

COURT OF APPEALS

Case number: PaKr 503/13

17 June 2014

Dissenting opinion of EULEX Judge Manuel Soares attached to the judgment of the Court of Appeals dated 17 June 2014, pursuant to Article 398.4 of the CPC.

As presiding and reporting judge on this case I disagreed with the majority decision in relation to two aspects: (1) the maximum limit of the imprisonment sanction applicable to the criminal offense of *war crime against civilian* under Article 142 of the Criminal Code of SFRY and (2) the imprisonment sentences imposed to the defendants. I find that these matters of disagreement are sufficiently important to justify a written dissenting opinion. However, it is not necessary more than a brief explanation.

The matter of the limits of the imprisonment sanction

By majority it was decided that pursuant to Article 38 of the Criminal Code of SFRY the term of imprisonment may not be less than 5 years and longer than 15 years. I am fully aware of the previous jurisprudence quoted in the judgment concurring with this assessment but with all due respect I am not convinced by it.

Under the former Criminal Code of SFRY the criminal offense for which the defendants were convicted was punishable by imprisonment for not less than 5 years and no longer than 15 years or by the death penalty, that could be replaced by imprisonment for a term of 20 years (Articles 38 and 142). Capital punishment was abolished by UNMIK regulation No. 1999/24 (Paragraph 1.5 of Section 1). This abolition, however, in my opinion, did not revoke the Criminal Code of SFRY's provision that permitted the imposition of imprisonment for a term of 20 years for criminal acts eligible for the death penalty. I cannot agree with the conclusion that in the situation where the sentence of death penalty had been abolished by UNMIK no more reference can be made to second paragraph of Art 38. The criminal act was no longer eligible for the death penalty but remained eligible for the alternative imprisonment up to 20 years. The only aspect that the UNMIK revoked was the option of imposing a capital punishment but not any other sanction applicable to the respective criminal offense.

Therefore, I think that the applicable sanction of imprisonment may not be less than 5 years and longer than 20 years.

The imprisonment sentences imposed to the defendants

Defendant J.D. was sentenced to 12 years of imprisonment and defendant Dj.B. to 10 years of imprisonment. In my opinion, when considering the limits accepted by the panel from 5 to 15 years, the adequate sanctions would be respectively 10 and 9 years of imprisonment.

The judgment considered as a mitigating circumstance for both defendants the fact that the criminal offenses were committed more than 15 years ago because the need for a punishment, seen from the perspective of the preventing purposes, diminishes over the time. I agree completely with this principle but I am of the opinion that its mitigating value is stronger and should determine lesser punishments than those imposed.

The purposes of a punishment, as it is written in the judgment, are related to ensuring individual prevention and rehabilitation, ensuring general prevention, expressing social disapproval to the violation of the protected social values and strengthening social respect for the law. The need of imprisonment to protect all the referred purposes is strongly weakened now that more than 15 years passed since the crimes were committed. As to the knowledge of the court, the defendants did not commit any other criminal offense since then, showing that individual prevention and rehabilitation have been achieved without the punishment. Expressing social disapproval for the disrespect of the law through a punishment would be much more efficient and reasonable if decided nearer the date of the events. My assessment could be different if the time elapsed since the crimes could be somehow attributed to the defendants. But this is not the case, as the crime was reported to the authorities and there was a period superior to 10 years during which no relevant investigation occurred. Of course the troubled circumstances of Kosovo after the armed conflict contributed to this delay. But punishing the defendants as this factor did not exist does not seem fair to me.

Additionally, it has to be considered that war crimes against civilian may be perpetrated through more serious actions, such as, for example, the abduction, torture and killing of several persons. If for those actions the maximum admissible sanction would be 15 years of imprisonment, without denying the wrongfulness of the defendant's acts, I find too harsh sentencing them to 12 and 10 years.

Presiding Judge

Manuel Soares

EULEX Judge