

**Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions**

REFERENCE:  
AL SRB 1/2020

6 March 2020

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions pursuant to Human Rights Council resolutions 35/15.

I am writing to follow-up on communication AL SRB 1/2019 concerning the extrajudicial killings of Mr. Ylli Bytyqi, Mr. Agron Bytyqi and Mr. Mehme Bytyqi during the Kosovo war, and the alleged lack of effective investigation and prosecution thereon.

I wish to thank Your Excellency's Government for its extensive reply dated 26 September 2019. I acknowledge the steps taken by the Serbian authorities for the protection of witnesses and the localization of missing persons. I also take note of the remaining problems impeding the regional cooperation that is crucial to the search for missing persons and excavation of possible burial sites. It is my intention to issue, later this year, a thematic report on the topic of mass graves and I hope I can return to you for this purpose.

In your response, a number of references are made to alleged violations committed against the Serbian people, including by NATO forces "*which resulted in 3000 deaths in a territory hundreds of kilometers away from Kosovo for which no-one has been held accountable so far.*" While these allegations were not the focus of communication AL SRB 1.2019, I stand ready to evaluate them and consider taking action, as appropriate, should information on at least some of those alleged killings be submitted to my mandate pursuant to the special procedures' methods of work<sup>1</sup>

I also note that the reply of Your Excellency's Government disputes some of the alleged facts concerning the killings of the three brothers, although, except with regard to the allegation that at the time of their arrest, they were escorting a Roma family, it does not elaborate. Your Excellency's Government further suggests that the alleged disputed facts could be manipulated "*to make constructions that are, consequently, untenable*". However, the reply does not elaborate on what those manipulations might be.

I further note the references to ongoing proceedings that should establish the facts and the strong view that the Serbian Courts will determine the facts and possible responsibility: "*Anyone responsible for the alleged crime will be punished.*"

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<sup>1</sup> <https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

I fully concur with Your Excellency's Government on the key role that Serbian courts should play in ensuring that there is no impunity for war crimes. It is with their important role in mind, that I express my concerns about Your Excellency's Government position that command responsibility for the killings of the three brothers cannot be investigated because: *"According to the Criminal Code in force then, there was no command responsibility which was not introduced to the Criminal Code of the Republic of Serbia before 2006. One of the fundamental principles of criminal law is to apply the law valid at the time of the commission of a criminal act and not retroactively or retrospectively. It may be retroactively applied only in case its provisions are more lenient for the perpetrator."*

I must stress that this argument is not in keeping with either international or domestic law and, accordingly, any ongoing investigations that Your Excellency's Government is said to be carrying out must consider accountability under the principle of command responsibility.

I will not restate the full alleged facts, as can be found in AL SRB 1/2019, but will summarize here the relevant elements of the issue of command responsibility.

On 23 June 1999, three citizens of the United States of America of Kosovar-Albanian origin, brothers named Mr. Ylli Bytyqi, Mr. Agron Bytyqi and Mr. Mehme Bytyqi, were apprehended by Serbian authorities after crossing a then unmarked border into Serbian Government controlled territory, while escorting a Roma family from Kosovo to safety.

I note that when the Kosovo conflict began, the brothers had travelled to Kosovo to join the Kosovo Liberation Army (KLA) and form what was called the KLA's "Atlantic Brigade". When the conflict ended, they gave up their arms and KLA uniforms.

Following their apprehension in June 1999, the brothers were convicted of illegally entering Serbia and sentenced to fifteen days in jail in Prokuplje. A decision for their release was issued on 8 July 1999. Instead of being released, however, they were taken by a special operations unit of the Serbian Ministry of Internal Affairs to a training facility near Petrovo Selo (Serbia), where they were allegedly executed.

In the spring of 2002, the Serbian authorities opened a criminal investigation into the murder of the Bytyqi brothers, eventually indicting two lower-ranking officers involved in the crimes, Mr. Sreten Popović and Mr. Milos Stojanović. However, various witness testimonies alleged that Lieutenant Colonel Goran Radosavljevi, who oversaw the Petrovo Selo facility, and Assistant Minister of Internal Affairs Vlastimir Đorđević exercised command responsibility over the killings. Despite these allegations, neither man nor any other in the chain of command were questioned as suspects.

As noted above, I must dispute Your Excellency's Government suggestion that command responsibility cannot be applied retroactively to the killings of the three

brothers. Two main arguments can be advanced to demonstrate that command responsibility should apply to the cases in question.

First, command responsibility is a key principle under international humanitarian law and customary law which are applicable to Serbia. According to Rule 153 of Customary International Humanitarian Law, “commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.” This principle of command responsibility applies to crimes committed during international and non-international armed conflicts.

The Federal Republic of Yugoslavia (FRY) and the KLA were in a non-international armed conflict at the time of the killing of the Bytyqi brothers.<sup>2</sup> A non-international armed conflict ends with the cessation of hostilities and a peaceful settlement. Although the KLA and the FRY negotiated a peace agreement in March 1999, the parties failed to reach accord, meaning that the conflict was still on-going.

The FRY was also in an international armed conflict with States members of NATO, including the United States of America, during the entire course of the Bytyqis’ detention. The Bytyqis were carrying documents showing their U.S. nationality. If the authorities of FRY had any doubt as to whether the Bytyqis were working for the USA or NATO, or whether prisoner of war status should apply, Article 5 of the Third Geneva Convention required the suspects to immediately treat the Bytyqis as prisoners of war until a competent tribunal determined whether they had combatant status under Article 4 of the same convention.<sup>3</sup>

Since the Bytyqis’ combatant status was never determined by a competent tribunal, they were to be treated as prisoners of war “until their final release and repatriation.” Given these facts, principles of international humanitarian law related to international armed conflict applied on 23 June 1999 when the Bytyqis were first detained in Prokupulje and continued to do so throughout their detention and transportation to Petrovo Selo, given that they were never actually released or repatriated. Those principles applied to them either as civilians or as prisoners of war.

As members of the KLA who had laid down arms, the Bytyqis also enjoyed the protections of Common Article 3, which applies to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms[.]” It should be noted that protections afforded by the Geneva Convention apply even after the signing of a formal ceasefire or peace agreement. Article 5 of the Third Geneva Convention explicitly states that the protections related to prisoners of war apply “until

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<sup>2</sup> ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement, April 3, 2008, Case No. IT-04-84-T, pg. 56-7, available at <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>

<sup>3</sup> Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), arts. 4-5, Aug. 12, 1949, 75 UNTS 135.

their final release and repatriation.”<sup>4</sup> Similarly, Article 6 of the Fourth Geneva Convention states that most of its provisions apply until “the general close of military operations [.]”<sup>5</sup>

It is thus clear that once protections under the Geneva Conventions attach to an individual in custody, such protections do not cease until their actual release or repatriation. Accordingly, the Bytyqis’ transfer to the custody of the suspects continued their initial detention, therefore extending the application of protection under Common Article 3.

**These principles and obligations establish that the Bytyqi brothers were afforded protection under international humanitarian law and thus that their killing may amount to a war crime. This in turn triggers Your Excellency’s Government obligations under international law to investigate the responsibility of the commanders and other superiors who may have been criminally liable for the killing.**

I wish to emphasize that Article 7 of the Statute of the International Criminal Tribunal for the former Yugoslavia adopted in 1993 includes command responsibility as a mode of criminal responsibility.

Therefore, Your Excellency’s Government was on notice that the principle applied to it. This position was accepted by a court in Bosnia and Herzegovina in the *Rasevic, et al* case dealing with crimes committed during the Yugoslav Wars. The court correctly reasoned that command responsibility was foreseeable at the time because Bosnia was subject to customary international law.

Secondly, in addition to obligations under international law, command responsibility seems to have been codified in various sources of law in the FRY. The FRY’s Military Manual (1988) included command responsibility in § 20 (Propisi o Primeri Pravila Medjunarodnog Radnog Prava u Oruzanim Snagama SFRJ, PrU-2, Savezni Sekretarijat za Narodnu Odbranu (Prava Uprava), 1988, §20). The Criminal Code of the FRY included general provisions of the act of committing a crime, including aiding-and-abetting and co-perpetration. Specifically, article 23 of the code criminalized behavior of a person as the perpetrator of a crime if he/she is “aid[ing] another in the commission of a criminal act” in particular by “giving of instructions or advice about how to commit a criminal act, supplying the tools and resources for the crime, removing obstacles to the commission of a crime, as well as promising, prior to the commission of the act, to conceal the existence of the criminal act, to hide the offender, the means to commit the crime, its traces, or goods gained acquired by the commission of a criminal act.”. Articles 141-144, 146(3), 147 and 150(a)) penalized “ordering” the commission of a crime.

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<sup>4</sup> Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 5, Aug. 12, 1949, 75 UNTS 135.

<sup>5</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 6, Aug. 12, 1949, 75 UNTS 287.

Although command responsibility was not specifically included in the Criminal Code of Serbia until 2006, the practice of retroactive application of command responsibility statutes dates back to World War 2, with the most prominent example being the Nuremberg Trials.

It is thus quite clear that Your Excellency's Government has an obligation under international humanitarian law and domestic legal instruments to investigate the criminal responsibility of commanders and superiors, including Goran Radosavljevi and Vlastimir Đorđević, for the killing of the Bytyqi brothers.

I am grateful to Your Excellency's Government for the additional information provided concerning the Bytyqi case and for the assurances that the killing is still being investigated. However, I hope that I have also established clearly the reasons for why any such investigation must look into command responsibility.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Agnes Callamard  
Special Rapporteur on extrajudicial, summary or arbitrary executions

**Annex**  
**Reference to international human rights law**

According to Rule 153 of Customary International Humanitarian Law, “Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.:

Common Article 3 of the Geneva Conventions states that “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Article 5 of the 3<sup>rd</sup> Geneva Convention relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 states that “The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [ Link ], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

Similarly, Article 6 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War states that “The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.”

Lastly, Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia states that “1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in

mitigation of punishment if the International Tribunal determines that justice so requires.”