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The paradoxical Kosovo 'special court' was a guarantee of political stability – that is why the ruling class wanted it

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Andrea Capussela discusses the many paradoxes of Kosovo's special court, which was supposed to investigate and deliberate upon the serious human rights abuses during and after the 1998-1999 war – and asks six questions.



ICJ – Public Hearing of the "Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo". CC BY-SA 4.0-3.0-2.5-2.0-1.0, via Wikimedia Commons

In December 2010 in the [Marty report](#) described a rather long line of crimes that allegedly were committed in Kosovo between 1999 and 2008. One year later the EU set up a special investigative task force to look into these matters. In July 2014 the task force [declared](#) that its findings were 'largely consistent' with the Marty report, and that it is ready to issue indictments. So the West asked Kosovo to establish a court to hear those charges. The EU and Kosovo made an agreement to that effect, which Pristina's parliament formally ratified. But last Friday Kosovo's parliament [refused](#) to establish the court.

Before the paradoxes one linguistic remark. This is an *ad hoc, ex post* court. At the very beginning it was called a 'special' court. But Western officials soon realised that domestic *ad hoc, ex post* special courts are highly problematic (see [here](#)). So they called it 'specialist' instead. And this is the adjective one finds in the official papers. But on Friday everyone talked about the '[special court](#)'. When things and words clash the former eventually prevail, even in Kosovo's official-diplomatic circles.

The six paradoxes of the Court

1. What crimes? The first paradox is that the discussion centred on the 'KLA war'. On the contrary, the crimes discussed in the Marty report mainly happened after the end of the 1999 conflict, and belong mostly to the category of organised crime (drug trafficking, political assassinations, witness intimidations, etc.). So the court has less to do with the 'KLA war' than with the means through which former leaders of the KLA, and others, acquired wealth and political power in Kosovo and now retain and increase them.

2. Why a court? The second, and closely related, paradox is that to persuade Kosovo to accept this court some Western diplomacies have used this argument: that the court would have '[cleaned Kosovo's image](#)'. But courts judge facts, not images: so what you need to clean an image is not a court, special or not.

3. Who wants it? The third paradox – related and even bigger – is a double one. On one hand, one of the main suspects – the current foreign minister of Kosovo: a 'key personality of organised crime', according to the Marty report, which names him two dozen times in connection with various kinds of crimes and bad deeds – was one of the most vocal advocates of the establishment of the court. And, on the other hand, all opponents of this politician and his party were adamantly opposed to the establishment of the court.

Herein lies madness. And the madness of otherwise rational people prompts questions. Was, perchance, this court intended to acquit the obvious suspects? Was it meant to be staffed with judges and prosecutors that would look favourably upon them? Was it meant to convict a few token figures, prominent but not too prominent, so as to give credibility to the image-cleaning plan?

Although these are legitimate questions there is no answer to them because the court has not been established. So I proceed on the assumption that the answer is 'No'. I shall assume, in other words, that the court was genuinely intended to administer justice impartially. If so, however, there are three more paradoxes.

4. What for? First, everybody – Kosovo's citizens, Western governments and electorates, world public opinion, and (ostensibly, at least) also Kosovo's government – wants Kosovo to be, or become, a liberal democracy. This implies that it must respect the principle of equality. Yet establishing an *ad hoc, ex post* domestic special court breaches that principle: because if I am a member of an organised crime enterprise in Kosovo I will face a different form of justice depending on whether what I did happens to be discussed in the Marty report or not, as well as because if my bad deeds are part of the report I will not face a neutral and impartial judge but an *ad hoc, ex post* one: one who was chosen in the knowledge that she will judge my responsibility for those facts. So the special court – whatever the quality and personal moral integrity of its judges (for the problem lies in their selection: in who selects them and when) – contradicts two cardinal principles of democracy: equality before the law, and the right to a fair trial.

5. Why? Second, why is a 'special' court needed? It is needed for five reasons. (1) During the nine years of its mandate UNMIK did not deal with the crimes discussed in the Marty report, despite having – or being able to find – all the information that Marty has uncovered. (2) EULEX too was unable, or unwilling, to touch those matters. (3) Despite 15 years of efforts, and the expenditure of much donors' money, Kosovo's judiciary still lacks the capacity, integrity and independence to deal with those cases (or indeed with any case of more than negligible political or economic importance): the judiciary is so subservient to Kosovo's élite that, according to a 2012 [report](#) by the European Court of Auditors, judges 'tend to act in anticipatory obedience to external influences'. (4) The ICTY itself has failed when it dealt with the KLA side of the 1998–99 conflict, because although it ascertained that some crimes had been committed it could not ascribe them to any identifiable person (with negligible exceptions): and this failure is due – by the ICTY's own admission (see, e.g., pages 9–20 of this [judgement](#)) – to the fact that the court did not succeed in protecting the integrity of the evidence (witnesses, mainly, many of whom refused to speak, said incoherent things, or changed their versions; and some potential witnesses died unnatural deaths before they could speak). (5) The ICTY, anyway, is not just on the way out but might also have been discredited by a recent string of prominent acquittals, which [seemed](#) politically motivated (the politics there might have had to do also with humanitarian standards in conflicts involving the US and Israeli armies, however).

None of these reasons is ascribable to the state or citizens of Kosovo. None, too, is ascribable to the criminal segment of Kosovo's élite, which cannot be blamed for acting as their interests dictate. All five reasons are ascribable to the international community: to the West, if you will.

6. In whose interest? Hence the last paradox. The West tried to force a sovereign state, whose sovereignty it wanted and supported, to accept a special court that would dent its sovereignty, and it did so in order to remedy mistakes – 1, 2, 3, 4, 5 – that are all ascribable to the West itself. The threat of establishing the 'special court' through a UN decision now raises this paradox to truly [portentous dimensions](#), rarely seen since paradoxes were first discovered.

A difficult but necessary way out

I fear that there is no good solution to this problem, precisely because of those five mistakes (incidentally, if the threat of establishing the court through a UN decision will be carried out, which I doubt, I wonder how the Security Council will justify it: will the resolution explain reasons 1–5?).

The best solution, in my view, is that which I first read in a piece that Jeta Xharra published about a year ago ('Kosovo needs to take out its own trash', *Pristina Insight*, 14 March 2014). Her advice to the West is: let Kosovo's own courts deal with these crimes, and tell Kosovo that if it fails to administer justice impartially there will be serious consequences for the political and economic support that the country receives from the West.

This solution may or may not work, just like the other two (the planned 'special court' and a UN-established one). Its great advantage is that it respects both logic and principle, which must count for something, and that it will set the interests of Kosovo's citizens diametrically against the interests of its politico-criminal élite. So this is also the only solution that can favour political change in Kosovo (which is rather urgently needed, in [my view](#)). And I suppose that, by now, the West too wants political change in Kosovo.

This, incidentally, explains the most paradoxical of these paradoxes: as the special court was, in effect, a guarantee of political stability, this must be the reason why Kosovo's governing majority accepted it and the opposition opposed it.

Note: This article gives the views of the author, and not the position of LSEE Research on SEE, nor of the London School of Economics.

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