



Humanitarian Law Center

Judging with impunity:

The role of prosecutors and judges
in show trials of Kosovo Albanians
in the period 1998-2000



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Content

Summary	7
Introduction	13
Socio-political context and historical background	15
Serbia's justice system	17
Position of judges and prosecutors in Serbia's justice system	20
Relevant law	22
International law.....	22
National law.....	29
Criminal offences against the constitutional order and security of the FRY.....	39
Human Rights violations in the trials of Kosovo Albanians	42
Cases	45
I. District Court in Požarevac.....	45
II. District Court in Niš.....	57
III. District Court in Kraljevo.....	67
IV. District Court in Prokuplje.....	78
V. District Court in Leskovac.....	88
VI. District Court in Belgrade.....	104
Judicial impunity	111
I. Later careers of judges and prosecutors involved in human rights violations	111
II. Worthiness to perform the judicial function.....	113
III. Lustration.....	114
IV. Criminal liability of judges and prosecutors.....	115
Conclusion	117

Abbreviations used in the text

FRY	Federal Republic of Yugoslavia
HLC	The Humanitarian Law Center
CCY	Criminal Code of the Federal Republic of Yugoslavia (Official Gazette of the SFRY, No. 44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90-1217, 45/90-1340, 54/90-1773 and 24/94) and Official Gazette of the FRY, Nos. 35/92-651, 37/93-816, and 24/94-273)
MUP	The Ministry of the Interior of the Republic of Serbia
KLA	The Kosovo Liberation Army
PJP	Special police units of the MUP
ORPP	The Office of the Republic Public Prosecutor
OWCP	The Office of the War Crimes Prosecutor of the Republic of Serbia
UNMIK	The United Nations Interim Administration Mission in Kosovo
VJ	The Yugoslav Army
CPC	The Criminal Procedure Code (Official Gazette of the Republic of Serbia, nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)

Summary

Around the end of 1996 and the beginning of 1997, the offices of district public prosecutors began indicting Kosovo Albanians *en masse*, pursuant to Article 125 of the CCY (with reference to terrorism) and Article 136, paragraphs 1 and 2 of the CCY (with reference to association for the purpose of conducting hostile activities).

The indictments for the most part alleged that the accused:

1. with intent to undermine the constitutional order and security of the FRY
2. engaged in dangerous activities endangering human lives
3. became members of terrorist/sabotage-terrorist groups
4. participated in the setting up of terrorist groups or gangs
5. engaged in armed attacks against members of the Police/Yugoslav Army/state institutions/Serbian and Montenegrin citizens in Kosovo/members of the Albanian minority loyal to the FRY and their property
6. engaged in acts of violence in order to create conditions conducive to a violent secession of Kosovo and Metohija from the Republic of Serbia and the FRY
7. armed themselves with automatic weapons and explosive devices
8. advocated the separation of Kosovo from the FRY
9. stood armed guard
10. kept watch on the movements of members of the MUP and VJ and informed the leaders of terrorists gangs about them
11. participated in digging trenches
12. set up barricades.

The trials for the above-cited charges were conducted by district courts in Kosovo (in Prishtinë/Priština, Pejë/Peć, Prizren, Mitrovicë/Kosovska Mitrovica and Gjilan/Gnjilan) during 1998 and 1999, more specifically until 9 June 1999 when the Kumanovo Agreement was signed and the army and police began their withdrawal from the territory of Kosovo.

With the withdrawal of the military and police forces, all prisoners were taken from Kosovo prisons and transferred to prisons in Serbia proper. According to the then Minister of Justice of the Republic of Serbia, Dragoljub Janković, **2,050 persons deprived of liberty were transferred to Serbian prisons** - 176 Serbs, Montenegrins and other non-Albanians, and 1,874 Albanians. Janković claimed that all detainees had to be temporarily relocated from Kosovo to prisons in Serbia for their own safety and for the sake of the safety of the staff working at these institutions.¹

8

The transfer of detainees ran alongside the transfer of cases to courts in Serbia. Initially, the Supreme Court of Serbia delegated these cases to courts in Serbia by issuing a decision on delegation for each individual case, always with the same explanation: the conditions did not exist in Kosovo for unhindered conduct of trials. Later on, the Ministry of Justice issued a decision specifying the pattern in which the cases transferred from Kosovo would be distributed among Serbian courts, according to which the District Court in Niš would take over the cases of the District Court in Prishtinë/Prishtina, the District Court in Leskovac would take over the cases of the District Court in Pejë/Peć, the District Court in Požarevac would take over the cases of the District Court in Prizren, the District Court in Kraljevo would take over the cases of the District Court in Mitrovicë/Kosovska Mitrovica, and the District Court in Vranje would hear the cases of the District Court in Gjilan/Gnjilan.²

The criminal cases transferred from Kosovo were heard by Serb judges from Kosovo, but also by judges from Serbia who had been previously transferred to Kosovo to help their colleagues with the caseload.

Even though the United Nations Interim Administration in Kosovo (UNMIK), having taken over all administrative functions in Kosovo, re-established district courts in the same towns where they had been before the war, the

1 Statement of Dragoljub Janković, Minister of Justice of the Republic of Serbia, 17 November 1999, available (in Serbian) at <http://arhiva.glas-javnosti.rs/arhiva/1999/11/18/srpski/P99111715.shtml>

2 Fahri Musliu, "Montirani procesi protiv kosovskih Albanaca (1999 – 2001)" [Show Trials of Kosovo Albanians (1999 – 2001)], /2007/ Helsinki Committee for Human Rights in Serbia, Belgrade, pp. 436-437.

Kosovo courts relocated to Serbia continued to hear the cases that had been transferred to Serbia alongside the transfer of prisoners.

The period 1998-2000 saw an enormous number of political trials of Kosovo Albanians before district courts in Serbia. The trials were monitored by civil society organisations, some of which hired lawyers to secure adequate legal assistance for the defendants. The Humanitarian Law Center (HLC) was actively involved in these efforts, by monitoring trials and hiring lawyers to protect the interests of the defendants.

The passing of the Amnesty Law³ promulgated by the then President of the Federal Republic of Yugoslavia (FRY) with the decree of 26 February 2001, brought an end to the proceedings against Kosovo Albanians. The law, inter alia, granted amnesty to all persons who had committed or were suspected on reasonable grounds of having committed the following criminal offences laid down in the Criminal Code of the FRY: preventing fighting against the enemy, under Article 118; armed rebellion, under Article 124; incitement to violent overthrow of the constitutional order, under Article 133; association for the purpose of conducting hostile activities, under Article 136; and damaging the reputation of the FRY, under Article 157. The amnesty provided for a bar to further prosecution, release from prison, and removal of convictions from the official records. The criminal act of terrorism was not covered by the amnesty, as a result of which it can still be prosecuted.⁴

The next Amnesty Law,⁵ promulgated on 2 July 2002, granted amnesty to Yugoslav nationals who had committed or were suspected on reasonable grounds of having committed the following criminal acts **in the territory of the municipalities of Preševo, Medveđa and Bujanovac** (Southern Serbia) between 1 January 1991 and 31 May 2001: terrorism under Article 125 (compare with the 2001 Amnesty Law) or the criminal act of association

3 Official Gazette of the FRY No. 9/01.

4 See, e.g., HLC press release, "Judgment in *Cobras* Case Delivered", 18 February 2016, available at <http://www.hlc-rdc.org/?p=31236&lang=de>; Gordana Andrić, "Kosovo Police Director Denies Serbian 'Terror' Charges", *BIRN*, 10 October 2016, available at <http://www.balkaninsight.com/en/article/kosovo-police-director-denies-serbian-terror-charges-10-10-2016>, accessed on 11 May 2017.

5 Official Gazette of the FRY no. 37/02.

for the purpose of conducting hostile activities under Article 136 of the CCY. The amnesty also entailed immunity from any further criminal prosecution and an immediate release from prison.

At the time it began drafting this report, the HLC possessed in its archive 140 indictments filed against Kosovo Albanians across Serbia, 97 judgments of courts of the first instance, 40 appeals lodged by defence lawyers against judgments issued by courts of the first instance, 40 judgments on appeal issued by the then-existing Supreme Court of Serbia, and four decisions of the Federal Court on requests for extraordinary reviews of final judgments.

The HLC made a number of requests for access to information of public interest to the Higher Courts in Serbia, which now hold the archives of the former district courts which heard these cases. Also, one such request was made to the Ministry of Defence, which houses the archives of former military courts and military prosecutor's offices. The Higher Courts in Kraljevo, Prokuplje, Niš, Zaječar and Leskovac allowed HLC representatives to scan all case files relating to those proceedings held in their archives, and these case files were used as a source of information for the present report. In this way, **more than 10,000 pages of court records were collected to be analysed in this report.**

The report examines in detail numerous infringements of fundamental human rights that took place in the course of the proceedings, the way prosecutors and judges handled these cases, the failure to investigate allegations made by defendants that torture and inhumane treatment was used against them during preliminary proceedings to extract confessions from them, the denial of the defendants' right to be given adequate time and facilities to prepare a defence, right to the assistance of an interpreter, right to be served with a judgment in writing within the time limit prescribed by law, and right to present evidence and have their evidence examined in accordance with law, along with other violations, which all **amounted to gross violations of the right to a fair trial as guaranteed by the domestic and international regulations which were in force at the time.**

In addition to documenting the violations of these guaranteed rights, this report also points to the fact that the **great majority of the judges and prosecutors who handled these cases still hold judicial offices.** Some remained in their jobs, many were promoted and serve among the highest-ranking judges or prosecutors, and some continued to work for various state agencies or became lawyers.

Introduction

The right to a fair trial is one of the basic human rights which is fundamental to the rule of law and a democratic society, but also to other freedoms and rights of citizens. This fundamental human right was (and still is) guaranteed by both the domestic legislation and international treaties to which Yugoslavia is a signatory. Denial of the right to a fair trial has provided grounds for holding the state accountable and, under certain conditions, for the criminal responsibility of individuals for unlawful and unconscientious conduct in the exercise of public functions.⁶

In principle, the right to a fair trial guarantees certain rights to the defendant in criminal proceedings throughout the course of proceedings, including the preliminary proceedings. A defendant *de facto* enjoys protection from the moment he is informed that he is suspected of having committed an offence. This protection applies also to questioning by the police of persons who have not yet formally become suspects.

When a trial is examined in terms of fairness, the proceedings are examined taken as whole, to ascertain whether the basic principles of fairness have been complied with, that is, whether the defendant has been given adequate opportunities to present his defence at all stages of the proceedings. The adequate defence standard implies in essence allowing a defendant to use all the means guaranteed by the Constitution, international treaties and applicable laws, which means must be practical and effective, and not only existing on paper.

It is incumbent upon courts to ensure that the right to a fair trial is respected in criminal proceedings by conducting those proceedings in accordance

6 Offences relating to misconduct in public office, See: Chapter XIX of the Criminal Code of the FRY, Official Gazette of the SFRY, nos. 44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90-1217, 45/90-1340, and 54/90-1773; Official Gazette of the FRY, nos. 35/92-651, 37/93-816, and 24/94-273; Chapter XXI of the Criminal Code of the Republic of Serbia, Official Gazette of the RS, nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89, and 21/90, Official Gazette of the RS, nos. 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/2002, 11/2002, 80/2002, 39/2003, and 67/2003.

with the relevant constitutional and legal norms. But other state authorities authorized to exercise public functions (such as the police) are also under a duty to ensure, within the scope of their competencies, that all suspects or persons placed in detention enjoy all those rights as guaranteed to them by regulations in force.

Domestic criminal legislation, that of the FRY and of Serbia alike, included the category of offences committed by persons acting in their official capacity, and stipulated punishments for those found to have acted unlawfully or in excess of their authority in the performance of their official duties. Both the Federal and Republic Criminal Codes stipulated two offences which are both of particular interest to this report – **Violations of the law by judges** (Article 181 of the CCY and Article 243 of the CC of Serbia) and **Unconscientious discharge of function** (Article 182 of the CCY and Article 245 of the CC of Serbia). Despite being different in terms of their essential elements, what both offences have in common is that they result either in personal gain for oneself or another, or inflicting injury to another, or violation of a right, or violation of law or rendering an unlawful act.

14

In order for a judge or other person exercising official duties to be held criminally responsible for a violation of the law, or unconscientious performance of duties, the degree of violation of the right to a fair trial must be such as to constitute a “gross” violation. A gross violation occurs, in a nutshell, when proceedings conducted by a judge or other government body are fundamentally deficient, to the point of violating the basic rules of a fair trial.

The purpose of this report is to inform the public of the facts surrounding the proceedings conducted against Kosovo Albanians in the period 1998-2000, the roles of the judges and prosecutors in the proceedings, the extent of their responsibility for the way these cases were handled, and the posts they currently hold within Serbia’s judicial system.

The information presented in the report is based on the following sources: case files pertaining to the criminal proceedings conducted against Kosovo Albanians by Kosovo district courts relocated to Serbia, or by the courts

that were given the jurisdiction to hear these cases by the Supreme Court of Serbia's decision on the delegation of cases; media reports; and the information obtained from various sources on the basis of freedom of information requests.

Socio-political context and historical background

The Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija were established in 1945 by a decision of the National Assembly of the Republic of Serbia "on the basis of the expressed will of the population of these provinces". This phrasing was incorporated also into the text of the Constitution of the Socialist Federative Republic of Yugoslavia (SFRY) enacted on 7 April 1963.⁷

15

19 amendments had been added to the 1963 SFRY Constitution by 1971. On 21 February 1974, a new constitution of the SFRY was enacted.⁸ The most significant feature of the 1974 Constitution was that it accorded to the Autonomous Provinces of Vojvodina and of Kosovo and Metohija a status almost equal to that of the constituent republics. Each province was allowed to have its own national bank, its representative in the Presidency of the SFRY, its own People's Assembly, its own education and judicial system, and its own police force.

Several days following the enactment of the 1974 SFRY Constitution, a new constitution of the Republic of Serbia was enacted,⁹ soon to be amended, first by amendments I – VIII,¹⁰ and later by amendments IX - XLIX¹¹. The purpose of the amendments was to give Serbia greater control over the

7 Article 111, paragraph 3 of the Constitution of the Socialist Federative Republic of Yugoslavia, Official Gazette of the SFRY no. 14, 10 April 1963.

8 Official Gazette of the SFRY no. 9, 21 February 1974.

9 Official Gazette of the SRS no. 8, 25 February 1974.

10 Official Gazette of the SRS no. 41, 18 July 1981.

11 Official Gazette of the SRS no. 11, 18 July 1989.

provinces by reducing their autonomous powers. Finally, **the Constitution of the Republic of Serbia enacted in 1990¹² stripped the provinces of “constituent part of the federation” status they had acquired under the 1974 SFRY constitution.**

The revocation of Kosovo’s autonomy by the amendments of 1989 and the new Serbian constitution of 1990, triggered protests and civil unrest, leading to street violence in Kosovo.¹³ In June 1991, the Serbian Assembly issued a decision to remove a number of professors and officials at the University of Prishtinë/Priština and replaced them with non-Albanians. The University’s assembly and several departments’ councils were dissolved and replaced by provisional organs composed predominantly of Serbs.¹⁴

16

The Albanian population put up a nonviolent passive resistance until 1996, boycotting elections staged by the Republic of Serbia and refusing to take part in the government and political hierarchy, and creating instead a parallel system, including a separate school and health care system.¹⁵

This situation continued until 1996, when the Kosovo Liberation Army (KLA) appeared on the stage, putting up armed resistance and attacking the Serbian police.¹⁶ The attacks on police and civilians continued into 1997 and, on a more massive scale, in 1998. As a result, the VJ and MUP from the spring of 1998, and with increased intensity from the summer to October 1998, engaged in operations against the KLA, especially near the Albanian border and in central Kosovo.¹⁷ In 1998, the MUP and VJ began attacking Albanian villages, which resulted in the displacement of people, destruction of property and deaths of many civilians. The MUP and VJ operation directed against the KLA had the characteristics of an ethnic cleansing of ethnic Albanians from Kosovo.¹⁸

12 Official Gazette of the RS no. 1, 28 September 1990.

13 ICTY trial judgment in *Šainović et al*, 26 February 2009, Vol. I of 4, paras. 220-222.

14 Ibid, para. 225.

15 Ibid, para. 226.

16 Ibid, paras. 793 and 797.

17 Ibid, para. 920.

18 Ibid.

The VJ and Serbian MUP operations in Kosovo triggered the NATO bombing of the Federal Republic of Yugoslavia, which commenced on 24 March 1999 and lasted until 11 June 1999. After the 78-day bombing campaign, the Serbian police and army pulled out of Kosovo. At the same time, about 100,000 Serbs¹⁹ left Kosovo and about 750,000 deported Kosovo Albanians²⁰ were able to return to their homes.

The conclusion of the Kumanovo Agreement,²¹ on 9 June 1999, brought an end to the war in Kosovo. The agreement stipulated the deployment under UN auspices of the international security force (KFOR) into Kosovo. The UN Security Council Resolution no. 1244 established the United Nations Interim Administration Mission in Kosovo (UNMIK),²² which is responsible, among other things, for the administration of the police and judiciary.

Serbia's justice system

The Constitution of the Republic of Serbia of 1990 provided that the organisation, establishment, jurisdiction and composition of courts, and procedure in the courts, be regulated by a separate law.²³

This law was the Law on Courts,²⁴ adopted in 1991 and amended in 1991 and 1992. Under this Law, two types of courts were established in Serbia: courts of general jurisdiction (municipal and district courts and the Supreme Court of Serbia) and commercial courts (commercial courts of the first instance

19 UNHCR data, available at <http://www.unhcr.org/news/updates/1999/7/3ae6b80ef/kosovo-crisis-update.html?query=Kosovo%20Crisis%20Update>, accessed on 16 May 2017.

20 UNHCR data, available at <http://www.unhcr.org/news/updates/1999/8/3ae6b80f30/kosovo-crisis-update.html>, accessed on 16 May 2017.

21 Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, available at <http://www.srbija.gov.rs/kosovo-metohija/?id=19947>, accessed on 16 May 2017.

22 United Nations Interim Administration in Kosovo (UNMIK), available at <http://www.unmikonline.org/pages/default.aspx>, accessed on 16 May 2017.

23 Article 102, paragraph 1 of the Constitution of the Republic of Serbia, Official Gazette of the RS, no. 1, 28 September 1990.

24 Official Gazette of the RS, nos. 46/91, 60/91, 18/92 and 71/92.

and the Higher Commercial Court).²⁵ In the territory of the Republic of Serbia (including its autonomous provinces), 138 municipal courts²⁶ and 30 district courts were established.²⁷ These included **five district courts in Kosovo** – the District Court in Pejë/Peć (established for the territory of the municipal courts in Pejë/Peć, Istog/Istok, Klinë/Klina and Gjakovë/Đakovica), the District Court in Prizren (established for the territory of the municipal courts in Dragash/Dragaš, Rahovec/Orahovac, Prizren and Suharekë/Suva Reka), the District Court in Prishtinë/Priština (established for the territory of the municipal courts in Lipjan/Lipljan, Prishtinë/Priština and Ferizaj/Uroševac), the District Court in Gjiilan/Gnjilan (established for the territory of the municipal courts in Viti/Vitina, Gjiilan/Gnjilan and Kamenicë/Kosovska Kamenica) and the District Court in Mitrovicë/Kosovska Mitrovica (established for the territory of the municipal courts in Vushtrri/Vučitrn, Mitrovicë/Kosovska Mitrovica and Leposaviq/Leposavić).

18

The district courts, among other things, had jurisdiction to hear in the first instance criminal offences punishable by a term of imprisonment exceeding 10 years or by the death penalty, and also certain other offences,²⁸ including the offences which are most relevant to the subject of this report, notably: incitement to violent overthrow of the constitutional order, threatening the territorial integrity of the state, and association for the purpose of conducting hostile activities.²⁹

25 Article 8 of the Law on Courts, Official Gazette of the RS, nos. 46/91, 60/91, 18/92 and 71/92.

26 Ibid, Article 18.

27 Ibid, Article 21.

28 Disclosure of a state secret; inciting ethnic, racial and religious hatred or intolerance; conspiracy to commit genocide and war crimes and incitement to commit genocide and war crimes; damaging the reputation of the government or an international organization; violation of equality in the performance of an economic activity, creating a monopoly and causing market disturbances, unfair competition in foreign trade; violation of the law by a judge; disclosure of classified information; jeopardizing the safety of an aircraft in flight; illegal production and trade of narcotics and facilitating the taking of narcotics; attack on a law enforcement officer on duty; manslaughter; incitement to suicide and aid in the commission of suicide; rape; and taking bribes.

29 Article 14 of the Law on Courts, Official Gazette of the RS, nos. 46/91, 60/91, 18/92 and 71/92.

The Supreme Court of Serbia was the court competent to review on appeal the decisions of district courts and to decide on extraordinary remedies after final judgments.³⁰

The Constitution of the Federal Republic of Yugoslavia of 1992 gave the Federal Court jurisdiction to decide in the final instance, if a federal law so stipulates, on extraordinary remedies filed against decisions of the courts of the FRY's constituent republics in matters governed by federal laws.³¹

As regards public prosecutor's offices, the 1992 Constitution stipulated that their establishment, organisation and jurisdiction would be regulated by a separate law.³²

The Public Prosecution Service in Serbia is regulated by the Law on the Public Prosecution Service³³ passed in 1991. Public prosecutor's offices were established for the territories of courts of corresponding instance,³⁴ and so in the territory of the Republic of Serbia (including autonomous provinces) there were 109 municipal public prosecutor's offices³⁵ and 30 district public prosecutor's offices.³⁶ Of these, **six district public prosecutor's offices were established in Kosovo** – the District Public Prosecutor's Office in Pejë/Peć (for the territory of the District Court in Pejë/Peć), District Public Prosecutor's Office in Prizren (for the territory of the District Court in Prizren), District Public Prosecutor's Office in Prishtinë/Priština (for the territory of the District Court in Prishtinë/Priština), District Public Prosecutor's Office in Gjiilan/Gnjilan (for the territory of the District Court in Gjiilan/Gnjilan), and District Public Prosecutor's Office in Mitrovicë/Kosovska Mitrovica (for the territory of the District Court in Mitrovicë/Kosovska Mitrovica).

30 Ibid, Article 17.

31 Article 108 of the Constitution of the Federal Republic of Yugoslavia, Official Gazette of the FRY, no. 1, 5 January 1992.

32 Article 104 of the Constitution of the Republic of Serbia, Official Gazette of the RS, no. 1, 28 September 1990.

33 Official Gazette of the RS, nos. 43/91 and 71/92.

34 Article 19 of the Law on Public Prosecution Service, Official Gazette of the RS, no. 43/91, 71/92.

35 Ibid, Article 21.

36 Ibid, Article 22.

As regards their jurisdiction, municipal public prosecutor's offices acted before municipal courts, district public prosecutor's offices acted before district courts, and the Republic Public Prosecutor's Office acted before the Supreme Court of Serbia, in matters that according to the law fall under the jurisdiction of these courts.³⁷

When it came to hierarchy, a higher public prosecutor had the right, but also the duty, to issue binding instructions to a lower public prosecutor on how to proceed in a case. Besides this, a more senior prosecutor could: undertake certain actions that fall within the remit of a lower prosecutor; and authorize a lower public prosecutor to proceed in a case which falls within the remit of another lower public prosecutor. Also, a higher public prosecutor was allowed to assume criminal prosecution and in exercising this power to: undertake all necessary actions to uncover crimes and identify the perpetrators in order to direct preliminary criminal proceedings; request an investigation; file charges and submit motions to indict with the competent courts and represent the prosecution; appeal against non-final court decisions and drop previously lodged appeals.³⁸

Position of judges and prosecutors in Serbia's justice system

The 1990 Constitution of the Republic of Serbia laid down the separation of powers, whereby powers were divided among the legislative, judicial and executive branches.³⁹ Judges of the Constitutional Court, Supreme Court and other courts were elected and dismissed by the National Assembly of the Republic of Serbia.⁴⁰

As provided for by the Constitution, courts of law are autonomous and

37 Ibid, Article 24.

38 Ibid, Article 17.

39 Article 9 of the Constitution of the Republic of Serbia, Official Gazette of the RS, no. 1, 28 September 1990.

40 Ibid, Article 73.

independent in their work and adjudicate on the basis of the Constitution, laws and other acts. No judge could be called to account for an opinion expressed in the passing of a judgment or detained without the approval of the National Assembly, in proceedings instituted on the grounds of a criminal offence s/he had committed in the exercise of his or her judicial function.⁴¹

The Constitution also guaranteed life tenure for judges, whose term of office could not terminate unless at their own request or if they had reached the age of mandatory retirement. No judge could be removed from office against their will, except: if given a non-suspendable prison sentence of not less than six months or convicted of an offence which made him unfit to continue to hold judicial office, or if he had carried out his judicial functions unprofessionally and unconscientiously. The Supreme Court was responsible for determining, in accordance with law, whether grounds existed for dismissal of a judge, and informing the National Assembly accordingly. Also, no judge could be transferred to another post against his will.⁴²

21

The Law on Courts set forth the position of the judicial authorities, and the rights, duties and responsibilities of judges.⁴³

As regards public prosecutors, the 1990 Constitution stipulated that the National Assembly of the Republic of Serbia would appoint and remove from office the Republic's Public Prosecutor, public prosecutors and deputy public prosecutors.⁴⁴

Unlike courts, public prosecutor's offices were defined in the Constitution as autonomous, but not independent, government authorities, whose responsibilities included the prosecution of perpetrators of criminal offences and other punishable acts specified by law, and filing requests for the protection of legality and constitutionality. Public prosecutor's offices were required to discharge their functions in accordance with the Constitution and the laws. A public prosecutor could not be called to account for an

41 Ibid, Article 96.

42 Ibid, Article 101.

43 Law on Courts, Official Gazette of the RS, nos. 46/91, 60/91, 18/92 and 71/92.

44 Article 73 of the Constitution of the Republic of Serbia, Official Gazette of the RS, no. 1, 28 September 1990.

opinion expressed in performing his prosecutorial function, nor could he be detained without the approval of the National Assembly in proceedings instituted on account of a criminal offence he committed in the exercise of his prosecutorial function.⁴⁵

The 1990 Constitution guaranteed life tenure for prosecutors, which could not be terminated without the prosecutor's consent; nor could a prosecutor be removed from office against his will, except in the cases as specified above for judges, in the manner prescribed by the law.⁴⁶

The Law on the Public Prosecution Service set forth the position, rights, duties and responsibilities of public prosecutors and deputy public prosecutors.⁴⁷

22

Relevant law

This chapter presents the domestic and international regulations in force at the time the Kosovo Albanians were on trial. Direct enforcement of these regulations was mandatory for judges, prosecutors and the Serbian MUP. A separate section of the chapter is dedicated to the rights of the accused at different stages of criminal proceedings, from arrest to judgment.

International law

International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was ratified by the Assembly of the Socialist Federative Republic of Yugoslavia (SFRY) and became law on 30 January 1971.⁴⁸

In addition to imposing the obligation on a state to respect and guarantee

45 Ibid, Article 103.

46 Ibid, Article 106.

47 Law on Public Prosecution Service, Official Gazette of the RS, nos. 43/91 and 71/92.

48 Decree Promulgating the Law on the Ratification of the International Covenant on Civil and Political Rights, Official Gazette of the SFRY no. 7/71.

to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinctions as to race, colour, sex, language, religion, political or other opinions, national or social origins, property, birth or other status, the Covenant also imposes a “positive obligation” on States Parties to take the necessary steps, in accordance with constitutional processes and the provisions of the Covenant, to adopt such laws or other measures as are necessary to give domestic effect to the rights recognized in the Covenant not yet in effect.⁴⁹

This international treaty specifically prohibits torture or cruel, inhumane or degrading treatment or punishment,⁵⁰ arbitrary arrest or detention,⁵¹ inhumane treatment of persons deprived of their liberty or disrespect for their dignity,⁵² and their unequal treatment before the courts.⁵³

The ICCPR lays down that States Parties must inform all persons who are arrested, at the time of arrest, of the reasons for their arrest, and inform them promptly, in writing, of any charges against them. Anyone arrested or held on remand on a criminal charge must be brought promptly before a judge or other authority authorized by law to exercise judicial power, and must be tried within a reasonable time or released. Also, anyone who is deprived of his liberty by arrest or detention in custody must be allowed to issue court proceedings, in order that the court may decide without delay on the lawfulness of his detention, and order his release if the detention is not lawful. Anyone who has been unlawfully arrested or detained in custody is entitled to compensation.⁵⁴

Also, the ICCPR prohibits any discrimination in judicial proceedings. All persons are entitled to have their case tried fairly and publicly before a competent, independent and impartial court, established by law, to decide on the merits of any criminal charges against them or on denial of their civil rights and obligations. All persons who are charged with a criminal

49 Ibid, Article 2.

50 Ibid, Article 7.

51 Ibid, Article 9.

52 Ibid, Article 10.

53 Ibid, Article 14.

54 Ibid, Article 9.

offence are entitled to the following minimum guarantees, in full equality: to be informed promptly and in detail, in a language which they understand, of the nature and cause of the charge against them; to be given adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing; to be tried without undue delay; to be tried in their presence, and to defend themselves in person or through counsel of their own choosing; to be informed, if they do not have counsel, of their right to have counsel and, in any cases where the interests of justice so require, to have court-appointed counsel free of charge, if they cannot afford to pay for one; to examine, or have examined, the witnesses against them, and to obtain the attendance and examination of witnesses for the defence under the same conditions as witnesses against; to have the free assistance of an interpreter if they cannot understand or speak the language in which the trial is conducted; and not to be compelled to testify against themselves or to confess guilt. In addition to the above, anyone who has been convicted is entitled to have his conviction and judgment reviewed by a higher court, according to the law, and, if the final judgment passed on has been subsequently reversed or if the person has been pardoned on account of a newly discovered fact which shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it has been proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.⁵⁵

The Republic of Serbia and the Federal Republic of Yugoslavia incorporated these rights into their respective Constitutions of 1990 and 1992.

Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment

The Socialist Federative Republic of Yugoslavia ratified the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment and Punishment, on 20 June 1991.⁵⁶

55 Ibid, Article 14.

56 Official Gazette of the SFRY no. 9/91.

The Convention provides for an absolute prohibition against torture and other inhumane treatment, with no exceptions. Its States Parties undertook to ensure that all acts of torture (including attempts to commit torture) are criminalised under their respective national laws.⁵⁷

In addition to prohibiting torture and other inhumane treatment, the Convention imposed several “positive obligations” on the States Parties:

1. Each State Party shall ensure that information regarding the prohibition against torture is fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to arrest, detention or imprisonment; each State Party must include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.⁵⁸
2. Each State Party shall ensure that its competent authorities conduct a prompt and impartial investigation, wherever there are reasonable grounds to believe that an act of torture has been committed in any territory under its jurisdiction.⁵⁹
3. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.⁶⁰
4. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and

57 Article 4 of the Law on the Ratification of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Official Gazette of the SFRY no. 9/91.

58 Ibid, Article 10.

59 Ibid, Article 12.

60 Ibid, Article 13.

adequate compensation, including the means for as full a rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. This article shall not affect any other right of the victim or other persons to compensation which may exist under national law.⁶¹

5. Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.⁶²

As it had done with the International Covenant on Civil and Political Rights, the Federal Republic of Yugoslavia also incorporated the provisions of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment of Punishment, almost in their entirety, into its 1992 Constitution.

26

International Convention on the Suppression and Punishment of the Crime of Apartheid

The Socialist Federative Republic of Yugoslavia ratified on 12 March 1975 the Convention on the Suppression and Punishment of the Crime of Apartheid.⁶³

The States Parties to the Convention have agreed that apartheid is a crime against humanity and that inhumane acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in Article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security, and that the States Parties to the Convention declare criminal those institutions, organizations and individuals who commit the crime of apartheid.⁶⁴

61 Ibid, Article 14.

62 Ibid, Article 15.

63 Official Gazette of the SFRY no. 14/75.

64 Article I of the International Convention on the Suppression and Punishment of the Crime of Apartheid, Official Gazette of the SFRY no. 14/75.

For the purpose of the Convention, the term “crime of apartheid” is used as applying to the following inhumane acts committed for the purpose of establishing and maintaining domination of one racial group of persons over any other racial group of persons and systematically oppressing them:

Article II:

Denial to a member or members of a racial group or groups of the right to life or liberty of a person:

- a) by murder of members of a racial group or groups;
- b) by the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or inhumane, cruel or degrading treatment or punishment;
- c) by the arbitrary arrest and illegal imprisonment of the members of a racial group or groups.

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The States Parties have also agreed that those individuals, members of organizations and institutions or representatives of the State, whether residing in the territory of the state in which the acts are perpetrated or in some other state, be held accountable under international law, irrespective of their motives, whenever they: (1) commit, participate in, directly incite or conspire in the commission of the acts referred to in Article II of the Convention; (2) directly abet, encourage or cooperate in the commission of the crime of apartheid.⁶⁵

International Convention on the Elimination of All Forms of Racial Discrimination

The Socialist Federative Republic of Yugoslavia ratified the Convention on the Elimination of All Forms of Racial Discrimination in 1967.⁶⁶

65 Ibid, Article 3.

66 Official Gazette of the SFRY no. 6/67.

The term “racial discrimination” as used in the Convention applies to any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁶⁷

The States Parties to the Convention have undertaken, inter alia: to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races; to engage in no act or practice of racial discrimination against persons, groups of persons or institutions; to ensure that all public authorities and public institutions, national and local, act in conformity with this obligation; and not to sponsor, defend or support racial discrimination by any persons or organizations.⁶⁸

The Convention on the Elimination of All Forms of Racial Discrimination has laid particular emphasis on racial segregation and apartheid, and the States Parties have undertaken in particular to prevent, prohibit and eliminate all discriminatory practices in the territories under their jurisdiction.⁶⁹

Finally, the States Parties have undertaken to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: the right to equal treatment before the tribunals and all other organs administering justice; the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; political rights, notably the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government

67 Article 1, paragraph 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, Official Gazette of the SFRY no. 6/67.

68 Ibid, Article 2.

69 Ibid, Article 3.

as well as in the conduct of public affairs at any level, and to have equal access to public service.⁷⁰

National law

Constitution of the Republic of Serbia of 1990

The Constitution defined Serbia as a democratic state of all citizens living in it, founded on the freedoms and rights of man and citizen, the rule of law and social justice,⁷¹ and guaranteed the individual, political, national, economic, social, cultural and other rights of man and of the citizen.⁷²

The Constitution guaranteed a number of rights, of which the following are most relevant to the present report: the right of citizens to have equal protection before the state authorities irrespective of their race, sex, birth, language, nationality, religion, political or other opinion, level of education, social origin, property, or any other personal characteristic; the right to life; the right to liberty; the right to freedom of movement and residence; the right to human dignity and a private life; the right to an effective remedy; the right to defence; and the prohibition of torture and degrading punishment or treatment.⁷³

70 Ibid, Article 5.

71 Article 1 of the Constitution of the Republic of Serbia, Official Gazette of the RS, no. 1, 28 September 1990.

72 Ibid, Article 3.

73 Other rights guaranteed by the Constitution: the right of citizens to have equal protection before the state authorities irrespective of their race, sex, birth, language, nationality, religion, political or other opinion, level of education, social origin, property, or any other personal characteristic; the right to life; the right to liberty; the right to freedom of movement and residence; the right to human dignity and a private life; the inviolability of privacy of correspondence and other forms of communication; the inviolability of the homes of citizens; the right to effective remedy; no punishment without the law; the right to defence; the right to compensation for unlawful or wrong conduct of a government authority; freedom from torture and degrading punishment and treatment; protection of family, health and environment; access to education (for members of other ethnic groups in their mother tongue); the right to own property, the right to work; freedom of religion; freedom of assembly and association; freedom of thought, conscience and public expression of opinion; freedom of the press; prohibition of deprivation of nationality; freedom to criticize public government and other authorities, and freedom to publicly express one's ethnicity and culture and to use one's own mother tongue and script.

The provisions relating to the imposition of pre-trial detention for persons who are reasonably suspected of having committed a criminal offence, and the length of such detention, are of particular relevance here. According to the 1990 Constitution of Serbia, a person reasonably suspected of having committed a criminal offence may be detained or held in custody by a decision of a competent court only when this is deemed strictly necessary for the unhindered conduct of criminal proceedings or to protect the safety of people. Pre-trial detention was envisaged to be used only for the shortest time necessary. The length of pre-trial detention ordered by a court of first instance could not exceed three months from the day of arrest. It could be extended to a further three months by a decision of the Supreme Court. If no charges were raised against him or her upon the expiry of this period of time, the defendant had to be released.⁷⁴

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Constitution of the Federal Republic of Yugoslavia

The 1992 Constitution of the Federal Republic of Yugoslavia (FRY) stipulated that international treaties were a constituent part of the internal legal order of the FRY and that the FRY undertook to fulfil the obligations arising from the international treaties to which it was a contracting party.⁷⁵

In common with the 1990 Constitution of the Republic of Serbia, the Constitution of the FRY in Chapter II dealt with the freedoms, rights and duties of citizens, laying them down in almost identical terms to those of the Serbian Constitution.⁷⁶

It is important to note that several provisions of the FRY Constitution regulated certain fundamental human rights much more closely than the Serbian Constitution. For example, when it comes to constitutional guarantees of the right to liberty, in addition to the express definition stating that no one may be deprived of his liberty, except on such grounds and

74 Article 16 of the Constitution of the Republic of Serbia, Official Gazette of the RS, no. 1, 28 September 1990.

75 Article 16 of the Constitution of the Federal Republic of Yugoslavia, Official Gazette of the FRY, no. 1, 5 January 1992.

76 Ibid, Articles 19-68.

in accordance with such procedures as were established by federal law, the FRY Constitution introduced a new obligation for state authorities: to inform all persons who were deprived of their liberty promptly and in their own language or in a language which they could understand, of the reasons for their arrest, and to inform their next of kin of their arrest if the arrested persons so required. In addition to this, a state authority was required to inform all arrested persons of their right to remain silent and to have counsel of their own choosing. Unlawful arrests were made punishable.⁷⁷

The Constitution further provided that a person reasonably suspected of having committed a criminal offence could be remanded in custody by a decision of a competent court only when this was deemed strictly necessary for unhindered conduct of criminal proceedings. Also, a person who was remanded in custody was entitled to be provided with a reasoned explanation for his arrest at the time of arrest or not later than within 24 hours of being arrested, and had the right to appeal against the detention order and to have his appeal decided upon by a court within 48 hours. As regards the length of detention, the Constitution required it to be as short as possible by stipulating that the detention ordered by a court of first instance could not exceed three months from the day of arrest, extendable to a further three months by a decision of a higher court. If by the expiry of this time limit charges had not been brought, the defendant had to be released.⁷⁸

The Constitution of the FRY prohibited torture, degrading punishment and treatment, while guaranteeing respect for the human personality and dignity in criminal and all other proceedings in the event of deprivation or restriction of liberty and during the serving of a prison sentence. It prohibited and made punishable any acts of violence against persons who had been deprived of their liberty or whose liberty was restricted, and any extraction of confession and other statements under duress.⁷⁹

77 Ibid, Article 23.

78 Ibid, Article 24.

79 Ibid, Article 25.

Criminal Procedure Code

The provisions of the Criminal Procedure Code (CPC)⁸⁰ set forth the rights guaranteed by the Constitutions of Serbia and FRY and the international treaties the FRY had ratified, as well as the rights, duties and responsibilities of courts, prosecutors and defendants in criminal proceedings.

Already in Chapter I, Part I of the CPC, the basic principles of criminal proceedings were defined, including those which are of particular relevance for this report, such as the presumption of innocence (Article 3), the right of uneducated persons to be advised on their rights, the prohibition of violence and extraction of confessions or statements under duress in the criminal proceedings (Article 10), the defendant's right to a defence (Article 11), the right to compensation for unjustified deprivation of liberty (Article 12), the inquisitorial (non-adversarial) principle and the principle of material truth (Article 15).

A. Presumption of innocence

The CPC lays down the rule which stipulates that the defendant's position in criminal proceedings is such that the burden of proof lies with the other side, be it a private or public prosecutor. Depending on the act a defendant is charged with, it was the prosecutor who had to prove beyond reasonable doubt that the defendant had committed a specific act. Therefore, no opinion of a court regarding the commission of a criminal act by the defendant could rely solely on assumptions or indications.

B. Right to defence

A defendant was entitled to have a lawyer throughout the whole criminal proceedings. Professional defence was mandatory in certain situations and stages of the proceedings, namely: (1) if the defendant was unable to speak or hear, or was incapable of defending himself on his or her own or if he stood

80 Official Gazette of the SFRY no. 4/77, 14/85, 26/86, 74/87, 57/89, 3/90, *Službeni list SRJ* br. 27/92, 24/94, 21/99, 44/99, 71/2000, 13/2001.

trial for an offence punishable by the death penalty; (II) if the defendant was charged with an offence carrying a term of imprisonment of 10 or more years; and (III) if the defendant was tried in absentia. A defendant might have defence counsel of his or her own choosing or have defence counsel assigned to him by the judge presiding over the trial (defence counsel may be a person other than a professional attorney, provided that he or she has a LLB degree and is capable of assisting the defendant with his defence).⁸¹

If a defendant held in custody had already been questioned, his lawyer was allowed to communicate with him through exchange of letters or orally, with the investigating judge having the right to view the letters before they were delivered to the lawyer or the defendant, or to order that the defendant only could talk to his lawyer in the presence of a certain officer. After the completion of the investigation or after charges filed without an investigation, the defendant could not be prohibited from communicating freely and without supervision, in writing and orally, with his lawyer.⁸²

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Defence lawyers were given the right to be present during the questioning of their clients, crime scene investigation, examination of expert witnesses and search of a client's home. The investigating judge was bound to inform in a convenient way both the defendant and his lawyer when and where the investigative actions at which their presence was allowed would take place, except where there was a danger in delay.⁸³

C. The prohibition of violence and extraction of confession and other statements under duress

Already during the first interrogation of a defendant, the authority conducting the proceedings had to inform the defendant of the accusations against him and on what basis he was suspected of having committed an offence, and to advise him of his right to remain silent and not answer any questions.⁸⁴ The CPC expressly states that no force, threats or any other similar means could

81 Article 70 of the Criminal Procedure Code.

82 Ibid, Article 74.

83 Ibid, Article 168.

84 Ibid, Article 218.

be used against a defendant to extract a statement or confession from him,⁸⁵ as no court decision could be based upon such evidence.⁸⁶ If force has been used to extract a confession, the court was obliged to rule to exclude the record of such a confession or statement from the case file.⁸⁷

If a defendant retracted his confession, he would be invited to explain why he had made differing statements and why he had retracted his confession.⁸⁸ Regardless of whether or not the accused has confessed, the authority conducting proceedings had a duty to collect other evidence, unless the confession was clear and complete and supported by other evidence, in which case further evidence could be only collected at the proposal of the prosecutor.⁸⁹

D. Ordering detention and treatment of persons held in custody

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Under the CPC, pre-trial detention was always to be ordered where there were reasonable grounds to believe that an individual had committed an offence punishable by the death penalty. For lesser offences punishable by less severe penalties (Article 42, sub-paragraph 1 of the Criminal Code of the SFRY), pre-trial detention was not mandatory.⁹⁰

A decision to order pre-trial detention was taken by the investigating judge of the competent court, and had to be delivered to the individual concerned at the time of his arrest or not later than within 24 hours following the arrest.⁹¹ The investigating judge was bound to promptly advise every individual deprived of his liberty of his right to retain a lawyer and to have his lawyer present during his questioning. Also, where necessary, the investigating judge was obliged to assist the individual to find and retain a lawyer. If within 24 hours of being informed of these rights, the individual deprived of his liberty

85 Ibid.

86 Ibid.

87 Ibid, Article 83, paragraph 1.

88 Ibid, Article 219, paragraph 2.

89 Ibid, Article 223.

90 Ibid, Article 191.

91 Ibid, Article 192.

did not secure the presence of defence counsel, the investigating judge had to question the individual immediately; if an individual deprived of his liberty stated that he refused to hire defence counsel, the investigating judge was obliged to question him within 24 hours. Where professional defence was mandatory, if within 24 hours of being advised of his right to have a lawyer an individual deprived of his liberty did not hire a lawyer or stated that he refused to have a lawyer, the court was obliged to appoint a lawyer to represent him.⁹²

A defendant could be held in pre-trial detention for up to one month from the day of arrest, by a decision of the investigating judge. Upon the expiry of this period of time, detention could be extended by up to two months by a decision of the trial chamber, and by up to three months by a decision of the Supreme Court if the proceedings concerned an offence punishable under law by more than five years' imprisonment. If upon the expiry of these time periods charges had not been brought, the court had to release the defendant.⁹³

After the charges had been submitted to the court until the completion of trial, detention could be ordered or vacated only by a ruling of the chamber. Two months from the day the last ruling on detention had become final, the chamber was bound to reassess whether the grounds for detention still existed and to rule to extend or vacate it, even if no motion to that effect had been submitted by parties.⁹⁴

Articles 201-205 of the CPC regulated treatment of persons held in pre-trial detention, specifically prohibiting all injuries to their personality and dignity. The restrictions that could be imposed on defendants were limited to those deemed necessary to prevent them from absconding and entering deals which could hamper the conduct of the proceedings. The law guaranteed detainees the right to eight hours of uninterrupted rest per day and to a walk outside for at least two hours per day, if the prison had a suitable fenced-off area. According the CPC, the court president authorized to do

92 Ibid, Article 193.

93 Ibid, Article 197.

94 Ibid, Article 199.

so (or a person designated by him) was responsible for the supervision of detainees and was bound to visit them at least once a week, and also to ask them, outside the presence of guards if he deemed it necessary, about the food they received, how their other needs were met and how they were being treated. The court president or a person designated by him was bound to take all necessary measures to correct any irregularities he found during his visits to prisons. The court president and investigating judge were allowed to visit detainees at any time, to talk to them and take their complaints.

E. The inquisitorial (non-adversarial) principle and the principle of material truth

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The CPC required an authority conducting proceedings to collect other evidence even if the defendant had already confessed, unless the confession was clear, complete and corroborated by other evidence, in which case further evidence could only be collected at the proposal of the prosecutor.⁹⁵

In addition to this, the judge presiding over the trial was obliged to ensure that the case be thoroughly examined, that the truth be found and that any actions aimed at procrastinating the proceedings without serving to clarify the facts of the case be thwarted.⁹⁶

The trial chamber was allowed to decide to examine evidence that had not been proposed or where proposal of evidence had been withdrawn.⁹⁷ The confession of a defendant given at the trial, however complete it might be, did not relieve the court from its duty to examine other evidence as well.⁹⁸ The CPC also required that the documents having evidentiary value be submitted, where appropriate, in their original form.⁹⁹

Given all the above, it is clear that the CPC applicable at the time imposed the obligation on courts to take whatever actions possible and granted them

95 Ibid, Article 223.

96 Ibid, Article 292.

97 Ibid, Article 322.

98 Ibid, Article 323.

99 Ibid, Article 332.

leeway to examine whatever evidence would clarify beyond reasonable doubt each allegation and assertion made by the parties during the proceedings, and only after a complete determination of the facts hand down a judgment finding a person guilty as charged.

F. The right to a reasoned judgment

The CPC required the courts to draw up in writing all judgments they had pronounced within eight days following their pronouncement, or within 15 days in more complex matters. If a judgment would not be drawn up within the prescribed time limits, the judge presiding over the trial was required to inform the president of the court of the reasons for the failure to do so, and the president of the court was required, where appropriate, to take measures to have a judgment drawn up within the shortest time possible.¹⁰⁰

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When drafting a written judgment, the courts were required to specify, in the statement of reasons section of the judgment, the reasons behind each count of the judgment and to clearly and thoroughly indicate which facts it considered proven or unproven and for what reasons, explaining in particular how the credibility of conflicting evidence was weighed up; to provide the reasons behind any decisions to deny motions of parties; to provide reasons behind decisions not to directly examine a witness or expert witness whose deposition or finding and opinion had been read out without the consent of the parties; to provide reasons behind its conclusions of law, in particular those regarding the existence of a criminal offence and the criminal responsibility of a defendant, and regarding the applicability of certain provisions of the criminal law to the defendant and the act he committed. If it sentenced a defendant to a penalty, the court was obliged to indicate in the statement of reasons which circumstances it had taken into account in determining the penalty and, notably, the reasons for finding that the act(s) of the defendant constituted a particularly serious offence or an offence warranting a more severe penalty than prescribed, or for deciding to

¹⁰⁰ Ibid, Article 356.

impose a lesser penalty, or acquit the defendant, or to impose a suspended sentence, or a security measure or confiscation of property gain.¹⁰¹

Decree on the Application of the Criminal Procedure Code during the State of War

The Federal Government of the Federal Republic of Yugoslavia, invoking Article 99, sub-paragraph 11 of the FRY Constitution, issued on 4 April 1999 the Decree on the Application of the Criminal Procedure Code during the State of War.¹⁰² The decree derogated certain CPC provisions, gave broader powers to law enforcement authorities, shortened the time lag between the serving of an indictment and beginning of a trial, shortened the deadline for filing objections to an indictment and the deadline for lodging appeals.

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The Decree prescribed that criminal offences punishable by fines or prison terms of up to five years be tried, in the first instance, by a single judge sitting alone.¹⁰³

In situations of urgency, law enforcement authorities were given the power to carry out investigative actions without the order from a public prosecutor or the state prosecutor. Investigating judges and law enforcement authorities were bound to inform a public prosecutor or the state prosecutor about any investigation and investigative actions they had launched immediately after launching them.¹⁰⁴

The Decree allowed law enforcement authorities to search homes and other premises and persons without a written court order and without the consent of the person affected, in cases where reasonable suspicion existed that the person had committed a criminal act against the constitutional order and security of the Federal Republic of Yugoslavia, against humanity

¹⁰¹ Ibid, Article 357.

¹⁰² Official Gazette of the FRY no. 21/99.

¹⁰³ Article 5 of the Decree on the Application of the ZKP during the State of War, Official Gazette of the FRY no. 21/99.

¹⁰⁴ Ibid, Article 6.

and international law, or against the Army of Yugoslavia, or any other offence punishable by imprisonment for a minimum of five years.¹⁰⁵

The authorities conducting an investigation or taking certain investigative actions were authorized to order detention against an accused for a period of up to thirty days, which was extendable by a further three months by a trial chamber's decision or by a further five months by the decision of a chamber of an immediately higher court.¹⁰⁶

Judges sitting alone were authorised not to render their judgments in writing unless expressly required by a party.¹⁰⁷ The deadline for lodging an appeal against a judgment was reduced to three days.¹⁰⁸

Criminal offences against the constitutional order and security of the FRY

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This group of offences was contained in Chapter XV of the Criminal Code of the Federal Republic of Yugoslavia (CCY), namely in Articles 114 to 140.

Despite significant differences, these offences have several common features which made it possible to place them in the same category.

First, all these offences are directed against the constitutional order and security of the FRY. The provisions relating to these offences were aimed at safeguarding the existing form of government, the principle of separation of powers, the freedoms and rights of citizens, judicial independence, national security and all the other attributes of a democratic state.

All offences from this group require intent. Degree of intent may vary, but for a person to be convicted of a crime included in this group, the existence of a specific intent must have been proved.

105 Ibid, Article 7.

106 Ibid, Article 8.

107 Ibid, Article 14.

108 Ibid, Article 15.

The lawmakers were particularly aware of the danger these offences pose to society, which is why they prescribed severe penalties for those who perpetrated them, including 20 years' imprisonment.

A. Terrorism

The criminal act of terrorism was defined in Article 125 of the Criminal Code of the Federal Republic of Yugoslavia as follows:

“Whoever with intent to endanger the constitutional order or security of the FRY causes an explosion or fire or commits another generally dangerous act or act of violence which causes fear or a sense of insecurity among the citizens, shall be punished by imprisonment of minimum three years.”¹⁰⁹

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Generally, dangerous acts or acts of violence constitute the *actus reus* of terrorism as defined by the CCY. The examples given include causing an explosion or fire, without excluding other dangerous acts. Generally dangerous acts are all acts that endanger human lives and property; acts of violence imply the use of force or threats against people or property. A sense of personal insecurity among citizens (the feeling that their lives, health, property or freedoms are in danger) are the consequences resulting from these acts.¹¹⁰

The criminal act of terrorism requires that a specific criminal intent must be present, which means that the element of intent must be far more pronounced than in some other offences against the constitutional order or security of the FRY.

109 Article 125 of the Criminal Code of the FRY, SRJ, Official Gazette of the SFRY, nos. 44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90-1217, 45/90-1340, and 54/90-177; Official Gazette of the FRY nos. 35/92-651, 37/93-816, and 24/94-273.

110 Dr Ljubiša Lazarević, “Krivično pravo – posebni deo” [Criminal Law – separate part], /1995/ Savremena administracija, Beograd, pp. 29-30.

The Criminal Code of the FRY also stipulated aggravated forms of terrorism,¹¹¹ which refer to cases where (I) an act of terrorism has resulted in the death of one or more persons, or has endangered human lives, or has been accompanied by severe violence or massive destruction, or has resulted in endangering the security, economic power or military strength of the state; (II) an act of terrorism is committed during a state of war or imminent threat of war; (III) the perpetrator has intentionally killed one or more persons. These aggravated forms were punishable by imprisonment for a minimum of ten years.

B. Association for the purpose of conducting hostile activities

The criminal act of association for the purpose of conducting hostile activities is defined in Article 136 of the CCY as follows:

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“Whoever sets up a cabal, band, group or any other association of persons with intent to commit criminal acts specified in Articles 114-119, paragraph 2, Articles 120-123, Articles 125-127 and Article 132 of this law [acts against the constitutionally established system, recognition of capitulation and occupation, endangering the territorial integrity of the state, endangering the independence of the state, preventing the fight against the enemy, serving in the enemy’s army, aiding the enemy, undermining the military and defence power, assassination of a high state official, violence against a high state official, terrorism, malicious destruction of the country’s important infrastructure, sabotage, dispatching and transferring armed groups, weapons and ammunition to the territory of the FRY] shall be punished by imprisonment of one to ten years minimum.

111 Article 139 of the Criminal Code of the FRY, Official Gazette of the SFRY, nos. 44/76-1329, 36/77-1478, 34/84-895, 37/84-933, 74/87-1743, 57/89-1441, 3/90-63, 38/90-1217, 45/90-1340, and 54/90-1773; Official Gazette of the FRY nos. 35/92-651, 37/93-816, and 24/94-273.

Whoever becomes a member of such an association [...] shall be punished by imprisonment of six months to five years.”

It is clear from the very wording of the cited article that this criminal act had two forms – setting up a criminal association and becoming its member. Both forms require intent i.e. that the perpetrator has awareness that he is setting up a criminal association or joining a criminal association, and also awareness of the criminal offences the association is formed to commit.¹¹²

This criminal offence also had an aggravated form, which was defined in Article 139 of the CCY as being committed in the period of time during which a state of war or imminent threat of war were in effect.

Human Rights violations in the trials of Kosovo Albanians

The judicial proceedings against Kosovo Albanians were rather uniform as regards rights violations and marked by the almost identical conduct of all the prosecutors and judges during the proceedings. At nearly every stage of the proceedings the defendants were denied the opportunity to exercise their constitutional and legal rights, and the judicial authorities in Serbia made their position even more difficult by the way they conducted the trials and their flawed assessments of evidence.

The indictments raised by the public prosecutors for the most part rested solely on the confessions the defendants gave to the police or investigating judges - confessions they retracted later at the trials, explaining that the police used beatings and torture to extract them. In addition to the indictments based on no other evidence besides the defendants' confessions, many of the indictments were based on the testimonies of witnesses whose credibility was called into question in a number of proceedings (see, e.g., Case K-88/1999 of the District Court in Požarevac – *Shukrija Gashi et al.*).

¹¹² Dr. Lazarević, “Criminal Law”, pp. 38-41.

The vast majority of the indictments were based on the so-called “paraffin test”, which the expert witnesses themselves claimed could not be taken as reliable evidence that an individual had discharged a firearm. In this test, the hands, shoulders and neck of a suspect are coated with special thin sheets to detect nitrate residues, which are an essential component of gunpowder. While nitrate residues are likely to originate from gunpowder, this cannot be determined with accuracy, because a suspect’s skin could have been contaminated by nitrates coming from other sources (the environment, smoke, garbage, burned objects, etc.) The “paraffin test” as forensic evidence was abandoned in the mid-twentieth century for not being a reliable indication.¹¹³

As for the role played by judges, they did not make any effort to put things right during trials. Moreover, they did not take into account defendants’ allegations that their confessions were extracted by torture, nor tried to probe their veracity. The courts went so far in ignoring these allegations as to disregard medical documentation produced by the defendants confirming their injuries, or to find that the injuries had been inflicted upon them much earlier (before detention).

In many instances, domestic judges imposed custodial sentences solely on the basis of the statements that the defendants had made to the police or investigating judges, which they themselves contradicted before the court. Prison sentences were imposed also on defendants who were alleged in the indictments to have opened fire at members of the police or military even if the weapons they allegedly fired had never been found (it is precisely because of such errors that the Supreme Court of Serbia overturned some of these judgments on appeal). **Some defendants were judged guilty and received prison sentences despite the existence of detention orders proving that at the time of the commission of the crimes in question they had already been detained** (see, e.g., the District Court in Požarevac Case K-12/2000 – *Fadil Isma et al.*).

113 See: Cowan, Mary E. and Patricia L. Purdon. “A study of the ‘paraffin test’” (Journal of Forensic Sciences), (Vol. 12, no. 1), (1967), p. 30.

All these judgments, without exception, failed to set out a statement of reasons, to explain how the courts weighed up the evidence put before them, which facts were deduced from the evidence presented, how the credibility of conflicting evidence was determined, and why the courts held that such evidence supported the charges. Almost none of the judgments made any mention of the elements of the crimes in question, including the mental elements, or the criminal responsibility of the defendants. Mitigating and aggravating circumstances were not specified and explained with respect to each defendant but presented in the aggregate, conveying an impression that the courts did not differentiate among the defendants but treated them collectively as a group.

In the majority of the court proceedings the defendants were denied the right to use their mother tongue. Many defendants complained, both during the trials and in their appeals, that as proceedings were conducted in Serbian they were not able to understand sufficiently the charges against them. These allegations were put to the courts by defence lawyers but the courts disregarded them, stating that the defendants had agreed that the proceedings be conducted in Serbian, a language they fully understood.

Finally, another striking characteristic of these trials was that **the judges as a rule sentenced the defendants to the time they had already served in detention**, thus sending them a message that they would be better off not appealing against their convictions, because otherwise they would be held in detention until their appeals were decided upon. On the other hand, if they failed to appeal, their case would be considered finally adjudicated, as a result of which they would not be allowed to seek compensation from the Republic of Serbia for unlawful deprivation of liberty.

It is evident from the above discussion that the defendants' rights to a fair trial were systematically violated. The amnesty laws of 2001 and 2002 were far from being able to right the wrongs done to Kosovo Albanian defendants by Serbian judicial bodies.

Cases

I. District Court in Požarevac

The HLC has in its archive 12 indictments relating to the cases heard by the District Court in Požarevac, of which seven were filed by the Office of the District Public Prosecutor in Prizren and five by the Office of the District Public Prosecutor in Požarevac. Of the seven indictments filed by the Office of the District Public Prosecutor in Prizren, three were filed by Public Prosecutor Dobrivoje Perić, and four by Deputy Public Prosecutor Jovan Krstić. As for the indictments of the Office of the District Public Prosecutor in Požarevac, they were filed by Deputy Public Prosecutors Slavica Mitrašinić and Dragana Jovanović.

The HLC also possesses 11 judgments of the District Court in Požarevac in the first instance. The judges who heard these cases were Dušan Spasić, Nikola Vazura, Nada Hadži-Perić, Jovica Mitrović, Milica Milosavljević, Zorica Nikolić and Dragan Vučićević, who sat on panels together with lay judges. Also, the HLC possesses two judgments of the District Court in Prizren, passed by Judges Pavle Vrašinić and Rade Mićunović sitting on panels with lay judges.

As for judgments on appeal, the HLC has only one such judgment, handed down by the Supreme Court of Serbia Judges Ljubomir Vučković, Novica Peković, Dragomir Milojević, Nikola Milošević and Natalija Janković

The HLC made a request to the Higher Court in Požarevac under the Law on Free Access to Information of Public Importance, seeking to find out how many case files pertaining to cases tried pursuant to Articles 125 (terrorism) and 136 (association for the purpose of conducting hostile activities) of the then-applicable CCY, and how many copies of court documents relating to these cases, this court had in its archive. In its letter of reply of 18 August 2016, the Higher Court in Požarevac replied it did not hold the requested case files. According to the court, these case files were so damaged during the 2014 floods that they became unusable, and were destroyed, with the consent of the competent authorities, to prevent transmission of infectious diseases. After consulting its register, the Higher Court in Požarevac informed

the HLC that another 19 cases under the cited Articles were heard by the court apart from those listed in the request, but that they possessed only one case file, which they subsequently delivered to the HLC.

K-81/1999 – Hazir Zenelaj et al.

Indictment Kt-141/1998 of the District Public Prosecutor's Office in Prizren initially included 18 individuals: 11 were charged with terrorism for firing several projectiles at MUP members on 27 September 1998 in the villages of Savrovë/Savrovo and Budakovë/Budakovo (in the municipality of Suharekë/Suva Reka), as a result of which one policeman received a penetrating wound in his right leg causing a bone fracture; the remained seven individuals were charged as co-perpetrators of a criminal act of terrorism because, on the orders of the leaders of a terrorist gang, they kept watch in the village Savrovë /Savrovo in order to inform the gang leaders of the MUP movements, and participated in trench-digging and setting up of barricades.¹¹⁴

As stated in the indictment filed by a Deputy District Public Prosecutor, all the accused denied being members of the KLA or joining any gang, and denied having handled firearms, even claiming they disapproved of the KLA's objectives and methods. The accused were interrogated and subjected to the "paraffin test". Nitrates were detected on their hands and clothing, confirming that they had discharged firearms, the indictment stated.

**Jovan Krstić is currently Secretary
of the Department for International
Cooperation and Legal Assistance at the
Office of the Republic's Public Prosecutor**

A trial panel presided over by Judge Dušan Spasić sentenced each of the 13 accused to 16 months in prison as co-perpetrators of the criminal act of association for the purpose of conducting hostile activities. Three of the accused were acquitted for lack of evidence.¹¹⁵

¹¹⁴ Indictment Kt-141/1998 of 7 December 1998.

¹¹⁵ Judgment K-81/1999 of 28 January 2000.

The accused defended themselves in the same way as during the preliminary proceedings, claiming they had never been members of any terrorist gang, nor participated in trench-digging or keeping watch. Some of them admitted to joining the KLA but denied participation in any of its activities or carrying guns or shooting anyone. Some of the accused expressly stated that they had been coerced into confessing to all the charges by police who beat and threatened them.

The “paraffin test” performed on the accused revealed nitrate and nitrite particles on their hands and clothing that likely originated from gunpowder and their being into contact with a firearm. The test, however, did not rule out the possibility that the particles originated from other sources. It is important to mention that the accused were farmers, which can explain the presence of nitrates and nitrites on their skin.¹¹⁶

The trial chamber **did not examine any other evidence** except the said test results, nor did it try to address the contradictions between the statements the defendants gave during the preliminary proceedings and those they gave at the trial. From the judgment it can be concluded that the trial panel did nothing to examine the allegation of coercion made by one of the accused or ascertain whether the defendant had been subjected to torture at the hands of police. The testimonies of the accused were not accepted as trustworthy but held to be an attempt to escape criminal conviction. However, the panel failed to provide the reasoning behind this conclusion or any evidence supporting it in the written judgment. The **“paraffin test” results were accepted by the court as indisputable evidence** that the nitrates and nitrites detected in the accused originated from firearms, despite this not having been confirmed by the court-appointed expert.

Furthermore, **the judgment of the trial panel said nothing about the intent on the part of the defendants**, nor did it explain on what basis it had established that the defendants, acting as advocates of Kosovo secession,

¹¹⁶ Nitrate particles are also present on people who are engaged in agriculture and come into contact with the artificial fertilizers used in agricultural work. That is why it was not possible to determine with certainty whether they originated from gunpowder, fertilizers, or some other sources.

intended to jeopardise the constitutional order and security of the FRY. **The trial panel did not explain on what basis the defendants were convicted as co-perpetrators.** What is more, the judgment did not individualise the responsibility of each of the accused as co-perpetrators in the commission of the offence with shared intent. And the court was required by law to establish beyond doubt that the accused not only knew each other but jointly wished for and planned the commission of the criminal act at issue. The K-81/1999 judgment of the trial panel which is the subject of the present analysis does not contain any of the above elements, including the circumstantial evidence on the basis of which the panel concluded that the accused knew each other.

48

The only things beyond dispute about this case are that the trial panel's judgment was handed down on 28 January 2000, **sixteen months after the accused had been placed in custody, and that all the accused were sentenced to a prison term covering the time they had already served in custody.** The sentence was to justify their 16-month detention and to deny them, unjustifiably, any opportunity to seek and obtain adequate compensation for excessive detention.

K-78/1999 – *Nezir Loshii et al.*

Case K-78/1999 had exactly the same course and outcome as the above described Case K-81/1999. Jovan Krstić, Deputy District Public Prosecutor in Prizren, filed the indictment,¹¹⁷ and the District Court in Požarevac on 11 February 2000 sentenced the nine accused each to 16 months in prison for the criminal act of association for the purpose of conducting hostile activities.¹¹⁸ A trial panel, comprising Judge Nikola Vazura and three lay judges, was presided over by the same judge, Dušan Spasić. **On the same day, the trial panel handed down its judgement and ruled to release the accused from detention** in which they had been held from 28 September 1998.

¹¹⁷ Indictment Kt-147/1998 of 23 December 1998.

¹¹⁸ Judgment K-78/1999 of 11 February 2000.

K-88/1999 – Shukrija Gashi

In the Case K-88/1999, the accused Shukrija Gashi was found guilty as charged of the criminal act of terrorism and sentenced to eight years' imprisonment. Between June and September 1988, Gashi, in his capacity as a KLA member, was issued with an automatic assault rifle and a handgun and kept guard on the territory of Suharekë/Suva Reka municipality (in the villages of Krushicë e Poshtme/Donja Krušica, Mohlan/Movljane and Budakovë/Budakovo). On 4 July 1998, Gashi, together with two other KLA members, met the three injured parties, seized their weapons and vehicle, and drove them to a KLA commander, whereupon they were beaten and threatened before being released the next day.¹¹⁹ Sokol Kabashaj, the second accused in this case, was acquitted after producing proof that he was not in the country at the time of the commission of the offence (an exit stamp sealed on his passport at the Kelebija border crossing bearing the date of 4 July 1998, the date when the critical event took place, and driver's travel log book issued by the bus operator for whom he worked as a bus driver).

49

Gashi was tried in absentia, and his conviction was based entirely on the statements the witness victims had given to the investigating judge in the preliminary proceedings, which were read out at the trial. Although it followed from the testimonies of these witnesses that they recognized and positively identified both of the accused (as the persons who had intercepted them, seized their weapons and vehicle and brought them before a KLA commander), the trial panel presided over by **Judge Vesna Ristić acquitted Kabashaj, as he proved he was out of country at the time of the crime, and sentenced Gashi to eight years in prison on the basis of these statements.** The trial panel did not concern itself with the manifest fact that the credibility of the witnesses was shattered the moment it was proved that the person they recognized as one of the perpetrators, namely Kabashaj, was not in the FRY at the time.

¹¹⁹ Judgment K-88/1999 of 23 December 1999.

K-64/1999 – Naim Hadergjonaj et al.

The Deputy District Public Prosecutor in Požarevac, Slavica Mitrašinić, issued the indictment Kt-71/1999-105 against Naim Hadergjonaj and Kamer Himai for terrorism and association for the purpose of conducting hostile activities. The indictment alleges that Hadergjonaj, together with another 20 members of the KLA, crossed into Albania, from where he brought weapons to the FRY; on their way back, he opened fire at the VJ border unit troops. Himai was alleged to have crossed into Albania illegally, in a group of 700 KLA members, to bring weapons from there, and to have kept guard afterwards in his home village. **The Deputy Prosecutor did not propose any evidence in support of the indictment besides examination of the victims.**¹²⁰

50

A trial panel, presided over by Judge Milica Milosavljević and comprising Judge Zorica Nikolić and three lay judges, sentenced the accused to 13 months in prison for the criminal act of association for the purpose of conducting hostile activities.¹²¹ At the trial, the accused gave evidence which was substantially different from that given in the preliminary proceedings. Hadergjonaj denied having ever gone to Albania to pick up weapons, saying he went about his life in his village and was forced to bear a rifle. At one point, he added, he had to flee to another village, where he stayed at his wife's brother's; in that village, he handed over his rifle to a third person who handed it over to the police. Himai admitted to having crossed into Albania illegally to bring weapons, but said he had been coerced into it by a group of uniformed Albanians who threatened to kill him if he failed to obey. He also said he had been coerced into keeping guard, but without arms. He maintained that he had obeyed the orders of the uniformed persons only to protect himself and his family.

Not even in this case, in which no other evidence was presented apart from the statements of the accused, did the trial panel try to determine the “material truth”. In a situation where there was **no other evidence**

¹²⁰ Indictment Kt-71/1999-105 of 3 August 1999.

¹²¹ Judgment K-64/1999 of 1 March 2000.

besides the defendants' testimonies to support the conviction, the panel stated, explaining its decision, that their testimonies at the main hearing were just an attempt to escape criminal responsibility. Moreover, the trial panel did not specify reasons for finding the defendants guilty per each count of the indictment, nor the existence of the requisite intent on their part.

In this case too, the defendants were **sentenced to the time they had already served in custody – 13 months** (they were held in custody from 30 January 1999 to 1 March 2000).

K-65/1999 – Sahit Hagjosaj

The Deputy District Public Prosecutor in Požarevac, Slavica Mitrašinić, charged Sahit Hagjosaj with the criminal offence of association for the purpose of conducting hostile activities. As set out in the indictment, Hagjosaj joined the KLA in the village of Prekolluk/Prekoluka, where he was issued with a semi-automatic assault rifle, ammunition and two hand grenades, and, armed with all these, kept guard.¹²² Hagjosaj, in common with the defendant in the previously described case, said in his defence that he had been forced to keep guard and carry arms, adding that he seized an opportunity to flee five weeks before the police entered the village. He handed over the rifle, ammunition and hand grenades to a third person, for that person to hand them over to the police (which he did).

A trial panel presided over by Judge Dragan Vučićević did not accept Hagjosaj's evidence, considering that he did not tell the truth in order to escape criminal responsibility. The panel did not address the issue of intent on the part of the defendant, which cannot be found to exist where a defendant was forced to behave in a certain way. As in the previous cases, **no other evidence was presented besides the testimony of the defendant.**

**Dragan Vučićević is currently a Judge
at the Higher Court in Požarevac**

¹²² Indictment Kt-65/1999-105 of 24 July 1999.

On 14 March 2000, the trial panel sentenced Hagjosaj's to 13 months in prison, crediting him with the time he had spent in pre-sentence custody from 24 February 1999 i.e. 13 months.¹²³

K-66/1999 – Rasim Isufaj et al.

52 In this case too the defendants – Rasim Isufaj, Lan Isufaj and Njazi Isufaj – were accused of the criminal act of association for the purpose of conducting hostile activities. The indictment filed by Dragana Jovanović Gagović, Deputy District Public Prosecutor in Požarevac,¹²⁴ alleged that the defendants were issued with rifles and ammunition and kept them before handing them over to the MUP. On 13 March 2000, the panel presided over by Judge Dragan Vučićević sentenced the defendants to 15 months in prison, which covered the time they had spent in pre-sentence custody from 18 December 1998 (15 months).¹²⁵ In this case too, the panel failed to take into consideration the defendants' claims that they were forced to bear arms out of fear for their lives and the lives of their families, and that as soon as the opportunity arose, they handed over the weapons and ammunition to the MUP. Not even **the fact that their testimonies called into question the existence of intent, which is an essential element of the offence charged**, did the panel feel prompted to order additional evidence to be presented which could have clarified the mental element of the offence.

**Dragana Jovanović Gagović is
currently Deputy Public Prosecutor
at the Office of the Higher Public
Prosecutor in Požarevac**

K-67/1999 – Gazmend Zeka

This case followed the same pattern seen in the K-66/1999 Case. The defendant, Gazmend Zeka, went on trial on the indictment filed by Dragana

¹²³ Judgment K-65/1999 of 14 March 2000.

¹²⁴ Indictment Kt-66/1999-106 of 22 July 1999.

¹²⁵ Judgment K-66/1999 of 16 March 2000.

Jovanović Gagović, Deputy District Public Prosecutor in Požarevac¹²⁶, and was convicted on 16 March 2000 of association for the purpose of conducting hostile activities.¹²⁷ He was sentenced to a prison term equalling the time he had spent in detention (from 24 December 1998). The three-judge panel was presided over by the same judge, namely Dragan Vučićević.

K-12/2000 – *Fadil Isma et al.*

Indictment Kt-63/1998 of the District Public Prosecutor's Office in Prizren, signed by Public Prosecutor Dobrivoje Perić, charged 25 persons with terrorism. As alleged in the indictment, the accused on 18 July 1998 fired several projectiles at a MUP patrol near Rahovec/Orahovac; the following day they again shot at members of the police, killing one; on 20 July 1998, they again shot at and severely wounded several policemen; finally, on 21 July 1998, they shot and killed one officer, also near Rahovec/Orahovac. The Public Prosecutor stated in the indictment that while none of the accused admitted to having committed the offence, the "paraffin test" detected nitrate and nitrite residues on their hands. He also proposed that the police officers be heard as witnesses to confirm that at the relevant time they were shelled upon in the territory of Rahovec/Orahovac municipality.¹²⁸

53

**Dobrivoje Perić is currently Deputy
Public Prosecutor at the Office of
the Higher Public Prosecutor in Niš**

On 12 March 1999, a trial panel of the District Court in Prizren, presided over by Judge Pavle Vukašinović and comprising Judge Rade Mićunović and three lay judges, sentenced 20 of the accused each to four years' imprisonment, three to two-and-a-half years, and one to one year.¹²⁹

None of the accused admitted to committing the offence they were charged with at the trial, the weapons allegedly used had not been tracked down,

¹²⁶ Indictment Kt-70/1999-106 of 2 August 1999.

¹²⁷ Judgment K-67/1999 of 16 March 2000.

¹²⁸ Indictment Kt-63/1998 of 27 August 1998.

¹²⁹ Judgment K-44/1998 of 12 March 1999.

and the testimonies of witnesses did not indicate that they recognized the accused as perpetrators. Disregarding all these factors, **the trial panel based its judgment solely on the results of the “paraffin test” performed on the accused.** Some of the accused said that after their arrest they were loaded onto military trucks used for transporting weapons and ammunition. During the ride, they held onto the walls of the trucks, which could explain the presence of nitrate and nitrite residues on their hands. Others said they had been ordered by the police to collect spent cartridges before undergoing the test, but the trial panel assessed their statements as an endeavour to exonerate themselves from criminal responsibility.

On 7 April 2000, the Supreme Court of Serbia, sitting in a panel comprising Judges Ljubomir Vučković as President, and Novica Peković, Dragomir Milojević, Nikola Milošević and Natalija Janković, ruled to reverse on appeal the judgment of the trial court. In its judgment Kž I – 269/2000, the court stated that **the court of first instance had failed to set out a reasoned basis for its conclusion that the presence of nitrates and nitrites on defendants’ hands was directly linked to the wounding and killing of the policemen.** Also, the court of second instance indicated that the case files contained no evidence proving that the accused carried out the attack on the MUP members, or that there were clashes in the area at the relevant time. The following observation by the Supreme Court’s is particularly worthy of note: **the accused were charged with killing one police officer on 21 July 1998 at 17:00 hours, and the case files showed that earlier that day, at 16:00 hours, an hour before the attack which resulted in the death of a police officer, all the accused had signed the decision imposing detention on them.** Faced with such a blatant error, the appellate panel had no option save to reverse the judgment in its entirety and send the case back to the court of first instance for a retrial.¹³⁰

**Dragomir Milojević is currently a judge
and President of the Supreme Court of
Cassation and the High Court Council**

¹³⁰ Ruling Kž I – 269/2000 of 7 April 2000.

At the retrial, the panel comprising Judge Dušan Spasić (presiding), Judge Nada Hadži-Perić and three lay judges on 17 July 2000 again sentenced all the accused to two years in prison for association for the purpose of conducting hostile activities. The only difference was that the operative part of the judgment was reworded to exclude 21 July 1998 (as on that date the defendants had already been under arrest, as was indicated by the Supreme Court). The judgment stated that the accused took part in an attack against MUP members, blocked the Bellacërkë/Bela Crkva - Rahovec/Orahovac road, and opened fire at MUP members, wounding one and killing one. The conviction was based on exactly the same evidence as the previous one, namely the “paraffin test” results. None of the facts that remained in dispute, as found by the court of second instance, were addressed or decided upon, nor were all the facts of the case fully determined. The trial panel in effect merely copied their previous judgment, omitting from it certain parts and actions which apparently could not be attributed to the accused.¹³¹ Particularly noteworthy is the fact that the accused were held in detention from 21 July 1998 and sentenced to a prison term covering the time they had spent in detention.

**Nada Hadži-Perić is currently a
judge at the Belgrade Court of
Appeal's War Crime Department**

K-82/1999 – Ekrem Veselaj et al.

The judgment in this case was a rare exception to the general pattern followed in the K-12/2000 Case analysed above. Indictment Kt-57/1998 filed by Dobrivoje Perić, Public Prosecutor at the Office of the District Public Prosecutor in Prizren, charged four persons, namely Ekrem Veselaj, Haziz Kryeziu, Emref Mazreku and Hilmi Perteshi, as co-perpetrators of a criminal act of terrorism. As alleged in the indictment, the four men, in their capacity as KLA members, on 4 July 1998 opened fire on members of the MUP in the village of Krushicë e Poshtme/Donja Krušica, damaging two MUP armoured

¹³¹ Judgment K-12/2000 of 17 July 2000.

vehicles. The prosecutors proposed an examination of the accused and witnesses – policemen from the Suharekë/Suva Reka police station.¹³²

On 5 January 2000, the District Court in Požarevac, sitting in a panel comprising Judges Nikola Vazura (presiding) and Jovica Mitrović and three lay judges, acquitted the accused of the charges of terrorism. In the statement of reasons, the panel stated that, from the evidence presented in the course of the trial, it could not be inferred that the accused participated in the attack on the said day and that their testimonies were clear and logical. With regard to the expert witness' finding regarding the presence of nitrate and nitrite residues on the hands of the accused Veselaj, the trial panel held that this evidence was insufficient for the court to find that the accused had discharged a firearm. **As explained by the trial panel, the “paraffin test” results per se do not count as evidence in criminal proceedings**, and the mere presence of gunpowder traces on the hands of the accused was not sufficient for the court to draw the conclusion that the accused fired a weapon, because nitrate and nitrite particles could have come from other sources besides gunpowder.¹³³

56

A simple comparison of this case with Case K-81/1999 discussed immediately above reveals that the same panel in two similar cases treated and assessed the “paraffin test” results completely differently and handed down two completely different judgments, without there being any other evidence in either of the cases that could explain this difference.

All the above makes it clear the District Court in Požarevac completely neglected the inquisitorial principle and the principle of material truth to the detriment of the accused. At no point in the proceedings did the panel order additional items of evidence to be introduced to complete the findings of fact and thus justify potential conviction; the contradictions between the defendants' statement made in the preliminary proceedings and those made at the trial were left unresolved; the panel did not try to obtain an explanation as to why the defendants contradicted their statements given during the investigation nor did it enquire into their allegations of coercion.

¹³² Indictment Kt-57/1998 of 23 September 1998.

¹³³ Judgment K-82/1999 of 5 January 2000.

The defendants were charged with several acts which all require a higher level of intent i.e. intention to commit the offence in order to jeopardise the constitutional order or security of the FRY, and the judgment issued by the court of first instance did not at all address or explain the intent element. The panels, comprising more or less the same judges, in some instances accepted the “paraffin test” results as reliable proof that the defendant had discharged a firearm (notwithstanding the opinion of expert witnesses that, although the nitrate and nitrite residues probably originated from gunpowder, that did not necessarily imply that the defendant had fired from a firearm), while in others they clearly stated that the “paraffin test” results alone could not be taken as evidence upon which to base a decision without other evidence or facts corroborating it. And last, the defendants were sentenced to terms in prison covering the time they had spent in pre-sentence detention and were thus indirectly discouraged from exercising their right to seek and obtain compensation for ungrounded and unlawful deprivation of liberty.

As the HLC does not have the judgments rendered on appeals against the judgments of the District Court in Požarevac, it remains unknown whether the Supreme Court remedied the gross violations of the defendants’ rights committed in the above analysed criminal proceedings.

II. District Court in Niš

The HLC’s archive contains seven indictments, of which five were brought by the District Public Prosecutor’s Office in Niš and two by the District Public Prosecutor’s Office in Prishtinë/Priština. All these indictments were signed by Deputy Public Prosecutors Miodrag Surla, Dragan Živić and Gojko Miljković.

The HLC also possesses five judgments issued by the District Court of First Instance in Niš. Marina Milanović, Dragoljub Zdravković, Slađana Petrović, Ivana Rađenović and Milimir Lukić were the judges who, together with lay judges, heard and decided these cases.

In addition, the HLC has four appeals against first-instance judgments lodged by defence lawyers, and a ruling of the Supreme Court of Serbia by which

the first-instance judgment handed down by the panel comprising Judges Dragomir Lelovac (presiding), Ljubomir Vučković, Novica Peković, Dragomir Milojević and Zoran Škulić was reversed on appeal.

The HLC made a request to the Higher Court in Niš under the Law on Free Access to Information of Public Importance, seeking to find out how many case files pertaining to cases tried pursuant to Articles 125 (terrorism) and 136 (association for the purpose of conducting hostile activities) of the then-applicable CCY, and how many copies of court documents relating to these cases this court had in its archive. In its letter of reply of 5 August 2016, the court stated that 50 such case files were held in its archives and provided HLC representatives with access to them.

K-180/1999 – *Besim Jashari et al.*

58

Indictment Kt-2/1999 filed by Miodrag Surla, Deputy Public Prosecutor at the District Public Prosecutor's Office in Prishtinë/Priština, charged Besim Jashari, Abdulah Hoxha, Tomor Hoxha, Shaip Berisha, Osman Murati and Zahir Shkodra with terrorism and association for the purpose of conducting hostile activities. As stated in the indictment, the first four of the accused were involved in setting up a terrorist gang in the village of Hajvali/Ajvalija, and the remaining two joined the gang and engaged in raising money and acquiring weapons, medical supplies, food and topographical maps. Jashari also shadowed certain individuals whose loyalty to the KLA had come under suspicion, and took part in an attack against MUP members. As regards the evidence offered, the Deputy Public Prosecutor proposed that the court obtain testimonies from the accused.¹³⁴

A trial panel comprising Judges Marina Milanović (presiding) and Dragoljub Zdravković and three lay judges on 18 February 2000 sentenced Jashari to ten years in prison, Abdulah Hoxha, Tomor Hoxha and Shaip Berisha to three-and-a-half years, and Zahir Shkodra to nine months.¹³⁵ Apart from Jashari, who admitted to the investigating judge that he had committed the

¹³⁴ Indictment Kt-2/1999 of 20 July 1999.

¹³⁵ Judgment K-180/1999 of 18 February 2000.

offence (an admission he retracted at the main hearing, saying he had been coerced by police into admitting to all charges against him), none of the accused admitted to having committed the offences they were charged with either in the preliminary proceedings or at the main hearing.

**Currently, Marina Milanović is a
Judge at the Court of Appeal in Niš**

Explaining its finding of guilt, the trial panel expressly stated that **its decision was based solely on the confession obtained from the accused Besim Jashari in the course of the investigation, an admission that he himself retracted at the trial.**

Without having any other evidence to support the charges besides the admission by the key defendant, which he retracted at the trial saying it had been extracted from him under duress, the panel based its guilty judgment on this dubious evidence.

59

**Dragoljub Zdravković is currently a
judge at the Higher Court in Belgrade**

Assessing Jashari's allegation of coercion, the trial chamber underlined that the written records of the interrogation of the accused (Ki-4/1999 of 9 June 1999) indicated that all the accused were advised of their rights at the time they were brought before the investigating judge, and that no force or threats were used against them. The trial panel did not consider Jashari's claims that he was slapped by a guard while being interrogated by the investigating judge as something warranting an investigation, **nor did it even summon the investigating judge and the guard to give testimony on that point, despite being bound to do so by the above-mentioned provisions contained in the constitution and international treaties.** Rather, the panel considered the written record of interrogation sufficient evidence that Jashari had been advised of his rights and that he had not been subjected to force or coercion whilst in custody.

Besim Jashari proposed that a statement he gave to officers of the MUP police department in Prishtinë/Priština during the investigation be read

out in the court, but the panel refused to allow it, invoking Article 83 of the CCY, which states that records and information excluded from a case file may not be used as evidence at the main hearing without prior consent of the co-defendants. As the co-defendants had not given their consent before the main hearing, the panel said it was not authorized to ask for their consent. However, neither Article 83 nor Article 84 of the CPC nor any other article of the CPC can be interpreted as stipulating such a procedure. On the contrary, **the judge presiding over a case may allow the introduction of certain items of evidence even if the parties have not previously agreed to it.** In other words, it is up to the trial panel to decide whether or not to allow that a certain item of evidence be introduced, even in situations where the consent of the parties has not been obtained for such an action.¹³⁶

60 **As the trial panel judgment against the six defendants was, by its own account, based solely on Besim Jashari's confession,** introducing additional evidence that could have supported the guilty judgment was absolutely necessary.

K-138/2000 (K-183/1999) – *Bashkim Sadiku et al.*

The criminal proceedings conducted in Case K-138/2000 before the District Court in Niš were almost identical to those conducted in K-81/1999 before the District Court in Požarevac. In K-138/2000, the indictment was also brought by Deputy Public Prosecutor Miodrag Surla. Six persons were indicted, namely Bashkim Sadiku, Azem Zhegrove, Feriz Kaçiu, Ekrem Jusufi, Fatmir Tahiraj and Xhafer Shala, for association for the purpose of conducting hostile activities. According to the prosecution, the accused from 1998 until May 1999 joined terrorist gangs, were issued with weapons, dug trenches in anticipation of police arriving at their village, and opened fire at police, endangering their lives. After their groups had been crushed, they threw away their weapons or handed them over to third

¹³⁶ Article 292, para. 4 of the Criminal Procedure Code, Official Gazette of the SFRY, nos. 4/77, 14/85, 26/86, 74/87, 57/89, 3/90, Official Gazette of the FRY, nos. 27/92, 24/94) 21/99, 44/99), 71/2000, 13/2001.

persons, and blended with the columns of refugees in an attempt to escape criminal responsibility.¹³⁷

The District Court in Niš, sitting in a panel composed of Judges Marina Milanović (presiding), Slađana Petrović and three lay judges, on 11 May 2000 sentenced Bashkim Sadiku, Azem Zhegrove and Feriz Kačiu each to two years and six months in prison, and Ekrem Jusufi to 18 months in prison. Fatmir Tahiraj and Xhafer Shala were acquitted.¹³⁸ According to the reasons cited in the trial panel's judgment, all the accused denied at the trial having committed the offence (their statements given in the preliminary proceedings were not cited in the judgment) and denied ever having been members of the KLA, stating that they lived with their families. Bashkim Sadiku tested positive to the "paraffin test", whereas Zhegrove and Kačiu were never informed about their test results. Ekrem Jusufi said he did not know whether the test had been performed on him because he was beaten unconscious by the police.

61

From the evidence supplied by an expert witness, it could be established that the nitrate and nitrite particles found on the hands and clothing of Bashkim Sadiku, Azem Zhegrove, Feriz Kačiu and Ekrem Jusufi might have originated from gunpowder. Having analysed the expert's finding, the trial panel concluded that the nitrate and nitrite residues found on the defendants' index fingers and in the area joining the index finger and the thumb were results characteristically found in persons who had fired a weapon, because burnt gunpowder residues, after being emitted from the back of a gun when a projectile is fired, are deposited in these very areas. The defence counsel's remark that the expert witness was not able to conclusively confirm that the nitrate and nitrite traces originated from gunpowder and therefore discount the possibility that they might have originated from other sources in the environment, was not discussed in the judgment at all.

Furthermore, the trial panel did not give due consideration to Ekrem Jusufi's claim that he did not remember whether or not he had been subjected to the

¹³⁷ Indictment Kt-54/1999 of 28 October 1999.

¹³⁸ Judgment K-183/1999 of 11 May 2000.

“paraffin test” because of being beaten unconscious by the police, let alone take any action to examine the matter. Instead, the panel just shrugged it off as something that had no bearing on the decision to be made in the proceedings.

**Miodrag Surla is currently a Deputy
Public Prosecutor at the Office of
the Higher Public Prosecutor in
Kruševac**

And last, the judgment was based solely on the “paraffin test” results, which, as suggested by the expert witness and well-established practice of the courts at the time, were not proof that a person had discharged a firearm. Also, the trial panel did not specify anywhere in the statement of reasons the evidence upon which its finding that the accused had shot at MUP members was made, i.e. the evidence upon which the accused were judged guilty of the said act.

62

All these errors were listed in the appeals lodged by the defence lawyers, and prompted the Supreme Court of Serbia, sitting in a panel comprising Judges Dragomir Lelovac (presiding), Ljubomir Vučković, Novica Peković, Dragomir Milojević and Zoran Škulić, to quash the judgment on 20 October 2000 and order a retrial.¹³⁹ The Supreme Court found that the judgment had seriously violated statutory procedural requirements, as it failed to explain on what evidence the accused were found guilty of shooting at members of the MUP, since the Public Prosecutor did not produce any piece of evidence in support of his allegations. However, not even the Supreme Court addressed the errors relating to the “paraffin test”, its reliability, or Ekrem Jusufi’s allegation of torture.

**Sladana Petrović is currently a
magistrate at the Magistrates Court
in Belgrade**

The case was tried again by the same panel of the District Court in Niš which had initially heard it. Bashkim Sadiku, Azem Zhegrove, Feriz Kaçi and

¹³⁹ Decision KŽ I – 1299/2000 of 20 October 2000.

Ekrem Jusufi were this time sentenced each to 18 months in prison for the same offence (and on the very same factual description as in the previous decision), and Fatmir Tahiraj and Xhafer Shala were again acquitted. In so doing, **the court disregarded the directions of the appellate panel.** Moreover, judgment **K-138/2000 of 23 November 2000 was identical in terms of its content to judgment K-183/1999 that the Supreme Court had overturned.** The trial panel did not even take the trouble to follow the directions of the appellate panel, but just copied their original judgment word for word and reduced the sentence for the accused from the initial two-and-a-half years to 18 months.¹⁴⁰

**Novica Peković is currently a Justice
at the Supreme Courts of
Cassation**

63

K-168/1999 – *Flora Brovina*

It was again Miodrag Surla, Deputy Public Prosecutor, who filed an indictment, this time against Flora Brovina. As stated in the indictment, between 1992 and 1998, Ms Brovina set up an association which advocated an unlawful separation of Kosovo from the FRY, and its independence; she participated in the formation of the KLA, by founding, together with 30 other Kosovo Albanian women, the League of Albanian Women, an organisation tasked with staging anti-state demonstrations in Prishtinë/Priština; she raised funds for other illegal organisations and associations; and when in mid-March 1998 she was appointed health minister of the Republic of Kosovo, her work focused on setting up the field hospitals to treat KLA casualties. The indictment further alleges that having been dismissed as health minister in June 1998, she returned to her association and organized women to knit jumpers and sew uniforms for the KLA, and engaged in the provision of medical care for wounded members of terrorist gangs. According to the Deputy Prosecutor, the said activities amounted to the criminal offense of association for the purpose of conducting hostile activities.¹⁴¹

¹⁴⁰ Judgment K-138/2000 of 23 November 2000.

¹⁴¹ Indictment Kt-48/1999 of 20 October 1999.

On 9 December 1999, the District Court in Niš, sitting in a panel comprising Judge Marina Milanović (presiding), Judge Dragoljub Zdravković and three lay judges, issued judgment K-168/1999 sentencing Flora Brovina to 12 years' imprisonment.¹⁴² The judgment was based upon the testimony taken from the accused in April 1999 in the course of the pre-trial proceedings, from which the trial panel inferred that the accused had confessed to the offence.

At the main hearing, Ms Brovina held firmly to her position that the League of Albanian Women was a non-partisan association registered in accordance with the law, which never engaged in terrorism, or campaigned for the secession of a territory, or pursued any political programme, but sought to educate Kosovo Albanian women. The first protest they staged was triggered by the dismissal of Sanija Gashi, editor of an Albanian-language magazine. The association had cooperation with various international humanitarian organisations such as OXFAM, Children Direct, Médecins Sans Frontières, Mother Teresa and others. As regards her being health minister, she said that she was elected to lead the health sector at a meeting between some political and non-partisan organisations held in March 1998 in Prishtinë/Priština, and that her primary task was to administer assistance to displaced persons and above all to try to obtain medicines from various humanitarian organisations. She categorically denied ever contacting anyone from the KLA during the state of war or providing medical supplies to field hospitals.

Despite the fact that the accused disproved all the charges against her at the main hearing, the trial panel based its judgment on her statements given on 24 and 29 April 1998, finding that she had confessed to all charges. Also, even the fact that the content of her statement given in the pre-trial proceedings could not be interpreted as confession, as the trial panel interpreted it, did not deter the court from judging her guilty and imposing such a draconian punishment. The court did not think it necessary to reconcile the apparent contradictions between the defendant's statements and resolve all those matters which the defence counsel throughout the proceedings (and later in their appeal as well) insisted should be resolved. What is more, nothing in the statement of the accused upon which the trial panel based its judgment of

¹⁴² Judgment K-168/1999 of 9 December 1999.

guilt suggested that during the state of war she participated in any activities attributed to her by the prosecution.

Upon hearing the appeal lodged by the defence counsel, the Supreme Court of Serbia, sitting in a panel comprising Judges Tomica Šekularac (presiding), Miloš Popović, Janko Lazarević, Predrag Gligorijević and Zoran Petrović, on 16 May ruled to set aside the judgment of the trial panel and send the case back to the District Court in Niš for a retrial. In its ruling, the court upheld the allegations set out in the appeal, finding the judgment to be unclear and self-contradictory, **and the decision of the trial panel based on an invalid conclusion drawn from the statements given by the accused in the pre-trial proceedings.** Moreover, the appellate panel underlined that it was unclear on what evidence the trial panel had established the decisive fact that the accused, during the state of war, engaged in the actions she was charged with. Further, the Supreme Court pointed to the inconsistency between the operative part of the judgment and the statement of reasons: the accused was convicted of taking part in the setting up of a terrorist gang, whereas from the statement of reasons it could be read that her actions were classified as cooperation with an enemy KLA association.¹⁴³

65

**Janko Lazarević is currently a Justice
at the Supreme Court of Cassation**

The above reasons, which the Supreme Court gave for overthrowing the judgment of the trial panel, clearly reveal the gravity and scale of Brovina's rights violations during the trial, and demonstrate the extent to which the trial judgment was based on stereotypes and bias rather than relevant evidence and facts.

K-110/1999 – Luan Mazreku et al.

Indictment Kt-167/1998 brought by a Deputy Prosecutor at the Office of the District Public Prosecutor in Prishtinë/Priština charged the brothers Luan and Bekim Mazreku with acts of association for the purpose of

¹⁴³ Ruling Kž I – 425/2000 of 16 May 2000.

conducting hostile activities. As stated in the indictment, in March and May 1998 respectively, Luan and Bekim joined the terrorist group “Lumi”, which was affiliated to the KLA, were involved in the kidnapping, torture and mutilation of a number of people, raped several persons of Serb ethnicity and participated in the mass execution of tortured and mutilated persons.¹⁴⁴

During the proceedings, the defence repeatedly pointed to a number of defects and contradictions in the indictment, which offered no evidence whatsoever to prove the defendants’ involvement in the mutilation, rape or mass execution of people. The defendants denied having committed any of the acts or ever being members of the KLA, saying they were in their home village of Malishevë/Mališevo at the time, selling oil and petrol. Bekim had confessed the crime before the investigating judge, only to say at the main hearing that the confession had been coerced from him by torture, providing a graphic description of how the injuries had been inflicted upon him. Luan testified that he too had been subjected to torture.

66

The court heard several witnesses and two medical experts, a neurologist and an expert in occupational medicine. **The medical doctor who examined the defendants confirmed the presence of injuries on their bodies**, which were located at the very places where the defendants claimed police injured them, and concluded that the injuries, taken both individually and in the aggregate, could be classified as light bodily injuries. The occupational medicine expert stated that the said injuries had been inflicted upon the defendants not earlier than six to twelve months before the examination. Although the presence of injuries had been confirmed, the trial panel concluded that they were not proven to have been inflicted by the police and relied entirely on the written record of their interrogation, on the basis of which it concluded that interrogations of the defendants were done in compliance with the CPC, that no objections were raised by anyone and no indications existed that torture or force were used to extract any statements. To support this conclusion, the trial panel cited the finding of the neuropsychiatric expert who had examined the accused Luan between interrogations and described his results as “within normal limits”.

¹⁴⁴ Indictment Kt-167/1998 of 1 February 1999.

Milimir Lukić is currently a judge at the Court of Appeal in Belgrade

In their closing arguments, defence counsel pointed out that the indictment was flawed in many respects, including in terms of the evidence proposed, and ill-grounded, and that the panel took some allegations in the indictment at face value (i.e. the allegation that the defendants were members of a terrorist gang).

Having assessed all of the evidence and facts presented at the main hearing, the trial panel comprising Judges Milimir Lukić (presiding) and Dragoljub Zdravković and three lay judges on 18 April 2001 sentenced the defendants to 20 years' imprisonment each.¹⁴⁵

The defendants were charged with killing two persons who were named in the indictment (which was subsequently amended). The defence produced evidence that one of those persons committed suicide as far back as 1981 and the other had died in 2000 (after the trial had begun and the defendants had long been in custody). The defence also raised the issue of contradictions between the statements the defendants gave in the preliminary proceedings and their testimonies at the main hearing, illustrating them with concrete examples, but the trial panel did not address these contradictions in the statement of reasons, nor did it try to reconcile them during the proceedings. Moreover, the court's decision did not provide a single clear answer to the objections and questions the defence specifically raised at the final main hearing.

67

III. District Court in Kraljevo

The HLC's archive contains six indictments filed by the District Public Prosecutor's Office in Mitrovicë/Kosovska Mitrovica, three of which were signed by Deputy Public Prosecutor Biljana Jakšić and the other three by Deputy Public Prosecutor Nenad Trifunović.

¹⁴⁵ Judgment K-110/1999 of 18 April 2001.

In addition to the indictments, the HLC possesses eight judgments of the District Court in Kraljevo and a judgment of the District Court in Mitrovicë/Kosovska Mitrovica. The judges who heard and decided these cases were Vesna Ristić, Mirko Rakić, Blagoje Miletić, Bogoljub Paunović, Radun Jovanović, Nevenka Balšić (from the District Court in Kraljevo), and Tomislav Ćirović and Milan Ćurčić, sitting in panels with lay judges (from the District Court in Mitrovicë/Kosovska Mitrovica).

The HLC also possesses four judgments that the Supreme Court – sitting in panels composed of Judges Dragomir Lelovac (presiding), Ljubomir Vučković, Dragomir Milojević, Novica Peković, Tomislav Đurđević, Evald Gruber, Vojislav Knežević, Mihajlo Virag and Nikola Mićunović – handed down upon appeals lodged by defence and prosecution.

68

The HLC made a request for information of public importance to the Higher Court in Kraljevo, seeking to find out how many files pertaining to cases tried pursuant to Articles 125 (terrorism) and 136 (association for the purpose of conducting hostile activities) of the then-applicable CCY, and how many copies of court documents relating to these cases this court had in its archive. In its letter of reply of 18 August 2016, the Higher Court in Kraljevo stated its archive contained 65 such cases and provided the HLC representatives full access to them.

K-88/1999 – *Hazir Peci*

In this case the defendant, Hazir Peci, was found guilty of the criminal offence of association for the purpose of conducting hostile activities in conjunction with the criminal offence under Article 33 of the Law on Weapons and Ammunition (unlawful acquisition, possession, carrying, manufacturing, trafficking and sale of firearms, ammunition or explosives).¹⁴⁶ The defendant received a concurrent sentence of two years in prison for joining the KLA in May 1998 in the village of Rahovë/Orahovo, digging trenches, organising men to keep watch in his village and supplying food to the KLA until September 1998, as well as for buying a hand gun with two bullets from an unknown

¹⁴⁶ Official Gazette of the RS, nos. 9/92, 53/93, 67/93, 48/94, and 44/98.

individual in Mitrovicë/Kosovska Mitrovica in 1973 and keeping it until the day he was detained.¹⁴⁷

On 18 November 1999, the trial panel presided by Judge Vesna Ristić handed down a judgment, which was **based solely on the statement that the defendant gave in the course of the preliminary proceedings and repudiated altogether at the main hearing**. The defendant said it was unclear to him how something he had never said to the investigating judge got into the written record, adding that he was obviously misunderstood during the investigation. At the main hearing (and later in his appeal), his defence counsel argued that during the investigation his client was not provided with an Albanian language interpreter, that he did not understand more than half of what was said to him, and that the written record of the interrogation was not read out to him. The trial panel considered these arguments ungrounded, saying that from the content of the written record it could be concluded that the defendant had been properly advised of his rights. The defence counsel also said that the conviction could not be based solely on a statement made in the preliminary proceedings which was altogether repudiated by the defendant at the main hearing, arguing that the trial panel should have examined additional evidence that could have supported the conviction. He continued that he had moved that a witness, whose statement given in the preliminary proceedings was used at the main hearing without the defence being given the opportunity to cross-examine the source of the statement, be called to give viva voce testimony. None of these arguments led the trial panel to consider handing down a different judgment.

K-85/1999 – Bahri Istrefi

This case was practically identical to Case K-85/1999. The District Court in Kraljevo sentenced Bahri Istrefi to two years in prison for association for the purpose of conducting hostile activities.¹⁴⁸ As stated in the judgment, Istrefi joined the KLA in July 1998, crossed into Albania with a group of people

¹⁴⁷ Judgment K-88/1999 of 18 November 1999.

¹⁴⁸ Ibid.

to obtain some weapons and bring them into the FRY, was issued with a rifle, two hand grenades and ammunition, was assigned to the 3rd Battalion in which he served until being arrested, and kept watch in the villages of Melenicë/Meljenica and Bajgorë/Bajgora observing the movements of the military and police.

On 27 November 1999, a trial panel presided by Judge Mirko Rakić handed down a judgment of conviction which was based solely **on the statement that the defendant gave in the course of the preliminary proceedings, and which he repudiated altogether at the main hearing.** When giving evidence at the trial, the defendant said that a police inspector told him what to say to the investigating judge and he obeyed. He denied ever having been to Albania or joined the KLA, but admitted to keeping watch, explaining that he did this only to protect his village, as member of a group of villagers who had organised themselves to protect the village from robbers. The older villagers kept watch in front of their houses, and the others kept watch with rifles a little further from the houses.

In contrast to Case K-88/1999, **no witness testimony or material evidence was presented** at the main hearing.

During the proceedings and thereafter in his appeal, the lawyer for the defence argued that no judgment could rely solely on a statement given in the preliminary proceedings and subsequently repudiated. In such circumstances, all the facts of a case must be fully determined and other evidence introduced with which to support a finding. Furthermore, the prosecution had failed to prove intent on the part of the defendant, his affiliation with the KLA or that he had gone to Albania to get weapons. And the defendant himself gave evidence to the contrary, saying that all the villagers kept watch in order to protect their village.

All the above notwithstanding, the Supreme Court of Serbia did not modify or reverse the conviction on appeal, but affirmed it in its entirety with its judgment Kž I – 761/00 of 21 June 2000. A panel comprising Judges Dragomir Lelovac (presiding), Dragomir Milojević and Predrag Gligorijević accepted the reasons stated by the lower court, finding that the defendant's testimony

at the main hearing was aimed at escaping criminal responsibility. The appeals panel did not consider any other grounds of the appeal.¹⁴⁹

K-89/1999 – Fadil Ajeti et al.

In Case K-89/1999, the District Court in Kraljevo, sitting in a panel presided over by Judge Mirko Rakić, sentenced the accused as follows: Fadil Ajeti to 18 months in prison, Arsim Tahiri to 16 months, Enver Ahmeti to 18 months, Samedin Salihi to 16 months, and Zeqir Salihi to 17 months in prison.¹⁵⁰ All the accused were tried in absentia, except Fadil Ajeti.

As alleged in the indictment, the accused in August 1998 joined the KLA, after which they were issued with weapons and uniforms, and then kept watch until 6 September 1998 on the movements and other activities of the police, thus committing the criminal act of association for the purpose of conducting hostile activities, acting as co-perpetrators.

71

**Mirko Rakić is currently a judge
at the Higher Court in Mitrovicë/
Kosovska Mitrovica**

This was yet another case where the primary evidence against those convicted was a self-incriminating statement one of the defendants had given to the investigating judge. The accused Ajeti repudiated the **statement at the main hearing, stating that it had been beaten out of him by the police**. At the main hearing, Ajeti admitted to keeping watch, not as a KLA member, but as a member of a group of villagers who organized themselves to keep watch over the village. He also said he had not known some of the co-defendants personally but only from a list a person unknown to him nicknamed “Hitler” had given him. He later returned the weapons and ammunition to that person. At the time of his arrest, he had a KLA emblem and a notepad with a list of persons who were issued with weapons, ammunition and hand grenades.

¹⁴⁹ Judgment KŽ I – 761/2000 of 21 June 2000.

¹⁵⁰ Judgment K-89/1999 of 8 February 2000.

As in previously described cases, the trial panel did not take the trouble to probe into the defendant's allegations that he was subjected to torture while in custody and that he did not know some of the co-defendants personally. As in Case K-81/1999 of the District Court in Požarevac, the **trial panel did not expound on co-perpetration**, which was the form of liability upon which the conviction was based, nor did it explain the individual responsibility of each of the accused as co-perpetrators with a shared intent. Furthermore, the trial panel did not specify how it arrived at the conclusion that the defendants knew one another and jointly planned and wished the commission of the offence. As regards the defendants other than Ajeti, who were tried and convicted in absentia, **the trial panel convicted them solely on the basis of the said Ajeti's statement.**

K-60/1999 – Hajrulah Peci et al.

72

In Case K-60/1999, the trial panel presided over by Judge Blagoje Miletić found the defendants guilty of association for the purpose of conducting hostile activities and sentenced them as follows: Hajrulah Peci to 18 months in prison, and Ismail Peci and Agim Peci each to 15 months in prison.¹⁵¹ According to the indictment, the defendants in May 1998 joined the KLA, were issued with weapons, and kept watch on the movements of the VJ; and the third defendant dug trenches. Hajrulah was taken into custody on 15 September 1998, Ismail on 30 December 1998, and Agim on 28 January 1999.

In this case the trial chamber again grounded its judgment solely on the statement taken from one of the accused, Hajrulah Peci, during the preliminary proceedings. Hajrulah later repudiated the statement at the main hearing, saying he was forced to confess under police pressure. He said he had been forced to keep watch by the KLA, who threatened to kill him if he did not comply. Ismail and Agim denied ever being members of the KLA, and said that the only reason why they had kept watch without arms was to protect their village from thieves.

¹⁵¹ Judgment K-60/1999 of 7 March 2000.

**Blagoje Miletić is today a judge
at the Higher Court in Mitrovicë/
Kosovska Mitrovica**

Despite not having any other evidence except the confession taken from Hajrulah during the preliminary proceedings, the trial panel found the defendants guilty. The rationale was that the statement of the main defendant given in the preliminary proceedings was sufficient evidence to find the defendants guilty and sentence them to imprisonment. Needless to say, the prison terms imposed equalled the time the defendants had already spent in custody.

In his appeal against the judgment, the defence lawyer of Hajrulah Peci pointed to a number of discrepancies it contained. For instance, the operative part of the judgment states that Hajrulah kept watch together with Avni Peci, whereas the statement of reasons states he kept watch with his uncle Sinan. Furthermore, nowhere in the judgment was it explained nor even mentioned what KLA plan and programme the defendants embraced. Also, the trial panel failed to explain the intent on the part of the defendant, in view of his allegation that he had been forced by the KLA to keep watch in his village carrying a firearm.

On 4 October 2000, a Supreme Court panel, comprising Judges Ljubomir Vučković (presiding), Novica Peković and Dragomir Milojević upheld the judgment of the court of first instance in its entirety as sufficiently reasoned, finding that the court of first instance had acted properly in relying on the confession made by a defendant during the preliminary proceedings. Rather than set out a reasoned basis for its decision, the appellate panel offered platitudes and commonplaces, without even addressing the arguments set out in the appeal.¹⁵²

Clearly, Hajrulah's allegation that the confession had been extracted from him under police pressure during the preliminary proceedings was not viewed as reason enough either for the court of first instance or for the

¹⁵² Judgment Kž I-1184/2000 of 4 October 2000.

court of second instance to request an investigation into the matter, or to introduce any additional item of evidence that could have supported the conviction. The whole proceedings were conducted with the idea of delivering a predetermined outcome - sentencing the defendants to prison terms equalling the time they had already served in custody and thus indirectly preventing them from claiming compensation for unlawful deprivation of liberty. Everything else was brushed aside, including the need to obtain other evidence on which to base the judgment, because the only items of evidence presented were the two conflicting statements of the defendant, or to show that the defendants' actions contained the elements of the offence with which they were charged.

K-68/1999 – Faik Sejdić et al.

74 This case was handled by the prosecutors and judges in nearly the same way as Case K-60/1999. On 23 March 2000, a trial panel presided over by Judge Mirko Rakić sentenced Tafil Prokshi, Bexhet Sejdić, Bekim Sejdić, Shemsi Miftaraj and Faik Sejdić each to one year and eight months in prison, and Bajram Sejdić to one year in prison for the criminal offence of forming a group with intent to conduct hostile activities.¹⁵³

The defendants were charged with joining the KLA in the village of Runik/Rudnik, digging trenches and keeping watch, with the first defendant also being charged with preparing food and meals for the KLA. Bajram Sejdić was tried in absentia.

The defendants testified at the main hearing that they had not joined the KLA voluntarily, and were forced to dig trenches and keep watch in their village. They also said their confessions during the investigation were not voluntary but extracted from them under pressure. Rather than request that additional evidence be introduced, the trial panel convicted the defendants solely on the basis of their confessions made during the investigation.

The defence lawyer of Faik Sejdić appealed to the Supreme Court of Serbia

¹⁵³ Judgment K-68/1999 of 23 March 2000.

against the judgment, on the grounds of these errors and the fact that the judgment was arbitrary and unreasoned. The Supreme Court of Serbia on 11 October 2000 upheld the reasons given by the court of first instance for its decision and affirmed its judgment.¹⁵⁴

The Supreme Court of Serbia, sitting in a panel comprising Judges Dragomir Lelovac (presiding), Novica Peković and Dragomir Milojević, even went one step further. In response to the defence lawyer's argument that because his client had repudiated his earlier statement at the main trial, the trial panel was bound to order the introduction of additional evidence that could have proved beyond doubt that he was guilty of the offence he was accused of, the appeal panel said that the defendant's defence at the main trial was not substantiated by evidence. This **stance of the Supreme Court of Serbia may be interpreted as implying that the defendant was the party who bore the burden of proof i.e. instead of the Public Prosecutor having to prove his guilt, he had the burden of proving his innocence.** Such a stance of the Supreme Court of Serbia undermined the presumption of innocence and imposed an impossible task on the defendant – to prove he was not guilty.

75

K-103/1999 – *Fehmi Hasani et al.*

By its judgment K-103/1999 of 20 April 2000, the District Court in Kraljevo, sitting in a panel comprising Judges Bogoljub Paunović (presiding) and Nevenka Balšić and three lay judges sentenced Fehmi Hasani to 11 years and Milajim Hajrizi to 10 years in prison for acts of terrorism.¹⁵⁵ The indictment Kt-64/1999 of 24 June 1999 raised by Nenad Trifunović, Deputy Public Prosecutor in Mitrovicë/Kosovska Mitrovica,¹⁵⁶ accused the two of joining the KLA in 1988 in the village of Stroc/Strovce, bearing firearms, digging trenches, keeping watch on the movements of the police, and taking part in the armed attacks on MUP members.

¹⁵⁴ Judgment Kž 1 – 1347/2000 of 11 October 2000.

¹⁵⁵ Judgment K-103/1999 of 20 April 2000.

¹⁵⁶ Indictment Kt-64/1999 of 24 June 1999.

**Currently, Nenad Trifunović is
Deputy Public Prosecutor at
the Office of the Higher Public
Prosecutor in Mitrovicë/Kosovska
Mitrovica**

76

The defendant Hasani at the main hearing repudiated his confession given during the preliminary proceedings, saying it had been coerced from him by torture and providing a graphic description of the physical abuse he endured at the hands of the police. He went on to say that he suffered from a mental illness and epilepsy, owing to which he was released from compulsory military service in 1981 upon being diagnosed. He could not produce any medical documentation confirming his condition, because his house had been burned with all his papers in it. Hasani also said that he had been tortured and threatened into confessing, first in police custody and later while being interrogated by the investigating judge, that he had never joined the KLA or used firearms, adding that over the preceding two years he had not lived in the village of Stroc/Strovce but in Vushtrri/Vučitrn, together with his family.

The defendant Hajrizi also contradicted what he had said in the preliminary proceedings, denying having joined the KLA or shot at police or kept watch in his village, adding that in the year preceding his arrest he had been living at his friend's place in Vushtrri/Vučitrn.

The trial panel ordered an examination of the defendant Hasani to assess his mental condition and capacity. A panel of experts found no mental illness, intellectual disability or temporary mental disorder in him, and concluded that at the time of the commission of the offence he was able to control his acts. The panel also found that the defendant did not have epilepsy. **Defence counsel objected that medical documentation confirming that the defendant had been released from the military owing to epilepsy should also be obtained and taken into account, but the trial panel ignored these objections.**

The defence counsel lodged an appeal against the judgment, in which they

repeated the objections raised in the course of the proceedings. Having heard the appeal, the Supreme Court of Serbia on 14 March 2001 set aside the judgment in its entirety and directed that the case be re-heard. An appellate panel comprising Judges Tomislav Đurđević (as president), Evald Gruber, Vojislav Knežević, Mihajlo Viraga and Nikola Mićunović, upheld all the allegations of the appellants relating to the trial panel's omission to obtain medical documentation from the military that could have shown whether or not the defendant was allowed early release from the military owing to a mental illness or intellectual disability, a point which was neither confirmed nor denied by the medical experts. As regards this very point, the court of second instance underlined that **Hasani's medical record at the neuropsychiatric department of the Mitrovicë/Kosovska Mitrovica hospital, which was available to the experts, indicated that Hasani suffered from hebephrenic schizophrenia.** The cited medical evidence called into question the finding and opinion of the panel of experts.¹⁵⁷

Furthermore, the Supreme Court panel underlined that at no point during the criminal proceedings did the defendants admit to shooting at the police, endangering their lives, and that the statement of reasons for the first-instance judgment did not offer any evidence proving that there were clashes between the KLA and the police at the critical time on the territory of Graboc/Grabovac, Bečuk/Benčuk and Gllavatin/Glavotina. It was precisely because of the incomplete finding of fact that the higher court did not uphold the judgment of the court of first instance but ordered that the case be retried. But what the court of second instance also failed to do is to probe into the allegations of torture made by the defendants. Since the defendant **Fehmi Hasani gave a graphic account of the torture he had undergone (including having cigarettes stubbed out on his neck), it was quite possible, through medical examination, to determine the cause of injuries on his body.**

¹⁵⁷ Ruling Kž I – 1772/2000 of 14 March 2001.

IV. District Court in Prokuplje

The HLC's archive contains three indictments, one filed by the District Public Prosecutor's Office in Prokuplje, and two by the District Public Prosecutor's Office in Prizren. The indictment of the District Public Prosecutor's Office in Prokuplje was signed by Public Prosecutor Miroslav Nikolić, and the indictments of the District Public Prosecutor's Office in Prizren by Deputy Public Prosecutor Jovan Krstić.

In addition to the indictments, the HLC has five judgments delivered by the District Court in Prokuplje, namely by Judges Branislav Niketić, Aleksandar Stojanović and Mijat Bajović sitting with lay judges. Also, the HLC possesses four judgments of the Supreme Court of Serbia, passed by Judges Tomica Šekularac, Miloš Popović, Janko Lazarević, Predrag Gligorijević, Zoran Petrović, Vladimir Danilović, Vesna Brašić, Miodrag Jakovljević, Ljubomir Vučković, Milena Savatić, Dragomir Stojanović and Božo Rakočević.

The HLC's archive also contains a ruling issued by the then Federal Court, sitting in a panel comprising Judges Petar Gvozdenović, Miroslav Vrhovšek, Jovan Radovanović, Lazar Raonić, and Milić Tomanović.

The HLC made a request to the Higher Court in Prokuplje under the Law on Free Access to Information of Public Importance, seeking to find out how many case files and trial records pertaining to cases tried pursuant to Articles 125 (terrorism) and 136 (association for the purpose of conducting hostile activities) of the then-applicable CCY, this court had in its archive. The Higher Court in Prokuplje responded that it possessed approximately 100 such case files in its archives and provided the HLC representatives full access to them for the purpose of legal analysis.

K-41/1998 – Ramadan et al.

By indictment Kt-55/1998 of 16 November 1998, Public Prosecutor Miroslav Nikolić of the District Public Prosecutor's Office in Prokuplje charged 15 individuals with the criminal offence of association for the purpose of conducting hostile activities. The indictment alleges that the defendants joined

the KLA between April and 20 July 1998, and organized themselves in order to raise money from the Kosovo Albanian diaspora in Slovenia for weapons and ammunition; having raised 96,155 German marks, they left Slovenia on 19 July heading for Kosovo on a bus operated by a bus operator from Suharekë/Suva Reka; they were arrested at a police checkpoint in Podujevë/Podujevo after the money has been found on them. The prosecution charged them with the criminal offence of association for the purpose of conducting hostile activities.¹⁵⁸

On 19 February 1999, the District Court in Prokuplje sitting in a panel presided over by Judge Branislav Niketić and comprising Judge Aleksandar Stojanović and three lay judges, sentenced four of the defendants each to four years in prison, and the remaining 11 each to three-and-a-half years in prison.¹⁵⁹

In its judgment, which is more of a political speech¹⁶⁰ than a judicial decision, the trial panel without any evidence creates a scenario where the defendants, construction workers in Slovenia, collected money from Albanians who also worked in Slovenia, and attempted to bring that money to Kosovo and hand it over to the KLA. Giving the reasons for its decision, the trial panel did not comment on the defence presented by the defendants or on the testimonies of witnesses it examined. From the facts which the trial panel said it relied upon, no evidence can be inferred to substantiate its conclusions. Therefore, **it remains unclear on what evidence the trial panel's conclusion that the money was raised for the KLA was based**, if the defendants testified that the money was for their families and the families of their fellow construction workers in Slovenia who could not travel home to Kosovo at

¹⁵⁸ Indictment Kt-55/1998 of 16 November 1998.

¹⁵⁹ Judgment K-41/1998 of 19 February 1999.

¹⁶⁰ A quote from the judgment: "The terrorist-separatist organisation KLA, formed in the southern Serbia area of Kosovo and Metohija, for a long period of time has been committing violent acts against Serbian and Montenegrin people and other ethnic communities living in the area. Their goal is to instil the feeling of insecurity in them and force them from their hearths and homeland, so that the Albanian ethnic minority can remain alone in this land, form its own separate state, secede from Serbia and join the Republic of Albania [...] In Serbia, they make cowardly attacks on the Yugoslav Army and police - on all the citizens - ethnic communities - loyal to Serbia who live in Kosovo and Metohija. They abduct, torture and kill them, and plunder and destroy their property."

the time. From the defendant's testimonies it could be inferred that some among them did not even know each other (and defendants knowing each other is an essential element of any offence which involves membership in a group, gang or other organization). The circumstance that they all travelled on the same bus was explained by the fact that from March 1998 buses travelling to Kosovo did not use their regular routes because of the events in Kosovo, so the passengers had to use alternative solutions, including taxis, to get to their final destinations from the places where buses stopped.

The defence lawyer of the defendants set out all of this in detail in his appeal, pointing to the completely irrational reasons given by the trial panel, the absence of evidence, the extent of the intolerance the presiding judge showed towards Kosovo Albanians, the draconian punishments inflicted and the purely subjective approach to justice; nevertheless, the appeals panel did not overturn the judgment of the court of first instance.

80

The defence tried to challenge the conviction by requesting an extraordinary review of the final judgment by the Federal Court, pointing out the numerous violations of basic procedural requirements and guaranteed minimum rights. The Federal Court, sitting in a panel composed of Judges Petar Gvozdenović, Miroslav Vrhovšek, Jovan Radovanović, Lazar Raonić and Milić Tomanović on 28 September 1999, dismissed the request as unfounded, stating that it did not point to any evidence upon which the judgment ought not to have been based but only tried to challenge the properly and completely established facts, which was not grounds for seeking this type of review. However, in giving the reasons for its decision, the Federal Court panel did not in any way try to explain what evidence had been presented to the courts upon which to base their judgments.¹⁶¹

K-90/1999 – Hajredin Sulaj

Even more problematic was the judgment handed down in case K-90/1999, by which Hajredin Sulaj was sentenced to 13 years' imprisonment for terrorism. The trial panel, comprising Judge Aleksandar Stojanović and three

¹⁶¹ Judgment Kps-22/1999 of 28 September 1999.

lay judges and again presided over by Judge Branislav Niketić, on 29 October 1999 found that the defendant joined the KLA between June and September 1998 in the village of Sllapuzhan/Slapužane, was issued with an assault rifle, a hand grenade and ammunition, kept watch to observe the movements of MUP members, stopped citizens for identity checks and communicated all the information gained in this way to the KLA leaders. The judgment was based on a certain list seized by the police upon entering the village, in which, according to the prosecutor, the defendant was listed as being tasked with keeping armed guard. Both during the preliminary proceedings and the main hearing, the defendant denied having been a KLA member and keeping armed guard. He said that he had lived peacefully in his village, and kept watch in front of his house at night simply in order to be able to wake his family members in the event of armed clashes and give them time to escape to safety.¹⁶²

Although from the judgment it cannot be inferred what happened during the proceedings, the defence lawyer for the accused specified all the violations committed by the trial panel, which could be classified as something much graver than serious violations of law. He pointed out that the president of the panel deliberately included untrue facts into the trial record, one such fact being that his recusal was requested after the indictment have been read, on account of which he was entitled to decide on his own on the request without sending the files to a court of second instance, while the truth was that his recusal was requested before any action had been taken at the main hearing.

In addition, the defence lawyer stated that although he had travelled four times from Belgrade to Prokuplje to visit and talk to his client, the president of the panel (who was also the president of the court in Prokuplje) refused to sign permission for him to visit his client, as a result of which he could not communicate with his client until the day of the main hearing.

The defence lawyer further stated that his client was in effect not allowed to use his mother tongue in the proceedings, as the interpreter provided by

¹⁶² Judgment K-90/1999 of 29 October 1999.

the court was an unskilled citizen who was not able to interpret accurately from Serbian to Albanian and vice versa, as a result of which the defendant did not understand the charges against him. The defence lawyer therefore stated that his client should be allowed to speak in his mother tongue, to which the president replied: "He can't, because this is Serbia."

Pointing to the wrong and incomplete finding of fact, the defence lawyer stated that the defendant had already at the hearing held in March 1999 informed the panel that in his village there was another person with the same name and surname, claiming that he was not the person from the list that the police seized. The panel then ordered the Prizren SUP of the Serbian MUP to find out if in the village of Sllapuzhan/Slapuzane there were indeed two persons sharing the same name and surname. But since the NATO bombing began the next day, all the case files were transferred to the court in Prokuplje, and the president of the panel in Prokuplje ruled not to introduce this evidence, as it could no longer be obtained. As a consequence, it was not established beyond doubt that the defendant was indeed the person who should have been indicted in this case.

82

The defence lawyer also cited the proclamation of the National Assembly of Serbia of 28 September 1998, which called on all Kosovo Albanians to surrender their weapons and return to normal life, promising that no one would be prosecuted except those who "had blood on their hands". The defence lawyer submitted that the proclamation should have been taken into account by Serbian courts, pointing out again that his client had never even used a rifle, and no rifle was found on him when the police entered his village.

And lastly, the lawyer for the defence pointed out the fact that the president of the panel throughout the proceedings used the derogatory term "shiptar" to address his client and also to refer to him in the operative part of the judgment, thus showing his strong bias against and hostility towards members of the Albanian ethnic minority. The penalty of 13 years in prison only reinforces this conclusion of the defence attorney, as it obviously was nothing but a demonstration of vindictiveness.

On 11 April 2000, the Supreme Court of Serbia sitting in a panel comprising Judges Tomica Šekularac (presiding), Miloš Popović, Janko Lazarević, Predrag Gligorijević and Zoran Petrović, ruled to modify the first-instance judgment in the part relating to the legal qualification of the defendant's acts and, instead of terrorism, found him guilty of the criminal offence of association for the purpose of conducting hostile activities, and re-sentenced him to two years and six months in prison.¹⁶³

**Zoran Petrović is currently a judge
at the Higher Court in Jagodina**

The Supreme Court of Serbia did not find any procedural defects in the proceedings conducted by the court of first instance, and stated as follows: the content of the trial record did not corroborate the allegations in the appeal (that the panel president managed the record in violation of due process); the defendant's right to defence was not violated in any way; the court of first instance did provide an Albanian language interpreter/translator in accordance with the Criminal Procedure Code; and the trial panel properly concluded that the defendant committed the crime, which was erroneously classified as terrorism. In response to the allegation that the court of first instance ought to have ascertained whether the defendant was the person who committed the crime with which he was charged or whether it was someone else sharing the same name with him, the Supreme Court found that the evidence indicated beyond doubt that it was the defendant who had committed the offence, for which reason the defence lawyer's request for obtaining additional evidence from the Prizren SUP was considered superfluous. As regards the use of the term "shiptar" to address and refer to the defendant during the proceedings and in the judgment, the Supreme Court of Serbia simply ignored it.

83

K-93/1999 – Arif Daka et al.

Exactly the same thing happened in Case K-93/1999. The trial panel, also presided over by Judge Branislav Niketić, and comprising Judge Aleksandar

¹⁶³ Judgment Kž I – 203/2000 of 11 April 2000.

Stojanović and three lay judges, on 29 October 1999 found the defendants guilty of acts of terrorism and sentenced them to prison terms as follows: Arif Daka to 14 years, Gzim Kabashi and Gani Salauka to 13 years, and Isuf Gashi and Ahmet Gashi to 10 years.¹⁶⁴ The reasons given were nearly the same as in Case K-90/1999. The defendants were charged with crossing into Albania, undergoing military training in Albania, smuggling weapons into Serbia (Arif Daka), being issued with rifles and keeping watch (the other defendants) in the villages of Mohlan/Movljane, Reshtan/Raštane, Krushicë/Krušica and Budakovë/Budakovo, before being arrested by the MUP on 9 October 1998. The judgment was almost entirely based on a certain register of fighters that had been seized by the police, supplied in the form of a photocopy.

The defendants were represented by the same attorney who had represented the defendant in case. In his appeal against the judgment, he raised the same issues as in K-90/1999 (procedural as well as material defects, and the conduct of the judge presiding over the panel).

But the Supreme Court, sitting in a panel comprising Judges Vladimir Danilović (presiding), Vesna Brašić, Miodrag Jakovljević, Ljubomir Vučković and Milena Savatić, yet again only changed the legal qualification of the act (association for the purpose of conducting hostile activities, instead of terrorism). Arif Daka had his sentence reduced by the Supreme Court to three years in prison, and Gzim Kabashi to two-and-a-half years, and Gani Salauka, Isuf Gashi and Ahmet Gashi each had their sentences reduced to two years. The Supreme Court upheld all the reasons given by the court of first instance, without questioning the evidence upon which the judgment of the lower court relied, and without dealing with the violations of due process alleged in the appeal, as a result of which the defendants' fair trial rights were substantially violated.¹⁶⁵

¹⁶⁴ Judgment K-93/1999 of 29 October 1999.

¹⁶⁵ Judgment KŽ I – 195/2000 of 31 March 2000.

On 24 December 1998, the Deputy Public Prosecutor at the District Public Prosecutor's Office in Prizren, Jovan Krstić, issued indictment Kt-148/1998 against 14 individuals for terrorism. As set out in the indictment, between July and 28 September 1998, the defendants armed themselves with infantry weapons, hand grenades and ammunition on the territory of Suharekë/Suva Reka municipality, kept watch on the movements of MUP members, and dug trenches; on 28 September 1998 they opened fire on MUP members, killing three and seriously wounding another five. The Deputy Public Prosecutor tendered "paraffin test" results and the defendants' testimonies as evidence.¹⁶⁶

On 2 November 1999, a trial panel of the District Court in Prokuplje, presided over (again) by Judge Branislav Niketić and including Judge Aleksandar Stojanović and three lay judges, sentenced key defendant Rahman Basha to 14 years in prison and the remaining defendants each to 15 years, on evidence supplied by an expert witness who confirmed that traces of nitrates and nitrites had been found on the defendants' hands and clothing.¹⁶⁷

Although the defendants testified that they were farmers and had never joined the KLA nor fired rifles, and that during the "paraffin test" they were not wearing their own clothes but some clothes that the police had given them just before the testing, after ordering them to take off their own clothes, the trial panel did not find it necessary to examine this matter. Moreover, some of the defendants retracted their confessions given during the interrogations, stating they were extracted from them by torture. Other defendants stuck to their earlier statements, reiterating that they had never joined the KLA or used firearms. But they nonetheless received long prison sentences solely on the basis of the finding and opinion of the expert witness, who actually never confirmed that the nitrate and nitrite traces found on them originated from gunpowder.

¹⁶⁶ Indictment Kt-148/1998 of 24 December 1998.

¹⁶⁷ Judgment 96/1999 of 2 November 1999.

In this case too, the defence lawyer listed all the procedural and material flaws and errors of law that occurred in the proceedings, particularly pointing to the fact that the president of the panel ruled to prohibit the defence lawyer from using his mother tongue in courtroom, although he was entitled by law to do so. The defence lawyer also submitted that no evidence related to the killing or wounding of police officers was presented to prove that the defendants had really taken part in the act.

86

On 30 May 2000, the Supreme Court of Serbia ruled to terminate the proceedings against the defendant Muhamed Basha (because of his death), and to quash the judgment of the court of first instance with respect to the other defendants, upon finding it in breach of a number of CPC and CCY provisions. An appellate panel presided over by Judge Tomica Šekularac and comprising Judges Miloš Popović, Janko Lazarević, Predrag Gligorijević and Zoran Perović, pointed to the fact that the judgment was based on no evidence other than the “paraffin test” results i.e. on the opinion and finding of the expert witness; that the trial panel failed to introduce any other evidence that could have proved or disproved that the defendants had shot the police officers; that **the president of the panel overstepped his authority** in deciding on his own recusal, which is a matter that an immediately higher court has jurisdiction to decide upon. The Supreme Court drew particular attention to the following circumstance: from the statement of facts in the judgment, it resulted that the police officers were killed on 28 September 1998; however, the case documents indicated that on 27 September 1998 the defendants were still in the place called “Reka,” surrounded by MUP forces, and therefore **could not have possibly been involved in the incident that took place a day later**. The Supreme Court of Serbia therefore directed that the case be retried by a different panel.¹⁶⁸

K-95/1999 – Gzim Loshi et al.

The indictment in this case (Kt-146/1998) related to the same facts and events that gave rise to the previous case (Kt-148/1998). On 18 December

¹⁶⁸ Judgment KŽ I – 201/2000 of 30 May 2000.

1998, Jovan Krstić, Deputy Public Prosecutor at the District Public Prosecutor's Office in Prizren, charged 13 individuals with terrorism as co-perpetrators. These charges too were based on a finding and opinion of an expert witness, a forensic chemist who performed the "paraffin test" on the defendants which detected nitrate and nitrite traces on their clothing and hands.¹⁶⁹ The defendants were arrested on 28 September 1998 in the place called "Reka" by members of the MUP and charged with killing three policemen and seriously wounding another five (the very same policemen referred to in case K-96/1999).

The trial panel, made up of different judges (Judge Branislav Niketić, as its president, Judge Mijat Bojović and three lay judges) on 9 November 1999 sentenced the defendants each to 14 years in prison. And yet again, the judgment was based on the finding and opinion of a court-appointed expert and "paraffin test" results, as no other evidence was presented.¹⁷⁰

87

The judgment was reversed in its entirety by the Supreme Court of Serbia's ruling KŽ I-194/00 of 9 May 2000. Also, the Supreme Court ruled to refer the case to the District Court in Požarevac, after finding in the case file a decision of the Supreme Court by which the case had been delegated, in the course of investigation, to the District Court in Požarevac, owing to which the District Court in Prokuplje was not competent to hear and decide on it.¹⁷¹

The appellate panel comprising Judges Dragomir Stojanović (presiding), Vladimir Danilović, Vesna Brašić, Miodrag Jakovljević and Boža Rakočević, also underlined that **the court of first instance failed to state the evidence upon which it found that the defendants shot the members of the MUP, killing a few and seriously wounding others**, and failed to explain how it was possible that the defendants, having shot the policemen in the village of Budakovë/Budakovo, were arrested the same day in the village of Vraniq/Vranić, at the place called "Reka", which are located 10 to 30km from Budakovë/Budakovo. In this case too, the appellate panel found that **the**

¹⁶⁹ Indictment Kt-146/1998 of 18 December 1998.

¹⁷⁰ Judgment K-95/1999 of 9 November 1999.

¹⁷¹ Judgment KŽ I – 194/2000 of 9 May 2000.

presiding judge overstepped his bounds in deciding on his own recusal, instead of sending the case file to the immediately superior court for it to decide on the matter.

The above analyses of the judgments passed by the District Court in Prokuplje point to the conclusion that Judge Branislav Niketić displayed hostility towards the defendants as members of the Albanian ethnic minority, imposed prison sentences which had no other purpose than to demonstrate power and take vengeance on the defendants for what was going on in Kosovo at the time, and handed down judgments which were political rather than based on law. The scale of violations found to be present in these judgments (some of which were sanctioned by the Supreme Court of Serbia by its decisions to quash them) shows that the courts infringed not only the standards of a fair trial, but also all the domestic regulations in effect at the time in the FRY. All these facts raise the issue of the criminal responsibility of the judges who ruled on these cases.

88

V. District Court in Leskovac

The HLC archive contains 14 indictments brought by the District Public Prosecutor's Office in Pejë/Peć, which were signed either by District Public Prosecutor Miladin Popović or by his deputies, namely Jovan Ninić, Slobodan Radović and Zoran Babić, and eight indictments brought by the District Public Prosecutor's Office in Leskovac, signed by Deputy District Prosecutors Vojislav Šoškić, Dragan Mladenović, Ljiljana Mladenović and Edvard Jerin.

Milomir Lazović and Vladan Bojić, Investigating Judges at the District Court in Pejë/Peć, led the investigation of these cases.

Apart from the indictments, the HLC possesses 34 judgments of the District Court in Leskovac. The judges who heard and ruled on these cases were Brankica Dašić, Goran Petronijević, Života Đoinčević, Milomir Lazović, Mirjana Ignjatović, Zoran Petrušić, Verica Vojvodić-Ristić, Radomir Gojković, Miroslav Veličković and Vitomir Krstić, who sat on panels with lay judges.

The HLC also possesses 15 rulings of the Supreme Court of Serbia on

appeals lodged by the defence and prosecution. The Supreme Court judges who heard and ruled on the appeals were: Duran Maričić, Natalija Janković, Zoran Škulić, Mladen Kulizić, Nikola Latinović, Aleksandar Ranković, Svetislav Milovanović, Dragiša Đorđević, Vladimir Danilović, Miodrag Jakovljević, Božo Rakočević, Ljubomir Vučković, Novica Peković, Dragomir Milojević, Vesna Brašić, Nikola Milošević, Slobodan Gazivoda, Dragomir Lelovac, Dragomir Stojanović, Tomica Šekularac, Miloš Popović, Janko Lazarević, Predrag Gligorijević and Zoran Petrović.

Additionally, the HLC possesses three rulings of the Federal Court, sitting in panels comprising Judges Petar Gvozdenović, Miroslav Vrhovšek, Jelisaveta Gajović, Lazar Raonić, and Milić Tomanović.

The HLC made a request for the following information to the Higher Court in Leskovac: how many case files and trial documents pertaining to the cases tried pursuant to Articles 125 (terrorism) and 136 (association for the purpose of conducting hostile activities) of the then-applicable CCY did the court hold in its archives. The court responded by providing access to the HLC to its entire documentation pertaining to the cases in question (over 2,500 pages) for legal analysis.

89

K-132/1999 – *Rasim Rexha et al.*

Indictment Kt-245/1998 charged Rasim Rexha, Muharem Pajaziti and Muhamet Tahiri with the criminal offence of association for the purpose of conducting hostile activities. The indictment alleged as follows: the defendant Rexha, in his capacity as the commander of the KLA staff, organized a group of 30 persons to go to Albania to collect weapons and bring them to Kosovo, armed a group of people and tasked them with keeping watch and digging trenches; the defendant Pajaziti was appointed to the staff and tasked with organising a field hospital and kitchen, providing the field hospital with medical supplies, and issued with an automatic rifle; the defendant Tahiri went to Albania to collect weapons, after which he was issued with a weapon and kept watch. The prosecutor proposed the hearing of the defendants and a witness.¹⁷²

¹⁷² Indictment Kt -245/1998 of 2 February 1999.

**Brankica Dašić is currently a Judge
at the Higher Court in Mitrovicë/
Kosovska Mitrovica**

90

The District Court in Leskovac, sitting on a panel presided over by Judge Brankica Dašić, sentenced Rexha to two years in prison, Muharrem Pajaziti to one year and six months, and Tahiri to one year and four months.¹⁷³ At the main hearing, Rexha and Muharrem Pajaziti retracted their confessions given to the investigating judge, and Muhamet Tahiri (who chose to remain silent during the investigation) denied all the charges against him. However, the trial panel was not convinced by their testimonies, regarding them as an attempt to escape criminal responsibility and finding no reasons to doubt the truth of their confessions in the preliminary proceedings. The trial panel considered that their statements given during the investigation were very detailed and cogent, so much so that they made their defence at the main hearing flimsy and illogical. The only other evidence presented apart from the defendants' testimonies, was a deposition taken from a witness for the prosecution during the investigation. The trial panel just read out the deposition, without calling the witness to testify *viva voce* at the main hearing, and without even citing his deposition in the statement of the reasons for the judgment. The judgment does not contain any explanation regarding the elements of the offence, including intent as a form of liability, or any other evidence supporting the indictment on which the defendants were tried and convicted.

K-58/1999 – Pashk Quni et al.

Everything that has been said about Case K-132/1999 can be repeated for the proceedings resulting from indictment Kt-I/1999 of the District Public Prosecutor's Office in Pejë/Peć as well.¹⁷⁴ The defendants, Pashk Quni and Gjergj Karaqi, were charged with involvement in the creation of a terrorist-sabotage group within the KLA in July 1998 in the village of Doblibarë/Doblibare, being issued with weapons and radios, and organizing men to

¹⁷³ Judgment K-132/1999 of 16 November 1999.

¹⁷⁴ Indictment Kt-I/1999 of 15 March 1999.

keep watch at four watch posts. The prosecutor proposed that the court hear the defendants (who in the preliminary proceedings did not confess to the offence) and six witnesses.

On 18 November 1999, a trial panel, again presided over by Judge Brankica Dašić, sentenced Pashk Quni to two years and six months in prison and Gjergj Karaqi to a year and two months in prison, for association for the purpose of conducting hostile activities.¹⁷⁵ The decision was based solely on the statements of witnesses given in the preliminary proceedings, without the witnesses being called to testify at the trial.

The defence lawyer pointed out this fact in his appeal to the Supreme Court of Serbia, but this court nonetheless ruled to affirm the judgment of the lower court in its entirety.¹⁷⁶ A panel comprising Judges Dušan Maričić (presiding), Natalija Janković and Zoran Škulić, concluded that the witnesses upon whose statements the judgment was based were in Kosovo at the time of the trial and that it was difficult for them to come to Serbia owing to the well-known events in Kosovo, for which reason the objection of the defence for the defendant Quni that the court of first instance had substantially violated statutory procedural requirements by denying the defendants the opportunity to cross-examine the key witnesses, was judged not valid.

The defence lawyer then made an attempt, which was equally unsuccessful, to obtain an extraordinary review of the final judgement by the Federal Court. This court, sitting in a panel comprising Judges Petar Gvozdenović (presiding), Miroslav Vrhovšek, Jelisaveta Gajović, Lazar Raonić, and Milić Tomanović, did not grant the request, on the grounds that during the proceedings before the regular courts it was established beyond doubt that the defendants had committed the offence they were charged with. In common with the Supreme Court, this court did not have a problem with the fact that the defendants had been denied the right to be given an opportunity to cross-examine the witnesses on whose statements the conviction was based.¹⁷⁷

¹⁷⁵ Judgment K-58/1999 of 18 November 1999.

¹⁷⁶ Judgment Kž I – 669/2000 of 16 June 2000.

¹⁷⁷ Judgment Kps-40/2000 of 6 December 2000.

K-45/1999 – Bekim Memaj et al.

The indictment Kt-58/1999 of the District Public Prosecutor's Office in Leskovac brought by Deputy District Prosecutor Ljiljana Mladenović, charged Bekim Memaj and Afrim Memaj with the criminal act of association for the purpose of conducting hostile activities. The defendants were alleged to have formed a terrorist-sabotage group in April 1999 in the village of Llukë e Epërme/Gornja Luka in the municipality of Dečani, elected members of its staff and its leadership, repeatedly travelled to Albania for weapons, kept watch at the entrances to the village, dug trenches and built bunkers, in order to deliberately hinder members of the MUP from performing their normal duties. The indictment included Jovan Račić as well, who was charged with the criminal offence of aiding an offender after the act (Article 137 of the CCY), because he provided the defendant Afrim Memaj with fake documents and drove him to Ulcinj in June 1999, although he knew that Memaj was with the KLA.¹⁷⁸

92

On 14 December 1999, the District Court in Leskovac, sitting in a panel presided over by Judge Života Đoinčević, sentenced the defendants each to one year and six months in prison. The trial panel held that all the charges against them had been proved, despite the fact that the defendant Bekim Memaj retracted at the main hearing his partial confession given in the preliminary proceedings, explaining that he was forced to confess, fearing what the police might do to him if he did not do so.¹⁷⁹ Afrim Memaj was tried in absentia. **The decision of the trial panel was based on a statement that a witness gave in the preliminary proceedings** - a witness who was not brought to the stand to testify at the main hearing, but whose statement was only read out before the court. Bekim Memaj admitted, both in the preliminary proceedings and at the main hearing, to keeping watch and travelling to Albania for weapons, saying that that was his obligation, but added that in July or August 1998, when weapons surrender was organised in his village, he too handed over to the police the rifle he had been issued with.

¹⁷⁸ Indictment Kt-58/1999 of 6 August 1999.

¹⁷⁹ Judgment K-45/1999 of 14 December 1999.

The Deputy District Public Prosecutor in Leskovac, Vojislav Šoškić, appealed against the short length of the sentence and won the appeal. On 11 May 2000, the Supreme Court of Serbia re-sentenced the defendants each to two-and-a-half years in prison. The appellate panel comprising Judges Aleksandar Ranković (presiding), Svetislav Milovanović, and Dragiša Đorđević, took the position that the punishments were too lenient and inadequate given the seriousness of the offences and the degree of criminal responsibility of the defendants, and particularly given their persistence and the danger their acts posed to society.¹⁸⁰ In its judgment, the appellate panel did not comment on the fact that Bekim Memaj voluntarily surrendered his rifle and was told on that occasion that all those who voluntarily gave up their weapons would not be prosecuted.

**Dragiša Đorđević is currently a
judge at the Supreme Court of
Cassation**

93

K-167/1999 – *Luaras Kelmendi et al.*

Deputy Public Prosecutor in Leskovac Zoran Babić charged Luaras Kelmendi, Muhamed Barlaj and Fadil Qelaj with the criminal offence of association for the purpose of conducting hostile activities, joining a terrorist-sabotage group in the village of Lutogllavë/Ljutoglava, and keeping watch at the entrances to the village in order to prevent MUP members from performing their regular tasks and duties.¹⁸¹

On 14 January 2000, the District Court in Leskovac sentenced Luaras Kelmendi and Muhamed Barlaj each to nine months in prison and acquitted Qelaj.¹⁸² Kelmendi and Barlaj denied the charges both in the preliminary proceedings and at the main hearing, saying they had never joined the KLA nor kept watch in the village. The moment the clashes began in the neighbouring village they decided to leave their homes and go to the village

¹⁸⁰ Judgment Kž 1 – 438/2000 of 11 May 2000.

¹⁸¹ Indictment Kt-259/1999 of 5 November 1999.

¹⁸² Judgment K-167/1999 of 14 January 2000.

of Staradran/Starodvorane. Police arrested them as they were leaving their village and took them into custody.

As regards the defendant Qelaj, he stated in the preliminary proceedings that he had never joined the KLA or kept watch, adding that it was Kelmendi and Barlaj who had done so. At the main hearing, he reversed the part of his statement incriminating Kelmendi and Barlaj, saying it was hearsay.

It was on the basis of this evidence alone that the trial panel, comprising Judge Milomir Lazović (presiding), Judge Brankica Dašić and three lay judges, sentenced two of the defendants to nine months in prison, without taking into account the statement the defendant Qelaj gave at the main hearing, which substantially contradicted his earlier statement given during the investigation. The trial panel concluded that this second statement was aimed at helping the other defendants to escape criminal responsibility, without explaining in more detail how it came to that conclusion.

94

**Currently, Milomir Lazović is a judge
at the Higher Court in Mitrovicë/
Kosovska Mitrovica**

The District Public Prosecutor appealed against the sentence, requesting tougher punishment for Kelmendi and Barlaj and a custodial sentence for Qelaj. On 19 May 2000, the Supreme Court of Serbia rejected the appeal and upheld the initial judgment.¹⁸³ The panel ruling on the appeal, comprising Judges Dušan Maričić (presiding), Mladen Kulizić and Zoran Škulić, held that all factual disputes had been properly resolved and that Kelmendi's and Barlaj's guilt had been established i.e. that the trial panel had properly evaluated all the circumstances of the case in deciding what sentence to give.

Judging by the content of the second-instance judgement, Kelmendi and Barlaj did not appeal against their convictions. The reason probably lies in the fact that at the time the judgment was delivered (14 January 2000) they had already been in custody for over eight months (from 10 May 1999), and therefore were eager to be released soon. Had they lodged an appeal, they

¹⁸³ Judgment KŽ I – 622/2000 of 19 May 2000.

would have probably remained in custody pending final adjudication of their case – in other words, the time they would have to spend in the remand jail would have exceeded the term they were sentenced to.

It is obvious that by manipulating the sentences the trial panels wanted to put the defendants before a difficult choice, which was an unfair and unlawful thing to do, to say the least. The fact that the defendants preferred to be released rather than to make use of all the remedies available to them could explain why the vast majority of these cases did not result in appeals. Another factor that probably discouraged them from appealing was that the appellate panels did not try to rectify all the errors and rights violations committed during the trials or to assess all the circumstances, which would inevitably have led to questioning the fairness of the trials.

K-175/1999 – Fadil Gjuliqi

95

Indictment Kt-298/1999, signed by Deputy District Public Prosecutor Vojislav Šoškić, charged Fadil Gjuliqi with the criminal offence of association for the purpose of conducting hostile activities. As set out in the indictment, Gjuliqi joined a terrorist-sabotage group in May 1998 in the village of Morinë/Morina, after which he went to Albania, where he brought an automatic rifle, kept watch in the village with the rifle, and dug trenches; he was arrested as he attempted to escape from Kosovo after members of the VJ and MUP had entered the village.¹⁸⁴

Vojislav Šoškić until 2014 served as a Deputy Public Prosecutor at the Appellate Public Prosecutor's Office in Belgrade; in 2014 he was transferred to the Office of the Organised Crime Prosecutor and retired later that year

Both in the preliminary proceedings and at the trial, Gjuliqi consistently

¹⁸⁴ Indictment Kt-298/1999 of 16 November 1999.

maintained that he had left Yugoslavia illegally as far back as 1994, to go to live in Germany, and that in May 1998 he went to Albania to fetch his son who lived there with his mother (after the parents divorced). In Tripoja, which is where he was at the time, five men came and forced him to go to Kosovo and join the KLA. Gjuliqi said they had forced him to come with them to the village of Morinë/Morina, keep watch and dig trenches. The first time he was given two days off from the KLA, he used the opportunity to flee to the village of Piskotë/Piskote, never to return to Morinë/Morina. He subsequently found out that two KLA members had threatened to kill him because he had not returned to his unit. No other evidence besides the defendant's testimony was introduced at the trial, nor did the prosecutor propose any other evidence in support of the charges.

96

On 15 March 2000, a trial panel comprising Judge Milomir Lazović (presiding), Judge Goran Petronijević and three lay judges sentenced the defendant to a year in prison, on finding that all the charges against him had been proven and that he had de facto confessed to the offence.¹⁸⁵

At no point in the proceedings did the trial panel even try to ascertain whether the required elements of the offence charged, including, most notably, intent, were indeed present in the defendant's acts, which is something it ought to have done, because of the defendant's claims that he had been forced to keep watch and dig trenches. Furthermore, the trial panel failed to determine the accuracy of the defendant's allegations that he had lived abroad for a number of years before coming to Albania to fetch his son and bring him to Germany, nor did it take into account his allegations that, as soon as the opportunity arose, he fled from his unit, and that KLA members had threatened to kill him. Explaining why it did not accept or at least enquire into his allegations, the trial panel merely stated that the defence he presented was designed to clear him of criminal responsibility. The KLA leaders must have trusted him if they gave him a weapon and tasked him with keeping watch, concluded the trial panel. This conclusion was made on a presumption which was not substantiated by any specific evidence.

¹⁸⁵ Judgment K-175/1999 of 15 March 2000.

Both parties appealed against the sentence. As a result, the Supreme Court of Serbia on 25 May re-sentenced Gjuliqi to two years in prison. An appellate panel comprising Judges Vladimir Danilović, Miodrag Jakovljević and Boža Rakočević, found that in view of the fact that the defendant went to Albania to fetch weapons, was issued with a semi-automatic rifle and kept watch with the rifle, and as such posed a serious menace to society, the sentence passed by the court of first instance was inadequate, given the seriousness of the offence and the defendant's degree of responsibility.¹⁸⁶

The panel of the Supreme Court of Serbia paid no attention to the allegations of the defendant and his circumstances at the time, nor questioned the finding of fact, nor determined whether the defendant's actions possessed the elements of the offence charged. Moreover, instead of determining whether or not his allegations that he had been forced to keep watch and, especially, that he had seized the first opportunity to escape, because of which he faced death threats, were true, the appellate panel arrived at the conclusion that he had confessed to the crime, and doubled his sentence.

K-52/1999 – Hajredin Zuberi et al.

Indictment KT/t-95/1998 of the District Public Prosecutor's Office in Prizren, brought by Deputy Public Prosecutor Jovan Krstić, included 10 individuals, who were charged with acts of terrorism for allegedly going to Albania to get weapons between June and 5 September 1988, and then smuggling them to Kosovo, digging trenches, building bunkers, keeping watch, and (some of them) shooting at the police.¹⁸⁷

Some of the defendants confessed to the crimes in the preliminary proceedings only to deny these statements at the main hearing, claiming they were extracted from them under police duress. Other defendants consistently denied all the charges both during the preliminary proceedings and the main hearing.

¹⁸⁶ Judgment KŽ I – 649/2000 of 25 May 2000.

¹⁸⁷ Indictment Kt-95/1998 of 28 October 1998.

On 28 December 1999, a trial panel of the District Court in Leskovac, comprising Judge Miroslav Veličković (presiding), Judge Vitomir Krstić and lay judges, found the defendants guilty as charged and sentenced them to prison terms as follows: Shukri Morina to two-and-a-half years; Qazim Morina, Hajredin Zuberi and Ulber Zuberaj each to five years; Reshit Morina, Xhem Berisha and Sula Morina each to three years; and Amrush Hoti to two years. Ahmet Kastrati and Mujo Morina were acquitted on all charges.¹⁸⁸

Besides the testimonies of the defendants, most of whom contradicted the statements they gave in the preliminary proceedings, the trial panel heard as witnesses the policemen who had been attacked, and obtained a finding and opinion from expert witnesses regarding the nitrate and nitrite traces found on the hands and bodies of the defendants. The policemen could not confirm that the defendants were the persons who had attacked. With regard to the “paraffin test” results, the trial panel concluded that nitrate and nitrite traces were found on the very places where they are characteristically deposited during the discharge of a firearm. However, the expert witnesses stated in unequivocal terms that the traces found on the defendants could have originated from other sources besides gunpowder, and therefore could not confirm with certainty that the defendants had fired firearms. Despite this, the trial panel found some of the defendants guilty and sentenced them to imprisonment. Ahmet Kastrati and Mujo Morina were acquitted, as the trial panel concluded there was no evidence to establish that they had committed the offence with which they were charged, despite the fact that nitrate and nitrite residues were detected on them too.

Both parties appealed against the judgment. The defence pointed out that there had been no evidence confirming that the defendants had discharged firearms, or even possessed them, or that any weapons were seized from them. The panel’s decision was in effect based solely on the statements of the defendants given in the preliminary proceedings under police duress, which they all retracted entirely at the main hearing. The appellants also indicated that the “paraffin test” was unreliable evidence, as it could not confirm with certainty that a person found with nitrate and nitrite residues on his hands

¹⁸⁸ Judgment K-52/1999 of 28 December 1999.

and clothing had discharged a firearm, therefore the court decision ought not to have been based on it.

On 28 June 2000, the Supreme Court of Serbia re-sentenced Qazim Morina, Hajredin Zuberi, Ulber Zuberaj, Reshit Morina, Xhem Berisha and Sula Morina, each to 10 years in prison, and quashed the sentences with respect to Shukri Morina, Amrush Hoti, Ahmet Kastrati and Mujo Morina, directing the court of first instance retry their cases. The appellate panel held that the defendants deserved 10 years' imprisonment because this was the mandatory minimum penalty prescribed for the criminal offence of terrorism with which they were charged, without calling into question the factual findings and reliability of the "paraffin test" upon which the judgment was based. Also, the fact that the defendants confessed to the offence in the preliminary proceedings only to retract their confessions at the main hearing, saying that the police had tortured them into confession, was simply waved aside by the appellate panel.

99

At the same time, the appellate panel quashed the judgment with respect to Shukri Morina and Amrush Hoti, upon finding that the conclusions the trial panel reached from the facts and regarding the legal qualification of the defendant's acts were premature, and that the defendants' earlier statements that they had participated in some KLA activities should be re-examined. With regard to Ahmet Kastrati and Mujo Morina, the appellate panel found that the court of first instance had been wrong to neglect the fact that they also tested positive to the "paraffin test", and quashed the part of the judgment concerning these two defendants.¹⁸⁹

K-81/1999 – *Valdet Lekaj et al.*

A rather similar situation occurred in the proceedings arising from indictment Kt-263/1999 brought by the Deputy District Public Prosecutor in Pejë/Peć, Zoran Babić, against 13 Kosovo Albanians who, according to the indictment, on 23 May 1998 ambushed a convoy of MUP vehicles in the village of Prilep, as a result of which seven policemen were seriously injured.¹⁹⁰

¹⁸⁹ Judgment Kž I - 457/2000 of 28 June 2000.

¹⁹⁰ Indictment Kt-263/1999 of 16 August 1999.

On 10 February 2000, the District Court in Leskovac, sitting in a panel comprising Judge Milomir Lazović (presiding), Judge Marija Ignjatović and lay judges, sentenced eight of the defendants each to 15 years in prison, and Valdet Lekaj to two years in prison, and acquitted the remaining four defendants. Some of the defendants in the preliminary proceedings admitted to having committed the offence, but retracted their confessions at the main hearing. The trial panel accepted the confessions given to the investigating judge as true, with the explanation that they were so clear and detailed that they rendered their testimonies at the main hearing implausible and unacceptable, and designed only to avoid criminal responsibility.¹⁹¹ As regards other evidence, the trial panel examined the witnesses (policemen) called by the prosecution. Referring to their testimonies, the trial panel stated in its judgments as follows: “None of the policemen heard recognized any of the defendants as participants in the attack of which they were accused; in the village of Prilep there were another 12 attacks on the police during 1998, besides that of 23 May.”

**Zoran Babić is currently a deputy to
the Organised Crime Prosecutor**

After the defence lawyer pointed out this error in his appeal, the Supreme Court of Serbia on 7 November 2000 ruled to uphold the trial judgment in the part relating to five of the defendants (including the four acquittals), and re-sentenced the remaining eight defendants as follows: two defendants had their sentences reduced to five years and six months and four had their sentences reduced to six years. The appellate panel decided to reduce their sentences with the consideration that the purpose of the punishment could be achieved with lesser sentences. As regards Imer and Zenel Nitaj, the appellate panel set aside their sentences, ordering the lower court to retry their cases. Furthermore, as the medical documentation attached to the appeal indicated that their mental capacity had not been evaluated by the court, the appellate panel instructed the trial panel to obtain a neuropsychiatric evaluation of their mental capacity, and base its findings on their responsibility upon its results. The Supreme Court of Serbia did

¹⁹¹ Judgment K-81/1999 of 10 February 2000.

not question the validity of the factual findings made by the court of first instance, nor did it consider that the trial panel erred when, in determining the defendants' guilt, it failed to take into account the fact that the policemen who gave evidence in court did not recognize any of the defendants.¹⁹²

K-8/2000 – Zeka Muhedin et al.

This case, also known as “Đakovica Group”, was one of the largest cases brought before the District Court in Leskovac. Indictment Kt-264/99/1999, brought by the District Public Prosecutor in Pejë/Peć on 10 January 2000, and Proposed Punishments Ktm-17/99, charged the defendants with acts of terrorism. The indictment alleges that the defendants, as members of a subversive terrorist group operating in the Gjakovë/Đakovica area, in the course of April and the first half of May 1999, carried out armed attacks on members of the MUP and Yugoslav Army, namely: on 10 April 1999 they opened fire on members of a MUP force, severely wounding one policeman; on 7 May 1999 they carried out an armed attack on members of the police force and military, in which four persons were seriously wounded; and on 9 May 1999, they attacked members of the police force and military, killing three persons, and lightly wounding two Yugoslav Army soldiers. A total of 143 persons were indicted, including **two minors**.¹⁹³

A trial panel comprising Judge Goran Petronijević (presiding), Judge Zoran Petrušić and three lay judges, on 19 May 2000 found all the defendants guilty and sentenced them as follows: forty-nine defendants received a term of 13 years in prison, fifty-one were given 12 years, twenty received 10 years, eleven received nine years, and 10 received seven years. The two minors were sentenced each to seven years in a juvenile detention facility. All the defendants had been in custody since 15 May 1999.¹⁹⁴

According to the statement of reasons for the judgment, the defendants chose to exercise their right to remain silent; at the main hearing they denied

192 Judgment Kž 1 – 1204/2000 of 7 November 2000.

193 Indictment Kt-264/1999 and motion to indict Ktm-17/1999 of 10 January 2000.

194 Judgment K-8/2000 of 19 May 2000.

all the allegations in the indictment, saying they had lived peacefully in their homes with their families, going about their usual daily work, before the police came and ordered them on 10 May or so to leave their homes and move to another part of the town, or before being stopped by police in the streets and brought in for informal questioning. Thereafter they were moved to the Dubrava Prison, from which they were subsequently transferred to prisons in Serbia. The trial panel heard a number of witnesses, mostly police officers, and obtained the opinion and finding of an expert witness regarding the nitrate and nitrite residues detected on the defendants' hands and clothing, and concluded that sufficient evidence existed to support a judgment of conviction, and handed down such a judgment.

102

The defendants, their family members and defence lawyers all appealed to the Supreme Court of Serbia, asking the court to set aside the judgment as all legal conditions were met for it to do so. On 23 April 2001, the Supreme Court, sitting in a panel comprising Judges Aleksandar Ranković (presiding), Nikola Milošević, Slobodan Gazivoda, Svetislav Milovanović, and Dragiša Đorđević, held a session at which it ruled to set aside the judgment and return the case to the court of first instance for a retrial. Odd though it may seem, **even the Deputy Public Prosecutor of Serbia proposed that the judgment be set aside** at the session.¹⁹⁵

The appellate panel explained in detail why the judgment of the first instance could not survive the appeal. Firstly, the trial panel cited the three incidents of which the defendants were found guilty, but it remained unclear which defendants, and how many of them, participated in each of the incidents. Furthermore, the trial panel failed to explain on what basis it had concluded that the defendants were members of a subversive terrorist group operating in the Gjakovë/Đakovica area, or to explain the issue of co-perpetration; because the defendants were charged as co-perpetrators, but co-perpetration was not mentioned either in the operative part of the judgment nor in the statement of reasons.

As regards the incomplete and wrong finding of fact, the appellate panel

¹⁹⁵ Ruling Kž I-I592/2000 of 23 April 2001.

found that the judgment had not been supported by the evidence adduced at the main hearing. None of the witnesses directly pointed at any of the defendants as the persons who had opened fire on them and on Yugoslav Army troops. The on-site investigation record of the investigating judge did indicate that there had been an exchange of fire in Gjakovë/Đakovica on 10 April 1999, but said nothing about which terrorists were involved in it; and the photographic documentation created at the scene of the attack did not provide any additional information regarding this point. Commenting on the record of the seizure of weapons, ammunition and explosive devices, the appellate panel stated that it merely listed the weapons and equipment items that were seized on that occasion, and as such it could not be used as evidence linking any of the defendants to the incident in question.

On considering the findings and opinion of an expert witness regarding the nitrate and nitrite residues detected on the defendants' hands and clothing ("paraffin test"), the appellate panel held that the only conclusion inferable from the expert testimony was that "there is a high likelihood that the defendants fired from firearms, but in situations like this one it cannot be confirmed with 100 percent certainty that the only possible source of nitrate and nitrite residues was the discharge from a firearm".

Finally, the trial panel found that the defendants' testimonies given at the main hearing were not fully examined in terms of the time of their arrest, and that the lower court had unjustifiably refused to allow the adducing of evidence proposed by the defence regarding the defendants' allegations that they lived with their families without taking part in any conflicts.

If ruling Kž I-1592/2000 of the Supreme Court of Serbia is compared with the earlier rulings of this court in nearly identical factual and legal situations, one cannot help but conclude that this ruling starkly departs from the usual practice of the Supreme Court. As can be seen from the foregoing analyses, the fact that the judgments at first instance were based solely on the involuntary confessions of the defendants during the preliminary proceedings (which they retracted at the main hearings) and the positive results of the "paraffin glove test", would not have prevented the Supreme Court from upholding the convictions. In these cases too the defendants

and their lawyers raised the issues of the vagueness of the judgments, the contradictions, the violations of due process, the lack of evidence, and the unreliability of the “paraffin test”, arguing that its results could not be taken as compelling evidence that a person had discharged a firearm, but the court of second instance considered these arguments irrelevant. Moreover, **the very same judges who heard this case (Kž I – 1592/00) on appeal, in other, nearly identical cases, handed down completely different judgments.** So the question now is whether the appellate panel of the Supreme Court made a mistake in this case by departing from its earlier and well-established practice, or whether in this case the court for the first time properly examined the issues raised in an appeal lodged by the defendants and their lawyers.

VI. District Court in Belgrade

The HLC archive contains court records pertaining to two cases heard by the District Court in Belgrade, both of which concern Kosovo Albanian students in Belgrade.

K-217/2000 (K-275/1999) – *Bekim Blakaj et al.*

Indictment Kt-631/1999 signed by Dušan Simić, Deputy Prosecutor at the Fourth Municipal Prosecutors’ Office in Belgrade, alleged as follows: 1) Bekim and Safet Blakaj on the territory of the City of Belgrade prepared terrorist acts to be carried out in Kosovo; the Blakajs, as members of an illegal organization of “shiptar” students at the Belgrade University called the “Shkumbini”, acquired weapons and organized the transport from Belgrade to Viti/Vitina of these weapons, which were to be used in terrorists acts in Kosovo. The indictment goes on to list the weapons in question and specify the vehicle used for transporting them and the name of the person to whom the weapons were handed over (Idriz Hajraj), and by these acts committed the offence of preparing terrorist acts; 2) Bekim Blakaj was charged with illegal possession of ammunition, by having on 13 May 1999 45 revolver bullets in his possession, and with identity document forgery, by having

obtained an identity card in someone else's name and replacing that person's photograph with his own, with the intention to use that ID card as his own; 3) Bekim and Safet Blakaj, Luid Ndou and Edon Ajrulagini were charged with illegal trafficking in medical supplies, by buying medicines and other medical supplies in Belgrade between 1995 and 13 May 1999, and reselling them to owners of private pharmacies in Kosovo, thereby gaining profit.

On 22 October 1999, the District Court in Belgrade, sitting in a panel comprising Judge Zoran Savić (presiding), Judge Mirjana Lazin and three lay judges, ruled as follows: to acquit Bekim and Safet Blakaj of the charges of preparing terrorist acts; to convict all four defendants of illegal trafficking; and to convict Bekim Blakaj of illegal possession of ammunition and identity card forgery. Bekim Blakaj was sentenced to one year in prison, and the remaining four defendants - Safet Blakaj, Luid Ndou and Edon Ajrulagini – were each sentenced to five months and 13 days in prison.¹⁹⁶

105

Over the course of the proceedings, the trial panel heard the defendants, who at the main hearing had retracted in entirety their confessions given in the preliminary proceedings (in which they had confessed to all charges against them, including preparing terrorist acts), as they gave a detailed account of the torture they were subjected to by the police to extract the confessions. The trial panel examined a witness called by the prosecution, who could not at any point of his testimony confirm that besides the ammunition, weapons had also been found in the flat in which Bekim stayed. The defendants admitted to reselling the medicines, saying they did not do this to supply any terrorist units, but only because they could make good money on them.

Giving the reasons for finding Bekim and Safet Blakaj not guilty of preparing terrorist acts, the trial panel stated that the Public Prosecutor had failed to produce a single piece of evidence supporting this charge. With regard to the statements and supplementary statements taken from the defendants in the preliminary proceedings, the trial panel found that the statement takers had not been specified in the documentation, that the statements

¹⁹⁶ Judgment K-279/1999 of 26 October 1999.

had been submitted to the court in the form of unstamped photocopies, and that even without any expert examination it was obvious that the signatures of the statement givers did not match. When evaluating the defendants' testimonies at the main hearing, in which they explained how these statements had been taken from them, the panel held that the statements could not have been taken as evidence upon which to base a conviction. The trial panel further concluded that there was no evidence that any weapons were seized from the defendants or anything else that could have proved the allegations in the indictment. Particularly important was the court's reasoning regarding the defendants' confessions which they retracted at the main hearing. Stating that it would not go into the defendants' allegations that their statements were "doctored", it nevertheless concluded that the statements in the very form in which they were presented, could not be used as something on which alone to base a guilty judgment without other corroborating evidence.

**Zoran Savić is now a judge at the
Court of Appeal in Belgrade**

Both the defence and the Deputy District Public Prosecutor, Nebojša Marković, appealed against the judgment. On 4 May 2000, the Supreme Court of Serbia, sitting in a panel comprising Judges Dušan Maričić (presiding), Nikola Latinović and Zoran Škulić, quashed the acquittals of Bekim and Safet Blakaj, upholding the remainder of the judgment.¹⁹⁷

Giving the reasons for its decision, the appellate panel stated that the trial panel had not given adequate weight to the statements the defendants gave in the preliminary proceedings, in which they confessed to the offences and gave detailed descriptions of their acts and circumstances surrounding them, nor had they examined the officers who took their statements, to clarify how they were taken and to clarify the defendants' allegations.

Following the above decision of the Supreme Court of Serbia, the trial panel, again presided over by Judge Zoran Savić, and including Judge Predrag

¹⁹⁷ Judgment KŽ I - 469/2000 of 4 May 2000.

Popović and three lay judges, for the second time delivered a judgment of acquittal.¹⁹⁸

Explaining their reasoning, the court of first instance first repeated the reasoning given for its previous judgment, stating that the Public Prosecutor had failed to produce any piece of evidence that could have supported a different judgment. In following the instructions of the appellate panel, the court made several attempts, through the Ministry of the Interior State Security Centre, to track down the officers who took the statement from the defendants and call them to testify, but managed to find only one of them. This officer of the State Security Centre said he was **unable to positively identify the statement-takers in this case**, explaining that because of the state of war they moved frequently from place to place, because of which he was not sure who questioned the defendants. He added that his role was limited to determining on the basis of the statements collected whether grounds existed for instituting criminal proceedings, and this was exactly what he had done in the case at hand. He underscored that he was not aware of any mistreatment of the defendants or that their statements were obtained in violation of the CPC.

107

Obviously, this is one of the few cases in which the court respected, at least partially, the basic rights of the defendants, including the *in dubio pro reo* rule. **The trial panel even at the retrial did not back down and withdraw its original position, which was that no one could be convicted of an offence without solid and sufficient evidence.** That said, a question remains: why did the trial panel not look into the defendants' allegations of torture, but rather dealt only with the formal shortcomings and omissions of the MUP officers while taking their statements, and used them as the grounds for acquittal?

K-338/1999 – Zef Paluca et al.

The second proceedings conducted before the District Court in Belgrade concerned Zef Paluca, Petrit Berisha, Driton Berisha, Dritan Meca, Shkodran

¹⁹⁸ Judgment K-217/2000 of 20 October 2000.

Derguti and Isam Abdulahu. These five Kosovo Albanians stood trial either for terrorism and association for the purpose of conducting hostile activities (Petrit Berisha) or association for the purpose of conducting hostile activities (the remaining four defendants), on an indictment brought by Veselin Mrdak, Deputy Prosecutor at the District Public Prosecutor's Office in Belgrade.¹⁹⁹

**Veselin Mrdak was a Deputy War
Crimes Procesutor until 2014, when
he retired**

108

According to the indictment, the defendants Zef Paluca and Petrit Berisha between the beginning of 1998 and the end of April 1999 set up a group in Belgrade, which also included the other three defendants and many other Kosovo Albanian university students in Belgrade, with the intention to perform acts of terror and sabotage; with that in mind, Zef Paluca and Petrit Berisha set up an illegal political group called "National Movement of Kosovo", raised money and used it to purchase weapons, ammunition, explosives, and explosive devices, and to create propaganda materials needed by the KLA, keeping part of the weapons and ammunition for themselves for use in the terrorist and sabotage activities they planned, hiding them in the jewellery shop run by Zef Paluca, and in two flats in Belgrade; they kept watch and gathered information on the movements of the police and military and their facilities in Belgrade; and at several meetings they held, they agreed to move to planning and organising terrorist acts across Belgrade, identifying the waterworks facility at Zvezdara, the Serbian Postal Service Headquarters in downtown Belgrade, the National Assembly Building, the Police Academy, etc. as potential targets, with the intention to undermine the security of the FRY. Their final decision on the attacks, which allegedly was to be made on 1 May 1999, was frustrated by members of the state security forces. In addition to this, Petrit Berisha was charged with participating in several attacks on MUP members in the area of the villages of Loxhë/Lođa, Raushiq/Raušić, Krushec/Kruševac etc., in which two policemen died, one of whom was captured, tortured, mutilated and eventually killed in the presence of the defendant Berisha. Before being charged, the defendants were interrogated

¹⁹⁹ Indictment Kt-282/1999 of 31 August 1999.

first by Serbian State Security officers, to whom they confessed to all crimes, and then by Investigating Judge Nebojša Živković of the District Court in Belgrade.

On 6 July 2000, the District Court in Belgrade, sitting in a panel comprising Judges Dragiša Slijepčević (presiding) and Rado Mićunović and three lay judges, delivered judgment K-338/1999 finding the defendants guilty on all charges and sentencing them as follows: Petrit Berisha to 12 years in prison, Zef Paluca and Driton Meca each to seven years, and Driton Berisha to six years, and Isam Abdulahu to six years and six months.²⁰⁰

The judgment was based on the confessions that some of the defendants made to the police and later retracted in their entirety at the main hearing, stating they were given under duress and describing in detail the torture they were subjected to at the hands of the police. However, the trial panel did not take any action with regard to their allegations. They were just mentioned in the judgment, but without any comment as to their truthfulness.

Besides the confessions, the police record of the search of the flat of Derguti's girlfriend was also used as evidence that the defendants had prepared the criminal offence. The police allegedly found a hand grenade in the flat, but during the proceedings it turned out that the **witnesses to the search had given conflicting testimonies about where exactly in the flat the grenade was found and how the police found it**. In the course of the proceedings, it surfaced that the police, after arresting Derguti and his girlfriend and before searching her flat, had the keys to the flat and could have entered it and "planted the evidence", so that it could be found later during the search, but the trial panel ignored these facts as well.

The defence appealed against the judgment, pointing out that the trial was clearly rigged and that the trial panel condoned the illegal methods of the state security officers, including coercion of statements, torture, mock executions of the defendants and blackmailing them into confessing, and a number of other illegal actions which the defendants fully described at

200 Judgment K-338/1999 of 10 July 2000.

the trial. Beyond the confessions which clearly were involuntary, no other evidence was put before the court against the defendants, let alone any evidence showing that they kept watch and gathered information on the movements of police and the military and on the facilities identified as potential targets of their terrorist attacks.

Defence counsel raised several issues in their appeal: there was a **gap of several hours between the arrest of Derguti and the search of his girlfriend's flat, during which time the police had the keys to the flat**, because of which the search results could not be taken as compelling and reliable evidence; before one room was searched, a member of the state security service entered the room by himself before the others followed him, which justifies the conclusion that he had an opportunity to "plant the evidence"; the fact that the Kosovo Albanian students hung out together in dormitories and flats by no means implied that they were setting up any kind of terrorist group in order to undermine the constitutional order of the FRY. Defence counsel also argued that the footage made for the Radio-Television of Serbia (RTS), which was used as evidence against the defendants, was not admissible as evidence in the first place, because the defendants who spoke to the RTS subsequently stated they were tortured into doing it. The defence counsel concluded his argument by saying that it was precisely because of their handling of the cases of Kosovo Albanians in Serbia that the international community insisted that all persons put on show trials be acquitted and proceedings against them terminated.

Having heard the appeal, the Supreme Court of Serbia on 17 April 2001 delivered judgment KŽ I – 161/2001, by which it modified the sentence passed on Petrit Berisha for terrorism, reducing it to three years. The appellate panel comprising Judges Aleksandar Ranković (presiding), Nikola Milošević, Slobodan Gazivoda, Svetislav Milovanović, and Dragiša Đorđević, said that as in the meantime the Amnesty Law had come into effect, the proceedings against all the defendants, except Petrit Berisha, who was tried on terrorism charges, were terminated.²⁰¹

201 Judgment KŽ I - 161/2001 of 17 April 2001.

With regard to Petrit Berisha's appeal, the appellate panel found it to be ill-grounded, because it had failed to challenge the validity and lawfulness of the judgment of the court of first instance and the court of first instance's acceptance of his statement given to the police. In common with the court of first instance, the appellate panel did not give due attention to the defendants' allegations of torture, nor consider that they deserved to be looked into. Rather, the Supreme Court panel satisfied itself with the explanation given in the first-instance judgment regarding the evaluation of the evidence presented, and summarily rejected the defence counsel's arguments that no court decision could be based on coerced confessions. The only ground of appeal that the Supreme Court accepted was that the sentence imposed on Petrit Berisha was too tough i.e. that the court of first instance overestimated the threat he posed to society, for which reason it re-sentenced him to three years. The remainder of the second-instance judgment contains nothing but vague and unspecific statements, to the point that it could be safe to say that the defendant's right to be given a clear and reasoned decision regarding the offence with which he was charged was violated.

III

Judicial impunity

I. Later careers of judges and prosecutors involved in human rights violations

A large number of judges and prosecutors who dealt with cases against Kosovo Albanians are still in state institutions. Moreover, some of them have even been promoted and today hold some of the highest judicial and prosecutorial positions in the country, others have moved to various state agencies, and others have become lawyers.

The HLC has approached the State Prosecutorial Council and the High Court Council seeking information about the judges and prosecutors who handled these cases, including their work biographies and the positions they currently hold.

According to the response received from the State Prosecutorial Council, some of the deputy prosecutors have remained in their positions, such as Dobrivoje Perić, Dragana Jovanović Gagović, Miodrag Surla, Biljana Jakšić and Nenad Trifunović. The majority have been promoted, such as Jovan Krstić, who was in 2009 appointed Secretary of the Department for International Cooperation and Legal Assistance at the Republic Public Prosecutor's Office, and Zoran Babić, who was in 2009 elected a Deputy Public Prosecutor at the Appellate Public Prosecutor's Office in Novi Sad, and in 2013 again promoted to a Deputy Prosecutor for organised crime. Vojislav Šoškić was elected in 2009 a Deputy Public Prosecutor at the Appellate Public Prosecutor's Office in Belgrade, in 2010 he was transferred to the Organised Crime Prosecutor's Office, where he worked until reaching the age of mandatory retirement in 2014. Veselin Mrdak served as Deputy War Crimes Prosecutors from 2005 to 2014, and Edvard Jerin was in 2014 elected Public Prosecutor at the Appellate Public Prosecutor's Office in Niš. Unlike the State Prosecutorial Council, the High Court Council did not supply to the HLC work biographies of all the judges listed in the HLC's request for access to information of public importance. The explanation was that these judges had ceased to hold office and therefore the Council did not have their work biographies.

On the basis of the biographies that were delivered to the HLC, the same conclusion can be reached as was arrived at for prosecutors – that the vast majority of judges have either remained in their positions or been raised to higher positions. Dragomir Milojević, Novica Peković, Janko Lazarević, Dragiša Đorđević and Mirjana Ivić are currently judges at the Supreme Court of Cassation; Nada Hadži-Perić, Marina Milanović, Ivana Rađenović, Milimir Lukić, Veroljub Cvetković and Zoran Savić serve as judges at various courts of appeal; Dragan Vučićević, Dragoljub Zdravković, Zoran Petrović, Mirko Rakić, Blagoje Miletić, Milomir Lazović, Brankica Dašić and Zoran Petrušić serve as judges at various higher courts; Verica Ristić is a Judge at the Basic Court in Prokuplje, and Slađana Petrović is a magistrate at the Magistrates' Court in Belgrade.

Some of the judges, such as Goran Petronijević, have become lawyers, and some have moved to other government bodies, as is the case with

Danica Marinković, who has been elected to the Board of the Serbian Anti-Corruption Agency.²⁰²

There exist a range of measures available to the states to remove from government institutions those officials who have applied the law in a manifestly erroneous and arbitrary manner to the disadvantage of the defendants, some of which will be discussed in the following pages.

II. Worthiness to perform the judicial function

Current domestic laws prescribe qualification, competence and worthiness, in addition to some formal requirements, as the criteria a person must meet to be eligible for judicial office. Worthiness implies the ethical qualities a judge should possess, and the behaviour in accordance with those qualities. The ethical qualities required of a judge include honesty, conscientiousness, fairness, dignity, perseverance and exemplary integrity, and behaving in accordance with these qualities implies that judges should preserve and uphold the dignity of judicial office both in the exercise of their official functions and outside their official functions, be aware of the social responsibility entrusted with them, preserve and uphold independence, impartiality, reliability and dignity in the exercise of their official functions and outside their official functions, and be responsible for the internal organization and the creation of a positive image of the judiciary amongst the general public.²⁰³

113

Non-compliance with the above-listed requirements may entail various consequences for the judicial office holders concerned. If the judges and prosecutors mentioned in this report had acted today the way they did in the proceedings against Kosovo Albanians, some of them would certainly not have been considered worthy of the judicial office under current Serbian laws.

202 Humanitarian Law Center, "Petition against Election of Danica Marinković to Position of Member of Board of Anti-Corruption Agency", 22 December 2016, available at <http://www.hlc-rdc.org/?p=33146&lang=de>, accessed on 17 May 2017.

203 Ministry of Justice and State Administration, "Pravosudne profesije" [Judicial professions], available (in Serbian) at <http://arhiva.mpravde.gov.rs/lt/articles/pravosudje/atlas-pravosudja-republike-srbije/pravosudne-profesije.html>, accessed on 19 May 2017.

III. Lustration

Lustration implies a set of administrative measures aimed at barring persons from exercising public office if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or belief in them in the past.²⁰⁴

On 30 May 2003, the Republic of Serbia passed the Law on Accountability for Human Rights Violations (also known as the “lustration law”), with a temporal scope of application limited to 10 years.²⁰⁵ This law has been out of force since 2013, without ever having been implemented in the 10 years specified.

114

This law defined lustration i.e. pursuing accountability for past human rights violations, as a procedure whereby to investigate and determine violations of human rights as defined in this law, determine individual accountability for human rights violations, and take measures against those whose accountability has been established. Within the meaning of this law, human rights encompass the rights set out in the International Covenant on Civil and Political Rights, which was signed and ratified by the Socialist Federative Republic of Yugoslavia, and in the rights of man and citizen laid down in the Constitution of the Socialist Federative Republic of Yugoslavia of 1974, the Constitution of the Federal Republic of Yugoslavia of 1992, and the Constitution of the Republic of Serbia of 1990.

Article 9 of the law stipulated that the law applied also to “ persons who acted in their official capacity in court proceedings [...] if they knew or ought to have known that the proceedings were conducted for the sole purpose of applying political views or criteria, which views and criteria were overtly or covertly presented as legal rules or criteria.”²⁰⁶

204 Resolution of the Parliamentary Assembly of the Council of Europe no. 1096, available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en>, Article 12, accessed 19 May 2017.

205 Law on Accountability for Human Rights Violations, (Official Gazette of the RS, nos. 58/2003 and 61/2003 - corr.)

206 Ibid, Article 9.

The Law on Accountability for Human Rights Violations in the Republic of Serbia has never been put into effect, individual accountability for human rights violations has never been pursued or determined, and no measures (such as publishing information on human rights violations that someone committed or limiting the access to public office of an individual guilty of such violations) have ever been taken against anyone.

The passing of a new lustration law has recently been proposed in Serbia.²⁰⁷

In contrast to Serbia, the lustration of the judiciary was completed, with varying success, in several former socialist states of East Europe. Germany and Poland stand out as the countries in which lustration was most thorough and transparent.²⁰⁸ Also, Bosnia and Herzegovina saw a sweeping reform of the judiciary personnel after the war.²⁰⁹

IV. Criminal liability of judges and prosecutors

Domestic legislation, that of the FRY and Serbia alike, had a separate category of offences known as offences committed in the discharge of an official function, and stipulated punishments for those found to have acted unlawfully or in excess of their authority in the performance of their official duties. Two offences from this category are particularly relevant to this report: **Violations of the law by judges** (Article 181 of the CCY and Article 243 of the CC of Serbia) and **Unconscientious performance of**

207 “Serbian Opposition Proposes New Lustration Bill”, *BIRN*, 19 June 2015, available at <http://www.balkaninsight.com/en/article/serbian-opposition-proposes-new-lustration-bill/lsv-predla%C5%BEE-novi-zakon-o-lustraciji>, accessed on 19 May 2017.

208 Sanya Romeike, “Transitional Justice in Germany after 1945 and after 1990”, International Nuremberg Principles Academy, 2016, p. 47, available at: https://www.nurembergacademy.org/fileadmin/media/pdf/news/Transitional_Justice_in_Germany.pdf; Alexander Mayer-Rieckh and Pablo de Greiff, “Justice as Prevention: Vetting Public Employees in Transitional Societies”, Social Science Research Council, 2007, pp. 222 – 254, available at: https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/7B57EFEC93-284A-DE11-AFAC-001CC477EC70%7D.pdf, accessed on 19 May 2017.

209 Alexander Mayer-Rieckh and Pablo de Greiff, “Justice as Prevention: Vetting Public Employees in Transitional Societies”, Social Science Research Council, 2007, pp. 181 – 212, available at: https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/7B57EFEC93-284A-DE11-AFAC-001CC477EC70%7D.pdf, accessed on 19 May 2017.

an official function (Article 182 of the CCY and Article 245 of the CC of Serbia). For a judge or other person acting in an official capacity to be held criminally liable for a violation of the law or unconscientious performance of an official function, the degree of violation of the right to a fair trial must be such as to constitute a “gross” violation.²¹⁰ A standard definition of a “gross” violation is that it occurs when proceedings conducted by a judge or other government body are fundamentally deficient to the point of violating basic rules of a fair trial. Most of the cases depicted in this report fit without any doubt within this definition.

Criminal prosecution of the above-cited criminal offences has long been statute-barred, and therefore cannot be used as an instrument whereby the holders of judicial offices mentioned in in this text can be sanctioned. However, in view of the systematic and widespread character of the violations of fundamental human rights inflicted upon Kosovo Albanians by the Serbian judicial authorities, some of the judges and prosecutors mentioned in this report could be prosecuted for offences under international law, which are not subject to any statute of limitations.

The International Criminal Tribunal for the former Yugoslavia, for instance, judged Radoslav Brđanin guilty of persecution as a crime against humanity for denying Bosnian Muslims and Bosnian Croats, on discriminatory grounds, some of the fundamental rights, including the right to proper judicial process.²¹¹ In this case the ICTY trial chamber concluded as follows: that Bosnian Muslims and Bosnian Croats were arbitrarily arrested and detained in camps and other facilities; that most of them were never informed of the charges against them, nor were any court proceedings ever instituted against them; that they were denied the right of access to a court; that their property was taken away from them without any legal process; and that the great majority of lawsuits initiated by Bosnian Muslims and Bosnian Croats following their dismissals, aiming at reinstatement into employment, were never dealt with by the courts.

210 Recommendation CM/Rec (2010)12 of the Committee of Ministers on Judges: independency, efficiency and responsibilities, para. 66.

211 ICTY Appeal Chamber Judgment in *Brđanin*, 3 April 2007, para. 303; ICTY Trial Chamber Judgment in *Brđanin*, 1 September 2004, para. 1075.

All of this led to the conclusion that they were denied the right to proper judicial process.²¹²

In the widely known case of *Josef Altstötter et al.* (the “Justice Case”), conducted before an Allied court, a number of German judges who served under the Nazi regime were on trial for crimes against humanity, including for applying laws in a discriminatory manner, in disregard of every principle of judicial behaviour.²¹³ Also, many judges were put on trial before military courts in the aftermath of World War II for denying prisoners of war and populations in occupied territories the right to a fair trial. For instance, in the case of *Sawada et al.*²¹⁴ two judges were convicted of a war crime for not affording prisoners of war a fair trial. The trial of these P.O.W.’s was considered unfair because: the interpreters did not translate anything except the defendants’ names and ranks; the defendants were not informed of the charges against them or the evidence against them; the defendants were not given an opportunity to plead; the defendants were not represented by counsel; and the proceedings lasted two hours at the very most.

117

Conclusion

The HLC has analysed just a part of the proceedings that were conducted before the Serbian courts in the 1998-2000 period, because a presentation of all the cases would exceed the scope of this report. The analysed cases are paradigmatic in that they paint a true picture of how prosecutor’s offices and courts have treated Kosovo Albanians in judicial proceedings. Almost all the proceedings were affected by gross violations of both procedural and substantive law, the defendants were denied their basic right to defence, the judgments passed were nearly identical, and arbitrariness in the evaluation of

212 ICTY Trial Chamber Judgment in *Brđanin*, 1 September 2004, paras. 1044-1045.

213 Judgment of Military Tribunal III in *The United States of America v. Josef Altstötter et al.*, p. 1062, available at <https://www.legal-tools.org/doc/04cdaf/pdf/>, accessed on 19 May 2017.

214 Judgment *Sawada et al.*, available at http://www.worldcourts.com/imt/eng/decisions/1946.04.15_United_States_v_Sawada.pdf, accessed on 19 May 2017.

evidence and the application of the law was all too obvious. The prosecutors filed indictments and judges imposed long prison terms which were not based on facts and evidence, and devoid of any kind of legal analysis of the criminal offences with which the accused were charged and their constituent elements.

In the context of this analysis, the fact that the media outlets, which were controlled by the political leadership of the FRY and Serbia at the time, were spreading hate against Kosovo Albanians and violating their right to presumption of innocence by condemning them in advance for terrorist acts, should not be overlooked.²¹⁵ Pronouncements by the highest state officials, and the entire editorial policies of the state-controlled mass media and their biased and selective coverage of the events in Kosovo, worked systematically to create an impression amongst the general public that the blame for the crisis in Kosovo lay solely with the Kosovo Albanians. In this way, the opinion was constructed in Serbia that the terrorism was widespread in Kosovo, and pressure mounted on the prosecutors and judges to charge and convict “the terrorists”.

However, the fact that indirect or direct pressure was brought to bear on the prosecutors and judges to prosecute Kosovo Albanians and sentence them is no excuse. As autonomous prosecutors and independent judges in their judicial functions, they were bound to comply with the relevant constitutional, legal and international law norms and ensure that the defendants received fair trials regardless of their race, ethnicity, political or any other affiliation. Moreover, given the defendants’ situation at that moment, it was even more necessary for the judicial authorities to respect their legal rights. But most of the prosecutors and judges preferred to agree to be used as further vehicles of the state leadership’s political propaganda, and reinforce with their indictments and verdicts the perception of Kosovo Albanians as terrorists.

215 *Večernje novosti*, “Obruč oko terorista” [Crackdown on terrorists], 15 October 1996; *Dnevni telegraf*, izjava Saveznog ministra policije Vukašina Jokanovića “Oslobodilačka armija Kosova nema nikakvih šansi” [Federal Minister of Police Vukašin Jokanović: Kosovo Liberation Army stands no chance of winning], 3 November 1996; *Večernje novosti* “Krvavi ciljevi” [Bloody goals], 18 January 1997; *Dnevni telegraf*, “Dobrovoljci rata 1992: Uzvrat ćemo teroristima” [1992 war volunteers: We will fight back terrorists], 19 January 1997; *Večernje novosti* “Uhapšeni teroristi” [Terrorists arrested], 28 January 1997.

The Serbian judicial authorities have never dealt with the issue of accountability of the prosecutors and judges who handled the cases of Kosovo Albanians. The reasons for this are numerous, one definitely being the fact the many of the prosecutors and judges still hold the same posts or have moved up the career ladder in their later careers. In contrast to the Serbian courts, the International Criminal Tribunal for the Former Yugoslavia has given proper regard to this issue, and in 2003 declined to appoint Goran Petronijević as Veselin Šljivančanin's defence counsel, because of his handling of a criminal case against Kosovo Albanians. Explaining what made him unsuitable for the appointment apart from not fulfilling the language requirement, the tribunal stated that, given Petronijević's reputation and character in matters of justice and human rights, his appointment could endanger the reputation of the Tribunal.²¹⁶

It is admittedly the absence of lustration in Serbia after the democratic changes in 2000 that has enabled those who abused prosecutorial and judicial office to retain their posts. But an even greater problem is their belief, which now seems justified, that it is possible, if not desirable, for members of the judiciary to now and then put themselves at the service of political interests and not face any punishment for that in the future.

216 Beta, "Petronijević odbijen zbog načina suđenja Albancima" [Petronijević rejected for his handling of Kosovo Albanians' trials], 10 July 2003, available at b92: http://www.b92.net/info/vesti/index.php?yyyy=2003&mm=07&dd=10&nav_category=64&nav_id=113609, accessed on 19 May 2017.

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