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LEADING ARTICLE

THE QUALITY OF JUSTICE

The UN must not permit ethnic bias in Kosovo's courts

The judicial system operating under the United Nations Interim Administration Mission in Kosovo (Unmik) is flawed. In its present form, it is likelier to perpetuate ethnic injustice than to eradicate it. Hatred between Kosovo's ethnic Albanian majority and its now much-reduced Serb minority remains intense; yet justice is supposed to be meted out in local courts for all but the worst of war crimes (which will go to an international tribunal). Before Nato's intervention, most local judges were Serbs, not least because Slobodan Milosevic purged ethnic Albanians from most government and professional positions.

Now, with much of a terrified Serb population on the run, most judges are Albanian with little recent judicial experience. They live with their own vivid recollections of the war; they cannot be expected to judge war crimes cases that pit the evidence of Serbs against that of Albanians without an entirely human, but judicially unacceptable, degree of bias.

It is therefore up to the UN administration headed by Bernard Kouchner to ensure that those charged with war crimes get an impartial hearing. The best option, recommended by the Bar Human Rights Committee of England and Wales after a fact-finding mission, would be for international, not local, judges to hear war crimes cases. Yet this is a solution that Dr Kouchner's administration refuses to countenance. Unmik insists instead that the local judiciary be included.

Unmik's stated aims in doing so are high-minded: to develop Kosovo's legal system and avoid all trace of "colonialism". A less high-minded aim - avoiding confrontation with the ethnic Albanian Kosovo Liberation Army (KLA) and its political leaders - is unstated. Dr Kouchner would be both foolish and stubborn to persist with this plan, especially given that Kosovan judges themselves favour leaving war crimes cases to international judges so that reconciliation can eventually become possible. It would be better to avoid miscarriages of justice now than to wait and see how Europe's most volatile province (where dozens were injured yesterday alone in the divided town of Mitrovica) responds to a system that legalises revenge. Without equality before the law, Kosovo's wounds will never heal.

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Kosovo's ethnic minorities are the victims of a biased and flawed judicial system concerned with revenge rather than justice, says **Steven Powles**, one of three delegates who visited the region on behalf of the Bar Human Rights Committee

UN denies Serbs justice

Five Kosovo Albanian men, armed to the hilt, approached the home of the Momcilovics, a Kosovo Serb family, on July 10 last year. The Albanians demanded entry to the house. When refused they proceeded to break the door down. Shots were exchanged and one Albanian was killed. Kfor troops arrived, the Albanians resisted arrest, Kfor opened fire and another Albanian was killed. Kfor then arrested the responsible Albanians and Serbs.

The whole incident had been recorded by closed-circuit television. It clearly showed the Albanians as aggressors and the Momcilovics acting in self-defence. By July 17, the Kosovo Albanian prosecutor and the Kosovo Albanian judge had released all the Albanians. Conversely, the Momcilovics (father and two sons) have been detained in custody awaiting trial while the remaining family has been forced to flee to Serbia, their home looted and burnt. Their case is just one of many that demonstrates the blatant partiality and bias of the Kosovo Albanian judiciary in ethnic matters.

After the arrest for war crimes of 11 Serbs and three Romas towards the end of last year, the Bar Human Rights Committee of England and Wales (BHRC) was asked to investigate the human rights and fair trial implications of war crimes trials in Kosovan courts.

The extent of the atrocities and human rights abuses of Kosovo's brutal and bloody conflict is still being uncovered. Mass graves and bodies are being discovered all the time. The demand for justice is high. The International Criminal Tribunal for the former Yugoslavia (ICTY) has stated that it is interested only in the "big fish" - Milosovic and his immediate cronies. Consequently, the lesser war crimes will be prosecuted in Kosovo's domestic courts.

Up until the Nato bombing in March last year, the majority of Kosovo's judges were Serbs. After the conflict almost all Serb judges fled to Serbia. Despite a drive for a multi-ethnic judiciary, the majority of Kosovo's prosecutors and judges are now Kosovo Albanian. Few have had any judicial experience in the past ten years. They are paid a paltry £150 a month, leaving them vulnerable to bribery and corruption.

Kosovo is a small, close-knit country and almost everyone has lost someone in the conflict. The Kosovo Albanian judiciary is no exception. It is no surprise then that over the past few months bias and partiality in their decisions have been clear. As one Albanian judge eloquently put it: "I hate f***** Serbs".

It seemed apparent to the BHRC observers in Kosovo that Kosovo Albanian judges would be unable fairly and impartially to try Serbs and other minorities accused of war

crimes. Even with those professional enough to put aside their natural leanings, (as one former judge proclaimed: "First of all I am human, then I am Albanian"), there will be the obvious risk of a perception of bias.

The BHRC has proposed that no ethnic Kosovan judge should preside over war crimes trials, and instead "international" judges should be deployed to administer justice in these cases. Furthermore, it is proposed that the Office of the Prosecutor of the ICTY should review all war crimes prosecutions to confirm that there is at least a prima facie case before the matter proceeds to trial.

The BHRC also learnt that almost all defence lawyers in Kosovo are now Kosovo Albanian, some of whom had spent as little as 20 minutes a month with their client. It is proposed that international defence lawyers should, at the defendant's request, be allowed to assist local defence advocates.

Since June 10 last year, which marked the end of Nato's air campaign, Kosovo has been subject to international rule under the supervision of the United Nations Interim Administration Mission in Kosovo

(Unmik) headed by Dr Bernard Kouchner, Special Representative of the Secretary-General. Unmik is responsible for the administration of the judiciary and judicial system. The BHRC put to Unmik officials the idea of international judges sitting alone on war crimes matters. The idea was rejected. Unmik is determined to establish and develop Kosovo's legal system and is therefore set on including the local judiciary in these trials. Unmik recently announced plans to set up the Kosovo Court for War Crimes and Ethnically Motivated Crimes, where an international judge will sit with local judges. Unmik's determination to include the local judiciary in war crimes trials is, in part, to avoid any perception of "colonialism", but more importantly to mollify the Kosovo Liberation Army (KLA) and its political leaders.

Unmik's concerns are misplaced. The Kosovan judges the BHRC met were all in favour of international judges sitting alone in war crimes cases. They felt that they would give weight to the proceedings and credibility to any convictions, precisely what is required if these trials are to be the first step towards reconciliation instead of the cause of further tension.

Despite the overwhelming evidence that Kosovo Albanian judges are biased, or at least will be perceived as biased, Unmik are going to include them in war crimes trials. The result will be a violation of the defendants' right to fair trial by an independent and impartial tribunal (Article 6 (1) ECHR). Unmik's insistence on the use of local judges therefore runs contrary to its mandate to "protect and promote human rights" (Security Council Resolution 1244 - Article 11(j)).

Unmik's response is that there have not yet been any violations and the appropriate way to proceed is to see if any problems arise. When it was pointed out that some people's fundamental rights will be violated along the way, one Unmik official's alarming reply was: "Well that's just too bad."

The author is a pupil barrister with Cloisters, 1 Pump Court.

Roger Thorn, QC (Recorder of the Crown Court, appointed a deputy High Court judge) and Alexander Duma (former Albanian Honorary Consul to the UK) were the other two delegates. Kosovo 2000: Justice not Revenge, BHRC, 0171-395 9508