. A war followed. Slovenia, having prepared defence forces, resisted the Serb attack, and this war ended shortly. Croatia was ill-organised and ill-equipped in military terms.

99) Many Croats and Bosniaks perceived Tudjman as too passive. As a consequence, they established the paramilitary organisation HOS, an abbreviation of Croatian Defence Forces. The HOS was not comprised of trained military, but was a mixture of popular resistance and criminals without military order and discipline. To signalise strength and obtain support, the HOS used Ustasa symbols from World War II and indicated their will to gain control all the way to the Drina River. The Serbs were provoked by the Ustasa symbols, and even Croatia's leadership considered HOS as a problem. HOS gained a lot of support among the Bosniaks and parts of the Croat population. Towards the end of 1991, Blaz Kraljevic became the HOS commander in Bosnia-Herzegovina. Kraljevic had for many years lived in Australia and after his return he headed the information office of a newly founded party. He had no military background, but he was charismatic and used simple language. He favoured an independent Bosnia-Herzegovina. During the initial stage he and HOS cooperated with the Croats and the HVO.

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100) From late September 1991 the Croat army HVO was better organised and conquered some Serb-dominated barracks with arsenals.

101) In the Serb-controlled areas the Croat population was killed or driven out, and Serb paramilitary units wreaked havoc. The city of Vukovar in eastern Croatia was devastated by bombing and Serb units advanced on the city, killing a considerable number of civilians. Peace diplomacy was tried, but no peace was obtained.

102) While the war went on in Croatia in 1991, tensions were rising in Bosnia-Herzegovina. Serb military units took control of strategic places. Croats and Muslims were detained and interned, and many fled to other parts of the country. Croat paramilitary forces also took up arms. HVO and HOS seized control of Croat-dominated municipalities like Capljina. As Croats got armed and organised, Serb units chose to evacuate strategic points and barracks that were located in Croat-controlled areas. This included, amongst other places, the Dretelj camp. When an armistice was declared in Croatia in January 1992, the danger of war became imminent in Bosnia-Herzegovina.

103) Following orders from the international community, a referendum on independence for Bosnia-Herzegovina was held. Of those who cast there vote, almost all voted in favour of independence, but the Serbs boycotted the referendum. Against the protests of the Serbs, Bosnia-Herzegovina declared its independence. This led to armed clashes. Bosnia-Herzegovina was recognised internationally on 6 April 1992, and from then on there was war. The Serbs proclaimed their own Serb republic in Bosnia-Herzegovina, driving out or interning the non-Serb population. Milosevic in Serbia wanted to keep as much as possible of Bosnia-Herzegovina under Serb control in a future Greater Serbia. Tudjman in Croatia wanted a similar solution for the Croat-dominated areas. Following an international initiative, Boban and Karadzic met for negotiations on 6 May 1992. They agreed on a division of Bosnia-Herzegovina. The Bosniaks reacted negatively because they had not been invited to the meeting nor given any rights of their own in the case of a solution.

104) The Serb forces advanced in May 1992, driving out Croats and Bosniaks and taking many of them as detainees. Almost the entire Neretva Valley, including Stolac, was occupied. In the summer of 1992, the Croat-Bosniak military advanced in Herzegovina. During the offensive from Croats and Bosniaks, Serbs were driven from their homes and many of them were detained and interned in, amongst other places, the Dretelj camp near Capljina. The indictment concerns some of those Serbs.

105) When Croats and Serbs negotiated for a political solution that did not presuppose an independent Bosnia-Herzegovina, tensions rose sharply between the Croat HVO and the HOS headed by Kraljevic. The Croats demanded that the HOS should be disbanded and its forces incorporated into the HVO. The president of Bosnia-Herzegovina, Izetbegovic, responded by appointing Kraljevic a member of the General Staff in Sarajevo. The following day, on 9 August 1992, Kraljevic and his entourage of a total of nine persons

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106) The next years saw a considerable Serb offensive.

107) Ethnic cleansing by means of deportation or murder was used actively by the parties, but to different extents. During the Srebrenica Massacre in July 1995, some 8000 Bosniaks were liquidated in a city that the UN had declared as a safe area.

108) The war lasted from April 1992 to December 1995 and ended with the Dayton Agreement. Bosnia-Herzegovina continued being a single country, but with a decentralised structure.

109) In the course of the war some 100,000 persons were killed, about half of them civilians. 1.8 million persons fled or were driven out of their homes.

110) THE DEFENDANT'S STATEMENT

The defendant explained during the main hearing that he grew up with his parents together with a sister and his grandmother. They lived in a house owned by the family. He had 8 years of obligatory school in Stolac and attended upper secondary school in Capljina. In Stolac, persons of different ethnic backgrounds lived side by side. His family are Muslims, and among their circle of friends there were both Catholics and Orthodox. The Communist Party was dominant, and Tito wanted all to be Yugoslavs; as a result, ethnicity and religion were not central issues during his upbringing. However, most were members of the Communist Party.

After having completed his schooling he played in musical bands and orchestras, earning a little money on the side by playing at weddings and funerals. For one year he stayed in the military, where all ethnic groups were represented. Later he started working at the winery in Stolac, playing music during weekends.

When the Communist Party dissolved he became an ordinary member of the SDP. At that time, Bosniaks, Croats, Serbs and Yugoslavs lived in the Stolac area, and mixed marriages were quite common.

Following outside pressure from Serbs living elsewhere, the Serbs in the area started arming themselves. In the autumn of 1991, Serb reserve forces from Montenegro passed through Stolac and acted inappropriately towards the local population. At the time, the Muslims had not started acquiring arms. Tensions grew in the region. In April 1992, acts of war in Sarajevo were televised. They also included a massacre in a mosque. This influenced them, and when young Bosniaks were offered arms and a uniform by going to Croatia and then being allowed to return to their hometown, the defendant was among those who travelled. They never received any arms and many

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returned to Stolac. At that point, the Serbs had taken control of the town. The defendant and a friend remained in Croatia, while the others, numbering more than a hundred, returned. Only the defendant and his friend were given arms and a uniform and they stayed there for about a month. Because conflicts arose in the camp between Croats and Muslims, the two of them chose to travel on, arriving at Metcovic. There they were shown some films and participated in meetings. The films included, inter alia, statements from Serbs that all Muslims were to be eradicated. The defendant joined the HVO, which was a regular Bosnian-Croat force. The defendant joined a scouting unit, thus being at the front line during active acts of war. On 12 June 1992 he was sent on a scouting mission that he perceived to be a virtual suicide mission because Croats now governed the HVO, protecting only Croat interests.

After having escaped the heavy Serb shelling on 12 June, he met two former friends who now served as security guards to General Blaz Kraljevic. The security guards referred to the HVO as traitors. Kraljevic offered the defendant to come to his headquarters and he explained to him what the HOS represented. He emphasised that they were pro-Bosnian. Kraljevic's wife was a Bosniak. The defendant joined the HOS and handed in his HVO uniform and the rifle that came with it. The HOS gave him a uniform, a grenade launcher and later a pistol. Kraljevic's unit was in Ljubuski. When the defendant was not on duty, he mostly lived in Capljina with his girlfriend, who later became his wife. The defendant became one of Kraljevic's security guards, and in addition he was sent to Stolac to recruit Bosniaks for the HOS. The defendant described Kreljevic as a charismatic leader who wanted to liberate Bosnia, and he was like a father to the young soldiers.

Both of the defendant's parents were wounded during a shell attack in the month of June. On 9 August 1992, the defendant was supposed to be one of Kraljevic's security guards, but was stopped at a Croat road block on his way to Ljubuski from the hospital where he had visited his mother. That same day Kraljevic and all of his security guards were assassinated in an ambush. The next day a judge, a policeman and the defendant came along to the scene to assist in the identification. The HOS then fell apart. The defendant was summoned to the HVO, where he was offered tasks and a new identity. He did not agree to this and instead became linked to the SIS – the intelligence service in Bosnia-Herzegovina and Croatia – which did military intelligence. In June 1993 he fled with his wife to Croatia and then to Norway.

As regards his position with the HOS, the defendant explained that he was a coordinator, bringing information to and from the HOS in Stolac and to and from the leadership in Ljubuski. He held no formal title. This lasted for about one week until he was wounded by shell fire, being injured by a splinter in his left hand. After this he was in Stolac to collect information for Kraljevic. In the middle of July he was given the formal rank of lieutenant, on a par with the other security guards, because by that they would receive some pay.

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The defendant got to know the Dretelj camp in the middle of June after he had met Kraljevic and after being injured. The camp was the base of some 100 HOS soldiers and there were also some detainees there. The defendant himself transported detainees to Dretelj a few times and he was at the camp on a few additional occasions. He was there as a security guard to Kraljevic. He observed torture on one occasion. Several of those persons he brought to the camp were taken there out of concern for their own security, because otherwise they would be killed in Stolac. He only executed orders. He left the HOS because after Kraljevic's death he knew too much and was in danger of being liquidated.

In connection with a police interview in May 2007, he drew up a list of the names of those he had participated in arresting and those with whom he had held registration interviews. He has confirmed that several of them were taken to Dretelj.

He himself did not exercise violence against anybody He helped several of his Serb neighbours so that they avoided winding up in Dretelj. There were many different kinds of persons in the HOS. Kraljevic did not have full control of his men. There was no good discipline and HOS soldiers committed abuses against civilian Serbs on some individual occasions. During the last stage of his stay with the HOS he was informed that two Serbs had been killed in Dretelj and that a married couple had been killed in Capljina.

In the course of the war in 1992 – 1995, a total of 26 of his and his wife's relatives died.

111) MAIN POINTS CONCERNING THE FACTS

112) The Court finds the following to have been proved as regards general factual circumstances of direct importance for the case against the defendant:

113) On the basis of statements in the case and documentary evidence, the Court finds that the defendant was linked to the HOS during the period mentioned in the indictment. The Court furthermore finds that the HOS was not a military well-organised unit of trained soldiers, but a unit recruited among volunteers, idealists, nationalists, mercenaries, foreigners and criminals. Kraljevic did not himself have any military background; as a consequence, the unit lacked a pervading military structure. Not least because of the unit's composition and lack of structure and discipline, individual HOS members could commit atrocities against civilians without Kraljevic's approval. Such atrocities took place especially at the Dretelj camp, but also during some arrests.

114) The Court finds it has been proved that the defendant was not one of Kraljevic's ordinary bodyguards, nor was he an ordinary HOS soldier; but he held a kind of middle leader

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115) At the Dretelj camp the number of detainees increased gradually. In August 1992 there were some 130 male and some 90 female detainees in the camp, with an average age of about 50 years. Many of the detainees in the camp were subjected to very serious physical and psychological abuse. At least two killings took place. Several of the female detainees were subjected to rape – some of them a number of times. There was also sexual abuse committed against male detainees. A number of detainees were subjected to torture and other kinds of abuse during their stay there. Many suffered persistent injury. Degrading acts also took place, like detainees having to crawl on their hands and feet, eat grass and make animal sounds.

116) Based on the evidence in the case, the Court believes that none of the Serbs who were arrested and taken to Dretelj were brought there out of concern for their own safety because of their lives being in such concrete danger that their detention was required to protect them. In this respect, the Court attaches particular importance to the statements from the Serbs themselves, where none of them perceived that to be the situation; moreover, none of them were informed that this was the reason why they were arrested.

117) The Court perceives the defendant's personality to be such that he is attracted by police tasks and wanted to elevate himself by exercising police authority. In some contexts he gave the impression of having more authority than he in reality could have had.

118) COUNT I OF THE INDICTMENT

119) The application of the law and the relationship to the Constitution have been discussed above in paragraph 79.
The conclusion there was that section 102 of the 2005 Penal Code, "crimes against humanity", cannot be applied to the defendant's acts in 1992, as it would be contrary to Article 97 of the Constitution. The defendant is to be acquitted of violation of section 102.

120) COUNTS II, III and IV OF THE INDICTMENT

121) COUNT II a)

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122) The Montenegrin Milan Stanisavic b. 170435 had been in the JNA for a short period, but he left the unit and returned home to Stolac. He was married to a Muslim woman. The defendant knew Stanisavic from when the defendant was a child. The defendant – in his capacity as HOS-MP – approached Stanisavic in late July/early August, but did not detain him on that occasion. They had a good meal together.

123) On 6 August 1992, Stanisavic was again approached by HOS soldiers. He was then arrested – probably because he had belonged to the JNA and had had guns at home. He was taken to the textile factory Inkos, where the HOS-MP had their headquarters. Then, together with other detainees, he was transported to the Dretelj camp, where he stayed until 17 August 1992, after which he stayed in other detention camps until he was released in late October 1992. During his stay at the Dretelj camp he was subjected to extensive torture; as a consequence of this he was diagnosed with post-traumatic stress disorder when examined by a medical doctor specialised in psychiatry in connection with an application for asylum in Denmark. Stanisavic is now dead.

124) The defendant has admitted having participated in the arrest of Stanisavic upon orders of General Kraljevic.

125) The Court finds it has been proved that the defendant did participate in the arrest of Stanisavic, but that he did not play a central part in it. Because of his prior knowledge of Stanisavic he was aware that Stanisavic at the time of his arrest was a civilian noncombatant. The defendant has alleged that Stanisavic was taken in for his own safety, but as indicated above in paragraph 116, the Court does not find this to be the case for any of those for whom this was alleged. No violence was applied to Stanisavic while the defendant participated in the arrest and transport of him to Dretelj. The transport took place in a column where General Kraljevic also participated. The defendant does not seem to have wished Stanisavic to be arrested, but obeyed orders. In its assessment of the evidence, the Court has attached particular importance to the defendant's hand-written list drawn up during a police interview in May 2007 and the witness statements given by Stanisavic's widow.

126) The defendant contributed to an arrest that led to a deprivation of liberty that lasted for more than one month. Based on the defendant's knowledge of Stanisavic, the arrest was unlawful. An order from a superior does in this case not provide any basis for exculpatory ignorance of the law, but it may have a certain bearing on the sentencing. The defendant acted with intent as far as the deprivation of liberty is concerned. Taking into consideration the situation, there was nothing to indicate that Stanisavic's internment would be very brief. Additionally, the defendant was aware that abuses were taking place in Dretelj and that Stanisavic too could be exposed to such abuses. Thus, the defendant could have realised the risk that the internment of Stanisavic resulting from his arrest in this case would last more than one month, and that he could be subjected to abnormal suffering. Thus, the requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the

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127) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

128) POST II b)

129) The Serb woman Draginja Duka b. 221222 was on 6 August 1992 approached and arrested by the HOS and via Inkos she was taken to Dretelj where she stayed until 17 August 1992 – after which she stayed at other detention camps until her release in late October 1992. Her husband was a former prison guard. She knew the defendant from Stolac.

130) The defendant has in court denied having participated in picking up Duka, but he has stated that he saw her at Inkos.

131) The Court finds it has been proved that the defendant arrested Duka. The defendant has also alleged that Duka was taken in for her own safety, but as indicated above in paragraph 116, the Court does not find this to be the case for any of those for whom this was alleged. No violence was exercised against Duka – neither during her arrest, transport or her stay in Dretelj. In its assessment of the evidence, the Court has attached particular importance to the defendant's hand-written list drawn up during a police interview in May 2007 and the witness statement given by Duka.

132) The defendant was aware that she was a civilian noncombatant Serb and that the arrest thus was unlawful. He acted with intent as far as the deprivation of liberty is concerned. Taking into consideration the situation, there was nothing to indicate that Duka's internment would be very brief. Thus, the defendant could have realised the risk that the internment of Duka resulting from her arrest in this case would last more than one month. Thus, the requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

133) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

134) COUNT II c)

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135) The civilian con-combatant Serb Scepo Pjaca b. 020834 was arrested around 6 August 1992 and taken via Inkos to Dretelj, where he stayed until he was released on 16 August of that year. Neither during his arrest, transport or stay in Dretelj was any violence exercised against him. He did not know the defendant from before, but his sister knew him from Stolac, where she lived.

136) The defendant has denied any involvement with Pjaca.

137) The Court finds that Pjaca's statements to the police and before the Court by telephone are diffuse because he has three different versions of the arrest and where he met his sister. Confronting him with these contradictions failed to bring about any clarification. Moreover, he initiated the Court's examination of him over the telephone by saying that he has not submitted any accusation against the defendant. He has not identified the defendant by prior photo lineup. Following the above, it has not been proved that it was the defendant who arrested Pjaca. Additionally, the Court points out that nor are the requirements pursuant to section 223 second subsection fulfilled, as the internment lasted for less than one month, and a stay in Dretelj for about 11 days without him being subjected to any physical violence or threats is not covered by the concept "unusual suffering".

138) Following the above, the defendant is to be acquitted of this count.

139) COUNT II d)

140) The civilian noncombatant Serb woman Zdravka Birkic b. 091031 – the sister of Scepo Pjaca (cf. count c) – was arrested around 6 August 1992 and taken via Inkos to Dretelj. She knew the defendant from before. She is now dead.

141) The defendant has denied any involvement with her.

142) The Court finds that it has not been proved it was the defendant who arrested her. The Court points out that she knew the defendant from before and that in police interviews she has stated that it was not him who arrested her. Additionally, the statement from her brother did not provide any clarification.

143) Following the above, the defendant is to be acquitted of this count.

144) COUNT II e)

145) The civilian noncombatant Serb woman Biljana Trninic-Medan b. 181146 – who cohabited with and later married Boro Medan (cf. count f) – was arrested on 6 August 1992 and taken via Inkos to Dretelj. She was released in late October 1992. Neither during her arrest,

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146) Prior to 6 August she was summoned to Inkos several times for interrogation.

147) The defendant has denied any involvement with her.

148) The Court finds it has been proved that the defendant participated in taking her from Inkos to Dretelj together with other detainees the same day. The Court does not find it has been proved that the defendant participated in or ordered her arrest. In its assessment of the evidence, the Court attaches particular importance to the statement of Trninic-Medan in conjunction the defendant's statement and other information.

149) The defendant was aware that she was a civilian noncombatant Serb and that the transport to Dretelj was a part of her deprivation of liberty. This complicity is unlawful. He acted with intent as far as his complicity is concerned. Taking into consideration the situation, there was nothing to indicate that the internment would be very brief. Thus, the defendant could have realised the risk that the internment of her resulting from her arrest in this case would last more than one month. Thus, the requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

150) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

151) COUNT II f)

152) The civilian noncombatant Serb Boro Medan f. 010138 – who cohabited with and later married Biljana Trninic-Medan (cf. count e) – was arrested on 6 August 1992 and taken via Inkos to Dretelj. Medan has not been willing to give any statement before the Court.

153) The defendant admits having arrested Medan.

154) The Court finds it has been proved that the defendant arrested Medan and participated in the transport of him from Inkos to Dretelj together with other detainees the same day. In its assessment of the evidence, the Court attaches particular importance to the defendant's hand-written list drawn up during a police interview in May 2007, the defendant's statement and the statement of Trninic-Medan.

155) The defendant was aware that he was a civilian noncombatant Serb, as they knew each other from before. He acted with intent. Taking into consideration the situation, there was

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156) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

157) COUNT II g)

158) The Serb woman CC b. 290955 – daughter of RC (cf. count h) – was together with her father arrested by the HOS on 21 June 1992. Her brothers were attached to Serb units. She and her father were taken to the tobacco station in Stolac where the HOS-MP were located before relocating to Inkos. The defendant had a leadership role there and interrogated her on 21 June. In the course of next 24 hours at the tobacco station she was subjected to gross physical abuses – including at least five rapes. Two of the rapes happened in connection with an interrogation done by two others linked to the HOS-MP, where she during the interrogation first had to undress, then was touched with a knife and then the abuses took place. In the course of the night she was taken to an office where she was raped by a third soldier, after which she was picked up again by one of the others and raped again. The last one who raped her did it again later in the night. The defendant did not commit any abuse against her.

159) On 22 June he issued a certificate to the father and daughter for loyalty and signed it as "Lieutenant". He said it was approved by the HOS leadership in Ljubuski. They were then released. On 24 June she was again taken to the tobacco station and then allowed to go home. She did not have any contact with the defendant that day.

160) On 25 June she was again arrested and taken to the tobacco station. In the course of the next 24 hours she was again raped. On 26 June she was released upon orders of General Kraljevic. She had contact with the defendant on 25 June, but not on 26 June.

161) The defendant has denied having any involvement in her arrests and the stay at the tobacco station.

162) The Court finds it has been proved that the defendant in a leadership role interrogated her once on 21 June. In the capacity of his leadership position he was responsible as an accomplice for her having been held at the tobacco station from 21 to 22 June; amongst other things, he gave the order to take her back to the prison room after the interrogation. The Court has not found it proved that the defendant had any responsibility for her having

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163) The defendant acted with intent as regards complicity in deprivation of liberty. The rapes of CC were various and happened at different points over a period of time; some of the rapes were combined with frightening statements about what had happened to others. Seen as a totality, the acts from 21 to 22 June are covered by the concept ”unusual suffering”. The defendant himself committed no abuse, nor did he give orders to that effect. However, he was aware that in the HOS there were soldiers who committed abuse against detained women, and he had concrete suspicions that this happened to her. The defendant could have realised the risk that such abuses would happen while she was kept in detention at the tobacco station. Thus, the requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

164) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

165) COUNT II h)

166) The Serb RC b. 170727 – the father of CC (cf. count g) – was together with his daughter arrested by the HOS on 21 June 1992. His sons were attached to Serb units. He and his daughter were taken to the tobacco station where they were interrogated. On 22 June the defendant issued a certificate to the father and daughter for loyalty and signed it as “Lieutenant”. They were then released. RC was arrested again on 23 June. He was taken to Dretelj, probably on 6 August, and there he was subjected to physical and psychological abuses. He was exchanged with Serb detainees on 18 August 1992. RC is now dead.

167) The defendant has admitted having picked up RC on one occasion.

168) The Court finds it has been proved that the defendant arrested RC, but that he procured his release the following day. For the rest there is incomplete evidence, both as regards whether the defendant had any part in the subsequent arrest and the transport to Dretelj, and what RC experienced in Dretelj. As has been pointed out, the violation of section 223 first subsection is time-barred. There is no basis for a conviction pursuant to section 223 second subsection.

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169) Following the above, the defendant is to be acquitted of count h).

170) COUNT II i)

171) The Serb Dragan Rudan b. 041056 was in the middle of July 1992 arrested by the defendant and others, taken to the tobacco station where he was questioned, and after some days he was released with a document similar to that given to the father and daughter C. Somewhat later he was again arrested and taken to Dretelj, where he was held until 31 October 1992. He was subjected to violence, but not from the defendant.

172) The defendant has admitted having arrested Rudan, claiming, moreover, that the last arrest was out of concern for his own safety.

173) The Court does not find it has been proved that Rudan was a civilian noncombatant. He himself explained to the Court that he was mobilized in the JNA and in conjunction with this he had arms and a uniform at home. Every other day he participated with the JNA in keeping positions and every other day he was at home doing other work. He often wore a uniform in his spare time. It is unclear whether his attachment to the JNA had ceased when he was arrested. Although he did not appear to be active during the days leading up to his arrest, there were no JNA groups that had laid down their arms. He has not claimed to have deserted, he has only stated that he tried to hide from the HOS. The detentions of him in the state of war that existed were thus as a point of departure not unlawful (cf. section 223 of the 1902 Penal Code), and when he was arrested he was not a protected person (cf. section 103 third subsection of the 2005 Penal Code). What he was subjected to in Dretelj were abuses linked to a deprivation of liberty that became unlawful only after a certain time in detention – alternatively, they were abuses against a prisoner of war. Consequently, in this case the defendant is not liable for what happened in Dretelj.

174) Following the above, the defendant is to be acquitted of count i).

175) COUNT II j)

176) The Serb Milivoje Elezovic b. 110942 was arrested on 17 June 1992 in Caplinja and taken to Dretelj. On several occasions he suffered mistreatment in the camp in the shape of punches and kicks, and on one occasion he was unable to stand and walk normally for one week. He also witnessed a fellow detainee being mistreated to death. The defendant did not commit violence against him. He was held in internment until 31 October 1992. He was a teacher and a civilian noncombatant. He did not know the defendant from before.

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177) The defendant put Elezovic on his list of those persons whose arrest he participated in, but during the main hearing he believed there was a mix-up of identity between that person and another victim, meaning that he did not participate in his detention.

178) The Court finds it has been proved that it was the defendant who arrested Elezovic and took him to Dretelj. In its assessment of the evidence, the Court has attached particular importance to the defendant's hand-written list drawn up during a police interview in May 2007, and that Elezovic has stated that the one who arrested him had a list of Serbs who were to be arrested, that other detainees cited the defendant's name as being the one who brought him there and that he supposedly had been a musician before the war. The Court attaches little importance to the fact that "accordion player" was said in this connection, as the defendant played various instruments, but probably not accordion.

179) The defendant was aware that Elezovic was a civilian noncombatant Serb and that the arrest thus was unlawful. The reason for the arrest was presumably that Elezovic was a respected man in Caplinja and as such useful for the purpose of exchange of detainees. The defendant acted with intent as far as the deprivation of liberty is concerned. Taking into consideration the situation, there was nothing to indicate that the internment would be very brief. Thus, the defendant could have realised the risk that the internment resulting from the arrest in this case would last more than one month. Moreover, at that point in time the defendant was aware that detainees were mistreated in Dretelj, so he could have realised the risk of Elezovic being subjected to "uncommon suffering". The defendant did not commit any violence against him, nor did he give orders to that effect.

180) The requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

181) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

182) COUNT II k)

183) The Serb EE b. 020341 was arrested by the HOS on 12 June 1992 in Caplinja and taken to Dretelj. On several occasions he was mistreated in the camp and forced to perform mutual oral sex with a fellow detainee. He also witnessed a fellow detainee being mistreated to death. The defendant did not commit any violence against him. He was held in internment until 31 October 1992. He was a civilian noncombatant. He did not know the defendant from before.

184) The defendant has denied any involvement in the arrest and transport of EE.

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185) The Court finds it has been proved that it was the defendant together with others who arrested EE and took him to Dretelj. In its assessment of the evidence, the Court has attached particular importance to the fact that in his hand-written list drawn up during a police interview in May 2007, the defendant stated that he arrested and interrogated Vera Brstina. Based on the statements in the case, the Court finds it has been proved that EE was arrested simultaneously with Brstina.

186) The defendant was aware that EE was a civilian noncombatant Serb and that the arrest thus was unlawful. The defendant acted with intent as far as the deprivation of liberty is concerned. Taking into consideration the situation, there was nothing to indicate that the internment would be very brief. Thus, the defendant could have realised the risk that the internment resulting from the arrest in this case would last more than one month. Moreover, at that point in time the defendant was aware that detainees were mistreated in Dretelj, so he could have realised the risk of EE being subjected to "abnormal suffering". The defendant did not commit any violence against him, nor did he give orders to that effect.

187) The requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

188) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

189) COUNT II l)

190) The Serb woman Vera Brstina b. 101037 was arrested by the HOS on 12 June 1992 in Caplinja and taken to Dretelj. She was mistreated in the camp on several occasions. She was held in internment until 31 October 1992. She was a civilian noncombatant. Her husband and sons had previously moved over to the Serb side. She did not know the defendant from before.

191) The defendant has admitted having participated in picking her up.

192) The Court finds it has been proved that it was the defendant together with others who arrested Brstina and took her to Dretelj. In its assessment of the evidence, the Court has attached particular importance to the fact that in his hand-written list drawn up during a police interview in May 2007, the defendant stated her name, and to EE's statement. There were incongruences in Brstina's statement – compared with, *inter alia*, EE's statement and the defendant's statement – and the Court has had to rely on a pre-trial judicial recording of evidence from her without the possibility of concrete follow-up. Bases on, *inter alia*, other

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193) The defendant was aware that Brstina was a civilian noncombatant Serb and that the arrest thus was unlawful. The defendant acted with intent as far as his complicity in the deprivation of liberty is concerned. Taking into consideration the situation, there was nothing to indicate that the internment would be very brief. Thus, the defendant could have realised the risk that the internment resulting from the arrest in this case would last more than one month.

194) The requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

195) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

196) COUNT II m)

197) The Serb DD b. 111039 was arrested by the HOS around 10 June 1992 in Caplinja and taken to Dretelj. He was mistreated on several occasions. The first time was in the course of his arrest, when he was kicked in the head twice. In Dretelj he was tortured during his first interrogation. He then wrote down the names of all Serbs that were left in Caplinja. This interrogation was headed by the defendant, but he did not exercise any violence himself. After the interrogation, DD was taken to the prison room. Somewhat later he was taken to another room, where the guards demanded that he should beat a fellow detainee several times with a stick, after which the fellow detainee had to beat him in a similar way. He was handcuffed while beating the other detainee. On that same occasion he was hit in the face by a prison guard, causing one tooth to fall out. On another occasion he was forced to perform mutual oral sex with a fellow detainee, whose name has been stated. He also had to drink his own urine. He often feared for his life. He was held in internment until 31 October 1992. As early as in mid-July there was an attempt at an exchange of detainees, which would also include him, but it fell through. He was a civilian noncombatant dentist. He did not know the defendant from before.

198) The defendant has admitted that he participated in picking up DD and bringing him to Dretelj and that he also had a short registration interview with him.

199) The Court finds it has been proved that the defendant participated in the arrest of DD and the transport to Dretelj, and that the defendant interrogated him once. During the

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200) The defendant was aware that DD was a civilian noncombatant Serb and that the arrest thus was unlawful. The defendant acted with intent as far as his complicity in the deprivation of liberty is concerned. Taking into consideration the situation, there was nothing to indicate that the internment would be very brief. Thus, the defendant could have realised the risk that the internment resulting from the arrest in this case would last more than one month. Seen as a totality, what DD experienced in Dretelj is to be considered "unusual suffering". The defendant himself committed no abuse, nor did he give orders to that effect. But he was aware that in the HOS there were soldiers who committed such abuses. The defendant could have realised the risk that such abuses would happen while DD was in Dretelj.

201) Thus, the requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

202) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

203) COUNT II n)

204) The Serb woman BB b. 270839 – married to the late MB (cf. count o) – was arrested on 30 June 1992 and taken to Dretelj. She was released on 31 October 1992. In a police interview she stated that she was approached on three occasions: once in March/April before the war that she stated started on 6 April, once in June in connection with a search, and on 30 June when she was arrested. On all three occasions, the same person was among those who came to her, and she was raped on the first and the last occasion by that same person. She is certain of this. She has named the defendant as the perpetrator. She did not know the defendant from before. She was told the defendant's name by others in Dretelj.

205) The defendant has denied any involvement with the married couple B.

206) Firstly, the Court emphasises that it finds it certain that BB on at least one occasion was subjected to rape. Secondly, based on the evidence in the case the Court finds it has not

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207) The witness was examined by a pre-trial judicial recording of evidence via video link, her police statements were read out to her and there were subsequent questions from the prosecutor, the defence counsel and the victim's counsel. As a result, it has not been possible to ask follow-up questions during the main hearing, as she could not bear coming to Norway or giving evidence by video link again.

208) In its assessment of the evidence, the Court attaches particular importance to the following:
209) firstly, she did not know the defendant from before;
210) secondly, she was not acquainted with the defendant's name prior to her arrival at Dretelj;
211) thirdly, in a police interview she has explained that she was the one who mentioned the defendant's name to the other women detainees because she had heard it at the office when she was taken in, while she in a previous interview explained that she first heard the name from the other women detainees;
212) fourthly, there are central witnesses whom it has not been possible to examine. This also includes the person who allegedly participated in the arrest, the prison guards at the office in Dretelj and the witness Elec;
213) fifthly, there are witness statements indicating that her first contact with the HOS, which she stated to be in March/April, may have been in the end of June; thus very shortly before she was taken to Dretelj;
214) sixthly, she was unable to identify the defendant in a photo lineup;
215) seventhly, she was interviewed by the police in Montenegro in a camp she was taken to in connection with her release, and she has stated that she told the police there what had happened to her, but she did not state the defendant's name on that occasion;
216) eighthly, she has explained to Norwegian police that she in Dretelj asked around a bit to find out about Repak, and she was then told that he had done this to other women as well. None of the witnesses from Dretelj – including women who had been raped – have claimed that the defendant abused them; quite the contrary, they have stated clearly that the defendant was not among those who committed such abuses;
217) ninthly, when asked by the police about why she in earlier police interviews did not mention the three occasions on which the same person approached them, she said that "it is difficult to remember everything";
218) tenthly, a witness who was partly present during her first contact with the HOS did not point out anybody during a photo lineup, and later pointed out another man based on the same photos;
219) eleventhly, according to BB the perpetrator was allegedly punished by General Kraljevic when he became aware of the abuse, but the defendant has not been subjected to any such sanction; and
220) twelfthly, the mode of action does not coincide with the defendant's mode during the arrest of Serb women.

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221) BB has in her last statement to the police explained that her having named Repak was largely based on a statement from one prison guard to another when she arrived at Dretelj and was taken to the office where there were three prison guards. According to B, the prison guards said ”what is Repak doing in Caplinja?”. None of the two who brought her to Dretelj were present in the office at the time, and the statement was not directed to them. It was B herself who linked the statement to one of the two who handed her over. Nor was the name Repak repeated at a later stage, although she sat in this office with the prison guards throughout the night, and although she has stated that she explained to them everything that had happened. Moreover, at that point in time the defendant had for more than two weeks been arresting persons in Caplinja and taking them to Dretelj, and it is not very likely that this would be new to the prison guards in Dretelj on 30 June. An alleged statement of this nature cannot in this concrete context be given any substantial weight as evidence.

222) Also in relation to complicity in arrest, the evidence is insufficient to convict the defendant.

223) Following the above, the defendant is to be acquitted of count II n) and count IV.

224) COUNT II o)

225) The Serb MB b. 081037 – married to BB (cf. count n) – was arrested on 30 June 1992 and taken to Dretelj. He was subjected to violence. He was released on 31 October 1992. MB is dead.

226) The defendant has denied any involvement with the married couple B.

227) The Court finds that the defendant is to be acquitted. The central piece of evidence is the wife’s statements. Also as far as he is regarded, the evidence is insufficient to support a conviction.

228) Following the above, the defendant is to be acquitted.

229) COUNT II p)

230) The Serb Rade Bulut b. 011050 was arrested around 6 June 1992 and taken to Dretelj. He was released on 30 October 1992. Bulut is dead.

231) The defendant has admitted having participated in the arrest.

232) The Court finds it has been proved that it was the defendant together with others who arrested Bulut and took him to Dretelj. In its assessment of the evidence, the Court has attached particular importance to the fact that the defendant named him in his hand-written list drawn up during a police interview in May 2007.

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233) The defendant was aware that Bulut –at least at the time of the arrest – was a civilian noncombatant Serb and that the arrest thus was unlawful. The defendant acted with intent as far as the deprivation of liberty is concerned. Taking into consideration the situation, there was nothing to indicate that the internment would be very brief. Thus, the defendant could have realised the risk that the internment resulting from the arrest in this case would last more than one month.

234) The requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

235) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

236) COUNT II q) and COUNT III a)

237) The Serb woman AA b. 170756 was in April 1992 picked up by the military police and after being interrogated she was released against a duty to report daily. She had worked as a general practitioner in Caplinja and was therefore known to most of the town's inhabitants. In 1992 she was a doctor with microbiology as her field of work. Her husband and child(ren) had travelled to a Serb-controlled area. The husband had a Serb military rank – presumably lieutenant – and was attached to a military unit.

238) On 5 May 1992, AA was arrested and taken to Dretelj. The defendant was not involved in her arrest or transport. In Dretelj she was after a while taken to an interrogation room where she met General Kraljevic, who after having had a conversion with her asked her to write a letter to her husband where she was to express the difficult situation in which she was, and that an exchange of detainees was the solution. She wrote that letter.

239) As a young Serb woman married to a man with leadership responsibilities in a Serb military unit, she was in a particularly vulnerable position in Dretelj. In the days following her arrest she was subjected to violence and abuse, including several rapes carried out by the prison guards. She notified Kraljevic of the abuses, but he did not believe her, but emphasised that no one was to touch the women because they were to be used for exchanges. This led to a break in the abuses, which continued a few days later with more rapes. There were both vaginal, oral and rectal rapes. Kraljevic was again informed, and again there was a break of a few days. Then the abuses continued.

240) Around 10 June 1992 – to some detainees in Dretelj – Kraljevic introduced the defendant as the new Chief Inspector for Herzegovina and another person as a local Chief of Police.

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241) A couple of days later she was again taken in for an interrogation, headed by the defendant. Then there was only one guard present in addition to the defendant, and this soldier said he knew her husband. Through walls and doors some soldiers and detainees could hear a little of what happened in the interrogation room. To give the impression that also this interrogation was done with the use of violence, the defendant clapped his hands to make it sound like she was being beaten. The defendant said that she should not tell anybody that he had not hit her. After that she was taken back to the cell.

242) These two interrogations were her only contact with the defendant.

243) The abuses against her continued until around 20 June, when the last rape took place. In July and August she was not raped. She explained in court that in all she was raped more than 30 times in Dretelj. She has identified about 10 guards who raped her. She was exchanged on 18 August 1992 and was then reunited with her husband and child(ren).

244) The defendant has admitted having had two short registration interviews with her in Dretelj.

245) The Court finds it has been proved that the defendant interrogated her twice; during the first interview that was headed by the defendant she was subjected to various kinds of torture as described above, including blows to her hands and body, and needle-pricks under her nails. The defendant himself hit her once with an open hand in the face. In its assessment of the evidence, the Court attaches particular importance to AA's extensive statement before the Court – a statement that essentially gave the impression of being nuanced and credible – though with a risk of a few erroneous memories. Her statement is substantiated by notes she made in 1992. The statement was nuanced as regards the defendant. In this respect, the Court makes reference to her statement that during the second interrogation he only pretended to commit violence against her. Furthermore she explained that she was surprised that he was accused of rape. In addition, the Court makes reference to the statements of other detainees and to the fact that in his hand-written list drawn up during police

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246) AA was a civilian noncombatant and was held in Dretelj with a view to exchange. The defendant was aware that this was unlawful. Heading an interrogation of her with the use of torture, where the interrogation ends by her being taken back to the cell, amounts to complicity in continued deprivation of liberty. The defendant acted with intent. Taking into consideration the situation, there was nothing to indicate that her internment would be very brief. Thus, the defendant could have realised the risk that the internment in this case would last more than one month. The defendant shall not be held criminally liable for what happened to her in Dretelj prior to the two interrogations; however, even what she experienced after the interrogations must, when seen as a totality, be considered as "abnormal suffering". The defendant was aware that in Dretelj there were soldiers who committed abuses against women although Kraljevic seems to have been against such acts. Thus, the defendant could have realised the risk that such abuses would happen while AA was in Dretelj after the defendant had interrogated her.

247) The requirements pursuant to section 223 second subsection of the 1902 Penal Code are fulfilled. Furthermore, the requirements pursuant to section 103 first subsection (h) of the 2005 Penal Code are fulfilled. The defendant has acted with intent also in relation to this legal provision.

248) Following the above, the defendant is to be convicted of violation of section 103 first subsection (h) of the 2005 Penal Code, cf. section 223 second subsection of the 1902 Penal Code.

249) As regards the exercise of violence against AA during the first interrogation headed by the defendant, the Court finds it has been proved that bodily assault under especially aggravating circumstances took place, and that the defendant intentionally was an accomplice thereto.

250) The Court does however not find it proved that during the interrogation AA sustained "serious injury" as defined in section 9 of the 1902 Penal Code, this being one condition for applying the penal provision mentioned in the indictment. The serious injury is to be a result of the torture during this interrogation. Serious injury was inflicted upon AA in Dretelj, but the torture during the interrogation was not the cause of it. And in any case, the Court finds that the defendant's intent did not encompass such serious injury – which is also a condition pursuant to section 231 of the 1902 Penal Code, which concerns intentional grievous bodily harm. The violence during the interview was serious and in part degrading, but at that time and place the defendant did not consider serious injury to be a possible consequence of the torture that took place. In relation to section 231 of the 1902 Penal Code, prior and subsequent abuses committed against AA – by others – are not encompassed by the said legal provision. It has been alleged that the defendant said to the guards something like "now she is yours" when the interrogation was concluded, and that

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251) Section 103 (b) of the 2005 Penal Code has a more wide-ranging description of the crimes covered than section 231, but as has been pointed out, the basic requirement is that the act must be punishable pursuant to the 1902 Penal Code if a violation of Article 97 of the Constitution is to be avoided.

252) Following the above, the violence linked to the interrogation is not punishable under section 231 of the 1902 Penal Code. The violence concerned is punishable under other violent crime provisions of the 1902 Penal Code, but the limitation period for such crimes is 10 years. This means that any application of such alternative violent crime provisions has been time-barred by limitation.

253) Following the above, the conclusion is that the defendant is to be acquitted of count III a). However, in fixing the sentence the Court can as an aggravating circumstance attach importance to the torture as part of the defendant's complicity in the deprivation of AA's liberty, since section 223 second subsection – which is not time-barred – provides a legal basis for attaching importance to what the victim was subjected to during the deprivation of liberty.

254) COUNT II r) and COUNT III b)

255) These two counts were waived by the public prosecutor during the main hearing.

256) Thus, the defendant is to be acquitted of count II r) and count III b).

257) THE SENTENCING

258) The defendant has been found guilty of eleven counts of war crime in the form of deprivation of liberty of civilian noncombatant Serbs with subsequent internment in the Dretelj camp. The internment lasted substantially longer than one month and/or the detainees were subjected to abnormal suffering. As regards violence and/or torture of particular importance for the sentencing, the defendant is linked directly to two instances in connection with interrogations headed by him.

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259) There is limited relevant legal precedent in Norway in this field. Rulings from international courts of justice mainly deal with more serious cases; besides, the penalty ranges differ from those that apply pursuant to the 1902 Penal Code – which are applicable in the case at hand.. Norwegian legal precedent includes some decisions linked to the post-World War II trials, and some decisions linked to deprivation of liberty in combination with gross violence, in cases concerning drugs or debt-collecting thugs, amongst others.

260) Among others decisions, the Court makes reference to the case of a Swedish mercenary who was convicted both by the Supreme Court in Mostar in Bosnia-Herzegovina and later by Stockholm District Court to eight years of imprisonment for international law violations in his capacity as a prison guard, including gross mistreatment of eleven detainees, torture, complicity in deprivation of liberty of many civilians, etc. He committed this extensive violence himself. As a mitigating circumstance, importance was attached to him being 20 years old at the time of the crimes.

261) As far as the defendant Repak is concerned, the Court considers it an aggravating element that the defendant had middle leader tasks that included, *inter alia*, finding civilian Serbs and taking the most important of them to Dretelj – primarily with the purpose of subsequent detainee exchanges. The rank of lieutenant may be used as an illustration of his level within the organisation. His execution of his tasks resulted in innocent persons being taken to Drletelj [sic], were they were subjected to long-term internment and in a number of cases to violence, other kinds of abuse and degrading treatment. The defendant did not however at any time perform any tasks as a prison guard or leadership tasks linked directly to Dretelj. However, because of the defendant's knowledge of the area and the activities there, it must be presumed that more persons were detained and some arrived earlier at Dretelj than would have been the case without the defendant's complicity.

262) Although the defendant has no independent criminal liability for what the civilian Serbs were subjected to in Dretelj, it is of significance for the sentencing how the deprivation of freedom that he contributed to was carried out, cf. section 223 second subsection of the 1902 Penal Code.. Thus, the sentencing shall not be done as if he personally had contributed to the individual actions that took place in Dretelj, but the consequences for those persons that he contributed to bringing to Dretelj are an important aggravating factor.

263) A significant aggravating circumstance is the torture to which AA was subjected during the interrogation in Dretelj that the defendant was in charge of. He personally gave her a slap in the face, but the Court finds that he as the one in charge of the interrogation must bear the main responsibility for all violence taking place during the interrogation, which amongst other things included several blows with a baton, scratching with a knife, needle insertions under her nails and undressing. The fact that independent criminal liability for this case of violence is time-barred does not prevent the Court from attaching significant importance to the said violence for the purpose of sentencing by making reference to section 223 second subsection of the 1905 Penal Code. Importance must also be attached to the use of a needle during the interrogation of DD.

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264) The circumstance that the defendant to a large extent acted on orders as regards arresting civilian Serbs and taking them to Dretelj, is in the Court's opinion not of significant importance as a mitigating circumstance. The Court considers that in war it is not extenuating to act on orders, and for others than soldiers of private rank the Court finds that orders will normally not be a significant mitigation circumstance. As regards the acts for which the defendant is convicted, the Court cannot see the existence of any circumstances warranting a reduced sentence because of an order situation.

265) As regards the time factor – the fact that 16 years have passed from when the acts were committed until they are adjudged – the Court has found it more difficult to assess. During his entire time in Norway the defendant has behaved exemplary, he has had a permanent job and has not received any convictions. On the other hand, it is often chance that decides when those persons responsible for war crimes that live abroad are discovered and investigated. The Court finds – after some doubt – no reason to attach decisive importance to the time factor. Had the Court done so, a significant part of the punishment would have been suspended.

266) As a mitigating circumstance the Court attaches importance to the fact that the defendant to a certain degree has contributed towards the investigation, including that he during the early stages named most of the persons mentioned in the indictment, thus associating himself with them, and moreover that he has given statements during a total of 17 police interviews. The circumstance that he refrained from arresting certain Serbs is also mitigating.

267) Additionally, the Court notes that during the second interrogation of AA he only pretended to be exercising violence, while in reality he did not touch her.

268) TTThe Penal Code, section 62, is applicable.

269) Upon an overall assessment, the Court finds that a sentence of five years of imprisonment is to be imposed.

270) This sentence also seems to have a certain proportional correspondence with the above-mentioned sentence from Bosnia-Herzegovina and the sentence from Sweden. It is the opinion of the Court that there are no fundamental differences between the judgment and the prosecuting authority's claim for ten years of imprisonment as regards the assessment of the punishability of the various acts. The difference between the said claim for judgment and the actual judgment is mainly due to the counts of which the defendant was acquitted.

271) From this sentence there shall be a deduction of 294 days for time spent in custody.

272) PECUNIARY CLAIMS

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273) Many of the aggrieved persons have presented claims for compensation for non-pecuniary damage; that is, money to be paid in compensation for pain and suffering. In addition, two of them have presented claims for compensation of economic loss.

274) As regards compensation for non-pecuniary damage, it is regulated by section 3-5 of the Compensation Act. The said legal provision gives a legal basis for compensation for non-pecuniary damage where injury has been inflicted upon a person or reproachable behaviour has been demonstrated as further described therein. The provision does not make reference to any provisions of the 2005 Penal Code, but this District Court presumes this not to be a conscious choice by the legislators, but a failure to adapt the existing legislation when the new war crime provisions were adopted. RR Thus, the District Court presumes that there is a legal basis for compensation for non-pecuniary damage in the case of deprivation of liberty covered by section 223 second subsection of the Penal Code. The defendant is not convicted pursuant to any provisions concerning violent crime; however, in fixing the amount of the compensation for non-pecuniary damage awarded, the Court attaches importance to the violence exercised by the defendant, and instances of violence where he was directly responsible. The defendant shall however not be held liable for abuses committed by others in Dretelj. This means that the defendant shall not pay compensation for non-pecuniary damage for the rapes committed in Dretelj.

275) In Norway, compensations for non-pecuniary damage are at a modest level; as an example, such compensation for a rape is normally set to NOK 100,000.

276) In addition to [the defendant's] complicity in the deprivation of her freedom, AA (cf. count II q) was subjected to torture during an interrogation that the defendant was in charge of, she was subjected to degrading treatment by having to undress completely, and the defendant personally gave her a slap in the face. Following the above, the Court finds that the compensation for non-pecuniary damage to AA is to be in the amount of NOK 100,000.

277) For the remaining victims, who have claimed compensation for non-pecuniary damage, it is the deprivation of liberty that is the basis for these claims. Because the defendant is not liable for the individual instances of abuse committed in Dretelj, the Court finds no reason to differentiate the amounts awarded as compensation for non-pecuniary damage, which is set to NOK 40,000 for each of them, with the exception of DD, where the amount is set to NOK 60,000 because of the use of needles he was subjected to in the interrogation headed by the defendant.

278) As regards compensation of economic loss, it is essential for the Court to emphasise that the defendant is only liable for damages where there is a causal relationship between the acts of the defendant and the damage. This means that the defendant is not liable to pay compensation for the extensive damage caused by rapes and gross violence committed by others. The medical expert witnesses have in agreement with their terms of reference performed their assessment on the basis of everything the aggrieved persons were subjected

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279) As far as AA is concerned, the doctrine of conditionality that applies in Norwegian law of compensatory damages leads to one central question: was the interrogation of her a necessary condition for the extensive abuses/damages/injuries inflicted upon her in Dretelj? The Court's answer to that is in the negative. Even without the interrogation headed by the defendant she would have suffered essentially the same damages/injuries and abuses. The doctrine of main cause that applies in Norwegian law of compensatory damages, means that it is the main cause that is held liable, meaning that a damage/injury that in any case would have arisen is not to be compensated by the defendant. The Court finds this to be the case as far as the rapes of AA are concerned. Thus, as regards her the following question remains to be answered by the Court: Did the torture she was subjected to during the interrogation headed by the defendant in and by itself lead to persistent injury?

The Court's majority, consisting of the presiding judge and lay judge Holte, do not find it substantiated that the specific interrogation in question led to persistent injury. It has been alleged that the blows to her hands caused her lasting physical injury in that after a few years her hands became swollen, but the Court must here take into consideration that she has been diagnosed with SLE, which is a chronic disease linked to the immune system and is not caused by blows. Psychologically, the many rapes and the long-lasting confinement have been the main factors. The dissenting judge, lay judge Marfjord, finds that the defendant is co-liable for damages towards AA, as the dissenting judge finds it probable that especially the psychological element of the interrogation that was headed by the defendant, caused – or to a sufficient degree contributed to causing – persistent injury. Following the above, the judgment will be based on the majority vote. Following the above, there is no basis for awarding a compensation for possible economic loss as far as AA is concerned.

280) A unanimous Court finds reason to add that any possible compensation for loss of income would have been modest, as AA has stated that she still works in a full-time position. Additionally, the Acte relating to compensation for victims of violent crime, which provides a legal basis for (advance) payments from the Norwegian State to the injured person, provides that the Act only applies to crimes committed in Norway. This means that any compensation awarded would have to be claimed from the defendant, who has no wealth and whose liability for claims for compensation for non-pecuniary damage totalling NOK 400,000 has been established above. Thus, the injured person would hardly be able to reckon with payment in full of any compensation awarded in addition to the compensation for non-pecuniary damage.

281) For acts where the perpetrator's criminal liability has become time-barred, any claims for compensation for non-pecuniary damage or ordinary compensation will also be time-barred. Section 11 of the Act relating to the limitation period for claims stipulates that claims for compensation arising from a criminal act may be submitted in the course of the penal case if

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282) COSTS OF THE CASE

The defendant has been partly convicted, partly acquitted. The public prosecutor has not submitted any claim for payment of costs to the public treasury. The Court finds it more important that the defendant should pay the compensation for non-pecuniary damage that he has been sentenced to pay than paying costs of the case to the public treasury.
Thus, costs are not imposed.

283) UNANIMITY

The judgment is unanimous, with the exception of the dissenting vote described in paragraph 279.

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284) Conclusion of the judgment:

285) 1. Mirsad Repak b. 290866 is convicted of eleven violations of section 103 first subsection (h) of the 2005 Penal Code, cf. the 1902 Penal Code, section 223 first and second subsections, cf. section 62, to a sentence of five (5) years of imprisonment. From this sentence there shall be a deduction of two hundred and ninety-four (294) days for time spent in custody.

286) 2. Mirsad Repak b. 290866 is acquitted of violation of 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.

287) 3. Mirsad Repak b. 290866 is sentenced to pay within two weeks

288) 3.1. to AA, NOK one hundred thousand (100,000)

289) 3.2. to DD, NOK sixty thousand (60,000)

290) 3.3. to Draginja Duka, NOK forty thousand (40,000)

291) 3.4. to Biljana Trninic-Medan, NOK forty thousand (40,000)

292) 3.5. to CC, NOK forty thousand (40,000)

293) 3.6. to Milivoje Elezovic, NOK forty thousand (40,000)

294) 3.7. to EE, NOK forty thousand (40,000)

295) 3.8. to Vera Brstina, NOK forty thousand (40,000)

4. Mirsad Repak is acquitted of the remaining pecuniary claims.

5. Costs are not imposed.

296) Finn Haugen

Annette Marfjord Jostein Gyrd Holte

The judgment was served on the person convicted by personal appearance today in combination with the summary being read out at a court session. Consequently, the time limit for any appeal is 16 December 2008. The person convicted

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