



**BAR HUMAN RIGHTS  
COMMITTEE  
OF ENGLAND AND  
WALES**

## **KOSOVA 2000- JUSTICE NOT REVENGE**

The Bar Human Rights Committee of England and Wales (BHRC) was founded by a group of barristers in 1991. It is an independent body primarily concerned with the support and protection of the rights of advocates and judges around the world where they are threatened or oppressed in their work. It is also concerned with defending the rule of law and internationally recognised legal standards concerning the right to a fair trial.

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16th February 2000

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# **KOSOVA 2000: JUSTICE NOT REVENGE**

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## **Section 1:** **INTRODUCTION.**

Towards the end of 1999, the Bar Human Rights Committee of England and Wales (BHRC) received a report from Kosova. 14 men, 11 Serbs and three Roma, had been arrested in Rahovec / Orahovac on war crimes and crimes against humanity. The International Criminal Tribunal for the former Yugoslavia (“ICTY”) made it abundantly clear that it was not minded to seek the surrender of what it considered “small fry” to The Hague<sup>1</sup>. The men were instead to be tried by domestic courts in Kosova.

It was reported that the local judiciary in Kosova, being almost exclusively Kosovar Albanian, had not been sitting for some ten years by reason of the Serbian / Milosovic regime; and that these 14 Defendants had been assigned Kosovar Albanian advocates, albeit with very limited means of access.

If the facts were as reported, the potential for abuses of human rights seemed obvious. It was therefore resolved by the BHRC that the three authors of this report should visit Kosova as independent advisers to conduct an investigation and compile a report.

To state the essence of our findings, and for the reasons set out hereafter, we fear serious violations of Human Rights. We have therefore recommended urgent reforms to the criminal justice system in Kosova.

16<sup>th</sup> February, 2000.

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<sup>1</sup> See Office of the Prosecutor at the ICTY Position Statement regarding the Investigation and Prosecution of Crimes Committed in Kosova, 2nd September 1999 – The ICTY are focusing their efforts and resources on the pursuit of those responsible for leading the conflict

## **Section 2:** **HISTORICAL BACKGROUND.**

The relevant background history is set out in greater detail at **Appendix A**. To summarise here, in March 1989 the Socialist Federal Republic of Yugoslavia (SFRY) imposed “special measures” assigning responsibility for public security in Kosova to the federal government. Many Kosovar Judges and Prosecutors were dismissed and the law of Yugoslavia was imposed in Kosova, in the main, by the minority ethnic of Serbs.

With the disintegration of SFRY during the 1990’s the situation in Kosova remained tense. A faction of Kosova Albanians formed a group known as the Kosova Liberation Army (KLA). In the late 1990’s, the conflict between the KLA and Serb forces intensified, resulting in widespread human rights abuses and violations.

In mid-March 1999, peace talks at the Rambouillet Conference broke down and on the 24th March NATO commenced air strikes against targets in the FRY. This continued until the 10th June when Kosova became subject to the rule of an international civilian and security presence under the auspices of the UN, in accordance with UN Security Resolution 1244 (1999)<sup>2</sup> and which continues to date.

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<sup>2</sup> § 5

**Section 3:**  
**UNITED NATIONS RULE IN KOSOVA**  
**and**  
**THE EMERGING JUDICIAL SYSTEM.**

With the breakdown of all the former institutions in Kosova, the UN were empowered to take over their governance by a civil presence known as the United Nations Interim Administration Mission in Kosova (UNMIK), headed by the Special Representative of the Secretary General (SRSG) Dr Bernard Kouchner.

In addition to UNMIK, the Organisation for Security and Co-operation in Europe (OSCE) was charged with the re-building of the institutions relating to justice, police, and public administration. The administration of the judiciary was, however, to be done by UNMIK.

Meanwhile, with the assistance of KFOR, many Kosovar Albanians were able to return home from refugee camps abroad. Alas, there developed a growing thirst for revenge by the Kosovar Albanians of their former oppressors the Serbs. Indeed, there was a growing trend towards intolerance of all minorities, including the Roma gypsies. (See **Appendix B** for more detail of recent repression.)

Against this background of civil unrest, characterised by attacks on the ethnic minorities by the Kosovar Albanians, attempts were made by the UNMIK to restore the administration of justice. Local judges and prosecutors were re-appointed but, insofar as any minorities were represented amongst their number, intimidation and repression soon reduced their number. (See **Appendix D** for more detail on the emerging judicial system).

As to the Kosovar Albanian judges, many started to refuse to apply the applicable law which had been declared as that which had applied prior to 24th March 1999, namely FRY law (in so far as it complied with internationally recognised standards of human rights). Their complaint was that FRY law was Serbian law. This led to their being mollified with the applicable law being re-defined to include the Kosova law that had applied prior to 22nd March 1989 (namely Kosova Federal law).

From June 1999 to date, delays became inevitable in the effective implementation of Resolution 1244, and especially “maintaining civil law and order” and “protecting and promoting human rights”. A lack of facilities for judges<sup>3</sup>, prosecutors, and the running of courts were compounded by many reported and documented instances of ethnic hatred.

By September 1999, UNMIK had appointed 36 judges and 12 prosecutors. The majority were Kosovar Albanian, but there were supposed to be appointed also Serbs, Muslims, Roma and Turks. However, of the seven Serb judges appointed two had already left Kosova.

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<sup>3</sup> Local Judges rates of pay are presently 450 DM (about £150 sterling) per month and are frequently in arrears.

Towards the end of December 1999, 328 judges and prosecutors, together with 238 lay judges, had been recommended for appointment. One obvious deficiency was the continuing lack of Serbs. As to the judges and prosecutors actually in post, there were now 47. 41 were Kosova Albanian, with 4 Muslim (Bosniac), one Roma and one Turk. Seven Serbian judges had been forced to resign or leave for their own security.

Against a growing atmosphere of fear, of witnesses refusing to make statements or withdrawing them and of threats to judges and prosecutors, the efforts to establish the rule of law in Kosova have been gravely hampered.

## **Section 4:** **RIGHT TO A FAIR TRIAL.**

*“Justice should not only be done, but should manifestly and undoubtedly be seen to be done”<sup>4</sup>*

Article 6 (1) of the Convention for the protection of Human Rights and Fundamental Freedoms [1950, Rome] provides inter alia:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.<sup>5</sup>

In *Findlay v United Kingdom*<sup>6</sup> the European Court of Human Rights stated that :

‘In order to establish whether a tribunal can be considered as ‘independent’, regard must be had inter alia to the manner of appointment of its members and their terms of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.

As to the question of ‘impartiality’, there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect’

During our visit we interviewed members of the UNMIK team charged with the establishment of the court system, the police, staff of OSCE, and others. From all these sources we heard of incidents ranging from at the least a lack of impartiality to a complete disregard of evidence.

The OSCE’s Legal System Monitoring Section has reported on a plethora of cases in which blatant judicial bias and impartiality have been displayed. The most poignant of these are as follows:

(a) On 10th July 1999, five Kosovar Albanian’s attacked the home of the **Momcilovic’s**, a Kosovar Serb family, with guns and attempted to break the door down. Those in the house and those outside exchanged fire. One Kosovar Albanian was killed. The whole incident was video recorded by a security system on the Momcilovic’s home. KFOR attended the scene arrested both the Serbs and Albanians responsible for the shoot out. (The Albanians however resisted arrest and one was killed by KFOR troops).

By 17th July 1999, all the Albanian defendants had been released by the Kosovar Albanian Judge while the Serbs still languish in jail, despite that fact that it was the Albanians who were the aggressors while the Serbs acted in self defence.

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<sup>4</sup> Rex v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256 at 259

<sup>5</sup> See also corresponding Article 14(1) of the International Covenant on Civil and Political Rights

<sup>6</sup> (1997) EHRR 221 at para 73

(b) **Danilo Mistic**, a Serbian, was arrested on 24th September 1999 as a war crimes suspect. Six witnesses identified him as a suspect from a photograph and gave his name for arrest. However, after his arrest the same six witnesses were shown a photograph of the man arrested, Mistic. None identified him as the man they saw commit the crime. This information was passed to the Kosovar Albanian Prosecutor, Skënder Morina,<sup>7</sup> on 29th October 1999.

As of the 7th February 2000, Mistic was still in custody.

For a more detailed consideration of Article 6(1) see **Appendix E**.

In the light of the cases cited above and others brought to our attention, it seems to us that there can be no present prospect of compliance with Article 6 while a Kosovar Defendant is tried by any court comprising any judge from another ethnic group.

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<sup>7</sup> We requested a meeting with Mr Morina, but we were informed that he declined our invitation.

## **Section 5:** **THE ‘WITNESSES’.**

During the course of our visit to Kosova we heard 27 ‘witnesses’ and raised with them our concerns regarding the standard of justice in Kosova and the likelihood of fair trials for those charged not only with war and other ethnic related crimes, but also other criminal proceedings generally. (See **Appendix F** for a list of these witnesses.)

These fell into four broad categories: OSCE officials, UNMIK officials, UN Police, and local Kosovar Albanian Judges and Advocates together with the recently appointed Joint President of the Department of Justice.

We put to each of the witnesses our concern that local Kosovar Albanian judges will be unable fairly and impartially to dispense justice in the current climate of hostility in Kosova. We suggested as an alternative that international judges should preside over all war crimes trials without the assistance of local judges to avoid any perception of bias or partiality.

On our first day of interviews in Kosova, we, met with a small group of UN Police Officers. One of the first things we were told by them was :

*“If you’re a Serb, you don’t have a chance in hell of getting a fair trial here.”<sup>8</sup>*

We were told how judges had been heard to make racist remarks in open Court, and one officer told us of an incident in which a Kosovar Albanian Judge had told him : *“I hate fucking Serbs.”* Morale amongst the officers we met was low. They felt that their ability to effect justice and implement law and order was being hampered by the Kosovar Albanian judiciary and their biased decisions. They expressed dismay at some decisions to release Kosovar Albanians, despite overwhelming evidence, and to detain Serbs despite the clear lack of evidence. As one officer put it : *“If you don’t bring in international judges and prosecutors, send us back – we’re wasting our time here.”<sup>9</sup>*

We heard from one OSCE official how UNMIK had proposed bilingual drafts of pro-forma arrest warrants. The local judges refused to accept them, it being said that they found it grossly offensive to have a document bearing both Serbian and Albanian. (UNMIK appeared to have agreed and the printing of such essential documents remains to be achieved).

Almost without exception, the OSCE officials we met were in favour of international judges sitting alone in war crimes trials. One official put it to us quite bluntly that under the present proposals a Serb cannot expect a fair trial. Accordingly, OSCE has, since June 1999, taken the view that there is an overwhelming need for a National War Crimes Court composed of international judges sitting alone and has been urging UNMIK to follow such a course. As yet UNMIK have failed to respond positively as it does not wish to internationalise the process. It is

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<sup>8</sup> By way of example we were referred to the ‘Momcilovic’ and ‘Mistic’ cases set out in Section 4 above.

<sup>9</sup> See also Becatoros Article “Some UN Police Want Out of Kosovo” 9<sup>th</sup> February 2000 – Associated Press.

concerned that justice should be in the hands of the local judiciary. Financing and resourcing of international judges will need to be addressed but it was suggested to us that a State, or a number of States, might agree to finance a number of their own judges to sit in Kosova for a limited period.

The Kosovar Albanian ‘Witnesses’ we met were, on the whole, favourably disposed towards the suggestion of International Judges sitting alone. Both Judges we met were in favour. One had originally been opposed to the idea, but had changed his position through fear that some local judges may be motivated by revenge. He felt the need only to be temporary, however, as good Kosovar Albanian judges should emerge given time.

The other Judge we saw felt that such appointments would lift the anxiety and workload from the local judges. Importantly, he was of the opinion that international judges could lend greater weight to the process than local judges, while a mixed tribunal of local and international judges would defeat the purpose of involving an international judge. This former view was endorsed by the Joint President of the Department of Justice, although she thought that Kosovar Albanian judges were capable of undoubted impartiality.

With one notable exception UNMIK officials were implacably opposed to international judges in the criminal justice system in Kosova. Arguments raised against international judges were summarised as follows :

- (i) Local judges have a knowledge of the local situation and relevant law.
- (ii) There is a need to avoid a perception of ‘colonialism’, resulting from any exclusion of the local judiciary from the judicial process.
- (iii) Local judges will learn international standards through the passage of time while international judges provide only a short term solution.
- (iv) Difficulties arise over the provision of resources and finance.
- (v) International judges are unnecessary as the present system works very well. Protection from judicial impropriety, bias and injustice lies in the presence of CivPol and KFOR who are in a position to correct bad decisions of local Kosovar judge’s. In effect, if an accused is released by a judge and a police officer thinks it wrong, that officer can continue to detain the suspect despite the judge’s order. Similarly, if a judge is detaining an accused on spurious grounds, the international police officer can release that person. By overruling the judge in a given case, International Police officers, we were told, can safeguard and protect the Rule of Law in Kosova.

(These arguments, we think, defy logic and appear to turn on its head the accepted relationship between judges and police. Individual police officers must never be in a position to disregard a judge’s order. This, far from promoting the Rule of Law, displays an utter contempt for it. If International Police officers are deemed to be necessary in the

current climate in Kosova, it is difficult to understand the arguments against the deployment of international judges.)

(vi) We also heard the bizarre argument that it is against the human rights of Kosovar Albanian judges to prevent them from sitting in judgment on Serbs because it is discriminatory .

A further view was also put to us, that although our concerns were acknowledged, it would be better to wait and see how the proposed system worked in operation so that an “*intelligent and informed assessment*” could be made. This argument appears to be that it is better for things to go wrong before an attempt is made to put them right. This approach was echoed with the view : “*It’s not helpful to say that the system is not working - nothing has gone wrong yet.*” When it was pointed out that given the ethnic considerations, the system was almost certainly bound to fail with resulting human rights abuses, the replies included : “*I am here to fulfil a mandate*”, and : “*That’s just too bad*”. We were told that questions of human rights should not be considered at present, for the emphasis must be placed on establishing the infrastructure of the legal system. Only after that is it appropriate to start being concerned with human rights.

We found these responses at least naïve, and potentially seriously disturbing.

It was also apparent to us that the representation the war crimes defendants are receiving from their defence lawyers is generally poor. They are dependant upon those few lawyers who are prepared to assist. Once again ethnic and political considerations play a part here as do lawyers’ concerns for their own safety and careers.

The UNMIK proposals appear to have overlooked the practical difficulty of the direct right of appeal to the highest Court of Appeal in Belgrade. Such appeals could have the far reaching and seriously negative effect, both legally and politically, of an Appeal succeeding in Belgrade on the ground that the fundamentals of fair trial had not been followed in Kosova.

This scenario was put to an UNMIK official who dismissed it, with the remarkable argument that such an appeal to Belgrade was unlikely as local lawyers in Kosova do not have a history or tradition of taking every point on behalf of their client in an attempt to ensure that justice is done.

It appears that perhaps the major argument against the use of international judges is political, in particular as to the perceived adverse effect that the use of international judges would have on relations between the international civilian presence in Kosova and the KLA.

As our investigations continued it became clear to us that UNMIK feel it important to maintain good relations with the emerging local system, and particularly the KLA and their political leaders.

## **Section 6:** **CONCLUSIONS AND RECOMMENDATIONS.**

### **CIVIL LAW & ORDER:**

1. Article 10 of UN Security Resolution 1244 (1999) provides for “*an international civil presence in Kosova in order to provide an interim administration of Kosova ...* .”
  - a) The period of interim administration is naturally left undecided, but there is also envisaged: “*a final stage, overseeing the transfer of authority*”.
  - b) We whole-heartedly endorse the view that the administration of justice should be transferred to the indigenous populations of Kosova as soon as possible. However; that final stage, while no doubt highly desirable to nearly all concerned, appears to us to be a long way off in respect of the administration of justice. This interim period still leaves so much to be achieved.
  - c) While the international civil presence exists, its mandate is to “*maintain civil law and order ...protecting and promoting human rights*”. The evidence we received clearly shows that this has still to be achieved.

### **VICTORS TRYING THE VANQUISHED:**

2. The protection and promotion of human rights appear to us to fall significantly short of fair and open trials conducted pursuant to international standards.
  - a) UNMIK are still clearly contemplating the trial of Serbs by Kosovar Albanian Judges and Prosecutors. On the evidence before us we feel bound to advise that in most, if not all cases for now, this will be held - and obviously so - to be wholly unacceptable.
  - b) After some eight months of interim administration by the UN, no one can be in any doubt about the deep and continuing distrust of one ethnic group for the other. If Justice is to be done, and to be seen to be done, it seems to us essential that independent, competent, and above all - International Judges & Prosecutors from other European Civil Law systems should be put in place by the UN as soon as possible:
    - i) We accept that this will require special training and interpreters for these International lawyers.
    - ii) However, we think that there need be no more than six such independent teams: one each for the five District Courts (Prishtina, Gjilan/Gnjilane, Prizren, Pec/Pejë, and Mitrovice /Kosovska Mitrovica); and the same for a Court of Appeal or a Supreme Court.
    - iii) The problems of actual or perceived bias on the part of local Judges are such that, in our opinion, International Judges and Prosecutors are needed in respect of both War Crimes and other crimes involving more than one ethnic group.
    - iv) Serious consideration will have to be given to the safety and security of these International Lawyers, their accommodation and internal travel arrangements. One obvious solution is that these should be undertaken by

KFOR, with the lawyers coming from the European country whose soldiers are currently policing the District in which they will operate.

**INTERNATIONAL JUDGES:**

3. We are encouraged that some of these issues are still being considered by UNMIK and that some proposals exist for the involvement for International Judges to sit in Kosova.<sup>10</sup>
  - a) Thus, the UN's continuing contemplation of using International judges does suggest to us that the practical difficulties raised with us (e.g., the need for their special training, interpreters and security), are well thought to be capable of some practical resolution.
  - b) However, insofar as it is proposed that local Judges should also sit with any International Judge, we think that this will be in clear breach of Art 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms [1950, Rome], and the requirement for "an independent and impartial tribunal". Should that be the case here, the UN could be faced with a dreadful and damning irony:
    - i) The UN are seeking to apply international standards of fairness to the system of justice in Kosova, so that must import Art 6 (1) of the EHRC.
    - ii) If a Serb is convicted under the present system (and typically it will be a Serb), and if he were to complain of an injustice because his Court included an Albanian Kosovar Judge, the Serb would have a right of Appeal to Belgrade's Court of Appeal under Slobodan Milosevic's regime:
      - a) The right to appeal to Belgrade has been preserved by the UN's definition of the "Applicable Law" to Kosova.
      - b) Yet Milosevic stands indicted for War Crimes.
    - iii) One rather imagines that the Belgrade Court would have much pleasure in allowing the Appeal: pointing out the obvious breach of Art 6 by which the International community purported to abide, and making huge political capital out of the whole affair.

**INVOLVING LOCAL JUDGES:**

4. It was argued before us that there is a strong political need to involve the local Judges, not least because they wish to be restored to their former status. In this respect we were reminded that some had recently gone on strike to get their way (to get themselves re-appointed) and had thus raised a virulent attack via the Press on UNMIK's regime under Dr Bernard Kouchner. It was widely reported to us that he had been seen to have given way to these demands.
  - a) We would be deeply unimpressed by the reasoning here, and the threats of those local judges; if it were not for the fact that support from the press and public opinion is undoubtedly of high political and pragmatic importance. We were

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<sup>10</sup> It is anticipated that Dr Kouchner will soon issue a new Regulation that permits international judges to work in the province. Their proposed mandate will be to process criminal cases coming from the Mitrovica area of Kosova and is expected to last four months.

strongly urged to recognise - as we do - that there is a growing local impatience with what is perceived in some quarters as an increasingly unacceptable and imposed rule by foreign or colonial powers.

- b) We seek therefore to recommend a compromise, acknowledging as we do that political considerations assume a peculiarly important rôle in Kosova.
  - i) If it is felt that a single International Judge sitting alone would be unacceptable (but as we still think is preferable), we would tentatively accept a Court comprising the International Judge sitting with up to two local Judges; but only given these four Conditions:
    - a) First; if the International Judge sits with more than one local Judge, then the local Judges must be of different ethnic backgrounds from each other.
    - b) Second; any local Judge should not be held qualified to sit until he has satisfactorily undertaken an approved course of professional training Continuing Judicial Training<sup>11</sup>.
    - c) Third; any local Judge sitting in this capacity must be remunerated at a level that both recognises the gravity and the responsibility of his duties, while protecting him from the risk of more obvious allegations of petty bribery.
    - d) Fourth; to avoid perceived bias, whether from the alleged victims or the Defendants; there must be a Right of Election to trial by the International Judge alone.
      - (1) To ensure justice, not only the Defence but also the Prosecution should have this Right of Election.
      - (2) This should, we think, be in addition to the International Judge being able to decide this of his own accord if he feels there would otherwise be a breach of any part of what is now the well-established jurisprudence of European Human Rights.

### **PROSECUTORS:**

5. Under the Civil Law System in operation in Kosova, the role of the Prosecutor plays an important part in the trial process. He can be a powerful influence in the instigation of a case, its passage and direction. Any bias on his part will directly effect the rights of the defendant. Particular cases were cited to us which in our view clearly demonstrated unwillingness to deal equally with Serb and Albanian.
- a) These fall into two categories - an unwillingness to prosecute those against whom a prima facie case may fairly be made and a determination to prosecute where a prima facie case is hard to see.
  - b) We acknowledge that it is difficult to know how any system may be instituted which will ensure that all cases are brought that should be brought.

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<sup>11</sup> To this end, the sort of "*Judicial Studies Board*" which we understand is presently being set up in Sarajevo might provide a useful example. Thus, until last summer the Kosovar local judges had not sat for some ten years. Even then they were administering a Communist-inspired, Party dominated system of justice the tenets of which were far below the standards that need to be applied to-day.

- c) We believe that as an interim measure a review of all potential war and ethnically related prosecutions should be made by the Office of the Prosecutor of the ICTY to ensure that a proper prima facie case can be made.

**DEFENCE LAWYERS:**

- 6. Very real difficulties arise in the appointment of Defence lawyers for minority ethnic groups in Kosova, especially for War or ethnically related Crimes.
  - a) Art 6 (3) of the ECHR sets out a Defendant's minimum rights. We heard compelling evidence that most, if not all, of these rights are substantially unmet at present in respect of a number of specific Defendants.
  - b) Art 6 (3)(c) requires that any Defendant be defended through legal assistance of his own choosing, and to be given it free when the interests of justice so require.
    - i) For a Defendant Serb, Roma, or one from any other ethnic minority; we think that there can be few (if any) lawyers of their own kind still remaining in Kosova, willing and able to practice free from very real threats of intimidation to themselves and their families.
    - ii) Some brave and truly professional Albanian Kosovar advocates there may be, ready to take on such cases for minority groups. We believe we met one such. But even he acknowledged he faced real threats to his livelihood in acting for an ethnic group that had long been antagonistic to his own.
    - iii) There appears to be no provision of Legal Aid.
    - iv) We therefore urge that:
      - a) Provision be made for Defence representation by any lawyer recognised by their professional body in the Country in which they practice.
      - b) Temporary rights of audience, sufficient to the purposes here, be accorded to the above.
      - c) The funding of this Defence representation should be on such terms as would, for instance, apply at "ICTY" - the International Criminal Tribunal for the former Yugoslavia..

**WITNESS PROTECTION:**

- 7. At risk of stating the obvious, and suggesting the most basic principles required for any satisfactory trial; nor can there be any reality of justice in Kosova without fearless witnesses.
  - a) We regrettably found ourselves unable to express any confidence at all in the present protection of potential Witnesses - neither for the Prosecution, nor for the Defence.
  - b) Possibly worse still, given the nature of local Prosecution and Judicial proceedings to date, we heard independent evidence, from compelling sources, that many Prosecution statements received by local Judges are deeply faulted. (If this be so, the importance of truly independent Judges is so much the greater.)

- c) It can be no surprise at all, given the recent and present lawlessness, that witnesses are almost entirely unwilling to come forward. This is so for even the most serious criminal offences, and even where the crimes alleged were witnessed by large numbers.
- d) In such a small, local, and closely-knit society as are the local communities in Kosova, the threats of intimidation and revenge are a daunting problem for those in pursuit of the not unreasonable aim of Peace with Justice.
- e) Given those aspirations the apparent absence of any Witness Protection Scheme (whether they be witnesses for the defence or the prosecution) leave us deeply concerned to know what the UN may yet seek to achieve here.

**INTERNATIONAL ACTION:**

8. The obvious fear is that there should continue to remain the lack of any of the most basic structures for the protection and support for the Rule of Law, and therefore the protection of Human Rights.
- a) We hope that our recommendations might be put into effect by the International Community as soon as possible.
  - b) We do not believe it is entirely too late, and we think there is much that might usefully be done.

**However; failing any positive support for the substance of our recommendations, coupled with immediate and effective action - the legal consequences we most fear for Kosova this year are REVENGE WITHOUT JUSTICE.**

**Section 7:**  
**SUMMARY OF RECOMMENDATIONS.**

- A. International Judges (and Prosecutors), preferably from other European Civil Law jurisdictions, should be appointed to Kosova; not only as to any War Crimes Court, but also to any of the five District Courts where there might be any inter-ethnic disputes - and any Supreme Court / Court of Appeal that might be set up in Kosova.
- B. In order to avoid any perceived ethnic bias, these International Judges should sit without local judges.
- C. If, however, it is felt expedient for there to be a mixed Bench, of local & International Judges; we urge safe-guards by implementing four Conditions, (as set out at page 16).
- D. A thorough programme of Judicial training must be undertaken by all who may sit here.
- E. Provision must be made for Defence representation from outside Kosova.
- F. The prevention of threats to, or intimidation of, any Witness requires urgent consideration, pending a properly planned and funded Witness Protection Scheme.

## APPENDIX A

### BACKGROUND

The Autonomous Province of Kosova and Metohija is located in the southern part of the Republic of Serbia, a constituent republic of the Federal Republic of Yugoslavia (formerly the Socialist Federal Republic of Yugoslavia). In 1974, the new SFRY constitution provided for a devolution of power from the central government to the six constituent republics of the country. Kosova was granted considerable autonomy including control of its educational system, judiciary and police. It was also given its own provincial assembly.

In 1981, Kosova had a total population of 1,585,000. 77% were Albanian and 13% were Serbs. During the 1980's, the Serb population began to voice concerns about discrimination against them by the Kosova Albanian led provincial government. The Kosova Albanians voiced concern about economic underdevelopment and called for greater political liberalisation and republican status for Kosova.

During the late 1980's there were increasing demands made by the Serbian population to strip Kosova of most of its autonomous powers. On the 3<sup>rd</sup> March 1989 the SFRY government imposed "special measures" which assigned responsibility for public security in Kosova to the federal government. On the 23<sup>rd</sup> March 1989 the Assembly of Kosova met in Pristina and voted to accept the amendments to the constitution, the Kosova Albanian delegates abstained. On the 28<sup>th</sup> March 1989 the Assembly of Serbia voted to approve the constitutional changes effectively revoking the autonomy granted in 1974.

In July 1990, the Assembly of Kosova passed an unofficial resolution declaring Kosova an equal and independent entity within the SFRY. The Assembly of Serbia responded by suspending the Assembly of Kosova. In September 1990, Kosova Albanian delegates proclaimed a constitution for a "Republic of Kosova". In September 1991, Kosova Albanians held an unofficial referendum in which they voted overwhelmingly for independence. On the 24<sup>th</sup> May 1992, Kosova Albanians held unofficial elections for an assembly and president for the "Republic of Kosova".

After the revocation of Kosovo's autonomy in 1989, the political situation became increasingly divisive. During late 1990 and 1991 thousands of Kosova Albanian doctors, teachers, professors, police and civil servants were dismissed from their positions. The local court in Kosova was abolished and many judges removed. During this period, the unofficial Kosova Albanian leadership pursued a policy of non-violent civil resistance.

From June 1991 the SFRY began to disintegrate in a succession of wars fought in the Republic of Slovenia, the Republic of Croatia and the Republic of Bosnia and Herzegovina. On the 25<sup>th</sup> June 1991, Slovenia declared independence from the SFRY, fighting followed with a peace agreement being reached on the 8<sup>th</sup> July 1991. Croatia declared independence on the 25<sup>th</sup> June

1991. Bosnia and Herzegovina declared its independence on 6 March 1992. Active hostilities ceased with the signing of the Dayton peace agreement in December 1995.

During the wars in Slovenia, Croatia and Bosnia and Herzegovina the situation in Kosova remained tense. In the mid-1990's, a faction of the Kosova Albanians organised a group known as the Kosova Liberation Army (KLA). The KLA advocated a campaign of armed insurgency and violent resistance to the Serbian authorities. In mid-1996 the KLA began launching attacks on the FRY and Serbian police forces. Throughout 1997, Serbian forces responded with forceful operations against suspected KLA bases and supporters in Kosova.

In late February 1998, the conflict intensified between the KLA and Serbian forces. In response to the intensifying conflict, the United Nations Security Council passed Resolution 1160 in March 1998 "*condemning the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosova*". Six months later the Security Council passed Resolution 1199. It demanded that all parties cease hostilities and that "*the security forces used for civilian repression*" be withdrawn.

In an attempt to diffuse the situation in Kosova; negotiations between Slobodan Milosovic and representatives of the North Atlantic Treaty Organisation (NATO), and the Organisation for Security and Co-operation in Europe (OSCE) were conducted in October 1998. The "Agreement on the OSCE Kosova Verification Mission" was signed on 16 October 1998. It provided for the partial withdrawal of Serbian forces and a limitation on the introduction of additional forces and equipment into the area. It also provided for the deployment of unarmed OSCE verifiers.

Despite scores of OSCE verifiers presence in Kosova, hostilities continued. In a further response to the continuing conflict in Kosova, an international peace conference was organised in **Rambouillet**, France, beginning on the 7<sup>th</sup> February 1999. Despite intensive negotiations, the peace talks collapsed in mid-March 1999. During the Rambouillet negotiations the violence in Kosova continued.

On the 24<sup>th</sup> March 1999, NATO began launching air strikes against targets in the FRY. After air strikes began, the FRY intensified its systematic campaign and forcibly expelled hundreds of thousands of Kosova Albanians from their homes.<sup>12</sup>

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<sup>12</sup> The above Background is taken from the ICTY *Milosovic* Indictment.

## APPENDIX B

### UN RULE IN KOSOVA – UNMIK

U.N. Security Council Resolution 1244, adopted on the 10th June 1999. authorises the Secretary General, with the assistance of the relevant international organisations, to establish a civil presence in Kosova in order to provide an interim administration under which the people of Kosova can enjoy substantial autonomy.

This international civil presence, which is known as the United Nations Interim Administration Mission in Kosova (UNMIK), is headed by the Special Representative of the Secretary General (SRSG), Dr Bernard Kouchner. The SRSG has overall authority to manage the Mission and co-ordinate the activities of all the UN agencies and other international organisations operating as part of UNMIK. The SRSG is also responsible for facilitating the political process designed to determine the future political status of Kosova, taking into account the Rambouillet accords (see U.N. Resolution 1244 para 11(e)).

There is therefore a ‘Four Pillar’ structure in which the UN is the lead agency. The United Nations Secretary-General’s Report required that “*the structure of UNMIK must ensure that all of its activities in Kosova are carried out in an integrated manner with a clear chain of command*”<sup>13</sup>. The “Four Pillars” are the UN (Civil Administration), UNHCR (Humanitarian Affairs), OSCE (Institution Building) and the European Union (Reconstruction); and together they form the United Nations Interim Administration in Kosova (UNMIK). Each is headed by a Deputy Special Representative of the Secretary General who is responsible for their component of the Mission. Each Deputy Special Representative is charged with assisting the SRSG.

The UN has primary responsibility for staffing and resourcing provincial and local administrations, and for carrying out a range of municipal functions. The UN is also the lead agency of judicial affairs having combined efforts with the OSCE to organise and maintain overview of the judicial system.

The UNHCR is the lead agency responsible for “*the safe and unimpeded return of all refugees and displaced persons to their homes in Kosova.*”<sup>14</sup>. The UNHCR also has the primary role in the protection and assistance to minority populations and to the distribution of humanitarian aid.

The OSCE is the lead agency responsible for institution building. Its tasks fall into four main areas:

- a) Human resources and capacity building in the areas of justice, police and public administration.

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<sup>13</sup> Report UN Sec Gen: 12/6/99, at para 2

<sup>14</sup> Paragraph 11 (k), of UN Res. 1244

- b) Democratisation and governance where activities include work with the media, political parties and non-governmental organisations.
- c) Human rights monitoring and capacity building.
- d) The conduct and monitoring of elections.

The European Union is tasked with rebuilding the physical, economical and social infrastructure and systems of Kosova; and supporting the reactivation of public services and utilities. Reconstruction activities include the assessment of short, medium and long term needs for industry, agriculture and commerce.<sup>15</sup>

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<sup>15</sup> The above extract is taken from the OSCE's "*As Seen As Told - Part II*". See also the Secretary General's report, 12.6.99: S/1999/672.

## APPENDIX C

### EVENTS SINCE 10<sup>th</sup> JUNE 1999

When KFOR entered Kosova in June 1999, most of the Serb population fled to Serbia (there used to be 40,000 Serbs in Pristina, now there are only a few hundred). As a result of intimidation and terror at the hands of Kosovar Albanians those Serbs who remained have been driven into Serbian enclaves.

There is a growing thirst among the Kosovar Albanians for revenge of their old Serb oppressors. There is, similarly, a growing trend towards intolerance of all minorities including Roma, Muslim Slavs and Turks.<sup>16</sup>

UNMIK has attempted to find local “partners in a joint administration”<sup>17</sup> and the Kosova Transitional Council (KTC) was accordingly established and meets on a weekly basis with the SRSG. The KTC brings together all major political parties and ethnic groups.

In his 16<sup>th</sup> September Report the Secretary General concluded that “*Its establishment has given Kosova residents an opportunity to have a direct input into the UNMIK decision making process*”. However, in reality it is the KLA which exerts a significant amount of control over local political affairs.

On the 22<sup>nd</sup> September 1999, the Kosova Serb representatives to the Council withdrew from the body in protest at the establishment of the Kosova Protection Corps, which they view as the KLA in disguise. The KLA is represented in politics by its official wing the PPDK. Whilst the KLA’s leaders have denounced violence and attacks on minority populations, there is firm evidence that it has been responsible for a significant amount of racketeering, corruption, and strong-arm tactics. The KLA’s main rivals, the PPDK, has in some areas found its members and leaders to be the victim of KLA intimidation.<sup>18</sup>

In his report of the 23rd December 1999, the Secretary General reported that the number of attacks on Kosova Serbs and other ethnic minorities in Kosova remained high and continues to be the overriding human rights issue in Kosova. Despite several KTC statements condemning such attacks - Serbs, Roma and Slavic Muslims have been the victims of killings; abductions; illegal arrests; arbitrary detentions; beatings; threats, and harassment. Members of ethnic minorities also suffer a severe restriction on their freedom of movement. As result, they are forced to concentrate in areas with other members of their own community.<sup>19</sup>

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<sup>16</sup> See: “*Anarchy and Madness*”, by Timothy Gash - New York Review 10<sup>th</sup> February 2000

<sup>17</sup> Gash, (ibid)

<sup>18</sup> Gash, (ibid)

<sup>19</sup> See the Secretary General’s report, S/1999/1250: paras 16 & 17. See also: paragraphs 70, 71, 72 and 76.

**THE EMERGING COURT SYSTEM**

**(A) U.N. Security Council Resolution 1244, and the UNMIK Regulations**

**U.N. Security Council Resolution 1244** sets out the “main responsibilities” of the international civil presence in Kosova. Its duties include, inter alia :

- a) Performing basic civilian administrative functions where and as long as required. (§11B)
- b) Organising and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections. (§11C)
- c) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peace-building activities. (§11D)
- d) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosova. (§11I)
- e) Protecting and promoting human rights. (§11J)

**UNMIK Regulation No.1999/1** vests all legislative and executive authority in Kosova, including the administration of the judiciary, with UNMIK, to be exercised by the SRSG. (Section 1(1)). The SRSG may appoint any person to perform functions in the civil administration in Kosova, including the judiciary. (Section 1(2)).

In exercising their functions, all persons undertaking public duties or holding public office in Kosova are obliged to follow internationally recognised human rights standards and not discriminate on grounds such as sex, race, religion, national, ethnic or social origin. (Section 2.)

**UNMIK Regulation 1999/1** stipulated that the applicable law in Kosova would be the laws applicable in the territory of Kosova prior to the 24<sup>th</sup> March 1999 insofar as they do not conflict with U.N. Security Council Resolution 1244, and UNMIK regulations. (Section 3).

**UNMIK Regulation No.1999/6** establishes the Technical and Advisory Commission on Judiciary and Prosecution Service. The Commission is composed of 10 local and 5 international members. Its purpose is to advise the SRSG on the structure and administration of the judiciary and prosecution service in Kosova. (Sections 1 and 2)

**UNMIK Regulation No.1999/7** sets up the Advisory Judicial Commission. The Commission is composed of eight local and three international experts and is supposed to be multi-ethnic and reflect varied legal expertise. The Commission was established to advise the SRSG on matters related to the appointment of judges and prosecutors as required, as well as on complaints against the judge and prosecution.

The Advisory Judicial Commission was mandated to invite applications for service as judges and prosecutors. The Commission was to be guided by UNMIK's goal to establish a professional, independent, impartial and multi-ethnic judiciary and prosecution service. (Section 5).

Section 6 of Regulation 1999/7 set out criteria for the appointment of judges and prosecutors. The applicants were required to have (i) a university degree in law; (ii) have passed the requisite professional exams; (iii) be of high moral integrity; (iv) not have a criminal record; (v) not applied discriminatory measures or repressive laws; and (vi) not be registered with any political party. Section 6.2 sets out the requisite years experience for the various judicial appointments.

**UNMIK Regulation No.1999/24**, of 12<sup>th</sup> December 1999, amends Regulation No.1999/1 on the applicable law in Kosovo. Following protest and complaint from the newly appointed judges about Regulation 1 and the fact that it imposed upon them a duty to apply the law in force in Kosovo prior to 24<sup>th</sup> March 1999 (i.e. FRY law) which they viewed as Serbian law, Regulation No.1999/24 made the applicable law in Kosovo the law that had been in force prior to 22<sup>nd</sup> March 1989 (i.e. Kosovo Federal Law) (Section 1.1). This change was effected after a number of judges had gone on strike, in protest at having to apply old FRY/Serbian law.

Section 1.3 stipulates that in the exercise of their functions, all persons undertaking public duties or public office in Kosovo are to observe internationally recognised human rights standards. [see Section 1.3 for full details] Section 1.4 gives the defendant in criminal proceedings the benefit of the most favourable provision in the criminal laws, before and after the 22<sup>nd</sup> March 1989 laws. Section 1.5 abolished capital punishment.

Section 3 retrospectively made the pre-22<sup>nd</sup> March 1989 law applicable from the 10<sup>th</sup> June 1999.

**UNMIK Regulation No. 1999/26** extended the period of pre-trial detention in Kosovo. The original time limit under both Kosovar and FRY law had been 6 months. However, due to the detention of a number of war crimes suspects who had yet to be tried, the period of pre-trial detention was extended. The Ad Hoc Court of Final Appeal was established to extend periods of pre-trial custody for a period of three months, and then a further three months. Once the full year of pre-trial delay has expired the accused shall be released.

### **(B) Secretary General's Reports**

In his report of 12<sup>th</sup> July 1999, the Secretary General observed that there was "*an urgent need to build the rule of law in Kosovo, including through the immediate re-establishment of an independent, impartial and multi-ethnic judiciary*". Prior to the 10<sup>th</sup> June 1999, of the 756 judges and prosecutors in Kosovo, only 30 were Kosovar Albanians.

Therefore, as a result of the conflict and the mass exodus of Kosova Serbs, the judicial system was bankrupt of qualified personnel and accordingly collapsed. Despite the absence of a

functioning legal system, KFOR arrested those responsible for serious crimes. It therefore became imperative to establish a fully functioning legal system.<sup>20</sup>

To develop Kosova's legal and judicial system, the Judicial Affairs Office was established. Its major areas of responsibility includes the administration of courts, prosecution services and prisons, the development of legal policies, the review and drafting of legislation, as necessary, for the goals and purposes of UNMIK, and the assessment of the quality of justice in Kosova, including training requirements.<sup>21</sup>

For an interim period, the judges and prosecutors were appointed by an emergency judicial panel prior to the establishment of the Judicial Commission to conduct a Kosova wide selection process. In view of the need for knowledge of the domestic legal system, UNMIK had a specific policy of recruitment of the judiciary and prosecution from among local lawyers.<sup>22</sup> It was recognised early on by UNMIK that the local lawyers required extensive training in not only international law and legal developments, but in some cases also in domestic law.<sup>23</sup>

The Secretary General recognised the urgent need to establish the rule of law in Kosova. He concluded his July report by saying:

*“If we are to succeed in establishing the rule of law as the basis for the development of democratic institutions, it is also vital to rapidly revive the judicial penal systems of Kosova. Reconciliation will not begin until those suspected of committing the most serious crimes, especially war crimes, are brought to justice. I appeal to Member States to place at UNMIK's disposal sufficient resources in terms of personnel and experts to meet the tremendous needs in this area.”*<sup>24</sup>

On the 30<sup>th</sup> June 1999, an emergency judicial system was initiated with the opening of the District Court in Pristina, while other courts were established in Prizren, Peje, Gnjilane and Mitrovica. Two mobile courts were also established.<sup>25</sup>

By September 1999, UNMIK, in consultation with the Joint Advisory Commission, had appointed 36 judges and 12 prosecutors. The majority were Kosova Albanian, but supposedly Serbs, Muslims, Roma and Turks were also represented. However, out of the seven Serb Judges, two had already left Kosova.<sup>26</sup>

The Secretary General concluded his September 1999 Report by saying that:

*“The international community must make it clear to extremists that it cannot and will not tolerate ethnically motivated murders and violence. ... The international community must also redouble its own efforts to provide a secure environment, especially for Kosova's vulnerable minorities. ...*

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<sup>20</sup> See para 66, SG Report 12.6.99

<sup>21</sup> See para 67 (ibid)

<sup>22</sup> See para 68 (ibid)

<sup>23</sup> See para 69 (ibid)

<sup>24</sup> See para 121 (ibid)

<sup>25</sup> See para 38 S/1999/987; SG Report, September 1999

<sup>26</sup> See para 32 (ibid)

*Equal attention must be paid to the judiciary and the penal system. All bodies must conform to internationally accepted human rights standards in order to enjoy both the confidence and respect of the people of Kosova*".<sup>27</sup>

In his last report of the year on 23rd December 1999, the Secretary General reported that a total of 328 judges and prosecutors and 238 lay judges had been recommended for appointment by the Advisory Judicial Committee. However, one obvious deficiency was the lack of Kosova Serb representation. The Emergency Judicial System had only 47 judges and prosecutors. 41 were Kosovar Albanian, four Muslim (Bosniac), one Roma and one Turk. Six Serb judges had been forced to resign for security reasons and another left for Serbia. A multi-ethnic judiciary in Kosova was prevented, largely as a result of threats belonging to members of ethnic minorities.<sup>28</sup>

The local judicial community was extremely reluctant to enforce UNMIK's Resolution 1 (Section 3) which required them to apply FRY law. They viewed Serbian Criminal Law as an instrument of oppression and part of the revocation of Kosova's prior autonomous status. Regulation 1 was amended accordingly by UNMIK to accommodate the newly appointed judges' position.<sup>29</sup> Thereafter, Serbian Law only applied in the rare cases where the applicable or Federal law fails to cover a given situation or subject matter. In criminal trials, the defendant will have the benefit of the most favourable provision in the two legal provisions.

There is a growing atmosphere of fear which has hampered efforts to establish the rule of law in Kosova. Witnesses to human rights violations refuse to provide information to the police. If they do, they often retract their testimony or do not appear for court hearings. Judges and prosecutors have received threats demanding that they not pursue an investigation against certain suspects or that they be released, despite compelling evidence against them gathered by KFOR or UNMIK police. The Secretary General noted therefore that "Impunity is emerging as a problem which undermines the substantial efforts to build an independent legal system and police force that respects human rights".<sup>30</sup>

The Secretary General concluded his 23<sup>rd</sup> December 1999 report by urging the international community "to do better". He stated: "*Crimes must be prosecuted in order to establish the rule of law in Kosova. The involvement of the criminal and unofficial law-enforcement activities of former members of the KLA and members of the Kosova Protection Corps and the Kosova Police Service risk undermining the future authority of those bodies and will not be tolerated. A strong response is needed in order to address the problem of unofficial law enforcement actors that have been reported to operate in the area.*"

He went on to conclude that these efforts are critically important on the Kosova political leadership, which must commit itself to peace, reconciliation, tolerance and respect for the rule of law.

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<sup>27</sup> See para 46 (ibid)

<sup>28</sup> See para 54 of 23 December 1999 SG report

<sup>29</sup> See para 55 (ibid)

<sup>30</sup> See para 84 (ibid)

**RIGHT TO A FAIR TRIAL.**

“There is no room for fine distinctions if Lord Hewart CJ’s famous dictum is to be observed: it is ‘*of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*’ ”

See *Rex v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259.<sup>31</sup>

Article 6 of the European Convention on Human Rights guarantees the right to a fair and public hearing in the determination of any criminal charge. The object and purpose of the provision is ‘*to enshrine the fundamental principle of the rule of law*’.<sup>32</sup>

Article 6, paragraph 1, provides inter alia:

“*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”.

Article 6(1) is to be broadly interpreted:

“*A restrictive interpretation of Article 6(1) - notably in regard to observance of the fundamental principle of impartiality of the courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention*”.<sup>33</sup>

**Independence:**

The requirement of independence of the tribunal has been interpreted to mean that the courts must be independent of both the executive and the parties.<sup>34</sup> In determining whether a court or tribunal meets the requirements of independence there must be consideration of the existence of guarantees and outside pressures<sup>35</sup>. Similarly, the ‘*appearance of independence*’ must also be given due consideration.<sup>36</sup>

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<sup>31</sup> Per Lord Browne-Wilkinson in *R v Bow Street Magistrate, Ex parte Pinochet* (No.2) [1999] 2 WLR 272 at 284.

<sup>32</sup> See *Salabiaku v France* (1991) 13 EHRR 379

<sup>33</sup> *Delcourt v Belgium* (1979-80) 1 EHRR 355

<sup>34</sup> See *Ringeissen v Austria* (1979-80) 1 EHRR 455 at para 95]

<sup>35</sup> See *Piersack v Belgium* (1983) 5 EHRR 169 at para 27

<sup>36</sup> See *Delcourt v Belgium* (1979-80) 1 EHRR 355 at para 31 and *Campbell and Fell v UK* (1985) 7 EHRR 165 at para 78 and *Findlay v UK* (1997) 24 EHRR 221 at para 73.

## Impartiality

The requirement of impartiality overlaps with that of independence. In determining whether this requirement is met, the European Court has developed a test that is both subjective and objective:

*“Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under article 6(1) of the Convention, be tested in a variety of ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and the objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect”.*<sup>37</sup>

The test for subjective impartiality is proof of actual bias. However, the “*personal impartiality of a judge is presumed until there is proof to the contrary*”.<sup>38</sup> The test of objective impartiality requires in essence that “*justice must not only be done: it must be seen to be done*”. It does not require a determination of the particular judge’s personal conduct, but a determination of whether there are “*ascertainable facts which may raise doubts as to his impartiality*”. If there is a legitimate reason to fear lack of impartiality, the judge must withdraw, the standpoint of the defendant is important of this assessment.<sup>39</sup>

Once a defendant has raised the issue of impartiality, it must be investigated unless it is ‘*manifestly devoid of merit*’.<sup>40</sup>

In *Remli* the refusal of a French court to take note of the applicant’s complaint that a juror had made a racist remark outside court led to a finding that article 6(1) had been violated. Once an allegation of potential bias is made, what is required by 6(1) is that the court or tribunal takes “*sufficient steps to check that the court [is] established as an impartial tribunal within the meaning of article 6(1) of the Convention and [offer] sufficient guarantees to dispel any doubts in this regard*”.<sup>41</sup>

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<sup>37</sup> *Piersack v Belgium* (1983) 5 EHRR 169. See also *Findlay v UK* (ibid).

<sup>38</sup> *Hauschildt v Denmark* (1990) 12 EHRR 266 at para 47

<sup>39</sup> See *Hauschildt* para 48 and n15

<sup>40</sup> *Remli v France* (1996) 22 EHRR 253 at para 48

<sup>41</sup> See *Gregory v UK* (1997) 25 EHRR 577 at para 49

## APPENDIX F

### OUR WITNESSES

We thank them warmly, one and all, for their co-operation and forbearance.

The Witnesses are listed here in alphabetical Order.

- 1) Peter Berg: - Human Rights Officer, USCE.
- 2) John Cubbon: - Legal Officer in the Department of Judicial Affairs.
- 3) PC Pat Cahill, RCMP: - CCIU [Central Crime Investigating Unit] & CIVPOL [Civilian Police].
- 4) Fernando Castanon: - Head of the Prosecution Service & Court Administration.
- 5) Susan Crombie: - UK's 2nd Secretary at the British Office for Kosova.
- 6) Jessica Elbaz: - Legal Assistant to Silvie Pantz, (see below).
- 7) Helger Engelmann: - Judicial Appointments, OSCE.
- 8) Walter Fleischer: - Head of Rahovec Field Office, OSCE.
- 9) Benedicta Giaeovor: - Director of the Prizren Centre for OSCE.
- 10) Christer Karphammar: - Deputy Head Prosecution Services & Court Admin Section.
- 11) Mrs Kelmendi: - Joint President of the Department of Justice. (A former Judge.)
- 12) Sandra Mitchell: - Head of Human Rights, OSCE.
- 13) Bashkim Nezati: - Albanian Defence Advocate, acting for four Serbs re War Crimes.
- 14) Maurice Nyberg: - Human Rights Officer, Rahovec.
- 15) Fernando Ortiz: - Legal Officer, Judicial Affairs.
- 16) Bill O'Neill: - Human Rights Adviser to the SRSG, UNMIK.
- 17) Robert Pulver: - Head of Rule of Law, OSCE.
- 18) Sylvie Pantz: - Director of UNMIK's Dept of Judicial Affairs.
- 19) Brent Pfundheller: - CIVPOL. Ex Chief of Police, Washington State.
- 20) Judge Etem Rogova: - President / Presiding Judge for the District Court in Prizren.
- 21) 3rd Sgt Daniel Quiroga: - Training and Selection Officer for the new KPS [Kosova Police Service]. Seconded from the Argentinian Army.
- 22) Cpl Dan Shiers, RCMP: - CIVPOL.
- 23) Milbert Shin: - Legal Adviser's Office, UNMIK. A member of the Californian Bar, experienced in War Crimes Tribunals, and present in Kosova since 22nd June 1999 at the start of UNMIK's mission.
- 24) David Slinn: - UK's "Head of Office" for Kosova.
- 25) Aqif Tuhina: - Formerly, both a President / Presiding Judge for Prishtina District Court and a Supreme Court Judge.
- 26) Jan Van Vizland: - Monitor for USCE.
- 27) Rolf Welberts: - Director of Rule of Law & Human Rights, OSCE.

### NB:

- 1) Dr Bernard Kouchner, the Special Representative of the UN's Secretary General ["SRSG"], was unable to see us by reason of his absence in Japan during our visit.
- 2) A District Court Public Prosecutor initially agreed to see us, but later declined to do so.

## APPENDIX G

### APPRECIATION OF ASSISTANCE RECEIVED

We are grateful for the assistance we have received from the following :

- The Office of the Rt Hon Paddy Ashdown, MP.
- The Bar Council; and in particular its Chairman, Jonathan Hirst QC.
- Peter Boydell, QC.
- Major Bryan Dickson.
- The Eastern Adriatic Desk of the Foreign & Commonwealth Office; (in respect only, we should record, of an assessment of the safety of our visit).
- Gazmend Elshani, our interpreter in Kosova.
- Colonel Matthew Festing, DL.
- The Hon. Society of Grays Inn.
- Mrs Doreen Huddard, of “Feed the Children”.
- KFOR.
- George Lillywhite, OBE.
- Mark Littman QC, author of “Kosova: Law & Diplomacy”.
- Lt Col Jamie Martin.
- The Hon Society of Middle Temple.
- The NE Circuit of the Bar; and in particular its Leader, Malcolm Swift QC, and its BHRC rep in Tim Hirst.
- OSCE:
- Frank Ledwidge, Barrister-at-Law on the Northern Circuit - and a Human Rights Officer with OSCE; a quondam liaison Officer for BHRC and our Guide.
- Thanks, too, to our skilful drivers and escorts of us in Kosova and Macedonia.
- UNMIK: and in particular John Cubbon, Barrister-at-Law - a legal Officer in the Dept of Judicial Affairs in Prishtina.
- “The Times”, and the helpful interest from Frances Gibb.
- Major-General Evelyn Webb-Carter, and his Staff at Joint Force HQ.

Many more should rightly appear in this list, if time and space permitted. We think they know who they are, and we thank them no less warmly. (For those who have also indicated modest contributions towards our not insignificant expenses here, we remain very grateful.)

We emphasise, however, that nothing in this Report is necessarily to be taken as being accepted or approved by any of the above people, or Organisations; save where this is made plain within this Report.

**ITINERARY**

**BHRC's Itinerary to Kosova / Kosova: 3rd - 7th February, 2000.**

We think it helpful to set out our Itinerary within the Country, limited as it was by time and circumstances.

But is it Kosova or Kosova? As we set out, and comment below, the former is the Albanian spelling while the latter is the Serbian.

**Albanian Names:**

**Serbian Names:**

**KOSOVA**

**Pristina**

**Prizren**

Krushe e Vogel

Krushe e Madhe

Nagafc

Hoce e Vogel

Brestoc

**Rahovec**

Hoce e Madhe

**Prizren**

Suhareke

Shtime

Ferizaj

(**Bold type** indicates the places where, and the order in which, we conducted our many interviews.)

**KOSOVO**

**Prishtina**

**Prizren**

Mala Krusa

Velika Krusa

Ngovac

Mala Hoca

Brestovac

**Orahovac**

Velika Hoca

**Prizren**

Suva Reka

Stimlje

Urosevac

These lists helpfully illustrate the divided nature of these communities, where there is not even agreement as to what their town or village should be called. Even where the place name is almost the same phonetically, a different spelling is frequently insisted upon.

It follows, of-course, that one's accidental choice of name or spelling is at risk of being seen as an indication of one's perceived bias.

To re-assert our own independence here, it should be noted that only by reason of alphabetical order have we listed the Albanian names before their Serbian equivalents; and referred to this Country in this Report as KOSOVA rather than KOSOVO.