

## **Comment: Kosovo Justice Impartial, Not Political**

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Guilt or innocence should never be presumed purely on the basis of ethnicity or wartime allegiances.

To begin to cut through the web of misunderstandings surrounding Kosovo's judicial system, one has to start with the basics.

The purpose of a trial is to determine if an accused person is guilty of committing a criminal act. Guilt is based upon examining and evaluating the evidence.

In a war crimes trial, it is not a defense that the accused was on the "right" side, fighting on the side of the government or for liberation - nor should it be. War crimes are by definition committed during a war, and either side can be found guilty of them.

When the International Criminal Tribunal for the former Yugoslavia in The Hague tries Bosnian war crimes cases, it determines whether the accused actually committed the alleged crimes. No one's ethnicity - Muslim, Croatian or Serbian - gives him immunity from prosecution.

Kosovar victims of war crimes and their families deserve justice, but Kosovo society as a whole deserves the security that can only be found in the consistent, impartial application of the rule of law.

In the recent war crimes trial against four former Kosovo Liberation Army, KLA, soldiers known as the Llap Group, the verdict found the accused guilty of killing five Kosovar Albanians and illegally detaining, beating and torturing eight others, and beating and torturing one Kosovar Serb.

The conviction and punishment for those crimes gave justice to the families of those who died, and comfort to the survivors. Just as importantly, it helped to drive home the principle that is the indispensable cornerstone of a society based on the rule of law rather than the law of biggest and strongest.

Why then has there been criticism of the verdict and sentences in the Llap Group trial?

Those who complain about the prosecution of former KLA soldiers because of whom they fought for, also apparently believe that service in such a "liberation" force should grant immunity from any future criminal charges.

A previous IWPR comment refers to the Llap Group trial as "politically motivated", implying that there was no evidence to justify the prosecution and conviction. But, in fact, it calls for politically motivated exoneration - better known as victor's justice.

There is, however, no denying that Kosovar Albanian witnesses came forward and testified that the accused committed murder and torture in Llapashtica and four other locations, despite some witnesses having been threatened. There is no denying that the physical evidence and witness testimony supported the verdict, or that the court applied to Commander Rustem Mustafa the same principle of commander liability as the Hague tribunal has applied to Muslims, Croats, and Serbs. Law is for all, not just some. Why then do some allege this was a "political" trial?

Some claim that some Kosovar Albanians “suspect” there is a “possible” secret agreement between Belgrade and the United Nations Mission in Kosovo, UNMIK, which in some unnamed way results in war crimes verdicts that favour Serbs over Albanians. The allegation is grandiose and groundless.

First, the July Llap Group trial had Kosovar Albanians as both the accused and as the victims. Why would UNMIK try to interfere in this case, and why would it be a “political trial” – unless you believe that the Kosovo courts should take the position that all former KLA fighters should be immune from the requirements of international humanitarian (war crimes) law.

By suggesting that KLA fighters are not bound by the same constraints as combatants in other conflicts, one would perforce be suggesting the KLA soldiers and enterprise were not recognised under international law. Neither Kosovars nor the KLA would agree to this – the latter’s leadership admitted in interviews during the war that it was bound by international humanitarian law.

Second, this conspiracy theory would require UNMIK to give secret orders to all the international judges and prosecutors in all war crimes cases, which gives the body credit for a degree of managerial capacity and political cohesiveness often conspicuous by their absence in more mundane spheres of work.

In just the Llap group case, this ridiculous theory would require not only the ethnic Albanian victims and witnesses to conspire together, but also that the UNMIK police, prosecutors and judges conspired with them and kept the conspiracy secret.

The international judges and prosecutors who worked on the Llap case were primarily from NATO countries which aided Kosovo – why would they be anything other than fair and impartial?

International judges are independent at home and in Kosovo - they do not and would not allow anyone to order them what to do. And why and how would all of these Kosovar Albanian witnesses and victims, and international professionals, get together to conspire? The answer - they could not and did not.

Third, the conspiracy theory is refuted by the careful decision of the court, which found the defendants not guilty of half of the counts on which they were charged.

An medieval philosopher, William of Occam, established the principle of logic known as Occam’s Razor - “the simplest explanation is usually correct”. In this case, the explanation for the verdict was that an impartial panel found the accused guilty based on convincing evidence from their fellow Kosovar Albanian witnesses and victims.

Another complaint voiced by some concerns the severity of the Llap Group sentences. Why? Does 13 years seem too high for ordering the murder of five people, and for beating, torturing and illegally detaining nine people, in four different locations? Does 17 years seem too high for the commander who did the same, with the responsibility to ensure such things would never happen? If Serbs had done the same, would this argument still be made?

As an experienced US and Kosovo international prosecutor, not involved in the Llap Group case, who has observed the justice system in Kosovo and Bosnia, I do not believe the sentences are too high. A recent analysis of Hague tribunal sentences posted on Justwatch by Ewen Allison found the mean average for war crimes sentences involving acts of murder to be 15.8 years, and 21.5 years where command responsibility is also involved.

If the sentences are too high, the defense attorneys should provide evidence to the Supreme Court upon appeal. The place to remedy a legal error is the court of appeals not the court of public opinion.

Some argue not that the Llap Group sentences were too high, but rather that sentences handed down to Serbs were too low in comparison. First, this argues for an appeal to raise those Serb sentences if they are too low. Second, however, this argument attempts to find a sentencing difference between Kosovar Serb and Kosovar Albanian war crimes trials by extrapolating from too small a sample - only one war crimes trial with Albanian defendants. In contrast, there have been 14 war crimes and wartime murder trials with Serbian defendants, ten of the former and four of the latter.

Universal principles of justice and applicable Kosovo law require a court to sentence each defendant based upon the unique circumstances and individual responsibility in each case. Until the court's written reasoning is filed, one cannot even try to compare sentences.

With 14 trials, it is not surprising that there were guilty as well as not guilty verdicts. While there were sentences lower than those of the Llap Group, there were also sentences of near equal magnitude - in the Serb defendant cases, Zoran Stanojevic murdered one man and received 15 years; Miroslav Vukovic committed war crimes but not murder yet received 12 years. The Besovic verdict reasoning has not yet been filed, so we cannot yet see why that particular panel decided on seven years, which does seem low for participating in war crimes with acts of murder. However, it is to be expected in any justice system that different trial panels, especially with judges from countries with different sentencing philosophies, may decide differently. The prosecutor can appeal to the Supreme Court to have the Besovic sentence increased.

The decisions of internationals on the Supreme Court also disprove any conspiracy theory. Zvezdan Simic was convicted of murder and sentenced to only eight years and four months by a local majority panel, but on appeal the sentence was increased to 12 years, while Cedomir Jovanovic was found guilty of participating in mass murder and his 20 year sentence was affirmed by the higher court.

Some other Serb defendant cases, which were cancelled by the Supreme Court international panels, were retried by internationals with trial panels that included Kosovar judges. While some retrials resulted in not guilty verdicts, others were found guilty of war crimes, including Andjelko Kolacinac and Miroslav Vukovic.

Some critics seem to presume that a not guilty verdict against a Serb is wrong, but how many have read the written reasons and trial testimony? How many realise that a not guilty verdict may be the result even if the court found there were war crimes, because there may not be sufficient evidence to prove that the defendant was responsible?

But before criticising any verdict, we should first read the court's written reasons. Otherwise, to assume innocence - or guilt - based only upon the defendant's ethnicity or former fighter status is not justice - it is prejudice and bias.

No one, no ethnicity, no side in a war, is above the law. That is the rule of law.

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