

# Report

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## International Mission of Inquiry

# Kosovo Justice for peace

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## **Introduction to the mission**

For a full ten years Kosovo-Albanians have been deprived of the most basic rights. Police stations, Kosovar prisons, courtrooms and tribunals have become in the hands of the Serb authorities, particularly in these last few years, the favoured stage for discrimination and repression led by the Belgrade government against the Albanian community - the absolute reign of "no rights" in the heart of Europe to serve the Serb nationalist cause and strengthen Milosevic's power, somewhat weakened after his defeat in Bosnia.

On 24 March 1999, the Contact Group countries, members of NATO, decided to use force in order to avoid a repetition of the Bosnian tragedy and the destabilisation of the whole region, and to make the man of Belgrade give in. This decision came after the failure of the Rambouillet Conference and the latter's refusal, right up to the end, to put an end to the repression and ethnic cleansing which had assumed frightening proportions since Autumn 1998 in spite of the presence of the OSCE observers on the spot. During the 79 days of NATO strikes on Serbia until Milosevic's capitulation, the Serb forces, police, paramilitaries and militaries deployed in great numbers in a Kosovo emptied of all foreign observers, indulged in a long and premeditated, massive and brutal expulsion of hundreds of thousands of Kosovo-Albanians to Macedonia, Albania or Montenegro and murderous exactions against the Albanian civilian population.

These 79 days of war were also characterised by the indictment of Slobodan Milosevic and of four other political and military leaders of Serbia or of the Federal Republic of Yugoslavia on 27 May 1999 by the International Criminal Tribunal for the former Yugoslavia (ICTY), for crimes against humanity and the violation of the code and customs of war.

"The West cannot give in...we must impose a rule of law, not one of murders and massacres. NATO would never have intervened if Mr. Milosevic had not attacked the Kosovars" said the German Foreign Affairs Minister Joschka Fischer on 24 April 1999 in order to justify Germany's participation in an armed conflict within NATO forces for the first time since the end of the second world war.

That is, if this conflict involving the Allied Nations within NATO was inter alia given the ign seal of law, as (in the name of the new world judicial order where human rights take priority and world citizens are raised to the rank of subjects of international law), it challenged those rules as fundamental to international law as the pre-eminence of the Security Council in matters of order and peace throughout the world, the sovereignty of nations and the right of peoples, then the sanction of what is illicit by using force assumes a form of legitimacy for those involved in this action to restore justice and human rights.

The indictment of a serving head of state for the first time by the ICTY and his capitulation several days later was also to say that in this new world order justice had a role to play and that the impunity of serving heads of state was a thing of the past.

For the first time in its history the United Nations found itself entrusted, under the terms of resolution 1244 adopted on 10 June 1999 and working from within the framework of an interim administration, with the mission of setting a nation on the road to Democracy, and of doing everything possible to ensure it's smooth operation. This took into account the half-measures, which were no doubt frustrating for the Serb and Albanian participants, contained in the UN resolution:- the preservation of Kosovo within the borders of the Federal Republic of Yugoslavia on the one hand, and the allocation of a substantial autonomy to Kosovo on the other which, as the Rambouillet agreement had already anticipated - and to which the resolution expressly referred - meant that Kosovo would have to be provided with its own institutions.

Nine months after the entry of the KFOR and United Nations representatives in Kosovo, the FIDH wished to examine the human rights situation in Kosovo and more specifically the action and decisions taken by the UN administration up until the present time in setting up a judicial system true to the spirit of resolution 1244, international conventions, and the demands of a Democracy, particularly in the area of respect for human rights.

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The mission took place from **31 March to 7 April 2000**. The official representatives visited Pristina, Pec (Peje), Mitrovica (Mitrovicë), Prizren, Gračanica, Malishevë and Velika Krusa (Krusa E Madhe). They are keen to express their gratitude towards the many different people they met within the Kosovo Albanian, Serb, and Turkish communities, towards the OSCE, the UNMIK and the KFOR representatives for the interviews which they so willingly gave and for the help which everybody gave in facilitating the smooth running of the mission.

The representatives are keen to express their gratitude to Nérimane and Xyme Kamberi for having accompanied them throughout the mission and to the Special Fund for supporting the FIDH's missions. Without its contribution this mission could not have taken place.

## **I. The brakes on peace**

### **A. First steps in an emergency**

During the ten years of apartheid and the repression that it entailed, justice had been relegated to the ranks of lost illusions. Albanian magistrates having been dismissed from their duties after the repression of autonomy, the courts and tribunals in Kosovo consisted for the most part of a high proportion (756) of predominantly Serbian magistrates in comparison with the population (since there were only about twenty Albanians, who were suspected of "collaboration" with the Belgrade government by their compatriots) magistrates (756) in relation to the population. As the Albanian lawyers, some of whom were former magistrates prior to 1990, were frequently avoided for civilian or commercial cases where common sense and pragmatism led clients to prefer a Serb, Bosniak or Turkish lawyer over them, some of them became specialists in political lawsuits, increasingly rare with the rise of repression. Bajram Kelmendi, assassinated with his two sons by Serb police on 24 March 1999, was the symbolic figure of this along with Destan Rukiqi and Fazli Balai. By their own testimony, the climate of systematic repression was such that the only right remaining to them, other than that of putting in a token appearance by the side of their clients (who had been convicted in advance) was to describe this state of absolute non-law which Kosovo had become, where the most basic rights were denied and ridiculed.

As the judiciary had become a tool of repression with practically all the magistrates acting as Belgrade puppets, those (predominantly Serbs) who had particularly held sway within the repressive courts of law were among the first to leave Kosovo, even before the entry of the KFOR. Moreover the prisoners filling the Kosovar prisons had all been taken away by Serb forces at the time of their departure from Kosovo in flagrant breach of the codes of war (which obliged them to free prisoners of war)<sup>1</sup>. Of course there was no police force in the end, the latter having served even more than the judiciary as the armed wing of Belgrade's "cleansing" policy.

The law courts and prisons are therefore deserted. It was a country without a police force and with a judiciary

comprising mainly Albanian, Turkish or Bosniac lawyers, many of the Serb lawyers having also left the country that representatives of the international community discovered when they arrived at the end of June 1999.

Resolution 1244 adopted on 10 June 1999 by the UN Security Council determined the objectives of the United Nations Interim Administration Mission for Kosovo for an initial period of 12 months. Its first task is to ensure peace, law and order and to put into effect the most appropriate means to achieve this. Throughout this period, the representative of the UN Secretary General is to facilitate the creation of democratic institutions within the framework of substantial autonomy in order to guarantee peace and security for all the inhabitants of Kosovo

1. Since his arrival in Kosovo, which was at the same time that the KFOR entered in June 1999, Sergio Vieira de Mello, first special representative of the UN Secretary General (SRSG) considered his first priority to be the establishment of an initially rudimentary judicial system. There were so many reasons to fear an immediate and more serious outbreak of common law criminality and to attempt to limit it : the judicial and institutional vacuum, the openness of Kosovo's borders, the post-war confusion (complete anarchy during which the Serb forces and authorities left the country), the need to protect minorities, notably Serb and Roma against probable acts of revenge, the attitude of armed Albanian extremists, mostly from the UCK, who were taking possession of towns and villages in an attempt to assert a parallel authoritarian administration and giving themselves over to commando actions of retaliation against non-Albanian minorities, indeed against every Albanian who did not make an immediate act of allegiance, and finally the presence on Kosovar territory of members of the Serb forces, particularly paramilitaries, likely to have committed war crimes and who continued to devote themselves to provoking and destabilising behaviour. In fact, on 30 June the KFOR detained 221 people suspected of crimes or misdemeanours committed since its entry into Kosovo.

On 30 June 1999 nine leading magistrates, appointed by the Special Representative of the Secretary General

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(SRSG), on the proposal of a joint council (Joint Advisory Council on Provisional Judicial Appointments -JAC-), comprising lawyers, magistrates or barristers from the various diverse communities in Kosovo and of UNMIK and OSCE representatives, took an oath. Three of them had the authority to rule only on provisional detention, two were nominated examining magistrates and the other four, state prosecutors. "Travelling" magistrates by force of circumstance, they had to visit every zone where the KFOR had carried out arrests, in order to provide a quick ruling on possible detentions and begin preliminary investigations where necessary.

According to the wish expressed by Sergio de Mello to see an "independent, impartial and multi-ethnic"<sup>2</sup> justice born, the magistrates were chosen according to demanding criteria. All of them had to have received judicial training and to have had previous experience in magistracy, particularly the Albanians who were recruited mainly from amongst those former magistrates dismissed from their posts in 1990. They represented almost all of the communities living in Kosovo as there were five Albanians, three Serbs and a Turk amongst these first magistrates of the new Kosovo.

The Joint Advisory Council on Provisional Judicial Appointments (JAC) swiftly appointed other magistrates to carry out strictly limited functions, as none of them was authorised to pass judgment or to investigate the full merits of cases. The 55 magistrates who were appointed by the JAC between June and the beginning of September 1999 (when the council was disbanded) were no more than 47<sup>3</sup> after the resignation and departure of the Serb magistrates who had been appointed. They were divided between the Courts of Pristina, Prizren, Pec and Mitrovica.

The most urgent things were thus prepared for first; provisional detentions were provided with a legal basis and investigations could be opened. However during several months up until the end of 1999 not one full court was set up - except at Prizren where the criminal court had been in place since August 1999<sup>4</sup>- thus permitting the trial of simple cases not requiring months of investigation. In September 1999 when the JAC was disbanded, a new council was formed<sup>5</sup>. The Advisory Judicial Commission (AJC) was responsible for proposing a list of Kosovar citizens and magistrates to the SRSG, with a view to their appointment as lay judges and judges to the courts<sup>6</sup>.

This judicial vacuum did more for the more urgent need for criminal justice than for civilian justice where no structure at all has been set up to this day for hearing cases. For several months now there has been no solution and civil or commercial lawsuits and even employment cases are liable to crop up every day

2. In the absence of any police during the initial months it was up to the KFOR to immediately set about establishing law and order in accordance with the task conferred on it by resolution 1244. This forced it to begin questioning and detaining suspects until judicial proceedings were decided upon by the relevant authorities.

For lack of anything better, the contingent forces (American, German, Italian, French, British) who had each been given the responsibility of one of the five zones as defined in the Kumanovo Agreement after having begun the arrests, were detaining people for questioning often outside of any legal framework other than the immediate mandate given by resolution 1244 to see that law and order is upheld, and more often than not in accordance with decisions taken by the military authorities in conformity with their national law.

KFOR's contribution, following the appointment of the first examining magistrates in the investigation the facts in the context of preliminary investigations and/or speedy questioning, and on the other hand in the search for the perpetrators of crimes or misdemeanours and their questioning, in short its role as judiciary police very quickly became a source of as much ambiguity as of difficulty. Furthermore the fact that soldiers are not by nature trained and ready to take on such duties, their ignorance of applied law, and particularly of the criminal procedure in force in Kosovo, handed the latter over to the reign of the arbitrary on a large scale.

The arrangement which was more often than not reached, consisted in those army corps called to play this role until the arrival of the first United Nations police officers, compromising by using their own legal systems - although it was by no means certain that they all had a very precise knowledge of that. The French contingent dispatched on this type of policing mission were more familiar with the judicial police than the soldiers of the other corps. Many of the KFOR's representatives, in their ignorance of the Yugoslav Code of Criminal Procedure applicable in Kosovo which sets out that the

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time spent in police custody may not exceed 72 hours, usually opted for a minimum length of 48 hours.

The lack of space available for holding people in police custody forced the KFOR to make a selection from among those detained and to only guard those suspected of having committed particularly serious crimes or misdemeanours (abduction, murder, arson, rape, war crimes..)

This extra role was allotted to the KFOR soldiers at the beginning when there was no police, in addition to their original mission, with the aim of guaranteeing safety. The need for this intensified during the Summer of 1999 when the number of attacks on non-Albanian minorities increased and the KFOR agreed to provide the necessary protection. In this context of growing insecurity with no police or judiciary, it is easier to understand the urgent appeals launched by Bernard Kouchner calling upon the international community to send a police force without delay, to ensure not only that law and order be respected, but also in their function as judicial police to complement the work of the magistrates who are powerless to conduct any investigations if not quickly backed up by a competent and efficient police force.

It will be seen that whilst the dispatch of police officers from numerous countries later incorporated into the UNMIK police force gradually lifted the burden from KFOR soldiers, it also caused fresh problems.

**3.** That a criminal justice system needs the support of a judicial police force, also implies the need to establish a prison system to allow persons placed under a committal order and then sentenced to imprisonment to be detained in sanitary conditions with the appropriate security.

In April 2000 four detention centres with limited capacity (less than 100 detainees) are operational and Istog<sup>7</sup> prison near Pec (Peje), able to accommodate 520 detainees, is also soon to accommodate detainees once the repair work has been completed. For the moment those detention centres in operation (Pristina, Mitrovica, Pec, Vushtrin, Gnjilane) are being guarded by UNMIK police. Only Prizren prison is managed by an Albanian administration.

There's no doubt that with the shortage of police, the difficulties of co-operation with the judicial authorities

and the low capacity of secure prisons, the normal operation of criminal justice in Kosovo is an illusion just nine months after the arrival of the KFOR. The Lipjan detention centre, currently being renovated, should also open its doors before the Summer and should be able to accommodate 88 detainees. UNMIK is finally ensuring the training of some 150 prison wardens<sup>8</sup> appointed to gradually replace UNMIK police officers thus allowing for the gradual replacement of the prison administration under the supervision of the Director Of the Department for Judicial Affairs, Sylvie Pantz, who took up the post at the beginning of 1999.

**4.** The question of which laws should apply in Kosovo is just as fundamental. The first legislative decision taken by the United Nations Special Representative of the Secretary General (SRSG), Sergio de Mello after his arrival, was to decree that the clauses of resolution 1244 and the international conventions on human rights, particularly the European Convention on human rights were to be immediately applied as law and that any legal clause currently in use which ran contrary to these was itself no longer applicable.

Bernard Kouchner's first and foremost psychological mistake a little after he took office in mid-July 1999 was undoubtedly in decreeing on 25 July 1999 that the laws which were in force up until 24 March 1999 remained in force subject to their compatibility with resolution 1244 and international conventions on human rights, and not to have included some terms of a discriminatory nature on ethnic, religious or racial grounds.

He overlooked the symbol of repression that the Serb Criminal Code, applicable in Kosovo after the suppression of autonomy, represented in the minds of the Albanians, whether jurors or not. The SRSG's decision immediately provoked a general outcry of protest among the Albanian magistrates who after striking for several days resumed service but decided to apply the Kosovar Criminal Code (largely inspired by the Yugoslav Criminal Code), which was in force until 1990. When they were called to rule on cases with some of their other colleagues from other communities, particularly Serb, discussions arose over whether Serb or Kosovar law should be applied. Those on trial remained uncertain about which law they would be judged under and which one they should insist on as being better for them. The first Serb magistrate resignations were justified amongst other things by the



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refusal of their Albanian colleagues to apply the law that UNMIK had declared was still applicable. The quarrel although it revealed the confusion that prevailed at that time and sowed the seeds of confusion in the minds of those awaiting trial, did not however have any serious consequences for the judicial programme, as no sentences were pronounced in the absence of operational courts.

The mistake was rectified in December 1999 by the SRSG's decision to decree that the more lenient of the criminal laws applicable in Kosovo since 22 March 1989 was to be applied during court legal proceedings. The option thus remained open to apply the Kosovar or the Serb criminal code.

The Code of Criminal Law Procedure most extensively used at this stage of legal proceedings and investigation itself remained the Code of Criminal Law Procedure of the Federal Republic of Yugoslavia without inciting the same protest from the Albanian magistrates.

A joint council, the Joint Advisory Council on Legislative Matters (JACLM) was established in Autumn 1998 and comprised up to five Kosovar lawyers and two international experts. It undertook the task of cleaning-up the laws in force in Kosovo and bringing them in line with international norms of democracy and human rights by particularly expurgating every notion or clause of a discriminatory nature and by integrating the new legislation constituted by the decrees of the Special Representative of the Secretary General of the United Nations. This council had to make its work public by the end of April 2000 providing the inhabitants of Kosovo, ten months after the vote on resolution 1244, with their first legal framework containing norms of a democratic country.

### **B. Coming to terms with past and present**

On top of the problems involved in the necessarily simultaneous establishment of a collection of institutions essential for preserving law and order, the UN administration, in order to satisfy the demands of resolution 1244, had to come to terms with a recent past marked by ethnic confrontations which the war had brought to a head and on which the resolution in its definition of a plural and peaceful society appeared to miss. Moreover, by conferring on Kosovo a substantial

autonomy even if maintained within the borders of the Federal Republic of Yugoslavia, the notion of sovereignty was curtailed. Under such conditions, everybody, Serb and Albanian alike, could only be left with a feeling of incompleteness and yet they were expected to try and be reconciled and live together once again. This is a source of inevitable frustration and further tension is therefore probable.

### **First steps towards reconciliation: The example of Pec**

One day towards the end of the month of March 1999, Father Sava, then staying at the monastery in Decani close to Pec (Peje), was driving with Bishop Artemje, Patriarch of Prizren, through the streets of Pec<sup>9</sup> which were full of Serb paramilitaries who had entered the town to force the Albanian inhabitants to flee. He gives the following account: "I saw a lot of paramilitaries in different uniforms ... Near the centre of town there were trucks full of women and children. We drove quickly, it was obvious what was happening. The road up to Rozaje was blocked. There were hundreds, thousands of people, with cars and on foot. They told us they had been given 10 minutes to go. I was crying, it was the road of sorrow. I was so shocked. There was mist at the top of the pass. I saw a woman in slippers. The bishop was shocked and petrified. I said "I can see the Serbs leaving Kosovo very soon"."<sup>10</sup>

In fact as soon as the KFOR entered Kosovo to maintain peace and security, many Serbs left Kosovo either of their own free will or by force. They were now the targets of acts of revenge particularly in the Pec region. There are only a few of them now cloistered in their enclaves, placed under the close supervision of the KFOR. At **Pec** they live enclosed in the town patriarchate (50 people of whom 25 are clerics) and at the Monastery of Decani under the close protection of the Carabinieri. There are 800 further North at Goradzevac and again at Istok they number 185. The Roma are more numerous and less exposed to extremist reprisals and lead more or less normal lives.

The administrator appointed to the region in the middle of July, **Alain Le Roy**, immediately tried to persuade the political representatives of every persuasion and from every community in the region to meet together in his presence in an effort to begin the long process of reconciliation essential for restoring lost confidence.

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Father Sava who represented the Serb community at this first meeting (held on 23 July 1999 at the UNMIK headquarters at Pec, which the LDK party and Kosovo Liberation Army (UCK) representatives also attended), opened the session with a long speech of repentance for crimes committed against the Albanian community by Serb forces.

This request for forgiveness moved as well as surprised the pretty intransigent participants from the Albanian community. It is clear that it was this first step, essential in any reconciliation, which made it possible for representatives from all the communities to participate in Pec's town council since the Autumn.

"These and similar atrocities pockmarked our history and on all sides it was agreed that we had to take this history, this past, seriously into account. We could not pretend that it had not happened. Much of it was too fresh in the memories of many communities. True forgiveness deals with the past, all of the past, to make the future possible," writes Desmond Tutu recalling his experience at the head of the Council for Truth and Reconciliation<sup>11</sup>. "Reconciliation is liable to be long dawn-out process with ups and downs, not something accomplished overnight and certainly not by a Commission, however effective. Reconciliation is going to have to be the concern of every South African " he continues.

Even if the apartheid that the Kosovar Albanians were subjected to did not last as long as that in South Africa, which is the best illustration of this, to expect peace and reconciliation to be reached more quickly in Kosovo than elsewhere, after the crimes committed there, is at best a figment of the imagination and at worst defeatism, to talk about a "Lost Peace" after a mere eight months of UN administration.

The patient and persistent contribution of the civil administrator for the Pec region to this long process of restoring mutual confidence, can be seen in what has been achieved in just a few months. The fact that less than a year after the vote on the resolution, in one of the most battle-scarred regions of Kosovo since the beginning of the conflict in 1998, meetings have taken place between the representative of the ex-UCK of Djukagjin - which together with Drenica was one of the most powerful strongholds of the UCK - and representatives from the Serb community in the

patriarchate of Pec, forbids any talk of failure and reinforces hopes of a possible reconciliation. The efforts made by Alain Le Roy in his region, allows one now to glimpse the possibility of the gradual return of the Serbs to their homes and villages. The decision taken at the Monastery of Gracanica on 2 April 2000 by the Kosovar Serbs, faithful to the moderate views of Father Sava and Momcilo Trajkovic, to sit on the interim council of the UNMIK, was amongst other things determined by the commitment of the UNMIK representatives to ensure the return in complete safety of the Kosovar Serbs.

### **The Situation of non-Albanian Minorities**

For all that however, it is true that on 2 April, Father Sava, an hour before making this important decision, expressed his anger and unsparing criticism of UNMIK regarding the current fate reserved for Serb and other minorities in Kosovo: "There are no more than 300 Serbs in Pristina, there is no longer any freedom of movement nor of expression. To talk in Serbo-croat in the town is to immediately expose oneself to problems, often very serious ones... UNMIK are mistaken in believing that the solution is reached by completely neutralising the UCK which continues to use violence and to terrorise all of the non-Albanian minorities. The International Community, particularly KFOR refuse to fight the UCK with weapons when it's the only solution, The return of Serbs will only be possible when safety is guaranteed, safety in speech and in self-expression.. We are in favour of the freeze on the question of Kosovo's status until the foundations of a democracy have been established."

The initial months following KFOR's entry have actually been marked by really serious incidents at diverse points in Kosovo where mainly Serbs and Roma have been forced to leave their homes under threat of execution, or because their homes were set on fire and take refuge in enclaves populated mainly by people from their community.

Their freedom of movement is particularly limited today. There appears to be nothing in the judicial plan to re-establish a nevertheless fundamental freedom. Quite the contrary as the magistrates, the majority now Albanian are suspected of giving in to heavy local community pressure and liberating those brought before them under suspicion of being either the author or the accomplice of ethnic crimes. According to Colonel

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Fouk, liaison officer for KFOR with the UNMIK Department for Judicial Affairs, this tendency has discouraged some UNMIK police officers or KFOR soldiers from making any arrests under this system where there is the risk that their prisoners would be set free again immediately " The Albanians", he adds, "feel that they are again in a war situation and that risks lasting as long as they feel that Kosovo might come under the control of Belgrade once again".

Every time a Serb leaves their enclave, they need close guarding which neither KFOR nor UNMIK police are always in a position to provide. Bernard Kouchner frequently repeats not "being in a position to put a police officer behind every Serb". Under the terms of the resolution adopted at the beginning of Spring. European Members of Parliament (like James Rubin during a trip to Kosovo in February 2000) have called upon the Albanian extremists as well as the Serbs to put an end to the violence in order to allow the implementation of resolution 1244 which provides a peaceful co-existence between the diverse communities in Kosovo.

These inter-community tensions reached their peak in a town like **Mitrovica** where the demarcation line which has cut the town in half since June 1999, stimulates and encourages confrontations between the extremists on both sides. The exacerbation of hate and tension - beginning with the perpetuation of the enclave - keeps alive in people's minds not only the deterrent that it was supposed to inspire but also the vision of a large scale deployment of security forces (armoured tanks posted around houses, or in quarters, helmeted and heavily armed soldiers, numerous barbed wire barricades, bunkers of bags of sand), the scars of war and the resulting irreparable divide between two communities.

A considerable number of Serbs left Kosovo, whether voluntarily or not, mostly during the first few days after the entry of the KFOR and the departure of Serb troops.

However we know that the reception by the Serb authorities for their compatriots expelled from Kosovo was unwelcoming to say the least. Those who did not know where to go have been "parked" in refugee camps in Southern Serbia, where hygiene conditions are precarious.

In a joint report on the position of minorities in Kosovo, the UNHCR and the OSCE assessed the number of Serbs still present in Kosovo at 100,000 at the end of January 2000<sup>12</sup>. This figure must be compared with the last known figure of the Serb population in Kosovo estimated at 195,301 in 1991 per 1,607,690 Albanians<sup>13</sup>.

Still more worrying was the new and more serious wave of murders, kidnappings or assassinations perpetrated against the Serbs or other minorities. Their number had dropped off for several months when it was again reported in January 2000 that thirteen people had been assassinated between the 12 and the 17 January of whom four were Moslem Slavs at Prizren, three Serbs at Gjilan and two Roma at Djakove. "There is little doubt that the motive for these criminal acts is ethnic in origin. These figures serve to highlight just how fragile the situation continues to be even with the very marked improvements that have been observed largely in connection with the establishment of a new judicial system" the UNHCR and the OSCE note in their report.

Killings committed by albanian extremists reinforce Milosevic's authority, still strong, even in Kosovo. Father Sava emphasizes it «every Serb, killed, here in Kosovo is one more nail which braces Milosevic's power»

### **Serbs loyal to Milosevic**

Father Sava, who has now withdrawn to the Gracanica Monastery with Bishop Artmeje, does not deny that dissension exists among the Serbs of Kosovo, nor that his views are not shared by the whole Serb community. The decision taken on 2 April to convene the interim Council, was, as soon as it was made official, condemned both by Belgrade and Oliver Ivanovic who represents the Serb community in Mitrovica.

For evidence of these differences of opinion, one only needs to interview the Serbs who live in Gracanica, many of whom fled from Pristina because they were ordered to leave their apartments by gangs they describe as gangs of young thugs, sporting the UCK insignia but unarmed. "Their are two currents in Kosovo: Momcilo Trajkovic and Illich and there is also Ivanovic who represents a third current close to that of Illich. The second represents the government of Belgrade and is pro Milosevic. Trajkovic is in the Artemje/Sava camp, recognised by the International Community and opposed

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to Belgrade. Here in Gračanica we are split: 50 per cent pro Artemje, Sava and Trajkovic; 50 per cent pro Illich and loyal to Milosevic."

The description of living conditions by the Serbs resident at Gračanica, most of whom, unless they are shopkeepers, are no longer working, is clear evidence of the way in which Milosevic is continuing to take advantage of the situation and to latch on to a not insignificant part of the Serb community.

The fact for example that salaries and pensions that for three years have been paid with a minimum delay of six months in Serbia are paid on time here is one illustration: "Birth certificates are still being drawn up here according to Serb rules ... We have a Post Office and a Bank here, dependent on Belgrade. When we are sick, we go to the Kosovo Polje (Fushe Kosovo) hospital escorted by the Kfor. We use dinars and DM. Civil servants are still being paid each month, without the slightest delay, by Belgrade, just like pensioners who also receive their pensions every month. As for those who have lost their job and who used to work before at Obilic<sup>14</sup>, Belgrade pays them 60 per cent of their old salary. UNMIK suggested that some of us who worked at Obilic be reinstated - but this proposal only affected 40 of us. Before we were 600 Serbs working at the station. We replied that all 600 should be reinstated and that there was no question of accepting if only 40 of us were taken back. Here in Gračanica there are a few Albanians. The baker is Albanian, everything is fine with the Albanians who live here, and round about, but on the other hand we no longer go to Pristina unless we are escorted."

Father Sava, who claims fiercely that he is opposed to any idea of partition, admits that in the northern part of the town of **Mitrovica**, on the other side of the River Ibar, one is no longer quite in Kosovo: "Over there," he explains, "it is almost Serbia. The Serbs live there among themselves, they have kept the same infrastructures as before, they are in direct contact with Serbia. Their agenda is in line with Belgrade's. The Serbs over there live well, they are short of nothing. The borders should be better protected by Kfor."

The fact that the court and the prison are in the northern part of the town raises some serious problems, similar to those raised by the way the hospital at Mitrovica is run \_ because it could not ensure protection for the

Albanians while they were being cared for, the UN administration was forced to open a second hospital, on the southern side, so that Albanians could receive medical care.<sup>15</sup>

Journalist (with Zeri) and philosopher, **Skelzen Maliqi** compares Mitrovica to Mostar: "The problem in Mitrovica does not only have to do with the role played by Kfor. All the Serb institutions were still there, with their members still very active. Kfor has not been very firm on this question nor with armed groups, of which there are many north of the Ibar; what's more, the borders with Serbia are out of control... this region is particularly important economically for Belgrade".

### **Victims of War, Prisoners and Disappeared**

Last, but by no means the smallest hurdle in the process of reconciliation, when the troops of Kfor entered Kosovo, investigators and lawyers from the ICTY began their investigations and exhumations. Each day the ploughed and upturned soil gave up the dead to survivors who were plunged into mourning. On the eve of winter, 2,108 bodies had been exhumed from 195 listed mass graves of the 529 already found. According to testimonies gathered by the TPIY investigators and confirmed that same day, the number of dead went up to 11,334.

To these can be added the victims of Spring 1999, the 2,100 prisoners<sup>16</sup> captured by Serb forces during the war and who, in contravention of even the most basic of war rules, which would have all prisoners of war returned at the close of hostilities, were taken to Serbia where they are still rotting in several prisons throughout the country, waiting for trial, a parody of justice, which is bound to attempt to legitimise what are nothing more than "spoils of war". Hundreds of Albanian families are being kept in ignorance about the fate of their loved ones, and are the victims of serious racketeering on the part of a number of unscrupulous Serb lawyers, who for payments of several thousand Dollars (US\$20,000 is the minimum charge) or Deutschmarks, promise news, freedom or intercession to make a visit possible... which often end in nothing.

Lawyers from all over Serbia, who say they hold the key to freedom, frenetically circulate their business cards at the Merdar border post, in the north of Kosovo, and the Prisoners' Committee, presided over by **Shukrie Rexha**,

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whose husband is being held at Nis, or Natasha Kandic's Humanitarian Law Centre, which is very active in cases involving Albanian prisoners detained in Serbia, have tried in vain to discourage families from giving in to their solicitations, it would be in vain \_ the hope of gaining some ground is too strong. The two organisations also deplore the fact that there are so few trustworthy lawyers in Serbia, who would be prepared to genuinely help the families with their proceedings without trying to make an unreasonable profit from the situation.

Information brought back by the lawyers or families who succeed in visiting their loved ones held in Serbia, after having forked out for the cost of a long and dangerous journey, is often alarming \_ deplorable prison conditions, lack of care for the growing numbers of sick, malnutrition and epidemics of gall which the prisoners try to fight by leaving their windows open even in the depths of winter.

**Kosovare Kelmendi**, the daughter, also a lawyer, of Bajram Kelmendi, a lawyer assassinated on 24 March 1999 with his two sons, runs the Pristina office of the **Humanitarian Law Center** and does not mince her words when explaining what Albanian prisoners being held in Serbia are: "Hostages, that's how we view them ... there are no files, no evidence of the alledged crimes they are being accused of, we are in a no-law situation. On 18 April 2000, the trial of some 145 prisoners will start. In most cases, the lawyers will not have had access to the files or to what are meant to be files. These trials are parodies of justice. The only way to get them released is to increase international pressure on Belgrade. These must not be campaigns for individual prisoners, they are all in the same situation of injustice and non-law, they are all equally important, those famous for their commitment and the others."

To the still unresolved question of the prisoners can be added that of the disappeared, numbered at 3,000 by the **Humanitarian Law Center**. "This figure, explains Kosovare Kelmendi, "corresponds to the number of cases we have researched and documented. In short, for each of these 3,000, we have witness statements from those who saw them for the last time and/or who were able to explain the circumstances of their abductions if they were eye-witnesses. From what we have been able to gather, it seems that many Kosovar Serb civilians facilitated or assisted in these abductions.

These files have all been sent to the office of the ICTY prosecutor. The people here all know the ICTY, but all the same they cannot understand why this jurisdiction is so slow and why they are left without any news for such a long time. The families of the disappeared live in a very difficult situation: as well as the anxiety of being without any news of their loved ones, they also have an immense and painful frustration. Time passes but it is impossible to grieve \_ there is always a glimmer of hope that keeps being ignited from time to time."

**Kosovare Kelmendi** also talks about the disappearances that have happened since the war, and that continue to be reported; those of which the non-Albanian minorities have largely been the victims, especially in the first months following the arrival of the Kfor. There is a rumour, which keeps emerging but is not substantiated by any serious evidence, about detention camps run by the UCK.

The Serb inhabitants of Gračanica who tell of these abductions of which their fellow countrymen have been victim, say themselves that the reality of these camps is a result of "simply reading the papers". In the Prizren region where, since June 99, the existence of detention camps and secret courts has been talked about, OSCE representatives remain very cautious on the subject. "We have no proof of these rumours, which remain just rumours that we do not believe to be credible," maintains Dan Engelman, who is in charge of establishing the Rule of Law at the OSCE office in Prizren.

Finally, there are the disappearances of which Albanians are still victim. The case reported by the Humanitarian Law Centre, of Bekim Susuri, a young man of 25, is without doubt one of the most troubling. He came from a village close to Prizren and was intercepted by Russian Kfor forces on 17 October 1999 on the road to Gjiçane. His parents had now news of him until they learned three months later that he was being held at Nis. Captured by soldiers from the Russian contingent, he was supposedly handed over to the Serb authorities at the border in the southeast of Kosovo, then transferred to Vranie, then to Podzarevac to be finally locked up at Nis.

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### Footnotes:

1. The fate of the prisoners of war was unfortunately omitted from the Kumanovo agreements signed at the end of June 1999 and as we shall see the illegal detention of more than 2000 prisoners in Serbia, by Serb forces, has greatly added fuel to the tension between Albanian and Serb communities in Kosovo.
2. UNMIK press release dated June 1999
3. 35 of whom were examining magistrates and detention magistrates and 12 were representatives of the Public Prosecution Office
4. Seven magistrates were appointed in August 1999 by the Special representative of the Secretary General to the Prizren County Courts.
5. The council consists of three internationals (OSCE, UNMIK) and eight local jurists of whom seven are Albanian and one is a Serb.
6. Article 23 of the Yugoslavian Code of Criminal Procedure anticipates, according to the gravity of the crimes prosecuted, of the first degree, courts composed of three jurors and two professional magistrates respectively (crimes punishable by 15 years or more of imprisonment) and two jurors and one professional magistrate in cases where the penalty incurred is less. In cases of appeal, only the professional magistrates are present. There are five in cases concerning the most serious crimes incurring penalties of 15 years or more and three in cases punishable by less.
7. This county which served as a base to the special forces and soldiers deployed in the west of Kosovo during the strikes was bombed at the end of April 1999 by NATO.
8. An initial 60 Kosovar guards were selected on 31 March 1999 after successfully completing the training.
9. The main Albanian quarter was completely destroyed putting Pec at the top of the list of the most devastated towns in Kosovo
10. Quoted from Tim Juddah: Kosovo War and Revenge, Yale University Press, London, April 2000, P. 243
11. Desmond Tutu: No Future Without Forgiveness, Rider, London, 1999
12. Cf UNHCR/OSCE : Assessment of the Situation of ethnic Minorities in Kosovo - November 1999/January 2000
13. Estimation of the Federal Institute of Statistics based on the birth rate in Kosovo and the number of immigrants.
14. Important electricity utility near to Pristina which employed before the suppression of autonomy 1,200 Albanians and 700 Serbs. After the suppression of autonomy, 700 of the 1,200 Albanians were "made redundant". Since the arrival of the Kfor, the utility has been run by a member of the British contingent and placed under the administration of UNMIK.
15. Cf. Mitrovica, cet abces qui devie le cours de l'histoire, by François Cr, mieux, former director of Mitrovica Hospital, Le Monde, 4 April 2000.
16. Just under 500 have been released to date by Belgrade, in successive waves.

## **II. A legal system for peace**

**Sylvie Pantz** took up her post at the beginning of November 1999, straight from the Hague where she was a magistrate for the ICTY, and is in control of legal affairs in Kosovo. Since her arrival, she has been active on all fronts: work meetings, tours of the different jurisdictions of Kosovo with her closest adviser, the highly respected **Nekibé Kelmendi**, a lawyer, widow of the famous lawyer and Vice-President of the LDK party, drawing up plans for prison administration, recruiting and training magistrates, meeting with the local Bar and settling conflicts between magistrates and the UNMIK or Kfor police. She defends "her building site" just set up and, passionate and complex, she does not hide her anger at seeing some draw premature conclusions or suspect Albanian magistrates of partiality - magistrates she is well used to defending: "How can anyone judge after only two months? Most of the magistrates were nominated in January 2000. Already by the end of March, people are making up their minds: there is no justice in Kosovo, the judges are rotten to the core! Would the same be done in Great Britain or France? Would a magistrate be judged after only two months? There is a world of incomprehension between the internationals who come here with their fixed ideas and established rules, and the people who live here, the magistrates who know their trade and have their legal system. Kfor has no compunction about handing to a magistrate a witness statement in a language that no Albanian magistrate can understand. For example, at Pec, witness statements were drawn up by the Carabinieri in Italian. How can the magistrates find their way around that? I had to rush some translators down there! What I want is to give my judges the material means and the security they need to be able to function properly."

Justice does not create itself \_ it presupposes on the one hand that the police service is functioning and efficient in equal measure and participates in the investigative process which the magistrates cannot carry out alone, and that, on the other, the procedures for executing decisions are thorough and efficient and, when it comes to criminal justice, the prison system is also functioning.

### **A. UNMIK police and the KPS**

1. Progressively, from the end of summer, contingents of UNMIK police arrived in Kosovo. Of the **4,718** police officers initially promised for Kosovo, by 1 April 2000, only **2,682** had been deployed and they came from 46 different countries. They were distributed thus:

<b>-Pristina:</b>	<b>637</b>
<b>-Prizren:</b>	<b>329</b>
<b>-Pec:</b>	<b>158</b>
<b>-Mitrovica:</b>	<b>541</b>
<b>-Gnjilane:</b>	<b>391</b>
<b>-Headquarters:</b>	<b>140</b>
<b>-Border police:</b>	<b>201</b>
<b>-Training:</b>	<b>37</b>
<b>-KPS:</b>	<b>108</b>
<b>-In training (awaiting deployment):</b>	<b>104</b>

The first problem, which occurs frequently and yet is fundamental for justice and magistrates' day-to-day dealings with the police to work properly, is that of language. While English is the language of the UN, it is certainly not that of Kosovar magistrates, who speak one at least of the local languages: Albanian, mother tongue of most magistrates, and Serbo-Croat, spoken by most Albanians and the mother tongue of Serbs and Bosnians, who are unlikely to know much Albanian. Of the 2,000 police of 46 different nationalities who today make up the UNMIK police force, all do not speak English and that is putting it mildly.

The second problem that complicates somewhat the magistrates' task of carrying out investigations and criminal proceedings, and more generally, maintaining public order, remains overlapping responsibilities between the Kfor and UNMIK police.

Resolution 1244 gives Kfor the mission of ensuring the maintenance of peace and security and is thus invested with the task of maintaining order. The progressive deployment of police forces throughout Kosovo has tended to release KFOR from the policing role it felt obliged to exercise when it first arrived, albeit

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reluctantly, feeling neither fit nor legally equipped for such a role.

It has some activities connected to the working of the judicial system, such as the transfer of prisoners from one detention centre to another or to the Court, the safety of magistrates (jointly with UNMIK police) and the maintenance of security around detention centres.

It is Kfor that proceeded in a number of regions of Kosovo, and especially near to Rahovec, to arrest Serbs suspected of war crimes. This seemed, in the words of the Kfor liaison officer with the Office of Legal Affairs, to give Kfor a very poor image within the Serb community. According to him, "Kfor relations with the Serbs are bad. The Serbs are convinced that Kfor is not neutral; the Kfor that is carrying out a certain number of investigations into war crimes committed in Kosovo during the strikes."

Today, there are regions in Kosovo where the insufficient number of UNMIK forces deployed is forcing Kfor to work with the judicial authorities. This is the case in Pec where the low number of police deployed (150) forces the Carabinieri to continue, against their will, to collaborate with the local justice system. Magistrates, like lawyers, complain about it. The tactics of the Italian Kfor are strongly contested, from several quarters: "The Italian Carabinieri," explains Adem Bajri, lawyer at Peje and UNMIK adviser on legal matters, "have a very particular understanding of their co-operation with the court. They refuse to play the role of real judicial police. When they lead an investigation, they do it alone, on their own initiative, without referring to the Prosecutor or the Examining Magistrate."

**Michael Jorsback**, member of the UNMIK Police Board, describes with bitterness the difficult relations and poor coordination, but often necessary for the maintenance of order between the UNMIK police and Kfor, and between Kfor or the Police and the judicial authorities. "The UNMIK police have problems of coordination with Kfor, mainly because of the mandates given to one or the other through Resolution 1244. This provides that the maintenance of order must be guaranteed and that to this end a police force must be established in Kosovo. The Kfor is an occupying force of a kind and as such has the precise mandate of maintaining peace and security. When members of Kfor proceed to arrest a group of men possessing arms, they are thinking

"secutiry". If we do the same thing, as police officers, we are thinking of the maintenance of public order. But, after the arrest, we think about taking the arrested people before the Public Prosecutor. For us, possessing arms is a crime to be pursued and sanctioned. The Kfor do not take this line."

This overlapping of functions between Kfor and the UNMIK police takes on a much more worrying dimension when it comes to protecting non-Albanian minorities. In a report published at the beginning of the year by the OSCE and the UNHCR, the organisations underlined the lack of coordination between UNMIK police and Kfor in regions where reinforced protection was proving essential and where the shortage of police resources was forcing Kfor to perform this task.

Michael Jorsback paints a rather black picture of the situation and of the functioning of the current judicial system: "The solution to resolve the current problems in Kosovo is not military, it is judicial. For there to be justice, an efficient police force is necessary, but an efficient and credible judicial system is also necessary. We do not have that today: the chain is not working. Non-Albanian minorities very quickly abandoned the idea of a multiethnic justice system; today justice has a tendency to be "ethnic" \_ if you belong to the right ethnic group, you are fine; if not, things are more complicated. What is more, while a certain number of arrested delinquents or criminals claim to belong to the UCK, they do not all belong to UCK. The UCK is not the only group responsible for the anarchy that reigns at present. There is real difficulty in trying to get the Albanians and the Serbs to live together again. One side wants independence which is refused them; the other is in hiding and if they come out, they risk being set upon by an Albanian."

This view must be compared with that of people on the ground, who think, for their part, that crimes of revenge, which were very frequent during the summer, are now much less frequent, even considering the fact that the few Serbs remaining are shut into their enclaves. "Interethnic crimes of revenge reached their peak in the summer," stresses **Tony Rivière**, chief commissioner at Pristina. "Today, they are clearly receding and have given way to general delinquency with its share of thefts, trafficking and murders which are not necessarily ethnically inspired."



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At **Mitrovica** on the other hand, the President of the District Tribunal, **Kaplan Baruti**, welcomes the quality of relations between the Tribunal and the French gendarmerie (Kfor), which according to him is more accustomed to judicial police activities and anxious to collaborate in a good spirit, with the Tribunal. His praises are markedly more measured when it comes to the UNMIK police. "The UNMIK police do not keep us informed, take their own initiatives and present us with them. The written statements that are sent to us are usually unusable; they are drafted in English and we have to find an interpreter, and then the form in which it is drafted is nothing like that required by the Yugoslav Code of Criminal Procedure. The Prosecutor and I wrote to ask for a meeting with those in charge of the police at Mitrovica, but we're still awaiting a reply. Then there are unending delays in carrying out warrants; in particular arrest warrants are not carried out with the necessary care."

The UNMIK Police is also in charge of the detention centres until the prison warders, currently being trained, begin their duties. The Albanian Magistrate takes umbrage at the initiatives taken by UNMIK police at Mitrovica prison without first referring to him, even though, according to him, the prison ought to be under his supervision.

While his counterpart in **Prizren**, **Ethem Rugova**, is satisfied with the services rendered by the UNMIK police, and by Kfor, both anxious to ensure respect for applicable Yugoslav law, **Basrim Nevsati**, an Albanian lawyer given a dock brief for the defence of Serbian war criminals charged in Prizren but currently held in Mitrovica, has since their transfer, denounced the liberties taken by the UN police with the applicable rules of procedure.

The fact is, and this is by far the most worrying deficiency, the UNMIK police have but a cursory knowledge of applicable law and especially of the criminal procedures in force in Kosovo.

An official from the central police station in Pristina, **Tony Rivière**, of Canadian origin, admits that, to his great surprise, since July 1999 he has been given no Yugoslav code of criminal procedure written in a language he can read and understand. Although the text has been declared applicable throughout Kosovo, it is absent from police stations where individual freedoms

are beginning to be put to the test. "There are 90 of us here of 33 different nationalities. Not everyone speaks English with the same ease; we all come from different legal systems as well. At the beginning we complained about the absence of written rules on the procedures to follow. There are things we knew \_ the length of time of custody of a maximum of 72 hours and our obligation before this time has expired to take the person being questioned before the Prosecutor so that he can decide what is going to happen to him. On the whole we take those in for questioning to the Prosecutor within 48 hours, but as far as the rest is concerned we are a little in the dark; we only know that we have to apply international standards, but that is such a vague notion that it doesn't solve any of our problems. Pre-detention is not carried out in local police stations, but in detention centres where they have their own rules."

2. Ideally the police functions in Kosovo should, as in any other country, be carried out by indigenous police officers, speaking the language of their fellow citizens, and more aware of the laws and customs of the country than foreigners coming from a variety of countries and cultures, and anyhow in Kosovo only for a limited time. Even if they put all the good will required into their mandate, it cannot seriously be expected that police seconded for a period of 6-12 months, learn and master perfectly a set of laws different from those in which they received their initial training. While the UNMIK police can, for a certain amount of time, continue to ensure that security and public order are maintained, it seems essential that judicial police functions should be very quickly taken up again by the local police (**KPS**), on condition, of course, that the quality of training they will be given, will enable them to fulfil their mission with all the rigour and impartiality required. The creation of a functional and equitable justice system depends on it.

The constitution of this local police force (**KPS**) is underway. **Seven hundred and fifty** police officers have already been trained at the Vushtrrin police academy where 34 hours of classes are given each week, over a period of 8 or 9 weeks, for each class. The goal that OSCE and UNMIK have set themselves is to train, in 16 months, 3,500 police officers, men and women, aged at least 21, and coming from all of Kosovo's communities, and in whom tolerance and concern for human rights are among the criteria for their selection to be admitted to the training school. The first cycle of training, completed in October 1999, involved 176 men and women. At the

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end of March 2000, 230 students left the School with their diplomas in hand. Among them were 31 women, 21 Serbs and 4 representatives of communities other than Serb or Albanian.<sup>17</sup>

### **B. Prisons in Kosovo**

The administration of Kosovo's prisons is still in its infancy. The opening of the detention centre at Lipjan and the centre at Istog will enable discussions to start about prison administration, which will naturally be made the responsibility of the Department of Legal Affairs.

To date, apart from the one in Prizren, managed by Albanians, the other detention centres (Pristina, Mitrovica, Peje, Gjilan, Vushtrín) are managed and administered by UNMIK police. The prisons at Pristina and Mitrovica are similar in their capacity (average 64 detainees) and their architecture, quite rudimentary and not well adapted to current security requirements. These architectural shortcomings, combined with clear negligence on the part of the UN police, may be deemed responsible for the successful and repeated escapes of several detainees from Mitrovica prison.

The cells, arranged around a circular corridor, each have a high, barred window looking out onto little passageways which lead into walkways situated in the centre of the circular building. Their average capacity is two or three detainees, with one slightly bigger cell able to take up to five. Security checks are made night and day every 15 minutes. None of the detention centres includes an area reserved either for women, or for minors. A young woman placed in provisional detention, charged with murder, is sharing a cell with another female prisoner, in Pristina, in the same corridor as the men's cells.

Three meals and a snack, in the absence of a working canteen, are prepared and delivered by the neighbouring Kfor. The prisoners met in Mitrovica and in Pristina, men and women, Albanian, Serb or Roman, all say they are satisfied with the conditions of detention and have no reason to complain about any ill-treatment. At Mitrovica, two Serb prisoners of war in particular, who were interviewed at length, stated that they were perfectly treated and only complained about their incarceration which they believed to be unjustified but for which of course they did not blame the prison staff. The hunger

strike commenced by these same prisoners a week later as protest notably about poor prison conditions, seems a little strange under the circumstances.

Commandant **Jan-Aker Nilsson**, Director of the detention centre in Pristina, explains that the number of people at the centre is in a perpetual state of change, as it is also a holding centre for prisoners who have not been charged for the whole area of Pristina. At 2nd April 2000 it was full with 61 men and 2 women. Half the detainees are charged with voluntary homicide. The Serbs, numbering 4, are separated from the other detainees, mostly young people. From the beginning of the detention pending charge, everyone has the right to visits from their lawyers, who can have access to their clients at any time except at night. Families have the right to one hour's visit per day, and only two members of the family can have access to the visiting area per day. Confidentiality of the discussions between lawyer and client is preserved. "In the first months after our arrival there were many suicides amongst the detainees" Commander Nilsson explained. "Most of the people who are here have psychological problems of greater or lesser severity, resulting from the events which occurred during the air-strikes." A written set of regulations fixes the procedure to be followed for detentions before charge, for detention generally, and for release, the safety regulations to be followed, and the rights as to lawyers' visits and family visits. There is no particular reference to the Yugoslav Code of Criminal Procedure, but at the beginning of this document (which is distributed to the 15 people who form the staff of this penal establishment) it is stated that it is "intended to ensure the detention before and after charge, and pending trial, of people being questioned and then charged, and detention should be carried out in a healthy, ethical and humane manner without consideration of race, religion, sex or ethnic origin of the people concerned, and respecting laws applicable in a democracy."

### **C. Courts and Tribunals in Kosovo**

At the beginning of the year 2000 Bernard Kouchner nominated **307** judges and prosecutors and **238** lay judges to sit in judgment in the criminal courts - making up for the delay which had occurred during the first months of the UN administration, and after selections had been made by the ad hoc commission. Out of the 307 career magistrates nominated, 25 were from non-

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Albanian communities, and 276 of them are currently in service. The nomination of these magistrates and lay judges was to enable trials to go ahead in the cases (particularly criminal cases) where the preliminary examinations had taken place, and which were ready to be tried. The Council of Europe had envisaged that for a limited period, there would be international judges in the Kosovo courts, but this recommendation had not been put into immediate effect. It was only after the serious incidents at Mitrovica in February 2000 that the two first international magistrates - one examining magistrate and a representative of the prosecutor's office - were nominated, in Mitrovica itself.

The participation of these magistrates in the judicial process however raises many varied problems, as we shall see later, from the knowledge of local laws and customs to the acceptance by local magistrates and those coming before the courts, not to mention questions of security, language and logistics.

To speak of "multi-ethnic" justice is certainly an unfortunate expression. There should only be one justice, and the representatives of the judicial system should work with the same concern for the respect of law, the protection of individual and public liberties and trying those who come before them, whatever may be their religion or race, and whatever community they may belong to. The judicial profession to be set up in Kosovo should, in the spirit of Resolution 1244, respect the plurality of communities in Kosovo. In conformity with this resolution, magistrates have been selected by the UN administration, the majority Albanian, but also Turks, Bosniaks, Roms and Serbs.

Only the Serb magistrates nominated by Bernard Kouchner at the beginning of the year 2000 refused to take the oath. To date no Serb magistrate has taken part in judicial proceedings in any of the jurisdictions in Kosovo. The other communities however are represented in all the jurisdictions. This real boycott of the UN judicial system can be attributed to the real harassment to which the Serb community was subjected during the later months of 1999, and the feeling of many Serb magistrates who had taken part at the beginning in emergency travelling courts, that they were particularly exposed. However this is not the only explanation and cannot have been valid in the Northern areas of Kosovo. In Mitrovica the President of the District Tribunal, situated as we have said in the

Northern part of the town with majority Serb population, is Albanian, and magistrates belonging to the other communities, and particularly the Serb community, were nominated. No Serb magistrate has taken office to date. But none of those nominated has left the town, they are all working there and move around in complete liberty. One of them is today a lawyer at Mitrovica, which shows that security is not the real reason for their refusal to take the oath.

**President Baruti** is the first to deplore this real disruption, particularly as his relationship with the Serbs is good. He has always lived with his family in one of the residential areas in the Northern zone in an exclusively Serbian neighbourhood - although now under heavy protection from Kfor. Throughout the area of jurisdiction of the District Court, the situation is the same: "six magistrates were nominated to the Municipal Court in Vushtriin. Among them was a Serbian woman. She refused to take the oath. I know her well and was on excellent terms with her. She is married to an Albanian from Vushtriin. We spoke about it and she told me she had to give in to the threats that were made against her by the leaders of the Serb community in Mitrovica to prevent her from taking office."

**At Leposavic**, a town to the North of Mitrovica with an almost exclusively Serb population, the five magistrates nominated by Bernard Kouchner were all Serbs. None of them has agreed to take the oath, and no Serbian magistrate is therefore in office in a town with a large Serbian majority. The judicial system therefore does not function in this town in the extreme North of Kosovo for lack of magistrates willing to take office.

A member of the **UNMIK** Department of Judicial Affairs stated "the explanation of this boycott situation is of course political. The Serbian community of Kosovo is loyal to Milosevic, and has no intention of participating in UN institutions. There is also a very pragmatic argument which Belgrade uses to convince any doubters. Serbian magistrates are largely aged 50 or more, and so approaching the age of retirement. If they work for UNMIK, not only do they risk being targeted by other members of the Serbian community, but they are liable to lose their pension rights definitely. Today even if they are not working, Belgrade pays them promptly at least 60% of their salary, and assures them that their pension will be paid as soon as they reach the age. Their choice in these conditions is fairly straightforward!"

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### **Magistrate training**

The magistrates nominated at the beginning of the year were mostly selected in the light of their studies and previous professional career, particularly before 1989, since when almost all the Albanian magistrates were dismissed by the Serbian authorities. There is still no magistrates training college in Kosovo but the magistrates in office, as well as future magistrates, receive an additional training arranged by OSCE in co-operation with the Council of Europe, the American Bar Association, international and local lawyers.

This training, which the newly appointed magistrates requested themselves, appears even more important since the review of legislation which has been undertaken to bring local law in conformity with international instruments on the subject of liberty and human rights in particular.

It is also necessary from a general point of view because of the bringing into effect of new regulations (there are some 40 new regulations promulgated by the SRSG) added to the existing law.

### **Treatment of magistrates**

Magistrates currently receive depending on their seniority and their position in the hierarchy, a sum between DM.300 and DM.780 per month. The majority of magistrates we spoke to considered this sum "humiliating". This opinion is shared by lawyers. Thus Mr. Nezvati, a lawyer at Prizren appointed to undertake the defence of some Serbs accused of war crimes, said "the judges are ill-paid, it is a humiliating sum...they are nevertheless impartial: they have the feeling that they are working for their people and for an ideal of justice.»

The Special Representative Bernard Kouchner defends this amount, recalling that teachers and other civil servants hardly receive more than DM.200 per month. Nevertheless certain magistrates inevitably compare the sum paid to them to that paid to other UNMIK officials. The President of the District Tribunal at Mitrovica, who receives the highest salary in the judiciary at DM.780, admits his frustration: "this remuneration is humiliating considering my position, my seniority in the profession and the lack of security in which we are obliged to work. My 25-year old son, who has not finished his secondary studies, works in the

Staff Department of UNMIK. His job is a subordinate post and yet he receives a salary of DM.1200 per month."

**To Skender Morina, General Prosecutor of Prizren**, a man in his fifties and another former magistrate (prior to 1989), the complaints about his unfair treatment were even more justified, as he only received DM 300 per month salary until December 1999. It has increased to DM 600 since January 2000, but he is no longer paid by UNMIK now. "A problem of budget management that is in the process of being solved »UNMIK explains. Skender Morina, who is philosophical and only too happy to be back in his former post, says nevertheless that he is going to stay in his post, even if he does not get paid for it : «I'm used to not being paid... I haven't been paid for the last ten years, but what matters today is that I am back in my former position of General Prosecutor, what matters is that there are courts...".

### **Security and Prosecution of war crimes**

**1.** There is not one day in Kosovo where the security in courts, both of judges and of those who appear in court, is not a problem, particularly in Mitrovica. The President of the Court is escorted from his home in the Northern part of the town, which is a Serb territory, to the court every morning and back home again in the evening. Otherwise, apart from his own situation, security is, from his point of view, still virtually inexistant in general, except when there has been an incident in the town. Since the incidents in February and March 2000, a tank has been posted near his house. His son, who works for UNMIK on the South bank of the river, is driven there by the UNMIK police every day. His wife hardly ever goes out, except for doing some shopping, which she mostly does by car. He himself says that he is not afraid of the Serbs whom he has known for a long time, but that he is more afraid of Serb newcomers to his part of the town.

He expresses even greater concern about the security in and around the building which hosts the court. "Security here is virtually inexistant; they only ask you to write down your name before you enter. Outside the building, there is just one tank and one police car, but not even every day. At the end of March, the first trial against Serbian perpetrators of war crimes arrested by the Kfor in Kosovo was due to take place. I decided to postpone the process, because the Kfor failed to provide the

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security I asked them to give... this type of trial immediately arouses a particular level of tension... Kfor are there to ensure security when the court is in session, i.e. to protect both the judges and those that are brought to justice. It is out of the question that we should relocate... If we give in to pressure groups and allow the course of justice to be governed by their agenda, there won't be justice any more... UNMIK and Kfor must ensure that trials can be held in the conditions of security required for them. The trials against the Serbs are not the only ones that pose such security problems. If tomorrow, we were to prosecute a former member of the UCK, the pressure and threats would be the same as if we were prosecuting a Serb. People - Serbs and Albanians alike - have got to understand that we cannot do without courts, even if this means that we have to mobilise a large number of security forces. I have written to UNMIK to request for security to be ensured during trials. But relocating for reasons of security or belonging to a certain community is unthinkable."

The Swedish magistrate, appointed in March 2000, who is currently investigating the "hottest" cases, such as, for instance, the attack of an HCR bus, the murder of a Russian soldier or the shots of Albanian snipers against French soldiers in Mitrovica, enjoys special security 24 hours a day.

**Christer Karphammar**, who is accompanied by at least two armed UNMIK policemen at all times, has already been in the Balkans for three years and acknowledges that the security of judges and courts is one of the utmost priorities, if one wants the legal system to be effective in Kosovo. "There are fundamentalists on both sides, Serbs and Albanians alike, and they are prepared to do anything... and trying to enforce justice in this region is full of dangers; we have to measure these dangers and try to guard ourselves against them. We have to accept them if we come to work here...".

2. Security is also one of the key issues of many debates within UNMIK, about setting up a jurisdiction for prosecuting the perpetrators of war crimes<sup>18</sup> and ethnic crimes, which is something of a pilot project. The principle of establishing such a jurisdiction now seems to have been accepted and even arouses enthusiasm among almost all the parties. **Father Sava** himself considers such a jurisdiction as "crucial for the reconciliation of the communities currently living on

Kosovon territory."

This jurisdiction, however, continues to arouse a number of questions as to its implementation. The prosecution of perpetrators of war crimes and, to a lesser extent, perpetrators of ethnic crimes, which are its very epiphenomenon, not only puts judges, but also and above all, victims and witnesses at risk. Needless to say the attendance of victims and witnesses and their protection are of prime importance for an effective judicial system.

As we know from the experience with the The Hague tribunal, the protection of victims and witnesses is a very complex issue. Striking a compromise between the necessary confrontation between defendants and plaintiffs on the one hand and the protection of those who are responsible for restoring the truth, on the other hand, is a difficult task. As a result of their legitimate concerns after all the suffering they have endured, they often refuse to appear before the court as witnesses.

The fact that the Criminal court was set up in a place far away from the places where the crimes were actually committed, however, proved to some extent a pre-condition for ensuring vital security, which was indispensable.

Establishing a national jurisdiction in the country where the crimes have been committed - war crimes and crimes against humanity - inevitably poses the question of the protection of victims and witnesses. Today, those who are leading the debate within UNMIK have come to acknowledge that their protection in the places where the conflict took place was inconceivable. And have come to the conclusion that if the courts come to the victims, they would be forced to turn round and leave their country, together with the witnesses, to enjoy a form of protection they cannot enjoy in the places where the crimes were committed, and that the courts where they are prosecuted, cannot guarantee.

### **Independent Courts**

The question that has inevitably been arising in reports of governmental or non-governmental organisations working in Kosovo and in the media over the last few months is the independence of judges. In short, Albanian magistrates, who today form the majority, are suspected of being partial, whether intentionally or not.

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These magistrates are subject to countless pressures from the Albanian community and some intransigent members of the former UCK in particular. They are accused of not applying the same standards in prosecuting those from their own community and those belonging to other communities, and the Serbs in particular. This is a grave accusation and, if it is well-founded, it seriously undermines, above all, any hope of seeing a judicial system established in Kosovo which is worthy of a democracy.

**Sylvie Pantz** does not hide her irritation at the fact that the judicial system in Kosovo is being criticised before it has even had a chance to prove itself. In fact, how can one draw a final conclusion about a judicial system whose establishment is certainly a much lengthier procedure than one would have thought, but which is still too recent to allow us to make a well-founded judgement. At present, only a very small number of decisions on the merits of cases have been made. The process of establishing an effective judicial procedure, from the judicial police to the implementing penalties, is so slow that the period of temporary detention was extended at the beginning of this year from 6 months, as stipulated by the Criminal Code, to 12 months at the beginning of this year in order to ensure that pre-detentions that last indefinitely do not turn into arbitrary detentions.

Albanian magistrates are also suspected of releasing those who have been transferred to them, on the grounds that they were Albanians.

**Fazli Balai**, a renowned criminal lawyer and former judge, has been involved in the appointment procedure of magistrates in the JAC Commission right from the beginning and still acts as an advisor to the UNMIK. He is critical of these simplistic judgements: 'The problem', he says, 'is, above all, a problem of how different areas of the law are allocated to different judges. They have brought back former magistrates from before 1989. Some of them were experts on labour law, others were experts on civil law, others were at the Appeals Court and others were experts on criminal law. The former training and expertise of these people is not recognised, so they are falling back on the expert on labour law, investigating judge, the former Counsellor at the Appeals Court, and of course, this is not working well. Since June 1999 only ten criminal cases have been heard in Pristina and 25 in Prizren... this is a bit scarce

to be able to draw conclusions. As for the problem of committal orders, things are not that simple either. First of all, prisons can only admit limited numbers, which means that clear decisions have to be made as to who should be admitted and who should be released. True, the ones that are released are minor delinquents, as there is just not enough room to keep everybody and the risk of absconding is not very significant, as people here, mostly Albanians, do not have any identity documents, so where should they go? And releasing someone does not mean that he benefits from an acquittal. In this context, there has been one case which has really stirred up public emotions; this is the case of a young girl who had been arrested because she had set a Serbian house on fire. She was released and many were those who cried out in indignation without even mentioning that in view of her very young age, she could not be kept in custody under the Criminal Code. Magistrates need to have a sense of recognition and support by the international community to enforce their authority and gain the autonomy which will give them their true status."

As for the level of crime, which foreign observers in Kosovo believe has risen significantly since June 1999 - apart from ethnic crimes, such as murders, arson attacks, theft and kidnapping - there has been an increase in so-called 'organised' crime, such as theft, trafficking of cigarettes, cars and drugs, as well as crime related to the increase in prostitution. The mission team was not able to collect evidence on the true character of «organised» crime which undoubtedly exists. To **Skelzen Maliqi**, the overpopulation of a city like Pristina (which has now about 450,000 inhabitants), linked to the fact that many a family found themselves unable to restore their houses which had still not be rebuilt before the winter, is an important factor which explains the rising level of crime. "More than 100,000 houses have been burnt, people have not returned to their homes; in many houses too many people live together in cramped conditions. There is a very high level of unemployment."

A joint report of the United Nations Population Fund (UNFPA), the International Migration Office (IMO) and the UNMIK statistical office reveals interesting facts about the present structure of society in Kosovo, with 50% of the population under 25 years old, 5 to 6 people on average sharing one house, 80% of houses with more than one small family, half of the working population

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without jobs, 36% of men claiming that they were living on subsidies from outside, and 7,343 houses in Kosovo uninhabited, with no one ever having claimed them.<sup>19</sup>

**Skelzen Maliqi** further explains the nature of crime in Kosovo: »In Prizren, there is organised crime, but it is not directed against the Serbs; there are hardly any Serbs left there any more. In Pec (Peje), there are "gangs", gangs of adolescents, but it is difficult to associate those to organised crime... as in Pristina, this is rather a form of crime linked to the city's overpopulation rather than urban unemployment.»

This observation has been confirmed by **Mr Nevsati**, an Albanian lawyer from **Prizren**, who also talks about 'organised crime' in the city. As for **Pec**, **Alain Le Roy** believes that one can hardly talk about "organised crime" - he also prefers to use the term 'gangs', i.e. groups of unemployed youths living a miserable life of delinquency and crime. As Albania is so near as well as the fact that the border is so porous, the presence of Albanians from Albania in Kosovo and their coming and going for more or less acceptable reasons is now quite likely, he says.

At the present stage of court cases, and due to the fact that there are no surveys or statistics on crime in the region, it remains difficult to have a very clear idea of the nature of this crime and its precise extent, the parts of the population that are particularly affected, the perpetrators of these crimes and the extent to which they are organised. It is easy to believe, of course that Kosovo is today afflicted by the same problem as Albania, which is a real hub of all sorts of trafficking, as a result of a "spill-over" and a certain state of anarchy caused by the situation in the aftermath of the war and the currently prevailing form of impunity. Due to the lack of transparency on this type of crime and the way it develops, we have to be careful not to make categorical judgments; all we can do at present is simply try to make sure that the level of crime does not further increase as a result of the institutional vacuum or the fact that there is no judicial system.

To **Colonel Foulk**, an American lawyer and liaison officer of Kfor in the Legal Affairs Department of UNMIK, "what matters is that there is no prevailing sense of impunity in Kosovo. ... we haven't got fair trials yet and lawyers themselves do not have a very clear idea of how the defence exercises their rights and of how an

autonomous and fair legal system works. Judges and lawyers still have a lot to learn. Currently, according to what community they belong to, the same pieces of evidence for the same facts are considered to be sufficient in one case, but not in another. But in principle, it is a problem of attitudes rather than bad intentions, since there are Albanian judges who, without intending to directly threaten someone or put particular pressure on someone, are worried that they might come across as pro-Serb, if, for example, they release a Serb, suspected of having murdered an Albanian or prosecuting an Albanian accused of murdering a Serb... The UCK is not the biggest problem. One must know that today, the Albanians, despite the presence of Kfor and the UN in Kosovo, do not have the feeling that they live in total security. The presence of Serbs in a Kosovo which is not autonomous, is felt by them as a threat that the Serbs will one day come back... there are Albanians who fear seeing the Kfor forces leaving Kosovo leaving them once again faced with the forces of Milosevic."

One representative of OSCE in **Prizren**, the only town in Kosovo where a sufficient number of trials have taken place to be able to make the first appraisals of the conditions in which they are held, makes a more moderated statement:

The OSCE regularly carries out judicial observation missions in order to see whether the judicial system works and to assess further training requirements: "Verdicts have been pronounced since the autumn. The majority of trials are more or less in accordance with the law ... there are cases where one has a feeling that the cards are actually distributed beforehand and outside the court's premises... We are aware of pressure put on judges in some cases where they were threatened, even by telephone... we learnt this indirectly, as the judges are not brave enough to talk about it. And then, there is sometimes minor cheating, although this is not necessarily in so-called cases of 'ethnic crime'. For example, in one case where an Albanian had been accused of having raped an Albanian woman in a house, the judges who made the decision whether this man should be kept in custody decided that he should be released. The decision mentioned the presence of three magistrates, although in truth, one of them was absent...everybody here has got to understand that justice is for everybody and that everybody must respect it and submit to it without trying to influence it."

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Albanian judges and lawyers only grudgingly accept the suspicion they are accused of by the international community. "We do not need to let ourselves be accused of being biased", says **Mr. Baruti, President** of the district court of Mitrovica. "The Serbs refuse to participate in court proceedings, so that they can discredit the judgments we render. For the last ten years we have been suffering an unprecedented discrimination and the courts have been used for this purpose...We will never repeat what has happened over this last decade; we have a much higher ideal of justice...I am a former magistrate. I have spent all my life as a magistrate...until they forced me to leave. I have been at the Court of Appeal for the last two years and before, I was Prosecutor at the Court of Appeals in Mitrovica... so what are their judgments all about? Here in Mitrovica, there has not been a trial yet."

This magistrate also gives an account of the current proceedings: 11 cases have been transferred to the court, one case of a minor is being investigated. 42 people are under accusation and investigations are current. Out of these 42, there are 11 Albanians, 29 Serbs, 1 Turkish and 1 Bosnian. 25 people are in custody and accused of war crimes (23 Serbs, 1 Turk and 1 Albanian). Out of the 28 people currently in custody, there are 14 Albanians and 14 Serbs.

In **Prizren**, the composition<sup>20</sup> of the court reflects the diversity of communities, (except for the Serbs of whom there are none in the town<sup>21</sup> since they were expelled during the summer). There are 14 cases of Serbs accused of war crimes and transferred to Mitrovica in November 1999, against the instructions of **Mr. Ethem Rugova**, who is the President of the court and who had started to investigate the case; the other Common Law criminal cases only involve Albanians, mainly prosecuted for murder, theft, arson attacks, kidnapping, rape, beating and injury.

To **Skender Morina**, Prosecutor at Prizren, the criticism of the functioning of courts in Kosovo, the problem is not so much that judges are biased, but rather the fact that "we have a real problem with police investigations that get transferred to us; in most cases, they can't be taken further, with no real outcome, and very often we do not have any evidence as we do not have any witnesses. So what shall we do if the case has been poorly handled? All we can do is release them."

**Adem Bajri, lawyer** and expert on criminal law in **Pec** and adviser to UNMIK for judicial affairs in the region, says with the same indignation: "We urgently need a functioning judicial police force, a role the Kfor is not playing at the moment. Only occasionally over the last eight months have we been able to carry out autopsies. How on earth can we deal with such cases of murder if we do not have one major piece of evidence which helps us to investigate the causes of this murder? We do not have a morgue here and the pathologists are in Pristina, and the courts, of course, do not have enough money to pay for the transfer of dead bodies to Pristina. Those from outside tend to call our magistrates incompetent or biased, because they are subject to the pressure of the UCK... It is possible that in certain cases, one is tempted to put pressure on magistrates, but I strongly believe in their integrity. Not long ago, two former soldiers of the UCK were questioned by the police after having committed an offence... they were released and the case was closed, simply because there were no sufficient charges against them; no evidence at all. It was immediately thought that it was due to pressure put on the magistrates that this decision had been made... I can assure you that I have seen the file... it is true, the file was empty...One should know that it is in the interest of Serbia and the Serbs loyal to Belgrade to convey the impression that trials against Albanians are biased and that Albanian judges are incompetent."

Even though everyone agrees - even the Albanians - that there certainly is pressure on magistrates, it is difficult to conclude that this pressure is the only reason why all these cases have been closed with no decision; their number is, in any case, very hard to estimate. There are no figures for the number of those who have been released,, and even if they were known, they would not be a reliable indicator, given the few cases that have actually been brought before the courts so far. Other equally important reasons that may explain why the functioning of the judicial system in Kosovo is still in its very early stages are the poor co-ordination between Kfor or the UNMIK police forces and Kosovan courts, the lack of funding for investigation, language problems, lack of material resources and a lack of self-confidence of magistrates, linked to the suspicion held against them by the international community.

We are concerned that the suspicion about the quality and the impartiality of magistrates contributes more to their being marginalised and does not permit them to



develop their full potential, authority and recognition by the entire people of Kosovo, which is indispensable for this institution to exist.

Now the new magistrates have been in place for eight or nine months since the end of a war and apartheid regime that have been utterly devastating for people's minds and attitudes but this is, in any case, not sufficient to judge whether the new magistrates can carry out their functions in accordance with the exigencies of a democratic system. The international community will enable them to establish a judicial system integrated into the democratic state proposed by resolution no. 1244, by helping them to fulfil their tasks, both through material support and moral support; however, this very state is still to be established itself. Taking into account the history and a tenacious local culture and tradition where, according to the Canun, vengeance has the status of law which they are all dependent on and from which they must distance themselves in order to be able to make neutral judgements.

"One must look behind the trial' says **Paul Ricoeur**. 'Behind the conflict, there is violence... one must take into account the most tenacious form of violence, i.e. vengeance, in other words, the claim of the individual to take the law into his own hands. In principle, justice is not only contrary to violence as such as well as hidden violence, but also vengeance, which is a pretence of justice, the act of rendering justice to oneself. In this sense, the basic act on which justice is based, as it were, is the act by which society deprives the individual of the right and the power to do justice for themselves - the act by which public power seizes this right and power for itself to apply and to pronounce the law; it is also by virtue of this confiscation that the most civilised operations of courts, and particularly in the criminal field, still carry too much of this visible mark of vengeance, the original form of violence".<sup>22</sup>

In this laborious quest for a democratic judicial system two questions remain open: first, how far should the international community be involved in implementing this new judicial system for Kosovo; in other words, where do the foreign magistrates come in and how long should they be there for? And secondly, what is the place and the future of a special jurisdiction for the prosecution of war crimes and ethnic crimes in Kosovo?

## **D. The issue of foreign judges**

There are two at the moment, one Swedish judge and investigator and an American who acts as Prosecutor. Both of them have been appointed to Mitrovica since February this year and are protected by the UNMIK police 24 hours a day. The material and human resources available to them are clearly much better than the relatively poor resources of local magistrates. After the incidents that happened in Mitrovica at the beginning of this year, Bernard Kouchner, who had been rather reluctant until then, was finally convinced that two foreign judges should be appointed to this city. There are also announcements of the forthcoming arrival of a few more judges from abroad who will be spread over several courts in Kosovo.

**Christer Karphammar**, a judge by training, has been "floating" around the Balkans for three years now. After having worked in Slovenia and in Bosnia, his last post was in Albania where he was acting as an advisor to the Prosecutor. He admits that the Albanian society, which is a predominantly rural society, is very complex in terms of its attitudes and that its firmly-rooted traditions and secrets are not revealed to the foreigner who happens to visit the place. He also says that without understanding them, it is an illusion to believe that one might be able to deliver justice in the country. Before coming to Mitrovica, he was in charge of analysing the complaints of the accused about the functioning of the legal system at the Legal Affairs Department in Kosovo since October 1999.

Christer Karphammar has his office at the court in Mitrovica, right opposite the office of President **Baruti**, who was not very happy to see foreign judges being appointed to the court - perceived by him and some of his colleagues or Albanian lawyers as a gesture of defiance towards the local magistrates from Kosovo. And for President Baruti in his court, it was also a form of humiliation: "When he arrived, he took a number of files, some delicate cases... normally, I, the President of this court, am in charge of the distribution of cases and their allocation to the magistrates of this court. I consider this type of attitude as discriminatory and an encroachment on the prerogatives I have as President of this court. I have complained about this to Mrs. Pantz...we are as competent as other magistrates... when Tito was still in power, we already had to tolerate the presence of foreign judges because of security

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problems... well, it's true, since they been here, there has been a slightly stronger presence of security forces outside the court."

**Ethem Rugova**, his counterpart in Prizren, who, it is true, has not had to suffer the same kind of "personal insult" at his court and who is in charge of investigating the cases of 14 Serbs suspected of war crimes, is, much more open-minded towards foreign judges being involved in the prosecution of such cases: 'I'm going to propose the participation of a foreign judge. There are four judges for criminal cases at the Court, two of them are too young and the other two have dealt with the investigation file, so we need somebody else.'

**Adem Bajri**, lawyer at Pec is not opposed, as long as the presence of these foreign judges "does not mean that the Albanian magistrates get marginalised", as they in any case, have to stay in Kosovo, unlike the foreign judges who have only been appointed for a limited period of time.

**Skelzen Maliqi** does not have any particular objections: "Why not foreign judges? After all, we are a protectorate, even if one might rather call it a `soft protectorate'... so, yes, why should we not have foreign judges to deal with these delicate cases?"

The files which **Christer Karphammar** took over are actually delicate cases, clashes with the Kfor which led to beating and injuries, even deaths and the attack against the HCR bus...

His opinion on delivering justice in Mitrovica is rather pessimistic: "The situation is extremely difficult and we can't do anything unless we have resolved the biggest problem, which is the problem of interpreters. Interpreters are vital for the smooth functioning of justice and the police. I'm currently investigating the murder of a Russian soldier by a young Albanian. Just imagine the translation problems that arise when I have to question witnesses among the Russian forces. I have a Serbian interpreter who speaks Russian, who translates my questions in English into Russian, although Russian is not his mother-tongue, and then he translates what the Russian soldier says into English. Things become even more complicated when, for example, as in this case, confrontations between Russians and Albanians are involved.... these problems also apply when the reports have to be written, of

course, reports which I am going to write in English, but which will then have to be translated into Albanian for the Albanian judges... with all these translations which are not very, very precise, a lot of the contents and even statements made by the accused, the victims and the witnesses actually get lost. There are not enough interpreters here, in any case, and they are rather mediocre, none of them is really familiar with the legal and court terminology, which is another potential source of mistakes."

Worst of all, however, is, he says, the complete lack of confidentiality: »Reconciliation after these incidents is not round the corner. There are fundamentalists on both sides. Local magistrates are very competent, but they have become terribly vulnerable as a result of the permanent tension which reigns in this city. If we want a functioning legal system here, we need the support of the international community, all of us, foreign judges and local judges. This means, we do not only need interpreters, who should be independent, i.e. not belonging to such or such community of Kosovo, but recruited outside, in other countries. We need them in sufficient number and competence, we need English-speaking clerks and translators to enable us to have the reports translated into the language spoken by the magistrates in time. This also implies that we would be able to find people who accept to come and work here, in very difficult conditions and in an environment which is both dangerous and hostile... candidates for these posts are few and far between! Of course, we are exposed to threats, but the danger is not there... there is no point in calling in judges to Kosovo from abroad if there are no material and human resources and if these judges do not know the Balkans and Albanian society.»

«They must also be familiar with Yugoslav law and, in addition to that, understand how this society works, because this is a society which is still very secretive and which is still extremely strongly based on the Kanun... all this must be taken into account if one wants to work properly here... if one does not make this initial effort, and if one just imposes courts modelled on the Western systems in this society, it won't work and we cannot make any mistakes, we must succeed. I am not very optimistic, but, I have come here because I want to see it work...»

## **E. Justice in war crimes cases**

The presence of UNMIK and Kfor made it possible for the first time to consider establishing a tribunal, as part of the judicial system which is being rebuilt, for the prosecution of those perpetrators of war crimes who will not be prosecuted by the International Tribunal for Yugoslavia.

**Fernando Castanon**, who is trained as a lawyer, has been leading the debate on this ambitious project in UNMIK, jointly with the OSCE. He has a wealth of experience of international justice and reconciliation processes; he was seconded to the tribunals of The Hague and Arusha in succession. He also acted as the Executive Director of the Truth Commission in Guatemala. His wealth of experience, and his experience of Guatemala in particular, have convinced him of how important it is that the perpetrators of crimes should be prosecuted in the place where the crimes "were actually committed». We were 13 in the Commission, set up to examine this proposed tribunal 5 from abroad. The team was soon unanimous in deciding that such a court should be established."

The principle of establishing a special tribunal has thus been accepted. Its jurisdiction will be set out in its statute which is still being worked on. However, there are plans for this court to have jurisdiction not only over war crimes and crimes against humanity in the strict sense of the term, which have been committed since 1989, when autonomy was abrogated, right up to the present day, but also crimes committed during the same period and motivated by racial, religious, political or ethnic discrimination. As far as we are aware, the Court will not have exclusive jurisdiction over war crimes, but may also have the authority to decide to investigate or prosecute those war crimes that have already been the subject of investigations by other courts in Kosovo which would then hand them over to this new tribunal.

Part of the idea is also to invite foreign judges to get involved in this new tribunal, at least as a first step, with 1/3 foreign judges and 2/3 local judges as the ideal ratio. Local law would be applicable."We are fully aware of the amount of material and human resources to be provided for this court; that means that if this court is truly established, it will have to be allocated the budget that is necessary for its smooth functioning, and the same goes for the Special Chamber of the Appeals

Court which will be mandated to deal with this type of cases in appeals procedures."

However, some important questions still need to be answered, such as the security of victims and witnesses which we have already mentioned, and the answers to these questions will determine the success or failure of this first ad hoc tribunal of this type.

There is another difficulty: in **Velika Krusa**<sup>23</sup>, more than 100 men, from the youngest ones to the oldest ones, were killed in summary executions in one village; as a result this village now has a predominantly female population. Their bodies were buried in the centre of the village, on the dirt road that runs through the village; there are more than a hundred earthen tombs, all covered with wreaths of artificial flowers in bright colours, with a simple piece of wood with the name and the dates of birth and death on top of it, or without even a name where the bodies were so mutilated that it was impossible to still identify them at all. Men, sons, fathers, husbands, brothers were all massacred in large numbers. One humanitarian organisation has launched a project aimed at teaching women to drive tractors and carts and to familiarise themselves with the work in the fields, as these are tasks that they now have to do completely on their own.

They are the principal witnesses of the incidents of the end of March 1999 when an attack was launched on the village by Serbian forces. Out of the 14 Serbs who were arrested by the Kfor and accused at Prizren, some of them came from Rahovec and they are suspected of having been involved in the massacre or having facilitated it. Even today, women refuse to go to court as witnesses and repeat the same as they already said in Albania in April 1999."Justice is only for men here", a doctor from the village dispensary explains.."Everybody here knows what the International Tribunal for Yugoslavia is, but when it comes to actually taking the step to go to the court to stand as witnesses, women are afraid of doing so; they do not dare to speak out, they don't know..."

The experience of the tribunal of The Hague has taught us that few agree to come as witnesses to the tribunal, compared to the number of witnesses heard on the ground by the investigators, probably for fear that they might find themselves face-to-face with the accused or that they might even recognise the hangman or one who

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has tortured other members of their families. This reluctance is likely to be even stronger before national courts, but time and confidence will surely do it for them.

Even if there are countless obstacles - as was the case before the International Tribunal for Yugoslavia was established - even if the challenge is enormous, it is vital that the international community should provide the financial and material resources for national courts to help restore the situation as it was before it became disrupted by the level of crime, to restore the patterns of society and bring about reconciliation. If it fails to provide these financial and material resources, there will never be justice in this region. For this court to be able to bring about reconciliation, non-Albanian magistrates in Kosovo, and Serbs in particular, will be involved in it. It is thus imperative that UNMIK and its representatives of the Serbian community, who have already been convinced by its usefulness, should make an effort to convince the Serbian judges in Kosovo that it is necessary, both for the Serbian community and for the Albanians, to get involved in this pilot tribunal.

### Footnotes:

17. OSCE numerals

18. The International Tribunal for Yugoslavia does not have the same scope of jurisdiction as national courts which retain their jurisdiction, particularly over perpetrators of crimes who cannot be transferred to the International Tribunal for Yugoslavia which, given the length and complex nature of investigations and procedures, mainly focuses on the proceedings against and prosecution of political and military perpetrators of war crimes and crimes against humanity as well as perpetrators of sexual crimes (rape).

19. This figure is quoted in relation to the figure estimated by this same report of the victims of war, of '9,000 people who died in the war; 90% of them died between March and May 1999'.

20. there are 51 magistrates at the district court of Prizren, 45 of whom are Albanian, 3 Bosnian, 2 Turkish and 1 Roma.

21. There are only a few Serbs left in Prizren, confined in the bishop's residence right in the town centre, which, together with the Orthodox church opposite, has been transformed into a real bunker, protected by the German troops 24 hours a day.

22. Paul Ricoeur: *Le Juste*, Editions Esprit, 1995

23. This summary execution was incorporated in the charge against Slobodan Milosevic of 24th May 1999 and the other political and military leaders of Serbia or the RFY. (also see FIDH report of June 1999 entitled 'Justice for the Kosovo Albanians, pp. 42 - 51).

## **Conclusion and recommendations**

Just before the first anniversary of the passing of resolution no. 1244, Kosovo is still undergoing a slow process of reconstruction, after being devastated by the war and the state of chaos in the aftermath of the war. The United Nations mission for Kosovo, of which Bernard Kouchner has been the co-ordinator since 15th July 1999, has opened up the road towards democracy for a country that only has a very vague idea of democracy and whose government and institutions had to be set up from scratch in June 1999. It is the first time that the United Nations have been given such a mandate and it is important that the international community should provide this mission with the necessary resources to enable it to accomplish this mission, so that the government can then be handed over to the local population in a democratic framework which they will have willingly embraced. Unless this new Kosovo is endowed with a proper Constitution, which forms the real backbone of a state in the process of being established, the institutions put in place by UNMIK will not find their rightful place.

- A fair and independent legal system in Kosovo is still to be established. It is vital for restoring social peace and it will only come into being when the entire population of Kosovo recognises it as their common asset, whether they are Albanian, Turkish, Bosnian, Serb or Roma.

- The United Nations - and Kfor as a security force, mandated to ensure that public order and security are maintained, will be under an obligation to provide human, financial and material resources necessary for the functioning of this new tribunal.

- The rapid deployment of **police forces** by the international community to reach the numbers envisaged is a priority, while local police officers are still to be selected and to undergo rigorous training. Their most important task is to ensure, in co-operation with the Kfor, an end to ethnic crime. The perpetrators of those crimes must be tracked down and arrested, so that they can then be handed over to the prosecutors.

- In order to compensate for the weakness of a judicial corps which is still too much exposed to local pressure, it appears indispensable that the perpetrators of these crimes, should, first of all, be handed over to the courts where they will be tried by benches including **foreign**

**judges.** Due to their presence and the important role they will play in restoring the country's peace, it is vital that the international community should provide all the human and material resources as soon as possible. Whether its commitment to helping Kosovo to become a democratic state, committed to the respect for human rights and personal freedoms, is genuine, will become clear when it genuinely contributes towards and achieves the implementation of resolution no. 1244.

- It is imperative that this process of establishing a new tribunal should be supported by political will that should be clearly expressed by representatives of all the communities, the Serbs and the Albanians, in the Interim Council of UNMIK. If they reject the continuing impunity of the authors of ethnic crimes, whoever they may be, then this will be the best proof of their willingness to build democracy under the auspices of the United Nations. As long as the local political representatives of Kosovo have not become involved in this first step towards democracy, the words of resolution 1244 will remain empty. It is the task of the Special Representative of the Secretary General to get the representatives of the Serbs and the Albanians on the Interim Council to officially declare their agreement to this point which is of prime importance for establishing a democratic state.

- In addition, the UN police forces that have been deployed must also be taught the contents of the criminal law and the law governing criminal procedures applicable in Kosovo, with codified versions of these texts to be distributed to them in a language which is readily understood by everyone. The judges are also to be given support by a sufficient number of independent, accredited interpreters familiar with legal procedures, in order to ensure that these cases can be dealt with within a reasonable period of time.

- The Secretary-General's special representative and the representatives of the Serb community who have accepted to be on the Interim Council, will have to make strong efforts to convince the Serb judges, who have already been appointed, to join the team of judges, who are already being trained, and to take the oath of office. The efforts made to achieve this goal, and the efforts of the Serb community in particular, will be proof of their good faith in this respect, they will be proof that they have genuinely distanced themselves from Belgrade and

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they will also be proof of their willingness to see Kosovo develop into a democratic, multi-party state.

- The international community will have to make every effort to ensure regular protection, and if necessary, extra protection of these **Serb judges**, especially against potential pressure from members of the Serb community who are hostile towards UNMIK and have remained loyal to Milosevic whose line is to systematically boycott the institutions put in place by UNMIK.

- Local judges from Kosovo will equally require the same **human and material resources** as foreign judges in the country; they will particularly require experienced and independent interpreters to enable them to exercise their functions in complete independence. In this respect, it appears to be vital to ensure that these local judges get a fair remuneration and that neither they, nor the population as a whole, are left with the feeling that, on the basis of this remuneration, they are perceived as "second-class" judges, and that those who exercise this function are not exposed to possible attempts at corruption.

- The judges from Kosovo should also be able to enjoy **greater security** as long as the tensions between the communities persist, to enable them to exercise their functions in complete calm and independence and also to escape potential pressure. Kfor will have to provide all the resources necessary for trials to be held in security, particularly in Mitrovica.

- The international community will finally have to pay for the establishment of a new tribunal in the region. This court is a real pilot project in the former Yugoslavia: it is mandated to prosecute the war and ethnic crimes that have been committed since 1989. It is set to be the key institution for bringing about peace and reconciliation between the communities in Kosovo. The international community will have to respond to the greater need for protection of victims and witnesses, as without victims and witnesses, this court will not be able to function.

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