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QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Situation of human rights in the territory of the former Yugoslavia

Two trials of Kosovo Albanians charged with offences against the State in the Federal Republic of Yugoslavia in 1997

Report submitted by the Special Rapporteur, Ms. Elisabeth Rehn, pursuant to paragraph 42 (c) of Commission resolution 1997/57

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Introduction

1. At the request of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, an observer from the Belgrade office of the High Commissioner/Centre for Human Rights attended major parts of two trials held in Pristina of 35 Kosovo Albanians. The present report is based on first-hand information gathered by the observer in Pristina, as well as on study of the charges and the trial transcripts. Furthermore, the observer spoke to the president of the court, introduced herself to the two presiding judges, and also spoke on various occasions to the Deputy Prosecutor conducting the prosecution and to lawyers for the defence.

2. This report reviews the two trials, which were held in May 1997 and in June/July 1997. They are assessed on the basis of international standards for fair trial provided in United Nations human rights instruments, in particular article 14 of the International Covenant on Civil and Political Rights. The Federal Republic of Yugoslavia is a party to that Covenant and also to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Convention against Torture), which contains several provisions in articles 12 and 15 which are particularly relevant to the trials held in Pristina. The report ends with a set of conclusions and recommendations submitted to the Government by the Special Rapporteur of the Federal Republic of Yugoslavia on the basis of the report of the trial observer.

I. THE FIRST TRIAL OF 20 PERSONS, HELD IN PRISTINA IN MAY 1997

3. Between 19 and 30 May 1997, 20 Kosovo Albanian men and women were tried and sentenced by the Pristina District Court. Two were tried *in absentia*. All the accused were charged with preparing to conspire to participate in activities endangering the territorial integrity of the Federal Republic of Yugoslavia under article 136 in connection with article 116 of the Penal Code. The offences carry a maximum sentence of 10 years' imprisonment in the case of forming a group with the above aims (article 136 (1)) or of five years' imprisonment in the case of membership in such a group (article 136 (2)). Six of the defendants were in addition charged with using dangerous or violent means in attempts to threaten the constitutional order or security of the Federal Republic of Yugoslavia, acts which article 125 of the Penal Code defines as terrorism, punishable with a minimum of three years' imprisonment.

4. According to the indictment, the accused formed or belonged to a secret association called the National Movement for the Liberation of Kosovo (NMLK) aiming to attempt, by the use of force, to sever Kosovo and Metohija from the Federal Republic of Yugoslavia and unite it with Albania. The organization’s main aims, according to the indictment, are increasing its membership, preparing armed rebellion by collecting various weapons and obtaining maps and blueprints of official buildings and distributing the movement’s magazine *Qllirimi* (Liberation). The statute of the organization, of which only a photocopy was presented in court, advocates what it calls the liberation of all Albanians living in Serbia, Montenegro and Macedonia,

an aim to be achieved, as a last resort, by armed struggle. It describes NMLK as an illegal organization, which, however, uses every opportunity to resort to legal means in pursuit of its aim.

5. The trial, which lasted six days, is the first of three involving Kosovo Albanians charged this year with having committed offences against national security. The charges in the first trial were limited to attempts and planning. Unlike the accused in the other trials, none were charged with actually having carried out acts of violence threatening the security of the State, which was the case in the second trial against 15 persons, reviewed in Section II below. Since then, 21 Kosovo Albanians, 18 of whom are in custody, have been indicted for forming what the indictment describes as a hostile terrorist organization, the Liberation Army of Kosovo, carrying out acts of violence in order to separate Kosovo from the Federal Republic of Yugoslavia. That trial has yet to take place.

6. All the accused, many of whom denied the charges against them or parts thereof, in particular the charge of terrorism, were found guilty. The main accused, who admitted to being a leader of NMLK and the editor of its magazine, was sentenced to the maximum punishment under article 136 of the Penal Code: 10 years' imprisonment. The other defendants, who included two women, one of them a 20-year-old student, were sentenced to prison terms of between two and nine years. Ten defendants claimed they had done no more than distribute the monthly magazine of the organization or write articles for it; five of them denied that they ever were members of NMLK.

A. Background

7. The trial took place following a series of armed attacks which had occurred in Kosovo during the previous year directed against several police officers, local government employees and persons whom the attackers have labelled “collaborators with the Serbian authorities”. A previously unknown organization, the “Liberation Army of Kosovo”, has claimed responsibility for most of these attacks, which started in April 1996, when six persons were killed and five others were wounded. The Special Rapporteur has repeatedly condemned these attacks. Similar incidents have been reported on a monthly basis. In reaction, the Serbian police initiated a wave of arrests on 22 January 1997, detaining around 100 people. The Belgrade office of the High Commissioner/Centre for Human Rights received testimony indicating that the police used excessive force in the course of making a number of these arrests and during subsequent interrogation of suspects.

B. General Observations

8. The trial was held in the District Court in Pristina. At the opening of the trial the 13 defence lawyers did not have enough space to sit and write, but the situation was promptly remedied on orders of the presiding judge the following day.

9. The presiding judge was firm but courteous to all parties, including the defendants and their lawyers. He invariably informed the defendants of their right to remain silent, a right which several defendants exercised. The judge scrupulously summarized statements from the defendants for the record,

including details given by 11 defendants alleging that they were tortured, ill-treated or threatened into making “confessions” before the investigative judge and, sometimes, afterwards. This contrasts sharply with reports of lack of accurate record keeping by judicial officials during the period of pre-trial detention.

C. Specific observations

1. Independence and impartiality of the tribunal

10. Article 14, paragraph 1 of the International Covenant on Civil and Political Rights specifies that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal”. The aim of this provision is to ensure that charges are brought before an independent court, established independently of a particular case and not especially for the trial of the offence in question. The United Nations observer, however, was informed by court officials in Pristina that it is customary for trials involving State security in one district in Kosovo to be brought by one public prosecutor and to be heard by one bench. The appearance of impartiality and independence of judicial and prosecution officials involved in trying political prisoners would be strengthened if these cases, like others, were heard by rotating benches and prosecutors.

11. The Pristina trial chamber consisted of a presiding judge sitting with two lay judges. Yugoslav law – in article 23.1 of the Code of Criminal Procedure - does not specify the latter’s qualifications. The observer was told by lawyers that, in this case, the two lay judges were retired policemen, one of them reportedly a former head of the Criminal Investigation Department. Such a background could create an appearance of lack of impartiality. Furthermore, lawyers informed the observer that consultations between the prosecution and judges before and during trials involving political prisoners were not uncommon, and that this happened in this and the second trial.

12. Independence presupposes the judiciary to be institutionally protected from undue influence by the executive branch. The independence and impartiality of a court can be called into question when one or more of its judges are perceived to be close to one of the parties, in this case to the prosecution.

2. The publicity of hearings

13. The publicity of hearings is also a requirement of article 14 of the International Covenant on Civil and Political Rights. In the Pristina District Court there was little space in the public gallery. Nevertheless, many representatives of the press, embassies and non-governmental and intergovernmental organizations were present. Only one member of the family of each of the accused was permitted to attend court proceedings, but this was prompted by space limitations. The requirements of publicity were fully complied with.

3. The right to adequate time and facilities to prepare a defence and to communicate with counsel of one's own choosing

14. The right to adequate time and facilities is one of the most important minimum guarantees for fair trial provided in article 14.3 of the International Covenant on Civil and Political Rights. It is the most important of all the facilities which a defendant must be provided with and is of particular concern to the United Nations in this case.

(a) Adequate time and facilities

15. The Special Rapporteur concludes that a number of defendants were denied an adequate defence for a variety of reasons. First, several lawyers met their clients for the first time after the investigative judge had already concluded the crucial stage of investigation, the results of which the prosecution relied upon. Lawyers experienced legal and practical difficulties in obtaining access to clients at an early stage (see below under (b) and (c)).

16. Second, some defendants had lawyers assigned to them only after they entered the courtroom and thus did not have an effective opportunity to prepare a defence, although they appear to have waived their right to have a week to do so (see below under (c)).

17. Third, access to nearly all relevant trial documents was denied to defence lawyers until shortly before the start of the trial, leaving them insufficient time to prepare a defence. On 14 February 1997 the investigative judge of the District Court in Pristina, Ms. Danica Marinkovic, made the following ruling applicable to all indicted persons and their defence lawyers. She ruled that, for reasons of State security: “all documents and records, as well as objects gathered as evidence, and presence during certain stages of the investigation, namely during the examination of the indicted, and confrontation and examination of witnesses, will be denied to the defence”. In practice, the order prohibited defence lawyers from having access to any trial documents other than the statement made by their own client to the investigative judge and also prevented their being present during the investigation of other accused persons. Consequently, access to any statements by the co-accused or essential documentary evidence for the preparation of a defence was only granted to the defence about one or at most two weeks before the start of the trial.

18. Article 73 (2) of the Code of Criminal Procedure, on which the judge’s ruling is based, permits, by way of exception, that “during preliminary proceedings, before the indictment has been brought, examination of certain documents or certain items of physical evidence by the defence counsel may be temporarily restricted if particular reasons of national defence or national security so require”. However, that provision does not appear to permit the exclusion of virtually all evidence as happened in this case. Authoritative legal commentary (by Dr. Branco Petric) explains that this provision should only be used in a very restricted manner. This did not happen. The restrictions applied to the defence regarding timely access to relevant trial

documents in this case put them at such a disadvantage as to result in a violation of the important fair trial principle of “equality of arms”, namely the procedural equality of the accused with the prosecutor.

(b) The right to communicate with counsel

19. Current legal standards in Yugoslavia prohibit a lawyer access to his client until he or she is brought before an investigative judge, which has to happen not later than 72 hours after arrest (article 196 of the Code of Criminal Procedure). The Constitution of the Federal Republic of Yugoslavia, in article 23, sets a higher degree of protection: it requires that arrested persons should have prompt access to counsel. However, in practice the Constitution’s higher standards are not enforced, as the federal Constitution, in article 67, permits ordinary legal standards to prevail. As a result, lawyers are in practice often not granted access to their clients until three days after their arrest, that is to say when they are brought before the investigative judge. In fact most allegations of torture and ill-treatment concern that three-day period preceding the defendants’ appearance before the investigative judge, when they are interrogated and denied access to a lawyer.

20. All the lawyers to whom the United Nations observer spoke stated that, when they were allowed to meet their clients, they were not permitted to communicate with them in private and to discuss their defence confidentiality. One or two prison guards were always present. One lawyer told the observer that the first time he was allowed to meet his client in private was at the opening of the trial itself. Another lawyer said that because of the constant presence of guards his client only felt able to tell him at their third meeting that he had been subjected to torture.

21. Yugoslav law in fact permits wide restrictions to be imposed on free communication between legal counsel and their clients. Article 74 (2) of the Code of Criminal Procedure permits the investigative judge to order “that the accused may converse with defence counsel only in his (the investigative judge’s) presence or in the presence of some particular official”. Even where free communication without surveillance between lawyers and clients is permitted and indeed when, in accordance with article 74 (3) of the Code, it is obligatory - i.e. in the period after the examination by the investigative judge has been completed or the indictment has been served – several lawyers maintained that such free communication continues to be denied in practice.

22. One experienced lawyer told the United Nations observer that he had referred to this legal provision when he met his client in prison after the initial investigation was concluded. The guard present at the meeting informed him that he was aware of the law. However, he also told the lawyer that he had nevertheless strict instructions from the State Security service to remain present throughout the interview between the lawyer and his client.

23. The apparent practice of not permitting defendants to communicate with their legal counsel in private is a clear violation of international human rights standards for fair trial. The Human Rights Committee, in its General Comment 13 on article 14 of the International Covenant on the Civil and Political Rights, states that article 14.3 (b) “requires counsel to communicate with the accused in conditions giving full respect for the

confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their professional standards and judgement without any restrictions, influences, pressures and undue interference from any quarter". Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that, save in exceptional circumstances, the right to confidential communication between legal counsel and his or her client may not be suspended. It also provides that "Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official."

(c) The right to defend oneself in person or through legal assistance of one's own choosing and to have legal assistance assigned in all cases where the interests of justice so require

24. The Prosecutor assured the United Nations observer that all the defendants had access to a lawyer at relevant stages of the proceedings. However, several defendants complained that when they were brought before the investigative judge they had no access to a lawyer to provide them with legal assistance. Enver Dugoli, for example, stated in court that he had been subjected to physical and mental torture that had resulted in visible injuries on his face, hands and other parts of his body, and denied the prosecution's claim that he had agreed to being questioned by the investigative judge without a lawyer. He told the judge that access to a lawyer had been forbidden to him when he had been brought before the investigative judge. One lawyer told the United Nations observer that interrogations of virtually all the defendants in this case started in the evening, when it was difficult for them to obtain the services of a lawyer. In this case, most defendants retracted in court the statements which they had previously made, often without having received legal advice, before the investigative judge, on the grounds that their statements had been extracted under torture, ill-treatment or duress. Nevertheless, the prosecution relied upon these statements as important evidence.

25. Some defendants did not have a lawyer when they entered the courtroom. Ragip Berisa, charged with an offence carrying a maximum of five years' imprisonment, had no lawyer. He explained that the lawyer who had visited him previously had not turned up in court. Although Yugoslav law does not oblige the court to appoint a lawyer in cases where offences carry a maximum punishment of five years' imprisonment, the presiding judge nevertheless proceeded to arrange for him to choose a lawyer on the spot from among the 13 legal counsel present. Mr. Berisa chose a lawyer, but he must have waived his right to postpone examination because the trial proceeded without the lawyer having time to prepare his client's defence. (Mr. Berisa was sentenced to two years' imprisonment.)

26. The main defendant, Avni Klinaku, had no lawyer when he appeared in court. Mr. Klinaku explained that he had not accepted the lawyer appointed by his family and that he would conduct his own defence. However, since he was charged with a serious offence punishable by 10 years' imprisonment, Yugoslav law requires that the accused in such a case should have defence counsel if necessary, assigned to him. The presiding judge promptly arranged for a lawyer present in court to defend the accused, who waived his right to have

eight days to prepare his defence. However, article 70 (2) of the Code of Criminal Procedure requires that the accused in cases of such a serious nature "must have defence counsel at the time when the indictment is delivered". As far as can be established, this obligation was not honoured in the case of Mr. Klinaku.

4. The right to trial without undue delay

27. Sixteen of the accused were arrested between 26 and 31 January 1997, and two more on 24 April 1997. The trial started on 19 May 1997 and thus was held without delay.

5. The right to the free assistance of an interpreter if the court language cannot be understood

28. The court proceedings were held in Serbian, but most of the defendants spoke only Albanian. A court interpreter translated questions from the judge or the prosecutor to the defendants, and the latter's answers. However, discussions between the parties in court not addressed to the defendants were not translated to the defendant, who thus remained unaware of questions put and answers given concerning them in the course of the trial. It would be better if all discussions between the parties were translated to defendants in their own language throughout court proceedings, a matter which is particularly important for those defendants conducting their own defence.

6. The right not to be compelled to testify against oneself and not to be subjected to torture

29. Many defendants, when brought to court, retracted the statements which they had made previously before the investigative judge, on the grounds that had been forced to make them because they had been tortured, ill treated or had been subjected to other forms of duress.

30. The United Nations delegation received several allegations from lawyers and defendants who stated in court that the investigative judge did not wish to read their claims that defendants' statements had been extracted under torture or duress into the record, even though such statements are an essential component of testimony, which the Code of Criminal Procedure requires to be entered into the record (art. 80).

31. Eleven defendants claimed they had been subjected to torture, ill-treatment or duress. The lawyer of Duljah Salahu claims that he saw bruises on the face of his client and wanted to draw the attention of the investigative judge to other injuries on his client's body. However, the investigative judge reportedly said she did not wish him to do so. The lawyer also claimed that the investigative judge was reluctant to enter Mr. Salahu's claims of torture into the 1 February 1997 record of examination. He said that she only did so, and then only in very general terms, after Mr. Salahu had insisted that he would otherwise not sign the statement he had made before her. Evidence of beatings was still visible when Mr. Salahu was admitted to Pristina prison. The prison doctor stated on 26 February 1997: "after a

detailed clinical examination we found, on admission, bruises on both hands (post contusion)". The lawyer said he requested an independent medical examination of his client, but the request was apparently not granted.

32. Ljiburn Aliju said that he was beaten with batons over the course of three days before being brought before the investigative judge. He also told his lawyer that the men whom he claimed had beaten him had visited him again in the week before the start of the trial and had threatened him that he should repeat in court what he had been made to say before the investigative judge. Hajzer Betulahu also said that his interrogators had subjected him to physical and mental torture and had threatened him by saying: "if you refuse to say in court what you told the investigative judge, we will break your bones".

33. Gani Baljija stated that he had been punched and kicked. A medical report drawn up during his detention was read out in court. Enver Dugoli alleged that his lawyer, the investigative judge and prison officials could see, when he was brought before them, the injuries on his face and hands resulting from beatings. His medical report was read out in court. A detailed statement of torture was given by Emin Salahi, who claimed that a gas mask had been put over his head, that paper had been stuffed into his mouth and that he had been given electric shocks and had been hit on the arms, legs and kidneys. He stated that he had asked for medical assistance, which had been denied.

34. Arsim Ratkoceri said that he had been beaten with batons on the hands and genitals and denied food for 24 hours. Muja Prekupi's lawyer alleged that he had been subjected to physical and mental torture for three days. Nebih Tahiri made a general statement that he had been "coerced" into making his statement and Ragip Berisa said he had done so under "duress". Sukrije Redza told the court that she had been interrogated late at night by State Security personnel and claimed she had been subjected to "mental and physical terror". In court, the prosecutor did not deny that interrogations had taken place late at night, pointing out that there were no rules regulating the court's working hours.

35. To the Special Rapporteur's knowledge, no prompt and impartial investigations were carried out into any of the allegations that statements had been extracted by various forms of torture, ill-treatment or duress, as required under article 12 of the Convention against Torture. Nor are attempts known to have been made to comply with the requirement of article 15 of the Convention against Torture that "any statement, which is established to have been made as a result of torture, shall not be invoked as evidence in any proceedings". No such investigations were made despite the claims of several of the accused or their lawyers that injuries resulting from torture were visible when the defendants in question were brought before the investigative judge and that, in some cases, there was prima facie evidence thereof in their medical records. The above allegations were carefully recorded during trial; however, it appears that the statements apparently extracted by such methods – which Yugoslav law specifically prohibits - were admitted in evidence in contravention of the requirements of the Convention against Torture and articles 83 and 219 of the Yugoslav Code of Criminal Procedure.

7. Non-compliance with several procedural requirements of Yugoslav law

36. The Code of Criminal Procedure provides a number of safeguards to protect the authenticity of legal records and the quality of evidence. Lawyers alleged in court that several of these procedural requirements had not been met. It appears that all their requests to have the evidence in question removed from the record on that ground were rejected by the court.

37. One lawyer stated that the times of beginning and ending of the interrogation of his client, Gani Baljija, had not been recorded, as the Code of Criminal Procedure requires in article 82 (2). He said that his client had been questioned for a long time in the evening and without a break. Hajzer Bejtulahu's lawyer drew the attention of the court to the fact that the interpreter had not signed the record of the interrogation, a fact not contested by the Prosecutor, who maintained, however, that such a failure was not sufficient ground to declare the statement in question inadmissible. It appears that the unsigned statement was indeed admitted in evidence, notwithstanding the clear requirement in article 82 (3) of the Code of Criminal Procedure that “the record shall be signed at the end by the interpreter if there was one”.

38. Yugoslav law provides that the examining magistrate has a duty to inform all parties, including defence counsel, of the time and place of investigative procedures. Article 168 (6) of the Code of Criminal Procedure specifies that if the accused has a defence counsel, the examining magistrate shall ordinarily inform only the defence counsel. However, State Security personnel took several accused persons for further investigation, without the knowledge of the lawyers concerned, after the investigative judge had completed the initial investigation.

39. For example, after the investigative judge had completed the interrogation of Gani Baljija, he was reportedly taken back nine times to the Kosovska Mitrovica security police for further interrogation. Saban Beka stated that he had been questioned once after his investigation by the investigative judge. Majlinda Sinani stated that she had been taken out as many as 12 times after the completion of her investigation, which had usually taken place at night, between 7 and 12 p.m. Her lawyer had no knowledge of these subsequent interrogations and therefore was not present to defend her client. Since any such further interrogations cannot take place without the prior permission of the investigative judge, the judge either failed to inform the defence lawyer in accordance with the legal procedures or else these interrogations were carried out in breach of the law, without the knowledge of the investigative judge. What is clear is that Majlinda Sinani's lawyer was unable to assist her client in the course of these interrogations, when Ms. Sinani was repeatedly pressed to admit to membership of NMLK.

8. Evidence

40. The main evidence on which the prosecution relied was statements made by the defendants in the course of investigation, parts or all of which many of them subsequently retracted in court on the grounds that these statements were the result of torture or other forms of duress. Observers from organizations other than the United Nations who were in court when other evidence was presented have pointed out that no witness testimony was presented and that the only material evidence produced was a machine-gun. Lawyers and the main accused argued that there was no proof that plans of buildings and other documents or material produced or referred to in court in support of the charges were in fact taken from the defendants, since the confiscated objects were not specified in the receipts issued after the search of the defendants' homes. Consequently, they argued, there was no evidence that the confiscated objects were in fact those produced in court and relied upon by the prosecution. Lawyers also observed that key documents presented in court, such as the Statute and the monthly magazine Qllirimi, were only presented in the form of photocopies which could not be accepted in evidence since they had not been properly authenticated. Nevertheless, this material appears to have remained on the court record and to have been used in evidence.

41. Although the United Nations observer was not able to study all the relevant documents, a review of the main evidence and a reading of the trial transcript, as well as consideration of comments made by observers present throughout the proceedings, indicate that the serious charges against the defendants were supported by little credible material evidence.

9. Trials in absentia

42. Two of the defendants were tried in absentia and sentenced to up to nine years' imprisonment. A strict interpretation of article 14.3 (d) of the International Covenant on Civil and Political Rights appears to prohibit trials in absentia, although the Human Rights Committee has held that such trials are permissible, but in strictly limited circumstances. Further observations about such trials are made in paragraph 66 below.

II. THE SECOND TRIAL OF 15 PERSONS, HELD IN PRISTINA IN JUNE/JULY 1997

43. For five days in June/July 1997 the District Court in Pristina tried 15 Kosovo Albanian men, 12 of them in absentia. According to the indictment, the accused had received military training in Albania and had subsequently formed a terrorist organization active in Kosovo with the aim of endangering the constitutional order and security of the State and of forming a separate state to be joined to Albania. Unlike the first trial held in May 1997, the accused were not only charged with preparing acts of violence, but also with responsibility for carrying out several attacks, killing 4 persons and attempting to kill 16 others. The attacks were said to have been carried out by the accused as members of the "Liberation Army of Kosovo", which had claimed responsibility for these acts.

44. All three accused who stood trial - Besim Rama, Idriz Aslani and Avni Nura - were charged under article 125 of the Penal Code with using dangerous or violent means in attempts to threaten the constitutional order or security of the Federal Republic of Yugoslavia (“terrorism”), an offence carrying a maximum penalty of three years' imprisonment. They were also charged with premeditated murder of one or more people, carrying a minimum penalty of 10 and a maximum of 20 years' imprisonment. One or more of the accused were also said to have been involved in the following incidents: the shooting of two policemen at Glogovac in an ambush in May 1993; an attack on a police car in April 1996 in which a policeman was wounded and a female convict travelling in the car was killed; the shooting of a policeman in Kosovska Mitrovica in June 1996; the throwing of two hand grenades - which did not explode - in February 1996 at a refugee camp in Vucitrn; and the throwing of bombs, which did explode but without causing casualties, in September 1996 at military barracks in Vucitrn.

45. Twelve of the 15 persons charged – including the chief defendant Besim Rama - received the maximum sentence of 20 years' imprisonment. Two defendants were sentenced to 15 years, one to 10 years and the remaining defendant, Avni Nura, had the charge of “terrorism” altered to unauthorized possession of arms and received the shortest sentence, of four years' imprisonment.

46. The observations concerning this trial should be read together with the observations made above about the first trial of political prisoners involving 20 Kosovo Albanians who were tried in May 1997 and convicted for lesser offences involving State security. Nearly all the issues and concerns raised there which stem from an assessment of international standards for fair trial provided in United Nations instruments apply equally to the trial of the 15 men in June/July 1997.

1. Specific observations

Independence and impartiality and conduct of the court

47. The bench consisted of 5 judges, including the same 3 judges who had tried the 20 accused in the first case. The same prosecutor argued for the prosecution. For reasons stated above with regard to the first trial, the appearance of independence and impartiality of the bench is not enhanced if the same judicial and prosecution officials appear to conduct all cases of a political nature; a concern compounded by the fact that several lay judges reportedly were former policemen.

48. Unlike in the first trial, the judge who presided in this trial did not promptly read into the record the claims by defendants that they had been subjected to torture. However, when this omission was pointed out to her, the presiding judge did include in the record a summary of the defendants' claims.

2. The right to be brought promptly before a judge and not to be held in unacknowledged detention

49. Article 9 of the International Covenant on Civil and Political Rights provides every person arrested on a criminal charge with the right to be brought promptly before a judge. Two defendants, Besim Rama and Avni Nura, told the court that between 16/17 September and 2 October 1996 they were held in an unknown place in unacknowledged detention, without access to anyone. Besim Rama was kept in a cell alone, but said he could hear Avni Nura being beaten. In court, Avni Nura stated that he had been arrested on 16 September 1996 and not on 29 September, the date wrongly recorded in the official records. Both men appeared before the investigative judge on 2 October 1996. Therefore, they were held for 16 days in unacknowledged detention and in breach of international human rights law and of Yugoslav law, which requires that no arrested persons can be kept longer than 72 hours without being brought before a judge.

50. For two weeks, these men had effectively "disappeared". The seriousness of any such detentions which the authorities refuse to acknowledge is underlined in article 1 of the Declaration on the Protection of All Persons from Enforced Disappearance, which states:

> "Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights ... . Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture ... ."

3. The right to access to counsel

51. International human rights standards require that such access should be prompt and that free communication between lawyer and client should be permitted. However, Idriz Aslani told the court that he had been kept for over six months without access to legal counsel to discuss his case. The first time he was allowed to meet his counsel freely to discuss his defence was on 30 May, three days before the start of the trial and then only for one minute, after which a guard came and free communication between counsel and client was made impossible.

52. The investigative judge interrogated Avni Nura and Idriz Aslani twice, on 2 and 7 October, without a lawyer even though, according to their lawyer, they had asked for legal assistance. Before that the two men had been held in unacknowledged detention, their lawyer making every effort to locate them, but obviously unable to meet them. The first day that their lawyer got permission to meet them was 8 October, but then only in the presence of a guard. However, when the lawyer showed the written authorization from the authorities, the guard reportedly informed the lawyer that he had received

instructions from the investigative judge that any discussion between lawyer and client was forbidden. When the lawyer attempted nevertheless to speak with his client, asking his client about the treatment he was given in police custody, the guard said he would terminate the visit. When the United Nations observer raised these reports with the prosecutor appearing in the case, he did not deny that guards had instructions to be present when lawyers met their clients, adding that this was done because lawyers had abused their powers in the past. However, the prosecutor did not make any specific allegation of abuse concerning the lawyers involved in this case.

53. Orders for the supervision by a guard of lawyer–client meetings, if they were indeed given, constitute not only a violation of international legal standards, but also breach article 74 (3) of the Code of Criminal Procedure, which makes free communication between a lawyer and his or her client at the conclusion of the investigation by the investigative judge mandatory. On 10 October 1997, the lawyer for the two men requested that this law be observed and that free communication be permitted, but he never received a response. The first time that their lawyer was allowed to meet his clients to discuss their defence was when the indictment was actually raised, according to the lawyer this only happened one week before the start of the trial. Given the seriousness and variety of the charges and the large number of defendants, this short period was clearly insufficient to prepare an effective defence.

4. Adequate time and facilities to prepare a defence

54. As in the previous trial, the investigative judge denied the defence lawyers access to all files, with the exception of their own client's file, and the possibility of being present during the interrogation of other accused persons. The order read: “Because of security reasons, the defence lawyers ... are denied presence during the investigation, during interrogation of the accused (except their client), the hearing and confrontation, and the examination of the file and records (except the ones relating to their client)”. The defence lawyers appealed against the ruling, arguing that it was unnecessarily restrictive and went beyond the limits set in article 73 of the Code of Criminal Procedure (which permits restrictions on access to certain documents and items only), thus making it impossible for them to conduct a professional defence. However, the appeal was rejected by the President of the District Court, on 17 February 1997.

55. As observed in the first case, such broad restrictions on access to crucial documents and other evidence violates the principle of “equality of arms” between the defence and the prosecution which underlies the fair trial guarantees provided in article 14 of the International Covenant on Civil and Political Rights.

56. During the trial, defence lawyers pointed out that Besim Rama had been dismissed from military service on the grounds, as Besim Rama put it, of “pains in his head”. They requested that the military service report be submitted to the court (which was done but did not prove to be conclusive) and that Besim Rama be examined by experts to establish whether he was in full possession of his mental capacities and aware of his actions at the time the crime in question was committed. The court ordered Besim Rama to be examined

by three psychiatric/psychological specialists from the Belgrade prison hospital. Their report, subsequently presented in court, did not show that Besim Rama was suffering from a mental illness or backwardness and found that his capacity to understand the meaning of his acts was unimpaired. However, defence lawyers objected to the findings on the grounds that the period of examination had been too short, that the conclusions of the report did not match the examination's findings and that the findings by psychiatrists who were part of a penal establishment were biased. They requested a second examination by an independent institution or, failing that, the opportunity to question the experts in court. However, the court denied both requests. The credibility of the findings of the experts would have been enhanced if the defence lawyers had been able to question the experts in court.

5. The right not to be compelled to testify against oneself and not to be subjected to torture

57. In court the main defendant, Besim Rama, stated on 3 June 1997 that from the moment that he was arrested, until the time that he was brought before the investigative judge, the police did not stop beating him. He said that his statement before the investigative judge – acknowledging his participation in a number of the crimes with which he was charged - was made under duress, because he had been tortured and because the police who had beaten him stood outside the judge's office, overhearing what he said. He claimed that his face was visibly swollen at the time. The reason for his distinct fear of the police was, he said, that he had been tortured to such an extent that he wanted to commit suicide. He said that he had informed the prison warden of the torture by his investigators, but that he had not been tortured while in prison.

58. In court Besim Rama initially acknowledged his participation in one incident, the firing on a police car in June 1996 in which one policeman was killed. Although he also admitted possessing several weapons, he denied his involvement in the other crimes with which he was charged and also that he had received military training or had gone to Albania. However, when the trial resumed on 9 July, Besim Rama retracted his statement acknowledging his involvement in the June 1996 shooting, claiming that he had made that statement out of fear of the police.

59. Basim Rama explained that he had been visited three times by police while in prison after the investigative judge had completed the investigation. He said that on 1 June, just before the start of the trial, an official, whom he identified in court as the public prosecutor in this case, had threatened him that he "would lose his head" if he failed to repeat in court what he had admitted to the police. Besim Rama maintained that two people had witnessed that threat. The public prosecutor was not in court that day and therefore could not be asked to confirm or deny this specific allegation. The court, however, is not known to have investigated this or other allegations by Besim Rama that his statement had been obtained through torture or duress, as required by the Convention against Torture. It was thus admitted in evidence, notwithstanding the provisions of international and Yugoslav law which exclude evidence being relied upon if it is established to have been extracted by such illegal methods. The same was the case for the other two defendants.

60. In court, Idriz Aslani denied all the charges against him, including possession of weapons or planning any of the attacks with which he was charged. He stated that he did not know any of the other accused. He added that all his statements to the police had been made under duress and threats and that medicines had had to be provided to him to help him recover from police torture. At one stage he had been told that he could leave the room in which he was being interrogated but not alive. The statement he had given to the investigative judge was also entirely false because he felt threatened. He saw that the same policemen, who had threatened and tortured him for three days previously, telling him what to say before the investigative judge, were standing outside the courtroom where he could see them when he made his statement to the judge.

61. Avni Nura told the court that he had been continually beaten for 10 days after arrest, after which a second group of interrogators had arrived who treated him “extremely inhumanely”. He had been made to strip naked and sit on an electric heater until he fainted, then hit again. This apparently happened twice. At one stage, he had had to lean against the wall, standing one metre away from it for a prolonged period and only allowed to touch the wall with two fingers, while being beaten on the back. He had then had to do push-ups and kneel on batons, after which, he said, he had been unable to walk. He had been tied to a bed for most of the time and at night prevented from sleeping. He had been unable to eat for several days. He claimed he had been beaten mainly on the stomach, hands and legs and had had electricity applied to parts of his body so that the marks would not be clearly visible. However, his face had swollen, and he had had visible scars. On 2 October 1996, 16 days after his arrest and after these injuries had become less visible, he was taken before the investigative judge.

62. In court, he admitted possessing weapons and bombs, but claimed this was because he had been a fugitive from justice since wounding a person in a blood feud and because he had to stand guard for his brother who was an arms dealer. Of the three defendants, he alone admitted to having visited Albania, but claimed this was to escape from the blood feud.

63. On 10 October 1996 the defence lawyer requested a medical examination of Avni Nura and Idriz Aslani at the Institute of Forensic Medicine “to establish the degree and extent of physical injuries”. He added that this should be done as soon as possible lest the wounds and traces of the injuries disappeared. However, he received no response and no such examination, which could have provided important evidence of torture or ill treatment, or the lack thereof, was carried out.

6. Evidence

64. Unlike in the previous trial, a number of witnesses appeared, all of them called by the prosecution. The United Nations observer was not in court on the day of their appearance, nor has the observer been able to review the many documents referred to in court on that day. However, a reading of the trial transcript and discussions with other local and international observers about the witnesses’ evidence produced in court that day indicate that none of the witnesses called produced credible material evidence to link the accused with the charges against them.

65. As in the previous case, the main evidence produced by the prosecution was the stated confessions of the accused before the investigative judge, and the admission made in court by the main accused, Besim Rama, which he subsequently retracted. There is strong evidence, however, that the statements to the investigative judge were made under torture and should therefore, according to international human rights standards which apply in the Federal Republic of Yugoslavia, not be accepted in evidence.

7. Trials *in absentia*

66. The majority of the accused (12 out of 15) were tried *in absentia*, as Yugoslav law permits. Several lawyers were present in court to represent the accused in their absence. The commentary of the Human Rights Committee on the Covenant permits trials *in absentia* in restricted circumstances: "When exceptionally for justified reasons trials *in absentia* are held, strict observance of the right of the defence is all the more necessary" (General Comment 13 (21) (d) (art. 14)). The United Nations observer was not in a position to establish whether the defendants' rights were strictly observed but the Special Rapporteur wishes to draw attention to the growing body of international opinion that such trials *in absentia* are no longer acceptable.

III. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

67. The trials were conducted in public, without delay, as international standards require. International and local observers had full access to the trial. During the two main trials the courts generally respected, with few exceptions, Yugoslav procedural rules for trial conduct. Major breaches, however, occurred during the period of pre-trial detention. Furthermore, both trials failed to meet important minimum guarantees for fair trial provided in United Nations standards, notably the International Covenant on Civil and Political Rights and the Convention against Torture, which the Federal Republic of Yugoslavia is bound to uphold.

68. As regards the evidence presented in court, the fact that several procedural requirements of Yugoslav law regarding the authentication and production of evidence were not met – apparently with impunity – seems unfortunately not to have prevented such evidence from being admitted in court. The apparent absence of credible material evidence linking the accused to the crimes they allegedly committed is a matter of grave concern. Serious doubts remain as to whether, on the basis of the nature of the evidence presented and the illegal manner in which many statements were apparently extracted, the accused should have been found guilty as charged. By the international standards provided in human rights instruments to which the Federal Republic of Yugoslavia is a party, the accused were definitely denied a fair trial. In particular:

- Defendants and their lawyers were given totally inadequate time and facilities to prepare a defence and to communicate freely;

The broad restrictions applied to defence lawyers regarding access to relevant documents and even in some cases regarding questioning their clients violated the important fair trial principle of “equality of arms”;

Many statements which defendants retracted in court on the grounds that they had been extracted under torture, ill-treatment or duress were not removed from the record and were apparently admitted in evidence (despite injuries reportedly being visible to judicial officials and despite the presence of other *prima facie* evidence in medical reports);

Prompt and impartial investigations into allegations of such unlawful treatment are not known to have been ordered by any authority;

Requests for independent medical examinations which could have confirmed or denied torture allegations were refused;

Two defendants in the second trial were held for two weeks in secret detention, which the authorities refused to acknowledge, denying them their rights to personal security, to be brought promptly before a judge and to have access to a lawyer.

69. The Special Rapporteur is concerned that basic human rights standards were not met in the two trials of 35 persons convicted to very long terms of imprisonment for offences against state security. In addition questions can be raised about the independence and impartiality of the judicial process. She expresses the hope that the Government will review the issues and concerns raised in the present report and that officials and others concerned will take them into account in the course of appeals, where appropriate, as well as in future trials involving similar offences.

2. Recommedations

70. The Special Rapporteur makes the following recommendations to the Government on the basis of the United Nations trial observer’s report:

(a) The Government should promptly order an impartial investigation into the claims of defendants and their lawyers that statements relied upon by the prosecution were extracted under torture or duress. If confirmed, the accused should be retried solely on the basis of evidence obtained by legal means.

(b) The appropriate authorities should ensure that any statements obtained by such methods are not admitted in evidence and are removed from the record.

(c) Trials of political prisoners for offences involving state security should be held by courts consisting of judges, including lay judges, whose background and qualifications fully meet established criteria of impartiality and independence. Such trials should be held, as is customary in other cases, before rotating benches and prosecutors.

(d) The Government should ensure that constitutional standards which provide arrested persons with prompt access to a lawyer should be immediately enforced (art. 23 of the federal Constitution). The legal provisions in the Code of Criminal Procedure which still do not permit such access effectively until 72 hours after arrest and which are currently being revised by the Ministry of Justice should be promptly brought into line with these constitutional standards.

(e) The Government should review legal provisions which permit broad restrictions to be imposed on free communication between lawyers and their clients (art. 74 (2) of the Code of Criminal Procedure), and ensure that they comply with international human rights standards which stipulate that all communication between lawyers and their clients should normally be conducted in private in full confidentiality, at most within sight but not within the hearing of any officials.

(f) The Government should introduce clear rules for the duration of interrogation of arrested persons, for the intervals between interrogations and for the recording of the identity of the persons conducting the interrogation. Late evening or night interrogations should be the exception. Sanctions should be provided for disobeying such rules.

(g) An independent investigation should be undertaken into allegations that the authorities refused to acknowledge that two defendants in the second trial were held for 16 days in September 1996 in secret detention and tortured. If the allegations are confirmed, those responsible should be brought to justice.

(h) If the impartial investigation into the allegations of torture, ill-treatment or duress described in this report confirms that these methods have been used, the Government should ensure that those responsible are brought to justice.

(i) Instructions should be given to investigative judges that torture allegations are essential elements of the testimony which should invariably be read into the record at all stages of the criminal proceedings. If there is credible evidence that statements were extracted under torture or duress, the allegations should be properly investigated and the statements concerned should not be admitted in evidence. The Government should introduce a mechanism to ensure that statements obtained from an accused person in violation of the law are forthwith invariably removed from the record and not admitted in evidence, as article 83 and 219 of the Code of Criminal Procedure and article 15 of the Convention against Torture require.

(j) Broadly phrased legal provisions permitting wide restrictions to be imposed on lawyers' access to relevant trial documents and interrogations - such as article 73 (2) of the Code of Criminal Procedure – should be restrictively interpreted to ensure that their application does not unduly favour the prosecution and result in violations of the important fair trial principle of "equality of arms" between defence and prosecution.

(k) Lawyers should have unhindered access to medical records of the examination of their clients in custody.

(l) The Government should introduce a mechanism to ensure that sanctions are invariably imposed when procedural requirements regarding the taking and recording of evidence are not met. Failure to meet such requirements should automatically result in the statements or documents concerned being excluded as evidence, unless supported by corroborative evidence.

(m) In all cases where the accused does not speak the language of the court, arrangements should be made to provide that the court interpreter translates the entire proceedings for the defendant, and not only the questions addressed to him or her by the judge and the prosecutor and his or her answers thereto. This is particularly important for those defendants conducting their own defence.

(n) The Government should ensure that, if trials have to take place *in absentia*, the defendants so tried are guaranteed the strictest possible observance of their rights.

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