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Eulex's Performance of its Executive Judicial Functions

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Introduction and Two Notes

This paper contains part of the evidence used in Chapter 5 of my book *State-Building in Kosovo: Democracy, Corruption and the EU in the Balkans* (I.B. Tauris: London and New York, 2015), which discusses the performance of the large rule-of-law mission – named EULEX Kosovo (Eulex) – which the European Union deployed in Kosovo in 2008. The book refers to this paper as the ‘Annex’ (and, like the book, this paper is updated as of the end of August 2014).

More precisely, this paper is the basis for Table 5.1 of the book (at pp. 119–20), which is reproduced below (with an added column giving a name to each case).

Table 5.1 Eulex’s main cases, 2008–14

No.	Annex	Name	Year	Type	Elite*	Outcome	Note
1	§ 2.1	Highway to Albania	2010	Grand corruption	L, 1	No investigation	†
2	§ 2.2	Privatization of <i>Sharrçem</i>	2010	Corruption	L, 1	No investigation	†
3	§ 2.3	Land expropriation	2010	Abuse of office	L, 1	No investigation	†
4	§ 2.4	Failed <i>Onyx</i> privatization	2010–11	Fraud, corruption	L, 2	No investigation	†
5	§ 2.5	Computers tender	2009	Corruption	L, 2	No investigation	†
6	§ 2.6	Election fraud	2011	Organized crime	L, 1	No investigation	†
7	§ 2.7	Limaj: road-building I	2010	Grand corruption	O, 1	No indictment	†
8	§ 2.8	Central bank: dossiers	2010	Blackmail, etc.	L, 1	No investigation	†
9	=	Central bank: corruption	2010	Corruption	O, 2	Acquittal, final	‡, ††
10	§ 2.9	Anti-corruption prosecutor	2012	Abuse of office	L, 3	Conviction, appealed	†††
11	§ 2.10	Telecom deal	2008–13	Grand corruption	L, 3	Acquittal, final	‡, †††
12	§ 2.11	<i>Customs service</i>	2011–13	<i>Corruption</i>	O, 3	<i>Acquittal, final</i>	‡‡
13	§ 2.12	<i>Health ministry</i>	2010–13	<i>Corruption</i>	L, 2	<i>Acquittal, appealed</i>	‡‡
14	§ 2.13	<i>Limaj: road-building II</i>	2014–...	<i>Grand corruption</i>	O, 1	<i>Indictment, confirmed</i>	‡‡
15	§ 2.14	<i>The mayor of Prizren</i>	2013–14	<i>Corruption</i>	L, 2	<i>Conviction, appealed</i>	‡‡
16	§ 2.15	Political assassinations	2009–13	Organized crime	L, 5	Conviction (appeal?)	†††
17	§ 2.16	Organ trafficking: medics	2008–13	Illegal transplants	L, 4	Conviction, appealed	†††
18	=	Organ trafficking: leaders	2013–...	(Org. crime?)	(L, 1?)	(Invest. pending?)	†††
19	§ 2.17	‘Marty report’ case	2011–...	War crimes, etc.	All, 1	Inv. by EU task force	†††
20	§ 2.18	Intimidation of a journalist	2009–13	Threats, etc.	L, 2	Acquittal, appealed	‡, †††
21	§ 2.19	<i>Limaj: war crimes</i>	2011–13	<i>War crimes</i>	O, 1	<i>Acquittal, appealed</i>	‡‡
22	§ 2.20	<i>Drenica KLA officers</i>	2013–...	<i>War crimes</i>	L, 2	<i>Investigation, pending</i>	‡‡
23	§ 2.21	Serbs	2009–...	War crimes	n.a.	Retrial, pending	‡, ††

* The letter indicates whether the accused belong to, or are aligned with, the leading faction of the elite (‘L’), or else oppose it or are opposed by it (‘O’); the number indicates their rank (1=highest members, 5=lower operatives).

† Demonstrably mistaken prosecutorial choice or judicial decision, *benefiting* the defendants or suspects.

†† Demonstrably mistaken prosecutorial choice or judicial decision, *damaging* the defendants.

††† Case opened under external pressure, exercised either by the EU or by international or domestic public opinion.

‡ Eulex acted without being subject to external pressure, and may be presumed to have acted of its own accord.

‡‡ Physiological case (underlined in italics): Eulex acted of its own accord *and* committed no demonstrable mistake.

Sources: Eulex’s judgements and press releases, official reports, author’s information and analysis.

The criteria used for selecting the cases included in this table are set out in Section 1. Section 2 describes and comments them. Section 3 concludes.

This paper is a re-elaboration and an updating of notes I took during my work in Kosovo and articles I published subsequently (indicated in the notes). It has been written in parallel with the book. In some passages it makes use of the interpretation articulated in the book about Eulex’s conduct, either to comment such cases or to formulate hypotheses on points about which the publicly available information is insufficient.

*

The cases discussed in Section 2 serve as evidence to reconstruct Eulex’s choices and policies: opinions are therefore expressed on the question whether crimes may or may

not have been committed. The criminal responsibility of the persons involved, however, depends not only on the facts of the case but also on their perceptions and intent. Our discussion focuses only on such facts and on how Eulex interpreted them, and does not address the question of the personal criminal responsibility of those involved: this point is immaterial for our purposes. When we criticize an acquittal, for instance, the focus of our attention are its motivations: in such cases, it may well be possible that the accused – considering the many aspects that are relevant under criminal law – did *not* deserve a conviction, and that, at the same time, Eulex acquitted them for the wrong reasons, or with an insufficient or contradictory motivation. Likewise, the criticism of a conviction should not be read as an affirmation of the innocence of the accused, who may well be guilty for reasons other than those invoked by Eulex.

Most of the persons involved in these cases have not been convicted or even indicted: their innocence must be presumed. Their names are indicated only when this is necessary to explain the case, by reason of their prominence or public role. Equally, it is only for ease of reference that the titles of Section 2 indicate the crime involved (the term ‘corruption’ is used in its broadest sense), which often is merely suspected.

*

On 2 May 2014 I submitted the draft of §§ 1.1, 1.2 and 2.1–2.22 to Eulex, inviting the mission to point me to any inaccuracies. On 17 May the mission sent me this reply:

Thank you for the opportunity to comment on your paper ‘Eulex’s Performance of its Executive Judicial Functions,’ which we read in detail. Since the matters raised therein pertain to judicial proceedings, some of which are completed, but several of which are ongoing or closely related to ongoing proceedings, the mission will not take the opportunity to comment at this time.

The text of §§ 1.1, 1.2 and 2.1–2.22 that appears below is the same as that I submitted to Eulex, save for a handful of corrections and the addition of a passage (corresponding to notes 218–222) describing subsequent events.

On 21 May 2014 I enquired whether the European Court of Auditors – which in 2012 audited Eulex’s performance of its *advisory* functions¹ – was interested in receiving the same draft I submitted to Eulex: I was invited to send it to them, and did so on 22 May.

On 5 June 2014 I published a draft of this paper on the web, to receive comments: I received a few, but none that led me to make changes. Save for a few corrections, therefore, this text is the same as the 5 June draft.

1. The Selection of the Cases, the Sources, and the *Dramatis Personae*

1.1 The Selection of the cases and the sources

The criminal cases listed in Table 5.1 of the book have been selected from a pool that includes: 1) those mentioned in Eulex’s press releases or public statements; 2) those reported on by Kosovo’s media or analysts, but not mentioned by the mission itself; and 3) other cases which I am aware of.

¹ European Court of Auditors, ‘European Union assistance to Kosovo related to the rule of law’, Special Report No. 18/2012, 16 October 2012, at http://www.eca.europa.eu/Lists/ECADocuments/SR12_18/SR12_18_EN.PDF.

Hence, the only cases that are excluded from this set are investigations that failed – and therefore received no publicity – and which I am not aware of. This may not be an irrelevant exclusion: for instance, in 2008 UNMIK transferred to Eulex 1,187 criminal files (see p. 133 the book). Besides those discussed at §§ 2.1–2.6, therefore, there might be more probable high-level crimes that Eulex did not investigate.

From this pool, cases have been selected according to two criteria:

1. the importance of the case: cases are considered important if they involve – or could implicate – high officials or members of Kosovo’s political or economic elite, or if they touch significant interests of such circles (the cases discussed at §§ 2.15–2.16, for instance, led to the conviction of relatively minor figures, but they involve important interests); the gravity of the crime is not used as a criterion: thus murder cases are not considered *per se* important, whereas the abuse of public office generally is, unless committed autonomously by low or mid-level officials;
2. whether the case is properly ascribable to Eulex: namely, whether Eulex (and not UNMIK) began the investigation or at least issued the indictment; this criterion stems from the conviction that the crucial choice in prosecuting high-level crime is the decision to investigate it and to take the suspects to court (although opened by UNMIK, the case discussed at § 2.16 is included because it was transferred to Eulex soon after its inception, and is anyway linked to that discussed at § 2.17).

The first criterion implies a necessarily subjective judgement, but the list of cases we selected includes all those viewed as important by six widely respected Kosovar journalists and analysts and a former Eulex official.² For the sake of completeness, at any rate, the main excluded cases are briefly described in § 2.23. Cases that cannot be qualified as ‘important’ according to this criterion are negligible for our purposes because they concern ordinary criminality, repressing which is not the reason why the mission was deployed in Kosovo (see pp. 99–102 and 107–11 of the book). The validity of this criterion was confirmed by Eulex itself, whose spokesperson declared that the mission

deals with high-level, complicated and time consuming cases. But the vast majority of work in the fight against corruption is carried out by the local authorities. EULEX can only tackle a fraction of the problem.³

The second criterion excludes only a handful of prominent cases, and only two corruption ones: the conviction of a former speaker of parliament, who used public money to pay the bill of his dentist, and several convictions for financial crimes

² Besides three who cannot (justifiably) be named, the persons I consulted are: Agron Bajrami and Flaka Surroi, respectively the editor-in-chief and a prominent commentator of *Koha Ditore*, Kosovo’s main newspaper (they submitted the list also to the newspaper’s journalists reporting on crime and judicial affairs); Jeta Xharra, an investigative journalist (and the victim in the case discussed at § 2.18) who is the editor-in-chief of an authoritative current affairs television program (*Jeta në Kosovë*) and of a related web newspaper (*Gazeta Jeta në Kosovë*), and the Kosovo director at *Balkans Investigative Reporting Network* (BIRN); Nebi Quena, the Associated Press correspondents for Kosovo; and Krenar Gashi, the executive director and the former executive director of two respected independent research institutes – the Institute for Development Policy (INDEP) and the Kosovar Institute for Policy Research and Development (KIPRED), respectively – which followed Eulex’s performance closely.

³ Quoted by Fatmir Aliu, ‘EU Kosovo mission fights back against critics’, *Balkan Insight*, 14 June 2012, at <http://www.balkaninsight.com/en/article/eulex-fights-back-to-critics>.

surrounding the insolvency of a bank.⁴ The two most prominent excluded cases are a war crimes trial – discussed at the end of § 2.20 – and the trial of a prominent civil society activist who obstructed a public official during a demonstration, in the course of which UNMIK’s police killed a demonstrator.⁵ It should also be noted that this criterion implicitly assumes that on cases that were already pending in 2008 Eulex’s judges always acted competently and according to their independent judgement (our findings suggest that this might not be a safe assumption).

In addition to these criminal cases, Section 2 discusses also the most important and sensitive commercial one (§ 2.22), which shall serve as anecdotal evidence.

The summaries that compose Section 2 are based on judicial decisions, published or unpublished (the main unpublished ones are available at the internet addresses indicated in the notes), Eulex’s press releases, and the correspondence I had with its prosecutors. Indirect sources are also used: literature and reports cited in the book, and other articles published by the Kosovo and international media.⁶

1.2 Eulex, its judges and prosecutors, and its mandate

Eulex has been deployed under the Common Security and Defence Policy of the EU, which is a component of the common foreign policy. The mandate of the mission is set by a Joint Action adopted by the Council of the Union in February 2008, and includes the power to directly exercise certain judicial and police powers: when acting in this ‘executive’ capacity, Eulex’s policemen, prosecutors and judges enforce the law upon Kosovo’s citizens *in lieu* of the domestic police and judicial officials.⁷

Although the actions and decisions of the mission’s prosecutors and judges are formally attributable to the Kosovo judicial organs in which they serve, they are the actions and decisions through which the mission exercises such executive functions: they must therefore ascribed to the mission.

Most of the cases discussed in Section 2 were handled by the Special Prosecution Office of Kosovo (SPRK), whose jurisdiction covers high-level corruption, organized crime, war crimes, and other serious crimes falling within Eulex’s executive mandate. The other cases were handled by Kosovo’s ordinary prosecution offices. SPRK comprises both Eulex and Kosovo prosecutors, but is led by an Eulex prosecutor, the head of the mission’s ‘special prosecutors’, who has hierarchical command over it: SPRK’s actions can therefore be ascribed to Eulex’s responsibility irrespective of whether an Eulex or a Kosovar prosecutor took them. Likewise, any serious mistake or omission by the Kosovar prosecutors serving in the ordinary prosecution offices can be ascribed to Eulex’s responsibility, because its mandate is also to monitor the performance of

⁴ See Eulex, Press releases, 10 November 2010 and 23 May 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0103.php> and <http://www.eulex-kosovo.eu/en/pressreleases/0142.php>, respectively.

⁵ See Eulex, Press release, 14 June 2010, at <http://www.eulex-kosovo.eu/en/pressreleases/0067.php>.

⁶ For the 2008–10 period, during which Eulex’s policies and practices took shape, Alexander Anderson’s balanced and thoroughly researched study – ‘State of constriction? Governance and free expression in Kosovo’, Youth Initiative for Human Rights (Pristina, 2010), at http://ks.yihr.org/public/fck_files/ksfile/STATE%20of%20CONSTRUCTION%20read%20only.pdf (disclosure: I was interviewed for this study) – on the quality of governance in Kosovo is often used.

⁷ *Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO* (hereinafter, the Joint Action), art. 2.

Kosovo's judicial officials and intervene – including by transferring the case to its own prosecutors – if they do not act properly.

The pre trial judges in charge of these cases were all Eulex judges, and the panels that decided such cases all included a majority of Eulex judges (two out of three in first instance, and three out of five in the appeals court).

Consequently, in the following pages expressions such as 'Eulex judged' or 'Eulex investigated' are to be read as meaning, respectively, that a panel of a Kosovo court including a majority of Eulex judges issued a certain judgement, or that either SPRK or an Eulex prosecutor serving in an ordinary prosecution office investigated a certain person.

Eulex and its judicial officials enjoy diplomatic immunity and are not accountable to Kosovo's citizens. The mission thus established a Human Rights Review Panel, which is in charge of hearing complaints about the exercise of the mission's executive functions. Its rules of procedure are such that complaints are often rejected as inadmissible, however, without reviewing their merits.⁸

The mission formally commenced its operations on 9 November 2008, but had in fact begun its work in the late spring of that year. In June 2012 its initial four-year mandate was extended until June 2014, and its 3,300 authorized staff was reduced to 2,250; a further reduction in the staff was decided in June 2014, when its mandate was again extended for two years.

This extension is likely to be the last one, and in June 2014 Eulex's executive powers were already drastically removed: its prosecutors now work only on cases chosen by Kosovo's judicial authorities, besides closing the cases they were already working on, and its judges no longer form the majority of the panels in which they sit. This solution, incidentally, is not the result of a positive assessment by the EU about the readiness of the domestic judiciary to tackle serious crime (see pp. 147–48 of the book), and had been called for by Kosovo's political authorities: reportedly, the 'Ministry of Justice spent the last year negotiating with the EU on how to *limit* the work of [SPRK]'.⁹

Next to Eulex, Kosovo also hosted the International Civilian Office (ICO), which supervised its authorities and had the power to stop any of their decisions that deviated from the blueprint for Kosovo's independence, the *Comprehensive Proposal for the Kosovo Status Settlement*, generally known as the 'Ahtisaari plan'.¹⁰ The ICO was withdrawn in September 2012, when the West judged that Kosovo had 'substantially' implemented the Ahtisaari plan and no longer needed international supervision.

Eulex's executive mandate focuses on the war crimes that occurred in 1998–99, and on organized crime and corruption, which are widespread in Kosovo. Such executive functions were assigned to the mission because Kosovo's judiciary is inefficient and permeable to political interference, corruption and intimidation. The mission's mandate is a difficult one, therefore. A few weeks after Eulex unveiled a very sensitive corruption investigation, in the summer of 2010, the jurist who served as the head of its prosecutors in 2010–11 discussed such difficulties and the mission's policy in an important interview:

⁸ The decisions and rules of procedure of this organ are available at <http://www.hrrp.eu>.

⁹ Jeta Xharra, 'Kosovo needs to take out its own trash', *Pristina Insight*, 14 March 2014.

¹⁰ Enclosed to UN Secretary-General, *Report of the Special Envoy of the Secretary-General on Kosovo's future status*, Doc. S/2007/168, 26 March 2007.

[question:] [w]ill Kosova¹¹ be free of corruption by September 2011? [answer:] The aim is to reach to an acceptable level of corruption by that time. You will never be able to eradicate it, but it should be within a certain acceptable level. [Q] The current level is unacceptable? [A] I am *terrified* with the current level... [corruption] has *invaded* the society. It has developed and has gone *deep*... This is not an easy job. What we should do is to get [corruption] out of the *system*... The aim is get the *system* running again. This is the best thing that we can do... [Q] Speaking of the high-profile cases, can you tell me at least who the next senior official is? [A] *Let me check my list*, and this does not mean that I will give you an answer... *I have the plan here*. We try to move on every week, every month, every day, in order to build up. [Q] Are there any other ministers... under investigation? [A] I cannot comment. [Q] The last question. If tomorrow I publish the news that there are other ministers who are under investigation, will you deny it? [A] It is too general. I can say that *there are cases similar to* [the sensitive case discussed at § 2.7, below]. [Q] And the very last question. Are there any [officials of other political parties] under investigation? [A] No political party should feel protected from the investigation. *We are investigating all political parties*.¹²

These views reflect a realistic diagnosis of the challenges faced by the mission, which stem from what the chief prosecutor calls Kosovo's 'system' (on which, see, e.g., pp. 43–59, 93–99, 162–66 and 186–99 of the book) rather than from the actions of individual persons or groups, and outline an ambitious but coherent plan to overcome them. In essence, Section 2 reviews the implementation of the chief prosecutor's 'plan'.

1.3 Kosovo's elite and its members

Most of the cases discussed in Section 2 concern suspected or, more rarely, ascertained crimes of Kosovo's elite. This elite is ostensibly divided into different political parties, but more important organizations are the factions – and the related politico-criminal power structures – that compose such parties. These factions dispose of political, economic, social and military power, and their interests likewise extend to politics, the economy and crime (see, in particular, pp. 35–38, 48–54, 151–55 and 195–99 the book). The main factions and parties merit a brief description.

The principal political parties of the elite are three. The Lidhja Demokratike e Kosovës (LDK, Democratic League of Kosovo), founded by the pacifist leader Ibrahim Rugova – a scholar of literature, who died in early 2006 – and composed of several factions headed by his main followers, which has a mainly urban electoral base.¹³ The Partia Demokratike e Kosovës (PDK, Democratic Party of Kosovo), founded and led by

¹¹ This is the Albanian name of the country.

¹² 'EULEX chief prosecutor "terrified" at level of Kosovo corruption', *Transitions Online*, 10 August 2010, at <http://www.tol.org/client/article/21696-eulex-chief-prosecutor-terrified-at-level-of-kosovo-corruption.html>, which translates excerpts of an interview by Arben Ahmeti, published by *Koha Ditore* on 30 July 2010 (emphasis added).

¹³ On LDK, see Kosovar Stability Initiative, *A Power Primer: A Handbook to Politics, People and Parties in Kosovo* (Pristina, 2011), at http://www.iksweb.org/repository/docs/politicallandscape_ENG_913183.pdf, pp. 23–34 and 70–71, and KIPRED, *Strengthening the Statehood of Kosovo through the Democratization of Political Parties* (Pristina, 2012), at http://www.kipred.org/advCms/documents/70927_Strengthening%20the%20statehood%20of%20Kosovo%20through%20the%20democratization%20of%20political%20parties%20-%20ENG.pdf, pp. 20–24.

most former commanders of the KLA, whose electoral support is predominantly rural.¹⁴ And the smaller Aleanca për Ardhmërinë e Kosovës (AAK, Alliance for the Future of Kosovo), founded and led by the powerful former KLA commander of the rural Dukagjini region, in West Kosovo, where its electoral support is narrowly confined.¹⁵

LDK emerged during the 1990s, to organize Kosovo's peaceful resistance against Milošević's repression, whereas PDK and AAK were founded after the NATO intervention, as rival offshoots of KLA's guerrilla formations. LDK was the leading partner of all governing coalitions until 2007, in alliance with AAK in 2005–07. Throughout that period PDK led the opposition. In late 2007 LDK became the junior partner of a government led by PDK, which had won the elections. In early 2011 LDK joined AAK in the opposition. PDK still governs Kosovo at this writing, supported by smaller parties. These three parties have very similar political manifestos, and differentiate themselves mainly by reason of the competing interests of the factions that compose them.¹⁶

The leading faction of the elite is the largest faction within PDK, led (ostensibly) by Hashim Thaçi. Thaçi was the political representative of the KLA (*nom de guerre* 'Snake'), he leads PDK since its foundation, and is prime minister of Kosovo since late 2007.¹⁷ Within PDK, the main competitor of Thaçi's group is a faction led by one of the two main military commanders of the KLA, Fatmir Limaj, whose *nom de guerre* was 'Steel': he was transport and telecommunications in 2007–10, but recently left PDK to form a new political party.¹⁸ The main external competitor of Thaçi's group arguably is the faction that controls AAK, led by the second main military leader of the KLA, Ramush Haradinaj: he founded and still leads AAK, was briefly prime minister in 2005, and exercises dominant political, social and military influence over the Dukagjini region, his area of command during the 1998–99 conflict.¹⁹

The Council of Europe and three leaked Western intelligence reports describe Thaçi as 'as the most dangerous of the KLA's "criminal bosses"' and qualify Limaj, Haradinaj and four other members of the elite as 'key personalities of organized crime' in Kosovo.²⁰ The aggregate turnover of organized crime in Kosovo has been estimated at between one

¹⁴ On PDK, see IKS, *A Power Primer*, pp. 35–43 and 73–74, and KIPRED, *Strengthening the Statehood of Kosovo*, pp. 18–20.

¹⁵ On AAK, see IKS, *A Power Primer*, pp. 44–46 and 74–75, and KIPRED, *Strengthening the Statehood of Kosovo*, pp. 27–29.

¹⁶ Anderson, 'State of constriction?', p. 3 note that '90% of the Kosovo Albanian political spectrum professes itself to be "centre right"'.

¹⁷ On Thaçi, see IKS, 'A power primer', p. 39. On the 'Drenica group', see Council of Europe, 'Inhuman treatment', pp. 14–18.

¹⁸ On Limaj, see IKS, 'A power primer', p. 42; Council of Europe, 'Inhuman treatment', p. 15 places Limaj in Thaçi's faction – the 'Drenica group' – but this analysis is now obsolete.

¹⁹ On Haradinaj, see IKS, 'A power primer', p. 44.

²⁰ Council of Europe, 'Inhuman treatment of people', pp. 14–15. Two such reports have been leaked: one is by the German intelligence service (dated 22 February 2005, and available at http://mirror.wikileaks.info/wiki/BND_Kosovo_intelligence_report_22_Feb_2005) and one is by the US contingent of KFOR (dating from 2004, and available at <http://static.nzz.ch/files/7/8/9/kosovo+-Haliti+Xhavit.1.9248789.pdf>); see also a presentation prepared in late 2000 by the intelligence services of NATO's contingent in Kosovo ('Organized crime in Kosovo: clan structure, main links') reproduced by Matt McAllester, 'Kosovo's mafia', *globalpost*, 27 March 2011, at <http://www.globalpost.com/dispatch/news/regions/europe/110321/kosovo-hashim-thaci-organized-crime>.

quarter and two thirds of GDP – the higher estimate is by '[u]ndisclosed EU reports dating from 2009' – and virtually all of it can be assumed to be controlled by the elite, either through its own politico-criminal power structures or through associated criminal organizations.²¹

Over the past decade the elite transformed its political and military power into economic wealth and influence, and reinvested part of the profits of its criminal activities in the domestic economy: figures like Thaçi, Limaj and Haradinaj are believed to generally act through intermediaries, or in association with prominent businessmen. The main one of them is the protagonist of the case discussed in § 2.4, Ekrem Luka, who is famously close to AAK's leader, Haradinaj, but reportedly finances generously also PDK: Luka owns some of Kosovo's largest private companies, and is equally qualified as one of the six or seven main criminal leaders of the country.²² Another businessman who served a similar function – until he died a very unnatural death, in the summer of 2012 (see p. 203 of the book) – was the former chairman of the board of directors of Kosovo's privatization agency. He represented the KLA in the USA during the 1998–99 conflict and accompanied Thaçi's at the Rambouillet conference, whose failure determined the 1999 NATO intervention; after Thaçi became prime minister he was appointed chairman of that agency and served as his informal economic advisor.

Finally, an important instrument of the elite is the informal secret service that the KLA established between 1998 and 1999, the Shërbimi Informativi Kosovës (SHIK, Kosovo Information Service). This organization continued its operations after the end of the conflict and is still active, under PDK's control. SHIK's leaders themselves belong to the leading faction of the elite, and allegedly include the current prime minister. This criminal organization is involved in the main interests of the elite – a recent study estimates that SHIK earns '\$200 million per year via bribery, extortion, racketeering and protection services', which represent a fraction of the elite's overall estimated criminal revenue²³ – and in activities that are instrumental to such interests, such as the intimidation or assassination of witnesses, journalists or political opponents: in particular, in 1999–2000 prominent members of LDK were the target of a campaign of political violence ascribable to SHIK, which is the subject of the case discussed in § 2.15.

In reviewing the cases of Section 2 we shall distinguish between three categories of persons linked to the elite:

1. genuine *members* of the elite (ranked 1 or 2 in Table 5.1 of the book), who participate in deciding its strategies and main actions: national leaders like Thaçi, Limaj, Haradinaj; the main leaders of other factions of the elite, such as the mayor of Skënderaj (§§ 2.8, 2.18, 2.20); important businessmen such as Luka (§ 2.4) or the

²¹ Such EU reports are quoted by Fabrizio Coticchia and Francesco Strazzari, 'High stakes, low strategies: the European Union and the fight against transnational organised crime in state-building missions', *Interdisciplinary Political Studies* 2 (2012), at https://www.academia.edu/4082476/High_Stakes_Low_Strategies_the_European_Union_and_the_Fight_against_Transnational_Organised_Crime_in_State-building_Missions, pp. 8–22, p. 13; the lower estimate is by Vedran Džihic and Helmut Kramer, 'Kosovo after independence: is the EU's EULEX mission delivering on its promises?', *International Policy Analysis*, Friedrich Ebert Stiftung (Berlin, 2009), at <http://library.fes.de/pdf-files/id/ipa/06571.pdf>, p. 13.

²² Council of Europe, 'Inhuman treatment of people', pp. 14–15, footnote 29.

²³ David Phillips, *Realizing Kosovo's Independence*, National Committee on Foreign Policy (New York, 2010), at <https://www.ncafp.org/realizing-kosovas-independence/>, p. 8; see also David Phillips, *Liberating Kosovo: Coercive Diplomacy and US Intervention* (Cambridge, MA, 2012), pp. 124 and 211–14.

chairman of the privatization agency (§§ 2.2–2.4); prominent ministers and the mayors of the main cities, such as a former health minister (§ 2.12) and the mayor of Prizren (§ 2.14);

2. *associates* of the elite (ranked 3 or 4), who lack autonomous influence over the choices of the elite or of its factions but contribute to implementing them and draw direct profit from them, such as: senior officials in the transport, education and health ministries (§§ 2.1, 2.5, 2.7, 2.12–2.13), in the privatization agency (§§ 2.2–2.4), and in the state-owned utilities (§§ 2.5, 2.10); the chief anti-corruption prosecutor (§ 2.9); a surgeon (§ 2.16);
3. lower *operatives* (ranked 5), who execute instructions received by the elite, such as the accomplices of a fraud (§ 2.4), and the killers who committed some political assassinations (§ 2.15).

1.4 The privatization agency of Kosovo and its money

The cases discussed in §§ 2.2–2.4 – and, indirectly, also that discussed in § 2.8 – involve the Privatization Agency of Kosovo (PAK), which is in charge of privatizing (by auction) Kosovo’s ‘socially owned’ companies and assets: namely, businesses and land that socialist Yugoslavia nationalized after 1945 and subsequently placed in ‘social ownership’, according to its original ‘self-management’ economic system. PAK was created in 2008 and is the successor – under Kosovo law – of an institution created by UNMIK in 2002, which had the same mandate.

This agency is led by a board of directors composed of eight members: five are appointed by Kosovo’s parliament, and three – who must be foreigners – by the head of ICO; when this mission was closed, in 2012, this power was transferred to Kosovo’s prime minister. The board members chosen by the parliament were all either members of the elite or associates of it, and on important matters they acted according to the instructions of the elite or of its leading faction, represented by the chairman of the board (see pp. 88 and 204–206 the book).

PAK has privatized some 300 socially owned businesses, mostly small ones, and collected proceeds amounting to approximately €800 million. The agency is also in charge of distributing such funds to three main categories of recipients: 20 per cent of the proceeds of each sale are to be paid to the workers of the socially-owned company that has been privatized; the remaining 80 per cent is applied to satisfy the claims of the creditors of the company, and if a balance remains it is paid to Kosovo’s Treasury.²⁴

The portion owed to the workers has largely been disbursed, whereas hardly any creditor has been paid, even though the first sales were completed in 2002. This delay is due chiefly to political reasons. Many creditors of Kosovo’s socially owned companies are other socially owned companies (often privatized by now) located in other parts of the former Yugoslavia: many are Serbian companies; UNMIK and Kosovo’s elite were therefore reluctant to make payments to such creditors out of funds that the population perceives as belonging to Kosovo, and which the government desires to acquire (see pp. 122, 142–43 and 204–209 the book). Delaying such payments implied that no payments to the Treasury could be made, however: the privatization proceeds (about €600 million,

²⁴ On this fund and the rules for its allocation, see International Monetary Fund, *Country Report* No. 12/180 (July 2012), at <http://www.imf.org/external/pubs/ft/scr/2012/cr12180.pdf>, p. 13. At 11, this report states that no such funds ‘should be transferred to the government budget before clarity has been established that these funds are free of claims from creditors and other stakeholders.’ Indeed, IMF’s budget forecast indicated no receipts for the government from such funds until at least 2017 (p. 24).

net of the payments made) were retained by PAK and deposited at the central bank, which invested them abroad in safe and liquid securities. This fund, equivalent to about 14 per cent of the 2010 GDP, played an important role in the case discussed in § 2.8.

1.5 The author and a warning

In the period encompassing most of these cases I was the head of the economics unit of the ICO, and I sat in the board of directors of the privatization agency. It is from these positions that I learned of such cases and could closely follow them.²⁵

Although investigating crime was not my function, on several occasions I suspected that corruption was involved in matters I dealt with: when I had credible evidence of it, direct or indirect, I sent reports to Eulex, addressing them to both the head of the mission's prosecutors and the head of SPRK. The cases described in §§ 2.1–2.5 and 2.10 concern probable crimes I reported to Eulex, which did not investigate, prosecute or punish them: my criticism of such choices might be biased, therefore.

In respect of some cases, however, Eulex has indirectly confirmed my criticism of its passivity. On 29 March 2014 an Eulex prosecutor sent me (by email) this request:

I have taken over some cases which were with different prosecutors in SPRK. I would like to talk to you and if necessary take a formal statement from you. I am looking into [the names of five cases follow]. I need to find evidence ASAP as time is running out.

Neither the contents of our exchanges nor the identity of such five cases ought to be disclosed. But some more general observations can be made, which shall serve as an introduction to Eulex's conduct in the most important cases it dealt with.

Three of such five cases concern facts about which I had no serious reason to suspect wrongdoing. The other two were the subject of reports I sent to the mission, and are rather important: both concern illicit profits measurable in millions of euros, and one is highly likely to implicate the prime minister. My reports were sent in 2010 and 2011. As preliminary investigations have now been opened on them, it follows that my reports had some foundation.

While I was in Kosovo, I advised Eulex's prosecutors that I considered it my duty to assist them in gathering information and evidence, which I could acquire in my official capacity. This could avoid the need for the mission to order premature searches or conduct interviews, which might damage their investigation strategy: in one case, discussed in § 2.10, I did perform such function. Yet this prosecutor contacted me three years after I left Kosovo, and between three and four years after the facts: paradoxically, moreover, the reason for the request is that 'time is running out', presumably because the mission shall soon lose its executive powers. The question, therefore, is why the mission has not asked me for information and evidence earlier.

Furthermore, my exchanges with that prosecutor ended abruptly before I could provide any information about them. Our exchanges ended after I outlined my reservations – discussed also in § 3.5, below – on the approach taken by the prosecutor in respect of one investigation, which focused only on one set of participants to the same transaction (the officers of a public agency) and neglected two other sets of participants (some ministers and the officers of a prominent private institution). I outlined such

²⁵ The positions I took in the board of directors were often similar to those of the two other ICO-appointed directors: for reasons of confidentiality, however, below I shall refer only to my own choices.

reservations on 9 April; on the same day I received a reply that I consider unsatisfactory; we briefly spoke by telephone a few days later, and agreed to talk again; we did not, and my two subsequent emails received no reply. Thus, beside commenting my report on that case and the prosecutor's approach to it, I could provide none of the evidence – emails and documents – I have on those five cases, which the prosecutor needed 'ASAP as time is running out.'

2. The Evidence

2.1 Corruption: a very costly and unnecessary highway

In April 2010 Kosovo's government decided to build a four-lane, 100 km highway from the capital, Pristina, to the border with Albania. The highway has been completed in 2013. Its cost exceeded €1 billion, equivalent to 25 per cent of Kosovo's 2010 GDP, and was paid for entirely by public money. This project has no discernible economic rationale, and severely strained public finances: the government undertook it having studied neither its economic feasibility nor its fiscal sustainability (see pp. 189–92 of the book).²⁶

The procurement process was seriously flawed. Firstly, the bids could not be compared according to objective criteria: the winner of the tender – a consortium led by a large US company – offered a €400 million variable price for the 100 km segment between Pristina and the Albanian border, whereas the runner-up offered a €1.3 billion fixed price for the whole highway (originally intended to run for 140 km, from the border with Albania up to the border with Serbia, so as to link Kosovo with the Vienna-Thessaloniki transport route). Secondly, the construction contract was negotiated after the winning bidder was chosen, when the negotiating power of the government was lowest: during the negotiations the estimated price rose by more than 60 per cent, to €659 million. Moreover, the government ignored the advice of the experts it disposed of – a UK law firm whose services reportedly cost €1.7 million, paid for by Kosovo's international donors – and accepted the very one-sided contractual terms proposed by the consortium, which the legal advisers judged to be also in breach of the tender rules.²⁷ The government then allowed construction to proceed without supervision for more than one year: Kosovo's press reported that the government was grossly overcharged ('astronomical prices') for cement, for instance.²⁸ As a result of these irrational choices, the construction price rose further during construction; the final price was 2.7 times higher than that indicated in the bid by which the consortium won the tender: the bid was €400 million for 102 km, or €3.9 million per km: the final price was €838 million for

²⁶ For an agile analysis of the political background of this infrastructure project, see Jean-Arnault Dérens and Laurent Geslin, 'Entre Pristina et Tirana, l'autoroute de la "Grande Albanie"?', *Le Monde diplomatique* 662 (2009), at <http://www.monde-diplomatique.fr/2009/05/DERENS/17115>.

²⁷ See Lawrence Marzouk, 'Kosovo spurned legal advice on "dangerous" highway deal', *Pristina Insight* No. 64, 20 May 2011 (disclosure: I was interviewed for this article); a version of this article is available at <http://www.balkaninsight.com/en/article/kosovo-spurned-legal-advice-on-dangerous-highway-deal>.

²⁸ 'Kosovo Press Review – May 17, 2011', *Balkan Insight*, 17 May 2011, at <http://www.balkaninsight.com/en/article/kosovo-press-review-may-aa7-2âaaaa>, reports that '[t]he consortium Bechtel&Enka is charging astronomical prices in the tender for the construction of Kosovo's highway. A cubic metre of concrete is invoiced at 180 euro and the price on the market is 75 euro.'

77.4 km, or €10.8 million per km.²⁹ This cost is far higher than average EU construction costs (2.5 higher than in Germany), and seems grossly excessive for a country like Kosovo.³⁰

The mistakes committed by the government in designing and implementing this project are so macroscopic, convergent and harmful to the public interest that they cannot be explained by mere negligence and incompetence: corruption is a more plausible explanation (see pp. 191–92 of the book). This is what I reported to Eulex, providing them with successive drafts of the construction contract, the advice given to the government by its legal advisers, and other documents.

Two weeks after the highway contract was signed Eulex searched the transport ministry in connection with a corruption investigation, but the investigation concerned other projects (see § 2.7). Several months later – after I first sent a further report to Eulex, and then wrote of the highway in articles published in Kosovo and elsewhere, criticizing also the mission’s inaction³¹ – Eulex’s ‘anti-corruption adviser’ wrote to me making reference to my report and asking whether I had ‘any evidence or information

²⁹ A summary of the payments made on this project by the government is offered by International Monetary Fund, *Country Report* No. 13/224 (July 2013), at <http://www.imf.org/external/pubs/ft/scr/2013/cr13224.pdf>, p. 21. See also, more recently: Paul Lewis et al., ‘US ambassador to Kosovo hired by construction firm he lobbied for’, *The Guardian*, 14 April 2014, at <http://www.theguardian.com/world/2014/apr/14/us-ambassador-kosovo-construction-contract-firm-highway>; and Petrit Collaku et al., ‘Albania-Kosovo highway costs soar to 2 billion euros’, *Balkan Insight*, 23 April 14, at <http://www.balkaninsight.com/en/article/albania-kosovo-highway-costs-soar-to-2-billion-euro> (disclosure: I was interviewed for both articles).

³⁰ Road construction costs in the EU are discussed by European Court of Auditors, ‘Are EU cohesion policy funds well spent on roads?’, Special Report No. 5/2013, 2013, at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/cont/dv/sr13_05/sr13_05_en.pdf. The Court audited a sample of 24 road-building projects in four countries: Germany, Poland, Greece and Spain. Among other data, the report indicates average ‘total costs’, which include purchasing and supervision costs, and average ‘construction costs’, which include planning and design costs but exclude land purchasing and supervision ones.

For motorways such as Kosovo’s, the report indicates an average *total* cost, expressing it in euros per km, and average *construction* cost, expressing it in euros per 1,000 square meters of ‘road surface’. For Kosovo we have the construction cost (€838 million), the length of the highway and its per-km cost (€10.8 million), and its average width, which is indicated on the website of one of the two members of the consortium: ‘28 meters wide which will be 2 circular strips of 3.75 meters with an emergency lane of 2.5 meters and the green belt in median width between 3 – 4 meters’ (<http://www.enka.com/Enka.aspx?MainID=254&ContentID=356>; accessed on 4 June 2014). Thus, assuming an average width of 24.5 meters of ‘road surface’ (28 minus the 3 to 4 meter ‘green belt’), Kosovo’s highway cost about €440,000 per 1,000 square meters: this compares to €171,868 in Germany, € in Poland, €217,627 in Greece, €369,501 in Spain, and €290,203 on average (pp. 16 and 21 of the audit report). Hence, Kosovo’s highway cost 51 per cent more than the average highway in the EU, and 2.5 times more than in Germany.

The comparison based on the average EU per-km *total* cost yields a smaller difference (42 per cent), ascribable to the fact that land purchasing and expropriation is more expensive in the EU. The calculation is as follows: EU average per-km *total* cost is €10,941,402 (p. 20); to derive the average per-km *construction* cost, we can apply to that figure the same ratio that exists between the EU average per 1,000 square meters *total* cost (€420,694) and the EU average per 1,000 square meters *construction* cost (€290,203), which is 1.44 (drawn from p. 21); applying this ratio to the EU average per-km *total* cost, we obtain an EU average per-km *construction* cost of about €7.6 million; this compares to Kosovo’s €10.8 million, which is 42 per cent greater. The nine percentage points difference between this result and the previous one reflects the higher market value of land in the EU compared to Kosovo, which expands the distance between total and construction costs in the EU.

³¹ See my ‘Road to ruin’, *Transitions Online*, 13 January 2012, at <http://www.tol.org/client/article/22939-albania-kosovo-highway.html>.

relating to specific acts of bribery, improper enrichment or similar'; I replied that I had delivered to the prosecutors all the information I had. Months later an Eulex prosecutor asked me if I had additional information on wrongdoing in the highway project, to which I gave the same answer; this prosecutor also asked whether I was available for an interview, to which I declared myself available: this exchange occurred in March 2012 and I have not heard from Eulex since. Such disinterest in this case is incomprehensible, given how strong and convergent the indirect evidence of corruption was. In June 2013 the mission denied that any investigation on the highway is pending; but in April 2014, after this project came under scrutiny by the international media, Eulex was reportedly 'scrutinising the government's decision to sign the highway deal.'³²

The Kosovo press frequently reported rumours and suspicions of corruption surrounding the highway, alleging that both the transport minister and the prime minister (two of Kosovo's main criminal leaders, reportedly) were involved. If those rumours were correct, as I believe, sums measurable in a few percentage points of Kosovo's GDP have been diverted into private hands, through above-market profits for the consortium and bribes to the highest members of the elite: press reports and an Eulex judgement in fact set the level of bribes in the road-building sector at 20 per cent of the contract value.³³

Two years after the contract was signed the head of the ICO told an interviewer that his mission did not deal with the highway (I did, in fact). Asked for the reasons why, he answered '[a]sk the US': even though he did not clarify who 'the US' was, his answer suggests that US agents (presumably the Kosovo embassy) assisted the consortium in securing a good deal (this was also my impression).³⁴ Hence, it cannot be excluded that diplomatic immunity posed some obstacles to Eulex in conducting a thorough investigation on this case: such obstacles, however, did not prevent an investigation on Kosovo officials or agents of private parties.

Rather, this apparent US involvement posed a *political* problem. The US embassy seemed concerned for the risk that an investigation would be opened on the highway contract, and, shortly after it was signed the ambassador made public comments about

³² Collaku et al., 'Albania-Kosovo highway costs soar to 2 billion euros'; for Eulex's earlier statement, see Visar Duriqi, 'Dosja e Autostradës së Kombit në Prokurori', *Gazeta Jeta në Kosovë*, 24 June 2013, at <http://gazetajnk.com/?cid=1,987,5861>.

³³ On the level of bribes, see Basic Court of Pristina, case No. P 8/13, *F.L. et al.*, Ruling on objections to evidence and requests to dismiss the indictment, 1 July 2013, at <http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/BasiCourtPrishtina/8-13/2013-07-01%20BC%20Pristina%20-%20MTP%20case%20-%20Indictment%20Ruling%20-%20ENG.pdf>, p. 65, and UNMIK, *Media Monitoring Headlines*, 8 October 2013, at <http://media.unmikonline.org>. On the rumours surrounding the highway contract, see Anderson, 'State of constriction?', p. 34.

³⁴ 'Feith: Përgjegjësinë për gjithçka e ka Qeveria', *Koha Ditore*, 9 July 2011, at <http://www.koha.net/arkiva/?page=1,13,61773>. Lewis et al., 'US ambassador to Kosovo hired by construction firm he lobbied for' reports the former head of the ICO as saying that 'all of a sudden we were presented with a fait accompli of this contract being concluded and being a liability on the budget'. On the contrary, on 3 March 2010 (about 40 days before the contract was signed) I sent to the head of the ICO my comments on the rationale of the highway and the dangerous contractual terms, enclosing the lawyers' comments on them (I have a copy of the note with the handwritten comments of the head of the ICO on it), and I also acquired a copy of the contract. The ICO, in other words, had all the necessary information to act: the head of mission's reply 'ask the US' is less an explanation as to why the ICO was not informed than as to why it did not act.

the inadvisability of prosecuting corruption.³⁵ It later emerged also that this ambassador ‘was encouraging Kosovo’s government to sign the highway contract’; then sought to guarantee to the transport minister – Fatmir Limaj, who was targeted by the investigation discussed in § 2.7 a mere fortnight after he signed the highway contract – a ‘diplomatic posting in New York or Washington’, as a ‘backdoor exit’ from that investigation; and in 2013 was employed by the lead partner in the consortium.³⁶

2.2 Corruption: Kosovo’s biggest privatization

In June 2000 UNMIK leased Kosovo’s sole cement factory – a socially owned company named Sharrcem – to a large global cement producer, Holcim, for ten years. In 2002 Sharrcem was placed in the portfolio of the privatization agency, to be sold at the end of the lease.

Under Holcim’s control Sharrcem prospered. As the end of the lease approached, however, Holcim slowed down the pace of its investments in Sharrcem. In particular, the quarry used to extract the stone with which cement is produced was nearing extinction, and large investments were needed to open a fresh one. Such investments had to be made well before the old quarry would be depleted, because without a near source of stone Sharrcem would have to cease production and would lose its market share – largely irretrievably so, by reason of the nature of the cement market.

In late 2008, more than one year before the end of the lease, Holcim informed the privatization agency (PAK, by then) that it intended to exercise its pre-emption right, had the agency chosen to sell Sharrcem. The lease contract in fact provided that if the privatization agency decided to sell the company during the term of the lease or shortly thereafter, the lessee (Holcim) had the ‘right to buy’ Sharrcem at a price to be established through negotiations or – should no agreement be reached – by an arbitrator.³⁷ Holcim asked the agency to make its decision in advance of the projected depletion of the old quarry, so to allow sufficient time for Holcim to open the new one and avoid an interruption of Sharrcem’s production.

³⁵ According to Anderson, ‘State of constriction?’, p. 34, the US embassy was ‘clearly uncomfortable with the developing situation. On 14 May 2010 [US] Ambassador Dell argued that corruption is best fought through structural reform of the economy rather than by prosecuting individuals.’

³⁶ See Lewis et al., ‘US ambassador to Kosovo hired by construction firm he lobbied for’, and Collaku et al., ‘Albania-Kosovo highway costs soar to 2 billion euros’.

³⁷ The ‘right to buy’ foreseen by the contract is usually called a ‘pre-emption right’: X commits to Y that, should he decide to sell a certain asset, he shall sell it to Y if Y, at her own discretion, decides to buy the asset; the sale is then made either at a pre-determined price (either fixed or variable), or at a price to be determined through negotiation or, failing an agreement, by a neutral third party (as in Sharrcem’s case). A pre-emption right is a common feature of long-term contracts for the lease of companies, and of other commercial or financial transactions. The value of a pre-emption right lies in the fact that the prospective seller (X, in our example) is deprived of the possibility of going to the market in search of better offers. Consequently, a pre-emption right is radically incompatible with a sale by auction, because it implies the *obligation* to sell to a pre-identified buyer (Y, in our example).

A pre-emption right therefore differs from the so-called ‘right of first refusal’, which merely grants to Y the right to match any offer that X may receive from a third party (Z) for the sale of the asset in question, leaving X free to sell to Z if Y does not match Z’s offer.

From the perspective of the lessee (Y, in our example) a pre-emption right is an important aspect of the long-term lease contract, as it secures the value of the investments made in the leased company (and it incentivizes such investments, to the benefit also of the owner of the company – X – and, generally, also of the economy at large). Naturally, the value of this right is implicitly reflected by a portion of the fee paid by the lessee under the lease: *ceteris paribus*, in exchange for such right a rational lessor will demand a higher fee, and, correspondingly, without such a right a rational lessee would demand a lower fee.

The privatization law provides that socially owned companies must be sold by public tender: its application would have nullified Holcim's pre-emption right on Sharrcem. But the privatization law is not intended to apply retroactively, and the lease contract – which had been made by the authority (UNMIK) that was then sovereign in Kosovo and enacted the privatization law – predates it: hence, the contract had to prevail and Holcim's pre-emption right had to be respected. The privatization agency's only had to decide whether to sell Sharrcem at the end of the lease, or after a reasonable interval (so as to cause Holcim's pre-emption right to lapse).

As the agency was unable to either manage Sharrcem or finance the investments needed to open the new quarry, a timely sale – namely, a sale made well before the extinction of the old quarry, as Holcim proposed – was a rational solution, because Sharrcem's production would have continued uninterrupted and the contract ensured that the sale price would be reasonably close to the company's fair market value, for it would be decided by a competent and neutral expert should the parties fail to reach a mutually satisfactory agreement.

The management and the board of the agency procrastinated and eventually decided to sell Sharrcem by public tender, on the argument that Holcim's pre-emption right was incompatible with the privatization law. This choice – I argued in the board – was not only unwarranted but also irrational, because the tender process could not be completed before the old quarry would be depleted: the tender would therefore be held after Sharrcem had stopped production and lost its market share and much of its value with it. For this and other reasons, the auction was certain to produce a significantly lower price than any that could be agreed with Holcim or decided by the arbitrator.³⁸ As the management of the agency and my Kosovar colleagues in the board were obviously not interested in discussing the merits of these arguments, I concluded that their position rested on undisclosed reasons: I reported all this to Eulex, advising them that if corruption was involved a timely intervention could avert its consequences. Eulex did not act.

Shortly thereafter Holcim transferred the lease contract (and the pre-emption right) to a Greek cement producer, with the privatization agency's consent. In the spring of 2010 the Greek producer advised the privatization agency that it intended to exercise its pre-emption right upon the expiry of the lease, at the end of 2010. This was the same request that Holcim had made and the agency rejected: this time the management and the board

³⁸ The agency argued that Holcim could participate in the tender, and that, if its bid was not the highest, it had the right to match the winning bid and buy the company (the agency therefore degraded Holcim's pre-emption right to a 'right of first refusal': see the previous note). But as the agency would have had to disclose the existence of Holcim's right to all potential bidders, the auction would most probably have resulted in Holcim's unopposed win at a very low price, because no other rational bidder would have either participated in the auction or made a high offer. The reasons are the following.

All potential bidders were aware that Holcim knew the value of Sharrcem better than anyone else, having run it for ten years: consequently, any bidder that would outbid Holcim's best bid would almost certainly overpay the company. Yet Holcim had no need to make its best bid in the tender because it had the right to match the winning bid: consequently, at the tender Holcim would make a very low bid and would match the winning bid if, and only if, such bid did not exceed its own valuation of Sharrcem. It follows that other bidders would bear the costs associated with the tender – studying Sharrcem and the tender documents, structuring the financing of the bid, making a sizeable deposit – only to face the alternative between either losing the tender or overpaying the company. Hardly any bidder would therefore participate in the tender, or make a high bid, and Holcim would win it at a low price (below any price the could be agreed between Holcim and the agency or decided by the arbitrator).

of the agency accepted it, using exactly the same arguments I had used to object to the stance they took with Holcim.

Consequently I wrote to Eulex again, on 9 June 2010, noting that this unexplained change of mind suggested a scheme to favour the Greek producer over Holcim, and possibly to favour it also in the negotiation of the sale price. Again, I added that if any crimes were involved timely action could still avert the worst consequence (a low price). On 15 October 2010 the head of SPRK advised me that they chose not to open an investigation because my report contained ‘no allegation for [*sic*] a committed criminal act’. This is true, of course, but is beside the point: my report merely alerted Eulex of the high probability that crimes were involved – by reason of the otherwise inexplicable behaviour of the agency – and provided documents that could contribute to proving them, had the mission chosen to open an investigation.

Negotiations with the Greek producer began and an agreement was reached (I was closely involved). The sale price was €53.5 million – partly paid in cash and partly by way of set off against reimbursable investments – and the buyer undertook to invest another €35 million in Sharrcem, making this the biggest privatization ever done in Kosovo. The price was judged low by Kosovo’s independent media. Conversely, on the basis of the economic and financial data on Sharrcem which the management provided to the board I believe the sale price was reasonably close to fair market value.³⁹ But I cannot exclude that such data were inaccurate: had corruption been at play, this was the obvious way to ensure a low sale price.⁴⁰

Three years later, in December 2013, the press reported that Eulex was investigating this privatization.⁴¹ The mission did not comment, and, since then, it took no public steps suggesting that an investigation has in fact been opened. Moreover, if an investigation was opened it almost certainly concerns some (mistaken) comments made by Kosovo’s auditor general about how the agency chose its advisers for the Sharrcem negotiation: we can safely assume that Eulex did not investigate (seriously or at all) the agency’s conduct before and during the negotiations for the sale of Sharrcem.

In 2013 the government imposed a 35 per cent import duty on cement, in order to shield Sharrcem from growing foreign competition (see p. 197 of the book): this measure was inconsistent with a regional free trade agreement Kosovo is a party to, and was later cancelled under EU pressure. Despite its outcome, this episode suggests that Sharrcem’s Greek owner has close links to Kosovo’s elite, and retrospectively adds credibility to the hypothesis that improper influence affected this privatization.

2.3 Corruption: a gift to a rich private university

On 23 September and 28 October 2010 the board of directors of the privatization agency approved the government’s decision to expropriate a large tract of socially owned land,

³⁹ Furthermore, a competitive sale process was ruled out by the contract, and the imminent depletion of the quarry did not allow the agency to delay the sale until after the pre-emption right would lapse.

⁴⁰ The negotiations put me in a difficult position, incidentally: I suspected corruption but had no evidence of it – rather, I had to take note of Eulex’s indifference to my reports – and I could not oppose the decision to sell Sharrcem because this would have destroyed the company’s value, leading to an even worse outcome than a low sale price. I chose to follow the negotiations as closely as I could, and I did not detect signs of wrongdoing (which does not exclude – as the text remarks – that the negotiation was distorted).

⁴¹ ‘Sharrcem under investigation by EULEX’, *InfoGlobi*, 17 December 2013, at <http://eng.infoglobi.com/sharrcem-under-investigation-by-eulex/>, quoting the chairman of the parliamentary committee that is competent for privatization policy.

and accepted the proposed compensation (payable to the agency as fiduciary owner of that land). Two board meetings were necessary because this matter was not part of the agenda of the first one, which approved the transaction only ‘in principle’: at the second meeting the board gave final approval to both the expropriation and the proposed compensation. On both occasions I voted against because the transaction was wrong, damaging and illegal.

The documents delivered to the board members before the second meeting showed that the land in question was to be transferred to a private entity, the American University in Kosovo, to build a new campus. The land is situated next to an American-style housing project in the outskirts of Kosovo’s capital, which was then being developed by a company whose managing director was the chairman of the board of the privatization agency. The documents also showed that construction of the campus began on or before 16 June 2010 – three months before the board of the agency was even informed of the expropriation – and that the €3.4 million compensation payable to the agency had already been agreed upon in the same period, by the finance and education ministers (both of PDK), a senior manager of the privatization agency, and the president of the American University.

This transaction was illegal because under Kosovo’s law and constitution that land should have been privatized by auction, not expropriated. The government, in any event, can expropriate assets only for a clear *public* purpose, can grant only their use (not their ownership) to private persons, and must do so through a competitive bidding process: the transaction met none of these conditions. In addition, the proposed compensation was equivalent to a fraction of the market value of the land. A study commissioned by the privatization agency reported that when banks accept comparable land as collateral for their loans, they value it at between €50 and €60 per square metre (valuations that must be seen as conservative, given their function); yet, for vague and unconvincing reasons the report concludes for a valuation of €15 per square meter. The €3.4 million compensation reflects an even lower valuation: €11 per square meter.

The difference between that amount and the fair market value of that land – between €15.4 and €18.4 million, according to the conservative criteria used by banks, but probably higher than that – represented a direct loss for Kosovo’s budget. Had the land been sold by auction, in fact, it would have fetched a price close to fair value, and all the proceeds of the sale would have been disbursed to Kosovo’s Treasury (the land belonged to a socially-owned company that had no workers and negligible creditors’ claims, because it was a holding company). With the expropriation designed by the government, conversely, the Treasury paid a €3.4 million compensation to the agency, which, under the privatization law, the agency would soon return to the Treasury. The Treasury thus lost between €12 and €15 million at least. This calculation assumes that the American University will reimburse €3.4 million to the government, as consideration for the land: absent such reimbursement, of which the documents I have seen make no mention, the loss would increase correspondingly.

This loss, of course, is equal to the gain made by that university, which educates the offspring of Kosovo’s higher classes.⁴² Such gain, in turn, is the direct result of the

⁴² This university is a non-profit institution, supported by a New York charitable foundation, whose degrees are issued by New York’s Rochester Institute of Technology. The university’s audited financial statements (available at www.aukonline.org) show that in the relevant period (2008–11) 95 per cent of its revenue was represented by tuition fees paid by its students (the yearly fee is equivalent to 21 times the

irrationality and illegality of this transaction, for it would have disappeared had such land been auctioned: *ex hypothesi*, the university could only win the auction by offering a price close to fair market value.

Finally, the transfer of this land was not linked to Kosovo's education policies (see pp. 200–2 of the book): it was a large, undisclosed, arbitrary and illegal subsidy.⁴³ The question, again, is whether these were innocent or conscious mistakes.

After the first board meeting, having reviewed the documents on the transaction, I enclosed them to a report to Eulex. The head of SPRK replied advising me to request the agency to challenge the expropriation and the compensation (both had already been accepted by it, as my report stated), and indicated no interest in investigating the matter. After the second board meeting I informed Eulex that the transaction had been given final approval. Eulex did not reply, either to these reports or to that I sent to its prosecutors in April 2011, before writing about this transaction in the media.⁴⁴ The mission took no steps suggesting that an investigation was opened, and it can be assumed that none was.

As in the case of the highway, also in this case diplomatic and political complications existed. Not only does the website of the university qualify the US embassy and the foreign aid department of the US government (USAID) as its 'partners', but an ICO colleague advised me that 'this deal was negotiated in a number of Sunday walks between [the US ambassador and the prime minister]. Might be difficult to fight' (another colleague was more emphatic: '[c]areful... You're entering a minefield!').⁴⁵ Again, it cannot be excluded that diplomatic immunity posed some complications to conducting a thorough investigation, but it was no impediment to prosecuting the Kosovo officials and the private parties.

2.4 Corruption: the elusive threats that stopped a privatization

In November 2009 the privatization agency tendered a relatively large company, named Onyx Banja, which owns a hotel, a spa, and a source of thermal water. These assets are located at the centre of the stronghold of the AAK party, the Dukagjini region, over

average monthly wage in Kosovo). Of its expenditure, 37 per cent was paid to the Rochester Institute of Technology (for various services that have no reference market price), 32 per cent to teachers, for their salaries, 9 per cent to the New York charitable foundation (for other *ad hoc* services), and 4 per cent to the president of the university, as salary. This university devoted 8 per cent of its annual expenditure to scholarships to Kosovo's deserving students, which is a little less than the annual profits it made on a training contract with Kosovo's government (the scholarships fund is financed primarily by Kosovo's official and private donors). In essence, therefore, this university is a business that targets rich students who have difficulty in obtaining visas to study abroad and do not wish to enrol in Kosovo's (inadequate) public and private universities: in exchange for high fees, it provides them with reasonably good education and a US degree, and it transfers about half of the fees they pay to its related parties in the USA. Despite this, this university is tax-exempt in Kosovo.

⁴³ Although a case can be made for relying on the private sector to improve the quality of higher education in Kosovo, which could justify also the provision of subsidies, such a policy did not exist at that time (nor does one exist now, to my knowledge). In any event, such a policy would require a transparent selection of the recipients of the subsidies and fair criteria for allocating private education services to Kosovo's students. Moreover, this subsidy was not connected to an extension of the American University's scholarship programme (see the previous note), which could have provided a partial justification for it.

⁴⁴ See my 'An education in deal-making, Kosovo-style', *Transitions Online*, 13 July 2011, at <http://www.tol.org/client/article/22546-an-education-in-deal-making-kosovo-style.html?print>.

⁴⁵ Shortly after I described this transaction in articles for the Kosovo press and other media the indication of the embassy and USAID as two of the university's 'partners' was removed from its website (see <http://www.aukonline.org/web/home/partnerships.html>).

which the founder and leader of that party exercises dominant influence. The winner of the tender was a company owned by Ekrem Luka, ‘one of the most powerful businessmen in the country’.⁴⁶ As we already noted in § 1.3, Luka and AAK’s leader Haradinaj are prominent members of the elite and are close to each other: according to the Council of Europe and several Western intelligence reports, they are also two of the six or seven ‘key personalities of organised crime’ in Kosovo.⁴⁷

Luka’s company won the tender for Onyx with a bid of €8.66 million, which was about 1, 3 and 5 millions higher than the next three bids.⁴⁸ The management of the agency described this bid to the board as a very good one: indeed, it seemed rather high.

By law, bids are binding commitments and bidders must make a deposit – €500,000 in this case⁴⁹ – to secure them. After the tender the deposit of the winning bidder is either applied as part of the sale price or confiscated, if the balance of the price is not paid within the deadline set by the tender rules. Winning bidders are allowed to withdraw from the sale – and to obtain the reimbursement of their deposit – only if credible threats are made against them, which prevent them from buying the company they won (this unusual rule was written by UNMIK, in 2002, and was justified by the weakness of the rule of law in Kosovo).

A few days after winning the tender Luka informed the police and the privatization agency that a citizen had threatened him because he wanted to have a 15 per cent share in Onyx. Four weeks later Luka informed the police – but not the privatization agency – that that man apologized to him and that he accepted the apology, and he asked the police not to prosecute the aggressor. It subsequently emerged that in the same days Luka paid €75,000 euros to this man, through an intermediary.

Shortly thereafter, Luka informed the privatization agency – but not the police – that the threats continued. On this basis, he requested the agency to cancel the sale and return him the €500,000 deposit. Although he did not refer to the apology, however, the police report he provided to the agency as evidence of the threats mentioned both the apology and the fact that he accepted it. The management of the agency advised the board of directors to accept both requests. I objected that the apology, accepted by Luka, deprived his requests of their foundation: the board agreed.

The board took this decision on 25 February, about a fortnight before the expiry of the deadline by which Luka had to pay the balance of the price. Three days later – Luka subsequently told the police – the same man threatened him again, in a more forceful and public manner than before: this time the aggressor was assisted by two accomplices and issued his threat in Luka’s own office, in front of a witness (Luka’s employee who had paid €75,000 to the main aggressor). Based on Luka’s and the witness’s reports, the police arrested the aggressors. Luka reiterated his requests to the agency. The management again supported them. I objected because – even assuming that the threats were credible and serious – the aggressors had been arrested: the rule-of-law system had

⁴⁶ Parim Olluri, Genc Nimoni, Florent Spahija and Shengjyl Osmani, ‘Mjedis i Pafavorshëm për Biznesmenët e Pafuqishëm’, in *Gazeta Jeta në Kosovë*, 29 February 2012, at <http://gazetajnk.com/?cid=1,987,1406> (Google translation of the Albanian text).

⁴⁷ Council of Europe, ‘Inhuman treatment of people’, pp. 14–15, footnote 29.

⁴⁸ The results of the tender – which indicate Luka’s and the next two bids – are published at <http://www.pak-ks.org/repository/docs/results40.pdf>. Onyx is described in Privatization Agency of Kosovo, ‘Fact sheet’ (undated), at <http://www.pak-ks.org/repository/docs/PEJ.pdf>.

⁴⁹ The deposit is indicated in the tender announcement, at <http://www.pak-ks.org/?page=2,14,40>.

worked, therefore, and the threat no longer existed. But the board decided to accept Luka's requests.

Before the board took this decision I sent a report to Eulex, enclosing the documents I had. I explained why neither the first, the second, nor the third round of threats was credible, and observed that the management seemed more interested in helping Luka to obtain the reimbursement of his deposit than in receiving of the balance of the price. I suggested the hypothesis that Luka had lost interest in buying Onyx, perhaps because he realized that he had offered an excessive price, and that the threats were a sham created in order to have the sale cancelled. I added that timely intervention – before the board meeting – would have averted the fraud. Although Eulex neither acted nor replied to my report, I informed them that the board unjustifiably accepted Luka's requests.

Half a year later, on 4 October 2010, the head of the mission's prosecutors informed me that the persons who threatened Luka had been convicted for extortion: my surprise grew when I read that Eulex was grateful for the information I sent them, which 'was a valuable source of evidence during the course of the trial.' Asked for a clarification, Eulex's chief prosecutor assured me that my arguments about the fraud hypothesis had been 'considered and thoroughly reviewed by the Eulex Prosecutor during the investigation'. The judgement in fact did consider that hypothesis, but excluded it by reason of a chronological argument:

[o]bviously, the panel has considered the possibility that [Luka] had somehow invented the threats in order to be allowed to withdraw from the tender, without losing the [deposit]; however this option appears to be unlikely, since in November 2009, [Luka] had not requested the [privatization agency] to withdraw from the tender, but simply informed the Agency about the threats he had received (such intentions will be notified only after three months, with the second notice filed with the [agency] on 15 February 2010).⁵⁰

This chronology is incomplete, however. The court omits to note that the deadline for paying the balance of the price expired in early March 2010: it would have been untimely (and suspect) for Luka to request the agency to cancel the tender four months before its expiry. Far from disproving the fraud hypothesis, therefore, the chronology of the events strengthens it. The rest of the judgement is equally unconvincing.

The only direct evidence of the threats were the statements given by Luka and the witness to the police. But both explicitly and repeatedly contradicted such statements during the trial, despite the objections of the prosecutors and the court's warnings about their duty to tell the truth. For instance, the presiding judge told the witness that one part of his testimony was 'completely different from what you said to the police... What is the true version?'⁵¹ The court decided that the 'true version' was that given to the police, primarily on the basis of the fact that Luka paid €75,000 to the main aggressor (which

⁵⁰ District Court of Peja, case No. 128/10, *Demaj et al.*, Judgement, 16 September 2010, p. 26. This judgement used to be available on Eulex's website, but sometime in 2013 it has been removed from it (the published judgements of this court are listed at <http://www.eulex-kosovo.eu/en/judgments/CM-District-Court-of-Peja.php>). The judgement – which was downloaded from Eulex's website – is available at <http://eulexannex.wix.com/draft>.

⁵¹ Ibid., p. 10; the many other contradictions and denials of both Luka and the witness, and the parallel objections by the presiding judge, are reported at pp. 8–10 and discussed at 21–24 and 29.

supposedly was the first instalment of a €150,000 payment).⁵² But the judgement does not explain why Luka and the witness would have ‘changed *massively* their versions of the events’ and would have told the truth to the police but ‘lied in front of the Court’.⁵³ The opposite is far more likely, and not only because in court they testified under oath.

First, the credibility of the threats was tarnished by the evolution of the events, and especially by the apology, which the court does not mention even though it is described in a police report that the judgement uses as evidence.⁵⁴ Also the timing and circumstances of the third and more forceful round of threats was suspect, because they were issued right after the board rejected Luka’s requests, and were made openly, in the entirely avoidable presence of a witness: in fact, those renewed, demonstrable and apparently more serious threats allowed Luka to persuade the privatization agency to cancel the sale and return him the €500,000 deposit.

Second, when victim and witness spoke to the police, Luka was still waiting for the board’s decision on his requests. Conversely, when they testified in court the sale had already been cancelled and the deposit reimbursed. If the threats were part of a fraud designed to allow Luka to withdraw from the sale, they had achieved their purpose: confirming them in court would only have exposed Luka’s accomplices to the risk of a jail sentence.⁵⁵

Third, the €75,000 paid by Luka to the accused could be the reward for the services of an accomplice rather than the result of extortion, as the court believed. This interpretation is supported by the fact that, even though the court explicitly advised Luka that he was entitled to be reimbursed of that sum by the main aggressor, he did not request it: if that money was extorted from Luka, why would he not make that request? This question is not considered by the judgment, which – somewhat paradoxically – considers the fact that the main aggressor never returned that money to Luka as an aggravating circumstance.⁵⁶

Fourth, the accused were born and live in the town of Peja, the main settlement of the Dukagjini, the region where Luka’s economic and (alleged) criminal interests are concentrated. This is also the area where the accused served in the KLA, under the command of Luka’s close associate Haradinaj, who exercises dominant political, social and military influence over the Dukagjini.⁵⁷ In this context, it is unthinkable that an ordinary citizen would repeatedly threaten Luka, in Peja, and that he would give in: besides the immediate cost, accepting such threats would seriously weaken his reputation

⁵² Ibid., pp. 25–26.

⁵³ Ibid., pp. 23 and 32, respectively.

⁵⁴ Ibid., p. 5 lists, among the documentary evidence, the police report dated 22 December 2009, in case No. 2009-DA-3199, which describes the apology and indicates that Luka accepted it; the summary of the main events of the case – where the apology is conspicuously absent – is at p. 20.

⁵⁵ Also the motive of the threats remained unclear. According to the court, the main aggressor wanted to ‘purchase’ from Luka 10 per cent of Onyx (ibid., p. 22). Based on the sale price, however, this shareholding would cost €870,000: this sum is hardly within the reach of the accused, because the judgement describes them as persons of ‘average’ financial condition (ibid., p. 1) and in 2010 the average monthly salary in Kosovo was about €250.

⁵⁶ Ibid. p. 33 discusses the aggravating circumstance; p. 34 reports, without comment, that the court reminded Luka of his right to make a request for reimbursement and that he declined to do so.

⁵⁷ To exemplify his influence in that region, Anderson, ‘State of constriction?’, p. 12 write that ‘[n]ewspapers covering the money-laundering trial connected with the legal defence fund of AAK leader Haradinaj disappeared from newsstands in AAK–run Peja.’

and attract further extortions. Such threats could only conceivably be issued at the request or with the consent of one of Luka's peers, such as Haradinaj, the prime minister and a handful of other (alleged) criminal leaders. Yet such figures would use more direct and quieter (but possibly harsher) means to extort money, shareholdings or businesses from Luka: the publicity of the threats and the arrest of the aggressors are radically incompatible with the involvement of the highest members of Kosovo's elite.

This last argument was not easy for the court to develop, of course, but the prosecutors should have considered it before indicting the aggressors. Conversely, the vast disproportion between Luka's and the aggressors' power and social status was manifest and demonstrable. Luka himself alluded to it, when the presiding judge confronted him with his statements to the police about the threats: he answered thus

I don't take [the aggressor's words] as a threat and I was not scared, if I am scared then I have to close the business and leave Kosovo.⁵⁸

Luka correctly alluded to the fact that, in order for the threats to scare a 'key personalit[y] or organised crime' like him, they had to be so serious as to force him to leave the country.⁵⁹ Because if a person like him could be threatened in his own stronghold, it would mean that either the rest of the politico-criminal elite had turned against him, or a new political-criminal faction emerged, with enough power to displace the old one. Luka, conversely, remains a powerful member of the elite.

None of these points is dealt with by the judgement, which paradoxically quotes Luka's vast business interests as a factor that corroborates the extortion hypothesis instead. The argument is that Luka paid €75,000 because he 'is a well known entrepreneur [and] it was natural that he was concerned about possible actions against his numerous activities.'⁶⁰

As if to disprove this entirely abstract argument, five days after the judgement was rendered a real episode of extortion occurred in the Dukagjini. On 21 September 2010 six persons led by two former body-guards of Haradinaj kidnapped a successful entrepreneur in a town near Peja and freed him after he paid a ransom (the request was €3 million); the police arrested two of the kidnappers, but they were sentenced only for illegal possession of arms.⁶¹ In 2011, 60 similar extortion or ransom cases were reported to the police, and only five led to indictments.⁶² The extortion of businessmen is frequent in Kosovo, and SHIK is reportedly active in this field: as the victims are typically at risk of retaliation, the number of such reports vastly underrepresents this phenomenon. According to the Council of Europe, furthermore, 'threats, blackmail and protection rackets' are part of the criminal activities in which Luka too is involved.⁶³

In December 2011 I articulated the fraud hypothesis in a article for the Kosovo press, which was quoted approvingly by other commentators.⁶⁴ That the accused silently

⁵⁸ District Court of Peja, *Demaj et al.*, Judgement, p. 21, footnote 44.

⁵⁹ Council of Europe, 'Inhuman treatment of people', pp. 14–15, footnote 29.

⁶⁰ *Ibid.*, p. 26.

⁶¹ This case is described by Olluri et al., 'Mjedis i Pafavorshëm për Biznesmenët e Pafuqishëm'.

⁶² *Ibid.*, quoting police statistics.

⁶³ Council of Europe, 'Inhuman treatment of people', pp. 13–15 and footnote 29.

⁶⁴ See my 'Ekrem Lluka, AKP-ja, EULEX', *Zëri*, 2 December 2011; see also, e.g., Olluri et al., 'Mjedis i Pafavorshëm për Biznesmenët e Pafuqishëm', which quotes my article.

accepted a 30-month sentence does not disprove that hypothesis: they presumably preferred not to disclose the fraud because this could involve a stiffer penalty and would provoke Luka's retaliation. In a conversation we had shortly after he left Eulex, the former head of the mission's prosecutors agreed with this interpretation.⁶⁵

Incidentally, my criticism of this judgement finds indirect support in the decision by which a Milan criminal court dismissed the complaint raised by the (Italian) Eulex judge who presided the panel which sentenced the aggressors. This judge complained that my article was defamatory: the Milan court upheld the prosecutor's finding that such complaint was unfounded, including because my criticism 'find support in the contents of the judgement'.⁶⁶

The conviction of Luka's aggressors for extortion was confirmed by the appeals court in May 2012, which raised their sentences to three years of imprisonment. Eulex did not publish the judgement, however, and its press release describes a very different case. My article and Kosovo's media focused on Luka and Onyx. In the press release, conversely, Onyx disappears and Luka becomes the deuteragonist to an unnamed foreign investor, who won the tender for an unnamed company:

[t]he first instance court found that between November 2009 and February 2010 in Pejë/Peć, the defendants acting as a group, extorted Ekrem Lluka to give them 150 thousand Euros. The case *also* relates to a privatization process that failed mainly because the defendants threatened a *foreign investor* to include them in the company that won the bidding process. This *caused* the *foreign investor* to withdraw from the privatization process.⁶⁷

The judgement correctly reports that the bid for Onyx was presented by a consortium formed by a Slovenian company, named 'Thermana', and a Kosovar company, named 'Dukagjini'.⁶⁸ The judgement correctly indicates also that Dukagjini's 'owner' is Luka, that Thermana had a 10 per cent share in the consortium, and that Dukagjini had the remaining 90 per cent.⁶⁹ Luka was believed to own Thermana too – which would explain both its silence with the agency and Eulex's strange omission to request the testimony of its managers or owners – but even if this were true Thermana would remain a foreign company, in a legal sense. Yet 'investor' is a factual expression, and cannot refer to the consortium: it can only refer to Thermana, and only on the assumption that its owners were foreign.

⁶⁵ He added, however, that in those circumstances the court could not decide otherwise. I disagree, of course, because the threats were not credible: but if his argument were correct, it would merely shift the blame for this judicial error on Eulex's prosecutors.

⁶⁶ Procura della Repubblica di Milano, Case no. 26,000/13 R.G., Richiesta di Archiviazione, 8 May 2013, p.1; the phrase quoted in the text is my translation of an excerpt from this passage: '[I]n particolare, l'autore commenta con toni critici, ma in ogni caso pacati, la decisione di condanna resa dal Tribunale, presieduto dal querelante, ritenendo che la motivazione non sia persuasiva e dà puntuale conto delle ragioni a sostegno di tale opinione. Ragioni che peraltro *trovano un riscontro nel contenuto della sentenza oggetto di analisi*.' The dismissal of the complaint was upheld by Tribunale di Milano, Case no. 26,000/13 R.G., Decreto, 19 August 2013; both documents are unpublished, and are available at <http://eulexannex.wix.com/draft>.

⁶⁷ Eulex, Press release, 14 May 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0280.php> (emphasis added).

⁶⁸ District Court of Peja, *Demaj et al.*, Judgement, p. 6.

⁶⁹ *Ibid.*, pp. 7, 12 and 13.

Even adopting this assumption, however, the sentence ‘the defendants threatened a *foreign investor*’ is false, because Thermana never reported any threats: indeed, the judgement *only* discusses the (non-existent) threats against Luka. For the same reason, also the preceding sentence – ‘[t]he case *also* relates to a privatization process that failed mainly because [of such threats against a foreign investor]’ – is false. The last sentence – ‘[t]his *caused* the *foreign investor* to withdraw from the privatization process’ – is equally false: not just because there were no threats against Thermana, but also because Thermana did not ‘withdraw’: it was the passive recipient of the agency’s decision to cancel the sale by reason of the threats against Luka.

These three false statements mislead the reader into thinking: 1) that the case concerned *two* episodes of extortion: one whose victim was Luka, and whose circumstances are left unsaid; and a far more plausible one against an unnamed foreign investor; and 2) that Luka’s extortion did *not* concern the sale of Onyx, because a ‘foreign investor’ won that tender. Described thus, the judgement becomes more credible. As the authors of this press release – which is attributable to the mission’s management – must have known that the case centred on Luka’s bid for Onyx, we can infer that these false statements were intended to mislead the public, and had the purpose of giving a measure of credibility to the judgement. This press release therefore strongly suggests that Eulex was aware that this judgement is (literally) indefensible.

Again, Eulex’s mistakes were both serious and converging. Its prosecutors ignored the crimes that implicated prominent members of the elite (Luka and the chairman of the privatization agency) and their associates (the witness, some managers of the agency, possibly also some police officers). Its judges confirmed this approach by issuing and confirming a conviction for a crime that was almost certainly never committed. And its management sought to give all this some credibility through that press release.

In July 2012, shortly after the appeals judgement, Luka was fined €900 for false testimony.⁷⁰ The imposition of this fine secured to Kosovo’s budget a payment that is equivalent to 0.03 per cent of the (direct) loss caused by the fraud, because Onyx was sold in July 2012 for a price of €6.1 million: the difference with Luka’s bid is €2.56 million, which rises above €3 million by reason of the two-year delay and the high interest rates prevailing in Kosovo’s banking sector (around 10 per cent).⁷¹

2.5 Corruption: procurement cases

I reported to Eulex also a handful of likely cases of procurement corruption (on which, see pp. 188–89 and 196–98 of the book). Most concerned the state-owned telecom utility (on which see § 2.10) and the state-owned energy utility. The documents I received were often incomplete, however, or did not suggest criminal wrongdoing as clearly as in the cases discussed above. But some corroborated information disclosed by the press and independent analysts, which wrote that the energy company

has instituted single source ‘negotiated’ supply for much of its high-value contracting. Its procurement is run by a namesake of Prime Minister Thaçi,

⁷⁰ See ‘Ekrem Luka tërhiqet nga dëshmia që i shpëtoi 500 mijë euro’, *Indeksonline*, 26 July 2012, at <http://www.indeksonline.net/?FaqeID=2&LajmID=24576>.

⁷¹ The tender for Onyx was announced by Privatization Agency of Kosovo, Press release, 4 April 2012, at http://www.pak-ks.org/repository/docs/PRESS-RELEASE_-_press_conference_-_20.04.2012.pdf. The €6,100,000 sale price appears in the announcement of the agency’s decision to accept the auction results, at http://www.pak-ks.org/repository/docs/AKP_Projektet_Individuale_ENG_Vendimet.pdf.

from his home village. Two companies, Ecotrade and AC/DC, owned respectively by brothers Mehdi and Hilmi Zhugolli, who deny closeness to the Thaçi brothers, gained over €75 million in [contracts with the energy utility] in 2008 and 2009: an exponential increase on previous years. Nearly all the contracts awarded these two companies were ‘negotiated’ single source arrangements, including one for €50 million: €14 million more expensive than another offer.⁷²

Eulex does not appear to have opened investigations on these matters.

The documents I received in 2009 on a tender of the education ministry, conversely, were complete and seemed clear. The tender was for the purchase of computers and internet connection hardware for Kosovo’s schools, and included instalment and maintenance services. The machines requested by the ministry were ordinary personal computers, those that consumers buy in shops or through the internet, and such ancillary services therefore represented a very minor part in the economy of the tender. The contract was awarded to a company whose offer was the third highest among the eleven bidders, and was 67 per cent higher than the cheapest bid (the difference was €24 million). The documents showed that this company won the tender because its experience and technical skills in the ancillary services received a very high score: the criteria for awarding the bid, in fact, attributed disproportionately low importance to the price for the computers and disproportionately high importance to the quality of such ancillary services. As this was a plainly irrational choice, given the nature of the computers, it presumably was the result of an abuse of office: such criteria were probably designed either to favour the winning bidder or to allow procurement officials to extract bribes from bidders on the application of the qualitative – and therefore subjective – criterion of the tender.

The independent media subsequently criticized this tender and public pressure led the ministry to cancel it.⁷³ Six months later the press reported that Eulex opened an investigation on officials of the ministry of education, but it is unclear whether it concerned that tender. At any rate, the investigation was neither confirmed nor led to indictments, and the two-year deadline for completing it expired in 2012 at the latest.⁷⁴

2.6 Organized crime: election fraud

Eulex did not prosecute numerous other suspected crimes of the elite that were reported on by the press. With one exception, however, the information that is publicly available about them is insufficient to establish with confidence whether such reports were well founded. The exception concerns election fraud, which Eulex effectively ignored: by reason of its direct effects and symbolic significance, this is the gravest omission among those described in this paper.

⁷² Anderson, ‘State of constriction?’, p. 47.

⁷³ Ibid., ‘State of constriction?’, p. 45; at 15, footnote 73, they add that ‘[t]he Ministry of Education’s intention of awarding a contract for supply of computers and internet to Kosovo’s schools that cost €24 million more than was necessary was revealed in a series of articles [on] 16-19 December 2009. Neither the Ministry’s written responses nor Minister Hoxhaj himself, in a 19 December 2009 meeting with YIHR, adequately answered the facts and analysis advanced by the newspaper’ (‘YIHR’ is the widely respected civil society organization that published this study).

⁷⁴ ‘EULEX investigating Kosovo Education Ministry’, *SEtimes.com*, 7 June 2010, at http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/newsbriefs/2010/06/07/nb-11.

The book (pp. 158–62) discusses the serious and widespread irregularities – including ballot stuffing – observed in the parliamentary elections held in late 2010. In the strongholds of the PDK and AAK parties the signs of organized, systematic fraud were unmistakable: while at national level election turnout was little above 45 per cent, in those regions it frequently exceeded 80 or 90 per cent – in some polling stations it exceeded 100 per cent, often by a wide margin – and as much as 90 or 95 per cent of the vote went to the party that controlled the relevant region; for instance, in the municipality of Skënderaj (on whose mayor see §§ 2.8, 2.18 and 2.20), turnout reached 93.68 per cent – 149 per cent in one polling station – and PDK won 96 per cent of the vote. A possible source of the ballots used to fill the boxes of these polling stations was the company that prints them, incidentally, owned by a prominent member of the elite close to both AAK and PDK (Ekrem Luka, the protagonist of the case described in § 2.4).⁷⁵ A European ambassador who took part in a mild election monitoring exercise privately talked to me of ‘industrial-scale fraud’, and three years later another European ambassador used the same expression in public comments.⁷⁶

Civil society and the opposition reported to the prosecution offices hundreds of breaches of the election laws, sometimes offering videos and other documentary evidence.⁷⁷ Yet, despite the overwhelming statistical evidence that fraud had been centrally organized, Eulex did not exercise its executive powers: such cases were left to Kosovar prosecutors, whose exposure to interference and intimidation by that same political elite that benefited from election fraud was precisely the reason why the mission had been granted such executive powers.⁷⁸ Predictably, the Kosovar prosecutors ‘ignored’ the hypothesis that fraud had been organized, and the cases that they opened resulted in few and very lenient punishments.⁷⁹ This outcome must be ascribed to Eulex’s own responsibility, for the reasons already indicated in § 1.2.

2.7 Corruption: the first road-building case

On 28 April 2010 a large contingent of Eulex policemen cordoned off the ministry of transport and the minister’s residence, and searched them.⁸⁰ The investigation concerned road-building contracts made in 2007–10, on which corruption was suspected, and focused on the transport and telecommunications minister, Fatmir Limaj: one of the highest members of the elite, albeit an antagonist of its leading faction, and (allegedly) one of Kosovo’s main criminal leaders (see § 1.3).

The investigation seemed well targeted, because numerous indirect but converging indicators strongly suggested that in the road-building sector corruption was systematic

⁷⁵ UNMIK, *Media Monitoring Headlines*, 8 October 2013, at <http://media.unmikonline.org>.

⁷⁶ *Ibid.*, 31 October 2013.

⁷⁷ Betim Musliu and Adem Gashi, *Organized crime in election process. An analysis of prosecution and adjudication policy*, Friedrich Ebert Stiftung (Pristina, 2012), at http://www.fes-prishtina.org/wb/media/Publications/2012/Ndjekja%20e%20krimeve%20te%20zgjedhjeve_DRAFT_20120613_English.pdf, pp. 5–6.

⁷⁸ The mission opened only one investigation (whose outcome I ignore): see Eulex, Press release, 10 February 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0231.php>.

⁷⁹ Musliu and Gashi, *Organized crime in election process*, p. 5.

⁸⁰ See Eulex, Press releases, 28 and 29 April 2010, at <http://www.eulex-kosovo.eu/en/pressreleases/0060.php> and <http://www.eulex-kosovo.eu/en/news/000220.php>, respectively.

and centrally organized (see pp. 188–89 of the book). In addition, independent media and analysts reported that:

in early 2008 Minister Limaj gathered together construction companies, telling them that ‘there is work for all,’ therefore none should slow down the tendering process by making complaints... For two years none did... and unsubstantiated rumour circulated that contractors were invited to pad a kickback percentage into their price... [The owner of a large road-building firm told a newspaper that] ‘[w]e cannot win tenders because we don’t give money to the government’;⁸¹

moreover, thanks to irregular procurement practices

three contracts worth €22 million in total were awarded to firms or consortia led by two close friends of Minister Limaj, despite lower offers from [competitors]... A €3 million contract was awarded to a company one month *before* it registered as a business...⁸²

Although the procurement rules required bidders to have substantial road-building experience

more than a third of the ministry’s tenders were won by firms created during the two years since Fatmir Limaj took charge... The chair of parliament’s economy and transport committee alleged that: ‘The companies constructing roads have no clue how to build a road, they just have connections to the Ministry of Transport’... [And the owner of a large road-building firm said that companies which pay bribes] miss out on laying several centimetres of gravel and asphalt’;⁸³

as a result, ‘[s]ections of the 1,000 kilometres of roads built in 2008–9 are already [in 2010] severely potholed’.⁸⁴

Shortly after the searches, the head of Eulex’s prosecutors disclosed to the press numerous details about the investigation: in particular, he

said millions of euros had been misused, gave the outline of pending indictments for which Minister Limaj and his procurement chief could face 55 years in prison, and said six other high officials were being investigated for corruption and organised crime. [On another occasion, he] indicated that the minister’s telephone had been tapped, named Limaj and [his procurement chief] as suspects in a litany of serious crimes, and stated that €2 million had been misappropriated in just one case alone.⁸⁵

The press reported also that an unnamed ‘EULEX official said that the ministry wiped its computer server just before the raid, attempting to erase evidence of criminality’ (erased data can famously be retrieved, especially if erased in haste), and that ‘EULEX has said that an arrest will soon be made’ in connection with this investigation.⁸⁶

⁸¹ Anderson, ‘State of constriction?’, p. 43.

⁸² Ibid., p. 44 (emphasis added: that company therefore did not exist when it won the tender).

⁸³ Ibid., pp. 43–44.

⁸⁴ Ibid., p. 43.

⁸⁵ Ibid., pp. 33 and 44, respectively.

⁸⁶ Ibid., pp. 44 and 34, respectively.

These statements contrast with the behaviour of the mission in virtually all previous and subsequent investigations, in which only dry and often anodyne press releases were issued, usually recalling the presumption of innocence. The chief prosecutor's reference to 'pending indictments' for 55-year prison sentences is particularly striking when compared with the prudence of the statements issued half a year later on an investigation (described in § 2.16) that directly implicates the prime minister, of whom Limaj was (and is) a political competitor: in that case the mission pledged to keep the investigation and its findings confidential, and asked the press to exercise restraint in reporting about it.

The searches and these statements were received enthusiastically by a wide section of public opinion, which perceived the link between corruption and the difficult socio-economic conditions of the country. This investigation was viewed as the sign that Eulex began to carry out its pledge to 'stamp out corruption and "catch the big fish"'.⁸⁷ Public opinion expected arrests and indictments, however, and grew impatient: two months after the searches Eulex's chief prosecutor gave this answer to an interviewer, who had asked him whether he was still convinced that the mission had sufficient evidence against Limaj:

Do you really think we would go that far with such a sensitive case, without having evidence? Or by having only one piece of evidence... there has been a lot of additional information.⁸⁸

Yet the two-year deadline for the investigation expired without any indictment being issued. In the light of the indirect indices of corruption, of the irregularities reported by the press on the basis of official documents, and of the findings that the mission itself confidently disclosed the failure of this investigation is inexplicable.

Press reports which I can confirm suggest that two powerful players might have desired this investigation to fail: the US embassy was reportedly very concerned at the prospect of an indictment of Limaj – who had just signed the highway contract (see § 2.1) – and worked on an 'exit strategy' or 'backdoor exit' for him.⁸⁹ The prime minister probably had the same intention, because shortly after the searches the press – and a source I consider credible – reported Limaj as saying that if he 'fell' to this investigation he would 'drag' the prime minister down with him (it is likely that if centrally organized corruption existed in road-building both would benefit from it).⁹⁰

The book (pp. 145–46) discusses these and other alternative explanations of the reasons why Eulex first launched and then shelved this investigation: none of them is compatible with the mission's mandate. This analysis is confirmed by the fact that two and half years later Eulex resurrected this investigation (see § 2.13), after the mission's

⁸⁷ Aliu, 'EU Kosovo mission fights back against critics'.

⁸⁸ 'EULEX chief prosecutor "terrified" at level of Kosovo corruption'.

⁸⁹ Respectively, Anderson, 'State of constriction?', p. 44, and Lewis et al., 'US ambassador to Kosovo hired by construction firm he lobbied for' reports; see also notes 35–36, above, and the corresponding text. Such plans are discussed also by Vetton Surroj, 'Operacioni Limaj (3)', *Koha Ditore*, 16 July 2012, at <http://www.kohaditore.com/?page=1,13,107468>, who claims to have discussed them with the US ambassador: the idea to favour Limaj's emigration to Canada, in order to quell the corruption scandal. The author of this article is a prominent politician and intellectual, who had been personally and publicly attacked by the ambassador in the previous weeks: although his article (and three other ones) might have been influenced by this conflict, his revelations seem credible.

⁹⁰ Limaj's threat was reported by the Kosovo press and by Andrew Rettman, 'Organised crime problem dogs EU record on Kosovo', *euobserver.com*, 25 January 2012, at <http://euobserver.com/24/115010>.

management changed and its crime-repression policy was brought closer to its official mandate (see § 3.5, below). This proves that the 2010 searches had collected enough evidence to sustain an indictment, and that in 2010–11 the mission's prosecutors chose not to act upon such findings.

2.8 Corruption: the case of the central bank

Suspected of abuse of office, corruption and money laundering, on 23 July 2010 the governor of Kosovo's central bank was arrested, handcuffed, and taken out of the main entrance of the central bank by a team of uniformed Kosovar policemen holding guns in their hands. This scene was recorded by the television cameras, because from inside the central bank the police warned the media of the time at which the governor would be taken out of the building.⁹¹

None of the corruption charges seemed plausible (disclosure: the governor is a friend of mine). In particular, the governor was accused of having accepted bribes to issue insurance licenses. Only two licenses were issued under his governorship, however: in one case the alleged bribe was unaffordably high (€500,000: more than the yearly turnover of this insurance company), and in the other case it was represented by assets on which no evidence was indicated. And yet the governor was accused of having issued also an unspecified number of other licenses, in exchange for bribes 'on average' of €50,000: neither the licenses nor the recipients were indicated. The money laundering charges and the gravest abuse of office ones plainly misunderstood both the underlying transactions and the role of the central bank. Some of the lesser charges were equally unconvincing, due to mistaken identities or similar factual errors; other ones were more plausible, but involved actions that appeared to have no criminal nature.

All the main allegations closely corresponded to those brought against the governor by newspapers close to the elite during the year that preceded the arrest, in what seemed a coordinated campaign.⁹² The governor was criticized also by the president and the prime minister. It was clear that the elite wished to replace the governor in order to acquire control over the central bank: weeks before the arrest a senior international official – who, like me, had repeatedly expressed his concerns to the government for such attacks on the head of Kosovo's most efficient and reliable institution – told me that the deputy prime minister told him that the government and the elite would cease their public campaign against the governor and move on to a 'legal track'.

The independent media subsequently provided greater details on the background for these attacks. The elite reportedly turned against the governor for three main reasons.⁹³ First, he repeatedly rejected the request to deposit certain funds held at the central bank – especially the privatization proceeds (€600 million) and the public pension fund (then amounting to about €300 million), equivalent in the aggregate to about 21 per cent of the

⁹¹ See Lawrence Marzouk, 'Cock-up or conspiracy? The arrest of Kosovo's central bank governor', *Pristina Insight* No. 62, 22 April 2011; a version of this article is available at <http://www.balkaninsight.com/en/article/cock-up-or-conspiracy-the-arrest-of-kosovo-s-central-bank-governor>. Footage of the governor's arrest, and Eulex's spokesperson comment, are available on video at: <http://tvnewsroom.consilium.europa.eu/event/eulex-kosovo/eulex-kosovo-central-bank-governor-arrested>.

⁹² Ibid. (disclosure: I was interviewed for this article, including on this and the following points).

⁹³ Ibid.

2011 GDP – in three Middle Eastern banks indicated by the elite.⁹⁴ This request was addressed to the central bank rather because it both manages the privatization fund and supervises the investment choices of the pension fund trustee.⁹⁵ Indeed, the media campaign against him began with criticism for the manner in which the central bank invested the privatization proceeds, and a senior central bank official told the press that

[t]he governor was willing to bend the rules by bringing in some of the Prime Minister's men to key positions but he was not willing to break the law by touching the pension funds, or the privatisation money.⁹⁶

Second, the governor repeatedly rejected the request to issue an insurance license to a company that did not meet the necessary requirements and showed every sign of being a money-laundering scheme instead. According to these reports, never denied, in a final attempt to obtain the license a former KLA commander and PDK politician – the feared mayor of Skënderaj, on whom see §§ 2.18 and 2.20 – threatened the governor of serious consequences if he did not issue it: the meeting was held at the central bank and in the presence of the finance minister (of PDK), who accompanied the mayor to the meeting.⁹⁷

I was aware of these episodes well before the arrest, but did not know of a third one: few days before the arrest the governor ordered an internal inquiry on a senior central bank official – a close associate of the prime minister, reportedly – who apparently extorted money from an insurance company (the official in charge of this inquiry was not arrested together with the governor but was equally investigated).⁹⁸

The governor was arrested by Kosovo's police under the direction of a Kosovar prosecutor believed to be close to the prime minister: the head of the anti-corruption task force within SPRK, the special prosecution office led by the Eulex's second highest-ranking prosecutor. His arrest was confirmed by a member of Kosovo's judiciary, which is exposed to interference, corruption and intimidation by the political elite. Through the governor's lawyer, moreover, I received the charges brought against him and discussed them with the governor's predecessor, a senior central banker from an EU member states who was selected by the IMF to lead Kosovo's central bank in 2005–08. Our assessment was that most charges and all the gravest ones were extremely implausible. I therefore suspected that this operation was intended to punish the governor for having protected the independence and the integrity of the central bank. I shared these concerns with senior representatives of the international community, and three days after the arrest we jointly advised Eulex to take over this case and examine the charges carefully (perhaps inappropriately, during that meeting I privately told the head of SPRK that such

⁹⁴ Ibid.: this request was reportedly first presented by a former adviser to the prime minister, of Middle Eastern origin.

⁹⁵ On the privatization proceeds (on which see note 24, above, and the corresponding text), see International Monetary Fund, *Country Report* No. 12/180, p. 11, which correctly recalls that they cannot be transferred to the government 'before clarity has been established that these funds are free of claims from creditors and other stakeholders.' Until then, under Kosovo law, they must be placed, through the intermediary of the central bank, in safe and liquid investment-grade securities. On the pension fund, International Monetary Fund, *Country Report* No. 12/100 (April 2012), at <http://www.imf.org/external/pubs/ft/scr/2012/cr12100.pdf>, p. 12 indicates that Kosovo's IMF program is, *inter alia*, intended to shield the pension fund 'from pressures to fund budget deficits.'

⁹⁶ Marzouk, 'Cock-up or conspiracy?'

⁹⁷ Ibid.

⁹⁸ Ibid.

charges ‘seemed implausible’, and made myself available to explain why). The mission assigned the case to its own pre-trial judges and the head of SPRK took direct responsibility over the investigation, although she conducted it in cooperation with the Kosovar prosecutor who began it.⁹⁹

In the important interview we quoted in § 1.2, Eulex’s chief prosecutor – hierarchically superior to the head of SPRK, who is the mission’s chief *special* prosecutor – discussed also this case. The interviewer first asked whether the governor’s arrest ‘was led by you’. The chief prosecutor answered that

[i]t is a SPRK case, led by a *local* prosecutor. The decision for the detention was also issued by a *local* judge. [Q] Is EULEX involved in this case? [A] Yes, of course. [Q] You have added two additional charges, what are these charges about? [A] He is charged with receiving a bribe and abusing an official position...¹⁰⁰

The interviewer then noted that ‘[a] letter was sent by the former international governor’: this letter, which I reviewed and marginally contributed to, explained why the charges appeared implausible. The chief prosecutor made this comment:

I have heard that [the former governor] sent a letter from abroad. [The speaker of parliament] has deemed this as *interference with justice*, and I have to agree with him.¹⁰¹

Asked a more general question, on whether he received pressure from diplomatic circles about Eulex’s investigations, the chief prosecutor answered that although he did receive pressures in the past, they stopped. Asked for clarifications, he said that it was ‘not a big deal’, and pointed to only one example:

[w]hen the governor was arrested, there were immediate reactions and concerns. [Diplomats and international officials] asked us what was going on, because the financial sector could be destabilized... All internationals [*sic*] were concerned about the financial stability of Kosova...¹⁰²

Such intervention might have been inappropriate, as the chief prosecutor argues: but the mission was made aware of the sensitivity of the case and was provided with an analysis of the charges, which outlined in some detail why, even assuming that they were supported by adequate evidence, most of them did not withstand scrutiny. Likewise, those who wrote that letter might have been ‘biased’, as the head of SPRK told me: but the mission (arguably) had a duty to consider its arguments anyway, because their strength or weakness was independent of the motives of those who articulated them.

The mission detained the governor for four months. Its judges issued at least six rulings ordering, confirming or extending his pre-trial detention: they only deal – rather

⁹⁹ Besides the arrest warrant, the Kosovar prosecutor signed (directly or through an Eulex prosecutor) the indictment (cited at note 105, below) and the appeal against its rejection: Special Prosecution Office of Kosovo, case No. PPS 64/10, *Rexhepi*, Application to appeal the dismissal of the indictment, 19 December 2011 (unpublished). The head of SPRK signed at least one of the applications to extend the pre-trial detention of the governor: Special Prosecution Office of Kosovo, case No. PPS 64/10, *Rexhepi*, Application for the extension of Detention on Remand, 18 October 2010 (unpublished). Both applications – which I received from the defendant – are available at <http://eulexannex.wix.com/draft>.

¹⁰⁰ ‘EULEX chief prosecutor “terrified” at level of Kosovo corruption’ (emphasis added).

¹⁰¹ Ibid. (emphasis added).

¹⁰² Ibid.

superficially – with the question whether the governor might flee or tamper with the evidence. The charges receive no critical examination, and the evidence is not reviewed in any detail: these rulings generally only evoke its existence, stating that the evidence brought by the defence was insufficient to counter it.

On 28 October, during the third month of detention, the parliament dismissed the governor (who had been suspended immediately after the arrest). The dismissal was unwarranted: *per se*, a prolonged pre-trial detention is not a lawful reason for dismissal (despite my insistence, however, the ICO did not stop this decision).

In a hearing held one week before the parliament's vote the pre-trial judge was helped by the defence to remark that three of the main charges – those on the issuance of insurance licenses in exchange of bribes – 'were supported *only* by anonymous letters'.¹⁰³ The judge therefore advised Eulex's prosecutors that, unless better evidence was presented, the governor might be released. After the hearing ended the prosecutors delivered additional evidence to the judge, without disclosing it to the defence. On the basis of such (secret) evidence the judge extended the detention of the governor for one month.

These facts are established by the appellate ruling that accepted the objections of the defence, qualifying the use of secret evidence as a breach of the governor's right to a fair trial under the European Convention on Human Rights.¹⁰⁴ The court confirmed the extension of the governors' detention, however. This judgement was rendered two days before the parliament voted to dismiss the governor. He was released on bail three weeks later.

The indictment was issued after an unusually long delay, in August 2011: all the most serious charges had been dropped, including the three that were based on anonymous letters and secret evidence.¹⁰⁵ The pre-trial judge rejected all six charges in the indictment, because four alleged acts that, even if proven, do not amount to criminal offences, and two lacked enough evidence to justify a trial.¹⁰⁶ The prosecution challenged this decision but the appeals court confirmed it.¹⁰⁷

The governor brought a complaint before Eulex's Human Rights Review Panel (see § 1.2 above), because all but two of the dozen charges that justified his arrest and detention proved *entirely* groundless, and the other two lacked any serious evidence. The complaint was declared inadmissible.¹⁰⁸

¹⁰³ District Court of Pristina, case No. PPS 64/10, *Rexhepi*, Ruling, 26 October 2010 (unpublished), p. 4 (emphasis added). This ruling – which I received from the defendant – is available at <http://eulexannex.wix.com/draft>.

¹⁰⁴ *Ibid.*, pp. 4–6.

¹⁰⁵ Special Prosecution Office of Kosovo, case No. PPS 64/10, *Rexhepi*, Indictment, 5 August 2011 (unpublished).

¹⁰⁶ District Court of Pristina, case No. KA 547/2011, *Rexhepi*, Ruling, 12 December 2011 (unpublished). This ruling – which I received from the defendant – is available at <http://eulexannex.wix.com/draft>.

¹⁰⁷ District Court of Pristina, case No. PPS 64/10, *Rexhepi*, Ruling, 11 January 2012 (unpublished). This ruling – which I received from the defendant – is available at <http://eulexannex.wix.com/draft>.

¹⁰⁸ Human Rights Review Panel, case No. 2011-23, *Rexhepi*, Inadmissibility decision, 20 March 2012, at <http://www.hrrp.eu/docs/decisions/Inadmissibility%20decision%202011-23%20pdf.pdf>.

Speaking about this case, in May 2012 Eulex's chief supervisor – the 'Civilian Operations Commander' of the EU – qualified it as a 'miscarriage of justice'.¹⁰⁹ This commendably honest comment captures the gravity of Eulex's mistakes, but neglects other equally troubling aspects of this case: the prosecutors' unusual zeal, which mirrored the determination with which the elite attacked the governor before his arrest; the remarkable correspondence between the baseless allegations printed by the elite's newspapers and the charges that the prosecutors brought against the governor; and the fact that the anonymous letters and the secret evidence helped the prosecutors to extend the governor's detention precisely when the parliament prepared to dismiss him.

According to the governor and other central bank officials those anonymous letters and other parts of the evidence were part of dossiers constructed by SHIK – the informal intelligence service of the leading faction of the elite (see § 1.3) – and were used also for the media campaign. They were based on information that could only be supplied by easily identifiable sources within the central bank or within financial and insurance companies, which had been fined by the central bank for irregularities. Yet Eulex ignored these issues: the governor would have been interviewed had an investigation been opened on the origin and use of such dossiers and anonymous letters.

With these dossiers the elite aimed at removing the governor from office, to appoint a more pliable successor. The first aim was achieved – due also to the ICO's failure to stop the governor's unwarranted dismissal – but not the second one, because this time the ICO acted: it opposed the appointment of the elite's preferred candidate, who was inadequate and ineligible. Incredibly, the same Eulex prosecutor who led the case against the governor – the head of SPRK – opened an investigation against the head of the ICO (and against me) for having opposed the appointment of that candidate. The head of Eulex's prosecutors later informed me that he stopped this investigation because, besides our diplomatic immunity, it had no basis; the head of SPRK was later (informally) dismissed by the mission – see p. 147, note 94 of the book – but only after I criticized the scandal of the anonymous letters in the Kosovo and international media.¹¹⁰

If we look at the effects of these two investigations – leaving aside the intentions of those who conducted them – and at the plans of the elite, their correspondence is striking: the first investigation provoked the dismissal of the governor, and the second one – had it continued – could either dissuade the ICO from opposing the elite's candidate or cause the annulment of the appointment of the person who became governor in his place. This second investigation darkens the shadow that the disconcerting alignment between the prosecutors' and the elite's actions already cast on this affaire.

Two years later the case discussed next added other details to this picture, concerning the integrity of the Kosovar prosecutor who arrested the governor – the chief of SPRK's anti-corruption task force – and the quality of Eulex's supervision of his work.

¹⁰⁹ Such remark was made at a public conference held on 25 May 2012, for which I did not find footage or a transcript: I rely on my notes; this official used that expression answering a question concerning this and other cases, none of which can be described as a miscarriage of justice. The announcement for the conference is available at http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/esdp/130407.pdf, and part of the discussion is reported by Nikolaj Nielsen and Andrew Rettman, 'EU mission in Kosovo to lose 450 policemen', *euobserver.com*, 25 May 2012, at <http://euobserver.com/24/116393>.

¹¹⁰ See, e.g., 'Eulex in Kosovo: a shining symbol of incompetence', *The Guardian – Comment is free*, 9 April 2011, at <http://www.theguardian.com/commentisfree/2011/apr/09/eulex-kosovo-eu-mission>.

2.9 Corruption: the case of the chief anti-corruption prosecutor

On 2 April 2012 Eulex arrested the chief of SPRK's anti-corruption task force on charges of abuse of office: he obtained money from the potential target of an investigation in exchange for lenient treatment. The charges were proved: on 23 May 2013 Eulex convicted him. He challenged this judgement, and the appeal is pending.

This Kosovar prosecutor received that appointment in 2009, and worked under the direct supervision of Eulex's second highest-ranking prosecutor. Besides the central bank case, these two prosecutors presumably cooperated closely also on other corruption cases discussed in this paper. As Eulex was responsible for the appointment and supervision of this prosecutor, his conduct casts serious doubts on the mission's capacity to evaluate and oversee the Kosovar judicial officials who work under its direct command. Eulex eventually convicted this prosecutor, of course, but the evolution of this case raises more unsettling questions.

The prime minister himself established the anti-corruption task force of SPRK, in early 2010, and insisted for the appointment of this Kosovar prosecutor as its chief.¹¹¹ Two days after his arrest, the prosecutor in fact declared that he was

surprised that Prime Minister Hashim Thaçi has not intervened yet after his arrest. Claiming that he is completely innocent, [the accused] said that Americans should investigate his case. Meanwhile, [his] attorney quoted his client as saying that he had the backing of Prime Minister Thaçi and his government.¹¹²

Unwittingly, these calls for help betray the widely suspected links between this prosecutor and his actions, on one hand, and the leading faction of the elite and its interests, on the other. Likewise, his call for a US investigation – which the accused evidently expected to be fairer to him than a European one – is consistent with the equally widespread belief that the prime minister is a 'US darling'.¹¹³

The arrest and conviction of this prosecutor were based on the statements of a citizen from whom he extorted €20,000. The victim reported this to Eulex in March 2011 – thirteen months before the arrest – and reiterated his report in October 2011, because the mission had seemingly taken no action.¹¹⁴ As Eulex's inaction continued, in February 2012 the victim informed a journalist. She researched the story and eventually contacted Eulex, for confirmation of some facts: the mission asked her to delay publication – she told me – and arrested the prosecutor three days later.¹¹⁵

¹¹¹ See Fatmir Aliu, 'Kosovo anti-corruption chief held for corruption', *Balkan Insight*, 3 April 2012, at <http://www.balkaninsight.com/en/article/kosovo-s-anti-corruption-chief-arrested-for-corruption>.

¹¹² UNMIK, *Media Monitoring Headlines*, 5 April 2012, at <http://media.unmikonline.org>, quoting Kosovo's most respected and widely read newspaper (*Koha Ditore*).

¹¹³ Rettman, 'Organised crime problem dogs EU record on Kosovo'.

¹¹⁴ See Selville Bajrami, 'Bosi i antikorruptionit në burg', *Zeri*, 3 April 2012, at <http://www.zeri.info/artikulli/1/1/46848/bosi-i-antikorruptionit-ne-burg/>.

¹¹⁵ The arrest and the investigation are described in Eulex, Press releases, 2 and 4 April 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0257.php> and <http://www.eulex-kosovo.eu/en/pressreleases/0261.php>, respectively. The days elapsed between the journalist's meeting with Eulex and the arrest might have been two or four instead: I did not take accurate notes of this in my conversation with the journalist, which was held in June 2012.

This acceleration was clearly motivated by the risk that Eulex's inaction on such a delicate case would be exposed, and not only by the possibility that the publication of the article would lead the prosecutor to destroy evidence or intimidate possible other witnesses. Eulex's long inaction despite the victim's insistence rather suggests that the mission would not have acted had such a risk not emerged. The motives for ignoring this case are evident, because it unveils very negligent oversight over this prosecutor and gives a troubling connotation to his close cooperation with Eulex's chief special prosecutor on the central bank case, which had already embarrassed the mission. Indeed, although the press release on the conviction of this prosecutor notes that he worked in SPRK, it omits the most salient information, namely that he held the crucial position of chief anti-corruption prosecutor and reported directly to the head of Eulex's special prosecutors.¹¹⁶ Moreover, Eulex may have been reluctant to investigate a prosecutor who was famously close to the prime minister and might have acted – in the central bank case and in other equally sensitive ones – under the instructions of the leading faction of the elite.

On the day after the arrest the journalist published her article: unlike other reports, it describes the charges and the victim's reports in remarkable detail, confirming that she did have prior knowledge of them, as she had told me.¹¹⁷ Her article also notes that the arrested prosecutor was 'close' to the Eulex prosecutor leading SPRK, and speculates that the investigation might be extended to the central bank case, because the governor alleged that near the end of his detention – after his dismissal – an intermediary claiming to speak on behalf of the Kosovar prosecutor offered to accelerate his release from jail in exchange for money.¹¹⁸

The extortion that led to the arrest of this prosecutor was unlikely to be an isolated crime, in fact, and presumably was but one instance of a set of similar crimes. The prosecutor was convicted only for that episode, instead. It must be recognized that without the victims' support – which is rare in Kosovo – it may have been impossible to discover other crimes committed by that prosecutor: but investigating his behaviour in the central bank case would have been inconvenient for the mission, because it would have led it to examine the quality and origin of the evidence he used, and to assess also the reasons why the head of Eulex's special prosecutor did not stop this unfounded investigation soon after the governor's arrest.

To conclude, besides revealing a remarkable degree of incompetence, this case indicates that the Eulex-led SPRK was permeable to improper influence, at least until the first half of 2012, by reason of the presence in a very delicate position of a criminal – a probable one, admittedly, as the appeal is pending – who operated with the prime minister's support and, presumably, also according to his instructions. Besides the central bank case, that is the period during which this office declined to open at least seven obviously warranted but politically inconvenient corruption cases (§§ 2.1–2.5 and 2.7), and failed to obtain any convictions in an equally sensitive case – discussed in the next paragraph – in which it disposed of clear documentary evidence of at least one crime:

¹¹⁶ See Eulex, Press release, 23 May 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0444.php>.

¹¹⁷ Compare Bajrami, 'Bosi i antikorupsionit në burg', with Aliu, 'Kosovo anti-corruption chief held for corruption' and Fatos Bytyci, 'Kosovo anti-corruption tsar arrested for corruption', *Reuters*, 3 April 2012, at <http://www.trust.org/item/20120403153800-oxnhb/?source=search>.

¹¹⁸ Bajrami, 'Bosi i antikorupsionit në burg'.

SPRK's permeability to improper influence is a plausible, albeit partial, explanation of these choices.

2.10 Corruption: an inexplicable telecom deal

In 2007 the mobile telephony branch of the state-owned telecom company (PTK) began to face aggressive competition from the private company (IPKO) that had just won Kosovo's second GSM license. As PTK felt unable to match IPKO's offer in a wide segment of that market, it chose to create a 'virtual mobile phone operator' capable of competing against IPKO: this business would be established as a joint venture, in partnership with a company disposing of good marketing experience. The crimes investigated by Eulex concern the terms and rationale of this deal, which must be described in some detail.

The plan was that PTK would transfer to the joint venture part of its GSM frequencies and the use of its telecommunications infrastructure, whereas PTK's partner would contribute its marketing skills. Thanks to better marketing and lower overhead costs than PTK's – because it was a 'virtual' operator – the joint venture would offer tariffs and services capable of attracting new customers and at least part of those customers who were expected to switch from PTK to IPKO. This deal thus aimed at re-capturing such customers: through the intermediary of the joint venture, its part owner PTK would still receive (part of) the profits generated by their phone calls. On the assumption that PTK was itself unable to match IPKO's more competitive offer, this was a rational strategy.

Naturally, such a deal made sense for PTK only if it owned the large majority of the share capital of the joint venture, because shareholders receive a percentage of the profits of their company that is equal to the percentage of capital they own. Furthermore, PTK needed to have full control – namely, a majority shareholding – over the joint venture in order to avert the risk that it would compete against PTK rather than against IPKO (a risk that has a colourful name in business jargon: 'cannibalization').

PTK needed a partner with good marketing skills, however, and any potential partner would likewise seek to obtain as large as possible a shareholding in the joint venture, in order to maximize its own future profits. But PTK's negotiating power was stronger than any potential partner's, because the joint venture needed GSM frequencies and infrastructure which only PTK could provide (Kosovo still has only two GSM licenses, and IPKO created a similar joint venture only later, in response to PTK's strategy). As its own contribution to the joint venture had no substitutes, PTK could therefore select several potential partners and force them to compete among each other on the terms of the deal.

Moreover, the founders of a company receive a shareholding that is proportionate to how much they contribute to its share capital. The planned joint venture needed some cash to set up its small operations (marketing, billing and administration), the partner's marketing skills, part of PTK's GSM frequencies and the use of its infrastructure. Clearly, the most valuable contribution was PTK's, which had a high and measurable cost (equal to a portion of the value of PTK's GSM license and infrastructure): marketing skills have very uncertain value, conversely, which anyway depends on the company's capacity to generate sales and profits.

In short, PTK had the interest, the opportunity, the right and the duty – because it was state-owned – to request a shareholding representing the large majority of the capital

of the joint venture: accepting a lower shareholding would have entailed an unjustified subsidy to its partner.

PTK identified a possible partner – a Kosovar-Albanian company named Dardafon – and negotiated with it the terms of the joint venture. In early 2008 they reached a preliminary agreement whereby PTK would own 75 per cent of the share capital of the joint venture and Dardafon would own the remaining 25 per cent.

In mid 2008, after Kosovo's independence, the government replaced PTK's board of directors with persons of its own choosing, who in turn appointed a new managing director. The latter and most board members were persons close to the prime minister or his PDK party. The press later reported that in the same period part of the owners of Dardafon also changed, and that the new owners were close to PDK.

Few weeks later PTK and Dardafon revised their preliminary agreement. They inverted the allocation of the share capital of the joint venture: 25 per cent to PTK and 75 per cent to Dardafon. The contribution of the two parties did not change: only their valuation changed, by a factor of 3. The independent media criticized this switch: the government publicly defended it and the contract was rapidly signed, but the allocation was marginally improved: 27 per cent to PTK and 73 per cent to Dardafon.

This switch directly contradicted PTK's strategy and was manifestly damaging for it. Not only did PTK unjustifiably lose two thirds of the value of its contribution to the joint venture and two thirds of its future profits, but it also exposed itself to the risk that the joint venture would compete against it (the 'cannibalization' risk). The joint venture could in fact become a syphon through which a significant part of PTK's profits would be permanently transferred to Dardafon's private owners: controlled by the latter, the joint venture would use PTK's own GSM frequencies and infrastructure in order to attract existing or potential PTK customers, and would then transfer to Dardafon 73 per cent of the resulting profits: only 27 per cent of them would accrue to PTK.

PTK operated in a strategic market, was Kosovo's most profitable company and one of the largest ones; furthermore, it was projected to be privatized (see pp. 156 and 204 of the book), and the new version of the deal threatened to significantly depress the sale price. Hence, as I learned of the switch I asked PTK to provide me with information and documents about it. PTK signed the contract (hurriedly) before sending them.¹¹⁹ In addition to these documents I eventually obtained also a report outlining the reasons why the new version of deal was damaging for PTK, which some managers of the company delivered to the managing director and the board well before the deal was signed: but the

¹¹⁹ On this matter I must report a conflict of interest, albeit of a moral nature, because I was publicly attacked by PTK's managing director. Anderson, 'State of constriction?', p. 40 write that the managing director 'stormed out of a meeting with [me], refusing to take part in what it described as interrogation.' The meeting was held about a year after the deal and concerned PTK's privatization process, its declining profits and certain strategic choices about which I had reservations. One of the questions I posed to him was why in the 6 months after he took office PTK employed about 700 people, raising its workforce by more than 30 per cent: the only intelligible part of his reply was that he planned, in the next three years, to open 36 new kiosks to sell SIM cards. Although I told him – in these or equivalent words – that his answer made no sense, the meeting lasted for another hour or so, during which we discussed more significant issues than that one. He left my office in a state of visible agitation: he first went to a European embassy to complain about my conduct during the meeting (he is citizen of an EU state too), and then went to a newspaper. His interview was published on the following morning under the title 'Arrogance of the ICO' (Arben Hyseni, 'Arroganca e ICO-së', *Express*, 29 October 2009). That morning the ambassador called me, and came to my office in the afternoon to explain the behaviour of the managing director: my assessment was that he had lost his lucidity.

minutes of the board meetings in which the deal was analysed and approved showed that the discussion was short and did not touch the arguments articulated by the report.

I first explained to Eulex's prosecutors why – in its new version – the deal was irrational and damaging for PTK during a meeting on PTK. I then sent them the documents I obtained, together with a report outlining my analysis of the deal. I met them one more time, at their request, to discuss both the deal and the significance of such documents. On each occasion, I noted that, in my view, such documents were sufficient to prove that the managing director who negotiated and signed the contract and the board members who approved it committed a crime: knowingly damaging the company they managed. The question, rather, was to find out why they committed that logically incomplete crime: whether bribes had been paid, by whom and to whom. As the deal involved significant economic interests, I added, the investigation presumably had to go beyond the immediate protagonists, because it seemed inconceivable that PTK's management would decide this deal autonomously and retain any bribes for themselves. The decision on this deal probably involved the prime minister, in fact, because although PTK fell under the competence of Limaj's transport and telecommunications ministry, the company was reportedly a fiefdom of the prime minister and his faction, and both its chairman and managing director were considered close to him and associates of his faction.

Eulex's prosecutors (SPRK) issued the indictment in June 2011. They indicted only the managing director and the chairman of PTK – and only for that first, incomplete crime, and for abuse of office – and three owners and managers of Dardafon (for fraud and forgery).¹²⁰ They failed to uncover the broader ramifications of this deal, and ignored the responsibility the other board members who voted for the deal.¹²¹ This indictment was the minimum that Eulex's prosecutors could do, based on the documents they had. They also showed little interest in receiving additional documents about the crimes: on 4 May 2010, more than one year before the indictment, I delivered to them some documents I had received, concerning the Dardafon deal and other cases of probable wrongdoing at PTK; one of such documents could not be sent because the electronic version I received could not be printed, but – I added in my letter – I was ready to deliver the electronic version to them: the prosecutors never asked for it. In addition, it is interesting to note that Eulex's prosecutors acted shortly after I published articles in the Kosovo and international press in which I criticized the mission's conduct in other cases: naturally this does not prove that without such articles they would not have issued the indictment, but, had they not done so, they could certainly expect me to unveil the fact that they disposed of documentary evidence of the crimes surrounding this deal and were not acting upon it.

Between 2008 and 2010 PTK's profits steeply declined. Part of this decline was unquestionably due to the direct and indirect effects of this deal, because the joint venture proved rather successful and probably acquired its market share at the expense less of IPKO than of PTK (while in that market IPKO's revenue grew, PTK's dropped

¹²⁰ See Eulex, Press release, 1 February 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0226.php>.

¹²¹ These persons are political appointees lacking the necessary professional qualifications for their function, and Eulex might have judged that they failed to understand the deal: but also the chairman lacks such qualifications, and was nonetheless indicted.

by more than 30 per cent).¹²² Before issuing the indictment, Eulex's prosecutors asked me to appear as a witness on precisely these questions. My diplomatic immunity – which the ICO (justifiably) refused to waive – barred me from complying with this request, but I explained to the prosecutors that I was an unnecessary witness because I had no facts to report, beyond those described in the (official) documents I provided to them: I could only offer an interpretation of such documents, which the prosecutors could themselves articulate drawing on my reports (which they evidently found convincing).

The trial centred on the question whether the deal was damaging for PTK. Both the defence and the accused presented expert evidence on this point. Eulex acquitted all the accused upon the argument that the deal was not damaging.¹²³ The discussion of this question is limited to this rather unclear sentence:

the Court analyzed the grounds and the conclusions of both expert reports submitted before the Court and found no conclusive facts and/or findings leading to cause damage to PTK whatever might be its value, having in mind a commercial perspective of this [deal], as well as its developments when concretely applied in the field.¹²⁴

The arguments and conclusions of the experts – which a court ought to review and critically analyse, as any other source of evidence – are not even mentioned, nor does the judgment discuss the reasons and effects of the switch in the shareholdings held by PTK and Dardafon in the joint venture. On the central point of the case, therefore, the court gave no reasoning: this is an unmotivated judgement.

One of the defendants retained a US law firm as counsel, which writes on its website that '[t]he Court found it notable that despite having no burden of proof, the defense took the lead in providing and highlighting the most useful testimony and evidence at trial.'¹²⁵ This suggests that the prosecution was weak in presenting its case, or chose inadequate expert witnesses.¹²⁶ But even if the prosecution was unable to illustrate the indirect effects of the switch ('cannibalization' and the 'syphon' effect), at least one direct effect of it hardly needed an explanation: why was the allocation of the shares in the joint venture inverted – changing such shareholdings by a factor of 2.9 – despite the fact that PTK's and Dardafon's contributions to its capital did not change? The court ignores also this question, which alone proves that the switch damaged PTK.

This unmotivated judgement is therefore also wrong, and manifestly so. These two characteristics might be linked, because it was difficult to build a seemingly coherent argument to support that decision. Moreover, the judgement was probably invalid because the panel that issued it included a jurist who does not seem to meet the

¹²² No official data on market shares in Kosovo's mobile phone market is available: our assessment is based on data provided by PTK (which might overstate its revenue).

¹²³ Basic Court of Pristina, case No. 279/2012, *B.D. et al.*, Judgement, 28 June 2013, at [http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/BasiCourtPrishtina/279-2012/\(2013.06.28\)%20JUD%20-%20%20B.D.%20et%20alia%20\(BC%20PR\)_ENG.pdf](http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/BasiCourtPrishtina/279-2012/(2013.06.28)%20JUD%20-%20%20B.D.%20et%20alia%20(BC%20PR)_ENG.pdf).

¹²⁴ *Ibid.*, p. 15.

¹²⁵ Patton Boggs, 'Patton Boggs Secures Acquittal in Rare White Collar Prosecution in Kosovo', Washington DC, 17 July 2013, p. 1, at <http://www.pattonboggs.com/news/patton-boggs-secures-acquittal-in-rare-white-collar-prosecution-in-kosovo>.

¹²⁶ The expert witnesses are indicated at p. 10 of the judgement: 'Hilmi Kastrati, Riza Blakaj and Zhilbert Tafa [for the prosecutors, and, for the defence] Joan Obradors, Paulina Pastor Alfonso, Ceri Jones and Mike Vroobel.'

requirements to serve as a judge in Kosovo.¹²⁷ Yet Eulex's prosecutors did not appeal against this indefensible acquittal. This choice is incomprehensible, and is radically incompatible with the mission's mandate to repress corruption (on which, see pp. 107–8 and 115–16 of the book). As in most other cases we reviewed thus far, the grave errors committed by Eulex's prosecutors – and, this time, also by its judges – can only be ascribed either to a remarkable degree of negligence, or to a reluctance to prosecute crimes that could implicate prominent members of the leading faction of the elite.

2.11 Corruption: the customs case

In 2011 Eulex investigated the head of Kosovo's customs service and the head of its legal department, for abuse of office and misuse of economic authorizations. In the abuse of office charge, the prosecutors alleged that these two officials authorized tobacco imports in excess of the prescribed limit:

[t]he decision to grant further importation of tobacco was allegedly based on political influence and contrary to any sound legal reasoning. This enabled companies to import tobacco with a lower excise rate, causing a material loss of over 5.000,00 Euro to the Kosovo budget.¹²⁸

In September 2011 the indictment was dismissed.¹²⁹ In October the prosecutors' appeal against this decision was partly upheld: the court judged that the abuse of office charges merited a trial.¹³⁰ But in May 2012 the trial court acquitted both defendants.¹³¹ The prosecutors announced an appeal but did not file it, and allowed the acquittal to become final. By accepting it the prosecutors acknowledged that the charges were not well founded, which again suggests a degree of incompetence.

It was true – I recall – that tobacco imports increased significantly between the announcement of an increase in the excise duty and the effective date of this measure. But Kosovo's trade regime is a rather liberal one, and was highly unlikely to provide for any form of import quota on tobacco (I could not check this point; but Kosovo is part of a regional free trade agreement that proscribes such measures). If so, the charges had no basis because the customs service could not prevent such 'excess' imports, no matter how damaging they were for public finances.

¹²⁷ Section 2(b) of UNMIK Regulation No. 2000/6 of 15 February 2000 – which is still in force and binds also Eulex – provides that '[i]nternational judges and international prosecutors shall... have served, for a minimum of five years, as a judge or prosecutor in their respective home country'. On his website (http://www.zenithchambers.co.uk/site/zenith_news/news_archive/jwc_kosovo_diary1.html), one of the two Eulex judges of this panel describes himself thus: 'I am a practising Barrister in the UK... I sit as a Deputy Judge Advocate in the Court Martial and as a Recorder in the Crown Court'. This jurist is not a *judge* in the ordinary sense of the word: he is a lawyer who spends part of his time performing two judicial functions, dealing with ordinary crime and soldiers' crimes. Moreover, this jurist does not seem to meet the 5-year criterion. On his application to Eulex, he writes that

[t]he minimum requirement was 3 [*sic*] years full time judicial experience within the applicant's own jurisdiction... I discovered that 6 years part time experience was acceptable too. Bingo! It was worth applying.

The book (pp. 140–41) discusses Eulex's decision to lower the requirements from five to three years, in breach of that UN regulation, and the reasons for it: this jurist may perhaps satisfy the criteria used by the mission, but not those set forth by the law, which (naturally) do not mention part-time experience.

¹²⁸ Eulex, Press release, 20 October 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0201.php>.

¹²⁹ Eulex, Press release, 6 September 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0182.php>.

¹³⁰ Eulex, Press release, 20 October 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0201.php>.

¹³¹ Eulex, Press release, 17 May 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0282.php>.

In this case, however, Eulex acted in circumstances that do not suggest other aims than enforcing the rule of law. In early 2011, half a year before this investigation began, the elite insistently opposed the renewal of the main defendant's mandate as head of the customs service, even though his candidacy was evidently stronger than that of the person favoured by the elite, namely the other defendant, the head of the legal department. The ICO prevented this manoeuvre, but in 2014, when the three-year mandate of the head of customs expired, the elite promoted the head of the legal department to that position, and thus took full control also of this agency. As Eulex's investigation targeted both officials, however, there is no indication that the mission favoured this outcome. Equally, the mission can be assumed to have acted of its own accord: the press did report numerous rumours or probable cases of corruption in the customs service, but so it did in many other cases that the mission did not investigate. This, therefore, is the first case that Table 5.1 of the book classifies as physiological one, in which the mission can be assumed to have acted in accordance with its mandate and to have committed no serious and demonstrable mistake.

Even if it were proved, however, this was a very minor episode compared to the scale of corruption in the customs service and in Kosovo more broadly. As we said, the highway presumably entailed bribes and illicit profits measurable in four or five percentage points of Kosovo's GDP, and corruption in other road-building contracts might have a similar sum over the last six years: in the aggregate, since Kosovo's independence the illegitimate profits stemming from procurement corruption in the transport sector might have reach some €400 million.

2.12 Corruption: the health ministry case

On 13 July 2010 Eulex arrested the highest civil servant (permanent secretary) of the health ministry. Two weeks later, the mission's chief prosecutor was asked about this 'surprising' choice, as this person 'was allegedly arrested for not paying taxes worth 7,000 euros':

[answer:] [t]his is only one of the charges against him. [Q] What are the other charges? [A] There are more charges against him.¹³²

More than two years later, in October 2012, Eulex indicted the permanent secretary, the former minister of health, and five less prominent defendants for 'several corruption related offences [namely for] attempt of abuse of official position or authority, mistreatment in exercising duties, accepting bribes, tax evasion and obstruction of evidence.'¹³³

On 5 June 2013 the former minister was acquitted of all charges: only the permanent secretary was convicted, and only for 'incitement to falsify official documents in co-perpetration and tax evasion'.¹³⁴ Eulex's prosecutors challenged this acquittal, and the appeal is still pending.

Although the judgment has not been published, there is no reason to doubt that also in this case Eulex acted in accordance with its mandate: it indicted a genuine member of the elite (the former minister), if a not very prominent one; it did so in circumstances that do not suggest any other aim than enforcing the rule of law (the press did report

¹³² 'EULEX chief prosecutor "terrified" at level of Kosovo corruption'.

¹³³ Eulex, Press release, 10 October 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0356.php>.

¹³⁴ Eulex, Press release, 18 June 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0455.php>.

rumours of corruption in the health ministry, but so it did in many other cases that the mission did not investigate); and it challenged the acquittal, suggesting that the prosecutors are confident in the strength of their case.

Also this case can be viewed as as physiological one, therefore. Its evolution, however, again suggests that the prosecutors acted negligently or incompetently, for the charges that apparently justified the arrest (corruption) took more than two years to be formulated and were anyway rejected by the first-instance judges.

2.13 Corruption: the second road-building case

On 16 November 2012 Eulex indicted former transport minister Limaj and six other defendants for corruption and money laundering. The case seemed to stem from a segment of the investigation described in § 2.7, which failed inexplicably after the April 2010 searches. The mission's press release is rather concise, but explains that the corruption charges concern the 2008–10 period and relate to three procurement tenders, in respect of which '[t]he alleged damage to the [ministry's] budget amounts to approximately two million Euros.'¹³⁵ According to the statements of the then head of the mission's prosecutors, the 2010 investigation had a much broader scope.

In July 2013 the pre-trial judge confirmed this indictment, but dismissed the money laundering charges and some lesser ones.¹³⁶ This ruling also confirmed that this investigation has the same origin as the earlier one, and adds interesting details about that operation. The press release summarizes this part of the ruling thus

[w]ith regard to the evidence collected by the prosecution during the investigative stage, the court found several procedural violations and excluded various items of evidence. Particularly the evidence obtained during the searches conducted in the house of Fatmir Limaj and in the server rooms of the Kosovo Assembly on 28 April 2010 were found inadmissible as in the opinion of the court both searches were unlawful because no exigent circumstances existed which would have allowed the police to conduct the search *without a written court order* and *without a written retroactive approval by the competent pre-trial judge*.¹³⁷

In March 2014 Eulex's appeal judges partly revised these findings, and ruled that the evidence gathered during the search at Limaj's residence is admissible, and will therefore be part of the trial together with the evidence collected at the ministry, whose admissibility was not in dispute.¹³⁸

Two observations can be made. First, those searches were conducted by Eulex's police under orders of the mission's SPRK prosecutors, which acted under the direct responsibility of Eulex's second highest ranking prosecutor (who was probably personally involved in such a sensitive case): that one of such searches was conducted unlawfully is yet another signal of the low average competence and diligence of the mission's staff. Second, the unlawfulness of that search is not a plausible explanation for the failure of the 2010 investigation, because the prosecutors considered all of them lawful.

¹³⁵ Eulex, Press release, 16 November 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0372.php>.

¹³⁶ Basic Court of Pristina, *F.L. et al.*, Ruling (cited at note 33, above).

¹³⁷ Eulex, Press release, 29 July 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0465.php>.

¹³⁸ See Eulex, Press release, 6 March 2014, at <http://www.eulex-kosovo.eu/en/pressreleases/0571.php>.

On 19 February 2014 Eulex issued another indictment – yet to be confirmed – against Limaj and four co-suspects, for corruption. The allegations again concern the ‘manipulation’ of two tenders dating from 2008, in respect of which [t]he prosecutor alleges damages to the budget of the Ministry of Transport in the amount of at least 890.000 euros.’¹³⁹

These two indictments confirm our assessment that the failure of the 2010 investigation is inexplicable. But if the mission shelved that investigation for political convenience or for other reasons external to its mandate, it is unclear why it would re-open it two and half years later. From a purely political perspective, little has changed since then: Limaj remains a political opponent of the leading faction of the elite – he left PDK and founded a new party in February 2014¹⁴⁰ – but he probably remains capable of ‘dragging’ the prime minister down with him, as he threatened to do in 2010 (he presumably has information about the prime minister’s likely implication in corruption surrounding PTK and the highway contract). The re-opening of this investigation may therefore be a signal that, between late 2012 and early 2013, the mission has changed its policy (see § 3.5, below).

These two indictments, however, only concern a minor part of the misuse of public money that certainly took place at the transport ministry. Overall, the prosecutors allege an aggregate ‘damage’ to the transport ministry’s budget of about €3 million. Considering that, according to Eulex’s ruling confirming the first indictment, the bribes paid for road tenders generally amounted to 20 per cent of the value of the contracts, the two indictments concern contracts for no more than €15 million.¹⁴¹ This is a mere 7.5 per cent of the transport ministry’s budget for the sole years 2008–09 (€199 million, in the aggregate; these years are useful indicators because the ministry’s budget had not yet been inflated by the expenditure for the highway, which is a separate episode).¹⁴²

2.14 Corruption: the case of the Mayor of Prizren

In late February 2013 Eulex indicted the mayor of Prizren and five other municipal officials, for abuses of office concerning the use of a tract of municipal land and ‘other acts that resulted in the serious violation of rights for a number of [citizens].’¹⁴³ The mayor belongs to PDK and is believed to be close to the prime minister.

A year later all the accused were found guilty.¹⁴⁴ The mayor received a two-year sentence, and the five other defendants received sentences between one and 18 months. All such sentences are suspended for a three-year probation period. The mayor appealed and did not resign, and received the prime minister’s explicit support.¹⁴⁵

As in the previous three cases, Eulex seems to have acted in accordance with its mandate. Unlike in those cases, however, the mission acted against a rather prominent member of the elite *and* obtained his conviction, albeit for what appears to be a small episode. The mission displayed unusual efficiency, moreover, as the trial proceeded

¹³⁹ Eulex, Press release, 19 February 2014, at <http://www.eulex-kosovo.eu/en/pressreleases/0562.php>.

¹⁴⁰ UNMIK, *Media Monitoring Headlines*, 1 March 2014, at <http://media.unmikonline.org>.

¹⁴¹ Basic Court of Pristina, *F.L. et al.*, Ruling, p. 65.

¹⁴² On such data, see Anderson, ‘State of constriction?’, p. 41.

¹⁴³ Eulex, Press release, 27 February 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0412.php>.

¹⁴⁴ Eulex, Press release, 13 March 2014, at <http://www.eulex-kosovo.eu/en/pressreleases/0576.php>.

¹⁴⁵ UNMIK, *Media Monitoring*, 19 and 28 March 2014.

rather rapidly. This case testifies that, if well led, Eulex has the potential to achieve results: the question, on which we shall return, is why such potential was not used during the first four or five years of its mandate.

2.15 Organized crime: a campaign of political assassinations

On 26 November 2009 a member of parliament disclosed the confession of a person who claimed that in 1999–2003 he committed several crimes against officials of the LDK party under the instructions of prominent members of PDK. On 29 November this person released a 30-minute video in which he describes such crimes, and discussed them in a press conference. This unusual confession and its political effects are well described in a cable that the US embassy sent to Washington two days later:

Kosovo's political establishment has been shaken following allegations that [PDK] officials were involved in assassination plots during an effort to consolidate power from 1999 to 2003... It is a political sensation that has rocked [the prime minister]... The [video] contained the confession to murder and other crimes of an individual named Nazim Bllaca, who claims that he was once a member of the PDK's shadowy intelligence and clandestine operations group, the Kosovo Information Service (SHIK)... Bllaca said that he worked for SHIK from 1999 to 2003 and participated in approximately 17 crimes – including assassinations, assassination attempts, beatings, threats, and blackmail – at SHIK's direction. He told the media that he worked for PDK presidency member Azem Sylja [an uncle of the prime minister]... In addition to Sylja, he implicates other senior PDK officials, notably: Xhavit Haliti (MP and Assembly Presidency member), Fatmir Limaj (Minister of Transportation), and Fatmir Xhelili (Deputy Minister of Internal Affairs). During the video confession, Bllaca says that he worked in the execution pillar of the SHIK, which assassinated 'collaborators,' LDK officials, and ICTY¹⁴⁶ witnesses... [This] sensationalist confession has captured Kosovo's full attention... its immediate impact is powerful and negative for a weakened Prime Minister and his PDK party... It confirms a common perception among Kosovo citizens that PDK is ruthless and prepared to employ violence to achieve its goals...¹⁴⁷

Besides its political implications, this confession could lead to the conviction of three (Sylja, Haliti and Limaj) of the six or seven persons whom the Council of Europe and Western intelligence reports qualify as Kosovo's main criminal leaders.¹⁴⁸ This confession could also disorganize SHIK, the elite's main instrument for political crime and a major criminal enterprise in its own right, with estimated annual earnings of \$200 million.¹⁴⁹ For these reasons, observers and international officials alike characterized this case 'as a test of EULEX's credibility' and of its oft-repeated commitment 'to go after "big fish".'¹⁵⁰

¹⁴⁶ The International Criminal Tribunal for the former Yugoslavia, a UN judicial organ sitting in The Hague, which is mentioned in the text corresponding to note 203, below.

¹⁴⁷ Cable sent by the US embassy in Pristina to the State Department on 1 December 2009, at <http://wikileaks.org/cable/2009/12/09PRISTINA533.html>, paras. 1–2, 4–6 and 8.

¹⁴⁸ Council of Europe, 'Inhuman treatment of people', pp. 14–15; note 20, above, provides references for the Western intelligence reports cited in the text.

¹⁴⁹ Phillips, *Realizing Kosovo's Independence*, p. 8.

¹⁵⁰ Cable dated 1 December 2009, paras. 8 and 2, respectively.

The main figures implicated by these allegations reacted immediately and ferociously. The prime minister's spokesman 'announced that Bllaca's statements were false', and the media close to the elite argued that the whistle-blower was 'mad, a blackmailer, a liar, and that Serbia put him up to the confession.'¹⁵¹

The mission reacted slowly instead. It waited four days before arresting the whistle-blower and placing him under protection, and, paradoxically, it did so only when the prime minister pressed it to act.¹⁵² This delay is incomprehensible: this whistle-blower claimed that he was part of the 'execution pillar of the SHIK, which assassinated... witnesses', and therefore needed to be immediately protected from the possible retaliation of his former colleagues. Several international officials and European ambassadors then stigmatized this delay, which was subsequently criticized also by the Council of Europe.¹⁵³

Such criticism would have been harsher had it been known that – as I heard at the time from ICO's management, and as two former Eulex officials confirmed to me – in the months before he disclosed his confession to the public, the whistle-blower rendered it twice to Eulex's chief prosecutor, who did not even make an official record of it. Indeed, in his video the whistle-blower says that he confessed to Eulex 'months' earlier.

The mission's chief prosecutor was rapidly replaced after his inaction was unveiled. In the interview we already quoted, his successor discussed also this case. The first question was whether 'Bllaca was telling the truth':

I can say that there are many reasons to take his statements seriously...
[Q] Is the SHIK under EULEX investigation? [A] Officially, the SHIK no longer exists. But... I am convinced that the members of this organization still exist and function... [Such] organizations change form, but do not cease to exist... especially here, in a country that depends on networks.¹⁵⁴

The investigation led to trials against the whistle-blower and other low operatives of SHIK, who were convicted (the whistle-blower pleaded guilty).¹⁵⁵ None of the higher figures named by him have been tried: one was investigated but was not indicted. Evidently, therefore, his statements were judged credible in the parts in which he incriminated himself and other killers like him, but not credible in the parts in which he accused members of the political elite, despite the fact that such statements exposed him to a high risk of retaliation and were therefore unlikely to be knowingly false. Of course, it cannot be excluded that Eulex merely failed to find other evidence to corroborate these allegations, but this may itself be an effect of unjustifiable four-day delay with which the mission placed the whistle-blower under protection, which sent a very negative signal to other potential witnesses.

¹⁵¹ Anderson, 'State of constriction?', p. 33, footnote 247 and p. 11, footnote 26, respectively.

¹⁵² See the cable dated 1 December 2009, para. 8.

¹⁵³ Ibid., para. 2, and Council of Europe, 'Inhuman treatment of people', p. 7.

¹⁵⁴ 'EULEX chief prosecutor "terrified" at level of Kosovo corruption'.

¹⁵⁵ See Eulex, Press releases, 1 December 2009, 12 January 2010, 13 July 2010, 3 and 19 July 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0033.php>, <http://www.eulex-kosovo.eu/en/pressreleases/0036.php>, <http://www.eulex-kosovo.eu/en/pressreleases/0071.php>, <http://www.eulex-kosovo.eu/en/pressreleases/0460.php>, and <http://www.eulex-kosovo.eu/en/pressreleases/0463.php>, respectively.

In short, the mission initially ignored a broad and reiterated but politically explosive confession; it acted only when such confession was made public; it left the whistle-blower exposed to retaliation for four days; it arrested him when the prime minister asked it to do so; and it investigated only one, and indicted none, of the prominent figures whom the whistle-blower accused. This sequence proves that Eulex disregarded its mandate, and strongly suggests that it did so for reasons of political convenience. This confession could deal a severe blow to Kosovo's main known criminal organization (SHIK), but could also harm its elite, its political institutions and its international image: the mission was probably reluctant to do so, as most of the cases we reviewed already signalled.

The question, rather, is how the Eulex's management could transfer its preferences to the prosecutors in charge of this investigation, whose duty was to act without regard for its political implications. The US diplomatic cable we quoted above proves that the management did – and therefore could – influence the prosecutors' choices, because it reports that

[o]n November 30, the day after Bllaca's video aired, [the prime minister] leaned on EULEX Deputy Head of Mission [his name is indicated] to take immediate action and arrest Bllaca... EULEX did take Bllaca into custody on November 30, but EULEX had originally planned to arrest Bllaca much later in the week.¹⁵⁶

It follows that Eulex's management instructed, or encouraged, the prosecutors to accelerate that arrest. Whatever its motives, of course, the prime minister's request was a sensible one; and by asking the prosecutor to accelerate that arrest the management merely reminded them of their duties. But this channel of influence between the management and the prosecutors – discussed at pp. 137–39 and 145–47 of the book, and on which we shall return at § 3.6 – could potentially allow the management also to advise caution in investigating the main figures implicated in this case. Its outcome suggests that such advice was delivered.

2.16 Organized crime: the trafficking of human organs

The first of these two cases began by chance. In October 2008 a Turk fainted at the airport of Kosovo's capital before boarding a plane to Turkey. It emerged that one of his kidneys had been removed, because he had sold it. The operation had taken place a few hours earlier in a clinic named Medicus, where UNMIK's police immediately arrested the surgeon who had performed it and his assistants.

A few days later Eulex formally began its operations in Kosovo: it received from UNMIK the file of the 'Medicus' case and opened the investigation on 12 November. The indictment was issued almost two years later, on 15 October 2010.¹⁵⁷

The second case began a few weeks later, between December 2010 and January 2011, when the Council of Europe unveiled and then adopted a report – written by Swiss senator Dick Marty, and generally known as the 'Marty report'¹⁵⁸ – on the inhuman

¹⁵⁶ Cable dated 1 December 2009, para. 8.

¹⁵⁷ Special Prosecution Office of Kosovo, case No. PPS 02/09, *Dervishi et al.*, Indictment, 15 October 2010 (unpublished; available at <http://eulexannex.wix.com/draft>); see also Eulex, Press release, 15 October 2010, at <http://www.eulex-kosovo.eu/en/pressreleases/0098.php>.

¹⁵⁸ Council of Europe, 'Inhuman treatment of people'.

treatment of prisoners taken by the KLA in 1999, who were mostly civilians. The report attracted the attention of international public opinion because it finds that in 1999–2000 the KLA harvested organs from the healthiest of its prisoners, murdered for that purpose, and sold them on the black market under the direction of commanders who are now prominent politicians: among others, the report discusses the role of the current prime minister – who in 1999 was the political representative of the KLA – and a medic who is now a member of his government. The allegations in fact go beyond this episode, and Eulex later described them as ‘implicating Kosovo leaders in an organized crime ring involving drug smuggling, organ trafficking and murder.’¹⁵⁹

The investigation on these matters is described in the next paragraph. The Marty report matters also for the Medicus case because it links it to the 1999–2000 episode, on the basis of information which

appears to depict a *broader, more complex organised criminal conspiracy* to source human organs for illicit transplant, involving co-conspirators in at least three different foreign countries besides Kosovo, enduring over more than a decade. In particular, we found a number of credible, convergent indications that the [1999–2000 organ-trafficking episode] is *closely related* to the contemporary case of the Medicus Clinic, not least *through prominent Kosovar Albanian and international personalities who feature as co-conspirators in both*. However, out of respect for the ongoing investigations and judicial proceedings being led by EULEX/the Office of the Special Prosecutor of Kosovo [i.e., SPRK], *we feel obliged at this moment to refrain from publishing our findings in this regard*.¹⁶⁰

After some initial disorientation, on 26 January 2011 Eulex announced that it took the report ‘very seriously’.¹⁶¹ It ought to follow that Eulex should have interviewed senator Marty without delay in order to receive his findings and then investigate the broader ramifications of the Medicus case, which had hitherto eluded the mission’s attention. This did not happen.

On 13 June 2011 Eulex’s prosecutors issued a second indictment – against the Turkish surgeon and the Israeli mediator who allegedly organized the organ-trafficking scheme that used the Medicus clinic as an operating theatre¹⁶² – and on 23 March 2012 they asked senator Marty to appear as a witness at the trial: the pre-trial judge approved this request on 11 May 2012.¹⁶³

¹⁵⁹ *Report of the European Union High Representative for Foreign Affairs and Security Policy to the Secretary-General on the activities of the European Union Rule of Law Mission in Kosovo*, Annex to UN Secretary-General Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Doc. S/2011/281, 3 May 2011, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/281, p. 15. For a critical, but balanced, analysis of these charges, see Nicholas Schmidle, ‘Bring up the bodies: Kosovo’s leaders have been accused of grotesque war crimes. But can anyone prove it?’, *The New Yorker*, 6 May 2013.

¹⁶⁰ Ibid., p. 25 (emphasis added).

¹⁶¹ Eulex, Press release, 28 January 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0119.php>.

¹⁶² See Eulex, Press release, 13 June 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0154.php>.

¹⁶³ See Fatmir Aliu, ‘Marty testimony in Medicus case undecided’, *Balkan Insight*, 10 May 2012, at <http://www.balkaninsight.com/en/article/dick-marty-s-immunity-may-prevent-him-from-testifying-in-medicus-case>, and Fatmir Aliu, ‘Dick Marty called to testify on June 18’, *Balkan Insight*, 11 May 2012, at <http://www.balkaninsight.com/en/article/dick-marty-called-to-testify-on-june-18th>.

But Marty was covered by immunity and could testify only if the Council of Europe waived it. Immunity is a prerogative of the institution, and, just as in the case of the International Committee of the Red Cross, it protects the confidentiality of sources who might otherwise be unwilling to speak: waiving Marty's immunity would have weakened the credibility of the Council of Europe's confidentiality assurances and seriously hampered its ability to conduct investigations that are part of its mandate.¹⁶⁴ Six months before Eulex requested the waiver of Marty's immunity, moreover, the mission's most important protected witness committed suicide, in circumstances which indicated grave negligence by the mission in organizing his protection (see § 2.19). As waiving Marty's immunity might have forced him to unveil the names of his most sensitive sources to Eulex's prosecutors, therefore, doing so could expose them to serious risks, because the mission was evidently unable to protect them adequately. Predictably, therefore, on 29 May 2012 the competent parliamentary committee of the Council of Europe decided against waiving Marty's immunity, with a unanimous vote.¹⁶⁵

The trial began on 4 October 2012, against the Kosovar defendants.¹⁶⁶ On 29 April 2013 Eulex convicted the medics and acquitted the two other defendants who had allegedly helped them.¹⁶⁷ Leaving aside the understandable failure to apprehend the Turkish and Israeli suspects, this was a meagre outcome: an almost four-year long investigation only produced the conviction of those who had been caught red-handed by UNMIK's police.

The judgement discusses also the request to obtain Marty's testimony. The judges wrote that '[i]t was the panel's view that its request would be readily approved', and criticized both Marty and the Council of Europe for having 'quickly retreated behind the cloak of immunity.'¹⁶⁸ A week later the Eulex prosecutor for the case added: '[t]o tell you the truth, I do not understand why [Marty's] immunity was not removed.'¹⁶⁹ Such criticism and perplexities are so unwarranted as to appear disingenuous, especially in the light of the mission's failure to protect a sensitive witness: a waiver of Marty's immunity would have been an extremely surprising decision on the part of the Council of Europe.

In the same interview, that prosecutor – who was in charge of the Medicus case since March 2010 – says that both he and the court 'had a lot of interest for [Marty's] testimony'. This statement is not credible either. Marty had findings about the Medicus crimes, about a related 'complex organised criminal conspiracy', and about the 'prominent' Kosovar personalities who 'feature as co-conspirators' in both. Marty withheld the publication of his publishable, non-confidential findings about those matters 'out of respect' for Eulex's pending investigation, and offered them to the

¹⁶⁴ For instance, Marty also wrote an important report on the 'extraordinary renditions' organized in Europe by the US government, and he presumably talked to persons who would risk their life – in Egypt, Afghanistan, Iraq – if their names were revealed.

¹⁶⁵ See 'Marty might not testify in Medicus case', *Balkan Insight*, 29 June 2012, at <http://www.balkaninsight.com/en/article/marty-might-not-testify-in-the-medicus-case>.

¹⁶⁶ See Eulex, Press release, 4 October 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0193.php>.

¹⁶⁷ Basic Court of Pristina, case No. P 309/10, *Dervishi et al.*, Judgement, 29 April 2013 (this judgement, which is not published on Eulex's website, is available at http://www.magistraturademocratica.it/mdem/qg/doc/Medicus_sentenza_29_aprile_2013.pdf); see also Eulex, Press release, 29 April 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0436.php>.

¹⁶⁸ *Ibid.*, pp. 23–24.

¹⁶⁹ Quoted by Kreshnik Gashi, 'Ndjekësi i tregtarëve të organeve', *Gazeta Jeta në Kosovë*, 6 May 2013, at <http://gazetajnk.com/?cid=1,979,5502> (the quotation is from a Google translation of the Albanian text).

prosecutors. Notwithstanding his immunity Marty could be freely heard as a source, and his information was evidently crucial for both the *conduct* of the investigation and the *collection* of the necessary evidence. But that prosecutor closed the investigation without having interviewed Marty.¹⁷⁰ He only requested to hear Marty as a witness; he did so only nine months after he issued the indictment; and we may safely assume that he knew that this was an impossible request, because Marty's immunity would not be waived. These choices demonstrate that this prosecutor and his superiors had no interest in hearing Marty, either as a source or as a witness. The question is why.

The following answer can explain also why they sought to hide their lack of interest for Marty's findings behind those oblique statements. Those findings threatened to transform an ordinary case about sordid crimes into a much broader, complex and politically sensitive one, implicating Kosovo's elite. Eulex was inclined neither to complicate its case nor to investigate those circles, as its conduct in the cases we reviewed thus far attests. But the Marty report could not be ignored. Thus Eulex chose to neutralize it: its prosecutors asked Marty to testify knowing that his immunity would not be waived, and they made that request only when it was anyway too late to expand the case to its broader ramifications. Once the waiver was refused, Eulex acquired a plausible answer to the question why it convicted only those who had been caught red-handed: the crucial witness would not testify. This hypothesis is supported also by other elements.

First, Marty's testimony was unnecessary to prove the charges that Eulex's prosecutors brought at the trial: he did not contribute any evidence to support them, and was unlikely to have anything to add about the responsibility of the medics and their associates: indeed, the medics were convicted anyway, and the two acquittals were for crimes – ordinary abuse of office and unlawful exercise of medical activity – which were below the level of Marty's inquiry. This corroborates the interpretation that the request to hear Marty was a public relations measure, intended to first display interest in his testimony and then blame the modest results of the investigation on the fact that he 'retreated behind the cloak of immunity'.

Second, Eulex's own statements prefigured this strategy, and revealed that ever since the Marty report was unveiled the mission adopted a policy of passivity. Having stated that the mission took the report 'very seriously', in fact, its press release continues thus:

EULEX calls on all relevant organizations and individuals, including Dick Marty, to present what evidence they have in regard to these serious accusations... As a rule of law mission, we work on the basis of fact and evidence. Without evidence, prosecutions cannot take place. *If we receive* this information, our prosecutors are ready to *follow up* immediately.¹⁷¹

The mission's prosecutors are described as the *recipients* of evidence provided by others, in the absence of which 'prosecutions cannot take place'. If the report was credible,

¹⁷⁰ The sources for this information are confidential. But Eulex did not comment an article ('Has Eulex changed its policy?', *Osservatorio Balcani Caucaso*, 27 May 2013, at <http://www.balcanicaucaso.org/eng/Regions-and-countries/Kosovo/Has-Eulex-changed-its-policy-136615>), which contains the same information and analysis of the text. A comment to this article – by a certain 'Smoked Sandwich', presumably a pseudonym – disputes my analysis but does not deny that Marty was not interviewed by the prosecutors: this comment is almost certainly by an Eulex official, probably a prosecutor involved in this case and in that discussed at § 2.10, on which he or she had inside information.

¹⁷¹ Eulex, Press release, 28 January 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0119.php>.

conversely, they ought to have *searched* for evidence about the broader ramifications of the Medicus case (interviewing Marty was the first step). This remarkable press release strongly suggests that passivity is what Eulex's management expected of its prosecutors on this case, which in turn offers a coherent explanation for their otherwise incomprehensible behaviour.

Finally, in early 2013 the prosecutor who was in charge of the Medicus case since 2010 was appointed head of SPRK.¹⁷² This promotion strengthens our hypothesis, for it implies that Eulex's management appreciated his handling of this case despite his inexplicable choices and modest results.

In fairness, this promotion was decided before the outcome of the case was known. But as soon as it was known that the only defendants who had been convicted were those caught *in flagrante delicto*, Eulex announced an investigation on seven other suspects. The mission's policy is not to disclose or comment on on-going investigations, and yet this press release describes the suspected crimes in remarkable detail, albeit in generic terms, and hints at the involvement of more prominent personalities than the medics.¹⁷³ Why was such an unusual (and potentially damaging) announcement made? Again, two answers are possible: Eulex intended either to pre-empt criticism that it satisfied itself with the minimum possible result, or to signal that its policy has changed and the mission is now determined to pursue high-level crime without regard for political convenience. The evolution of the investigation shall solve this alternative, if the mission's mandate will last long enough for it to complete it.

2.17 Organized crime: the 'Marty report' case

This case concerns the matters described in the other 21 pages of the Marty report: organ trafficking, murders, torture, drug trafficking, and other serious crimes. These allegations concern the same criminal circles which were at the centre of the confession rendered about one year earlier by the SHIK operative who participated in some political assassinations, but they are much broader than the whistle-blower's allegations: if supported by appropriate evidence, Marty's allegations could decapitate Kosovo's politico-criminal elite as well as its official institutions. Unlike those of the whistle-blower, moreover, these allegations came from a very respected source and an official one: they 'created panic inside [Eulex]', which immediately said that 'it may *not* have the jurisdiction to investigate' them.¹⁷⁴

The mission's reflexive attempt to wash its hands of this case found support in the initial reaction of the US embassy, which qualified the Marty report as 'unfounded'.¹⁷⁵ These comments, in turn, emboldened Kosovo's elite and especially its prime minister, who declared that 'the way charges had been laid against him by Swiss senator Dick

¹⁷² See Eulex, Press release, 13 February 2013, at <http://www.eulex-kosovo.eu/en/news/000411.php>.

¹⁷³ See Eulex, Press release, 30 April 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0437.php>, whose title is 'Eight other suspects under investigation related to the Medicus case'.

¹⁷⁴ James Bone, 'Tackling organ trafficking claims may be beyond us, says EU mission in Kosovo', *The Times*, 19 December 2010, at <http://www.thetimes.co.uk/tto/news/world/europe/article2849952.ece> (emphasis added). I can confirm the panic of the mission's management, as well as the excitement of some officials at the prospect of such an investigation.

¹⁷⁵ UNMIK *Media Monitoring Headlines*, 22 December 2010, at <http://media.unmikonline.org>, reports that '[s]everal dailies quote Michael Murphy, U.S. deputy ambassador in Kosovo, as saying that allegations made by CoE rapporteur Dick Marty are without arguments and unfounded.'

Marty reminded him of the “propaganda of [Nazi] Joseph Goebbels”.¹⁷⁶ But the Marty report received wide and positive coverage in the international press, and both the EU and European public opinion demanded a thorough investigation. The mission had to change its position, therefore, and on 27 January 2011 it acknowledged that the report had to be taken ‘very seriously’ – as we already noted – and stated that

‘EULEX has the capacity, the expertise, the location and the jurisdiction to handle [this case]. We are ready, willing and able to assume that responsibility. As an initial technical step, EULEX prosecutors have opened a preliminary investigation.’¹⁷⁷

In May 2011 the mission slightly retracted these statements, saying that it ‘*is assuming responsibility for the investigation*’.¹⁷⁸ In August it declared that it ‘continues to move forward with the *preliminary* investigation, through a special task force, *partially* based in Brussels.’¹⁷⁹ The ‘EU Special Investigative Task Force’ (SITF) was established only in October 2011, conversely, when the lead prosecutor took office.¹⁸⁰ This task force is *entirely* based in Brussels, moreover, and is both formally and *de facto* separate from Eulex, with whom it merely shares the legal basis: the lead prosecutor was appointed by the EU, not by Eulex, and SITF defines itself as ‘an *autonomous* entity that derives its jurisdiction and legal authority from the European Union Council Decision establishing the EU rule of law mission in Kosovo (EULEX).’¹⁸¹

This sequence of contradictory statements betrays Eulex’s disorientation. The ten-month delay before the investigation could begin reveals the difficulties faced by the mission in accepting its responsibility to act upon such allegations, in devising a credible manner to do so, and in establishing an *ad hoc* task force, which was eventually set up by the EU itself.

Assigning this case to a task force separate from Eulex was a sensible solution. But it implicitly acknowledges that Eulex’s ordinary services may not be capable of conducting complex investigations on high-profile suspects relying on vulnerable witnesses; this is a very significant admission, for such investigations ought to be the core of the mission’s executive mandate. The task force, for instance, was protected from one of Eulex’s most evident weaknesses, such as the permeability to Kosovo’s elite of confidential

¹⁷⁶ ‘Kosovo leader rejects Swiss bank account charges’, *swissinfo.ch*, 30 December 2010, at http://www.swissinfo.ch/eng/politics/Kosovo_leader_rejects_Swiss_bank_account_charges.html?cid=29136368.

¹⁷⁷ Eulex, Press release, 28 January 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0119.php>.

¹⁷⁸ *Report of the European Union High Representative for Foreign Affairs and Security Policy to the Secretary-General on the activities of the European Union Rule of Law Mission in Kosovo*, Annex to UN Secretary-General Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Doc. S/2011/281, 3 May 2011, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/281, p. 15 (emphasis added).

¹⁷⁹ *Report of the European Union High Representative for Foreign Affairs and Security Policy to the Secretary-General on the activities of the European Union Rule of Law Mission in Kosovo*, Annex to UN Secretary-General Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Doc. S/2011/514, 12 August 2011, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2011/514, p. 14 (emphasis added).

¹⁸⁰ See *ibid.*, and *Report of the European Union High Representative for Foreign Affairs and Security Policy to the Secretary-General on the activities of the European Union Rule of Law Mission in Kosovo*, Annex to UN Secretary-General Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Doc. S/2012/72, 31 January 2012, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/72, p. 14.

¹⁸¹ EU Special Investigative Task Force, ‘Factsheet’ (undated), at http://www.sitf.eu/images/fact_sheets/sitf_factsheet_eng.pdf (emphasis added).

information about sensitive investigations or enforcement actions (the origin of such permeability is genuinely disconcerting: see pp. 143–44 of the book). Likewise, any charges stemming from the investigations of the task force shall be heard by an equally *ad hoc* tribunal, established by agreement between the EU and Kosovo: although formally part of Kosovo’s judicial system, this court will be staffed with foreign judges selected by the EU, will sit abroad, will be governed by special rules of procedure, and will be empowered also to assess the constitutionality of such rules (and of its own existence).¹⁸²

More than any other one, the evolution of this investigation will signal the direction of EU policy in regard of Kosovo’s rule of law problems. No information on the investigation is available: ‘[c]onsistent with sound prosecutorial and law enforcement procedures, the Task Force does not discuss publicly its findings or details of its investigative operations’, and unlike in the Medicus case these procedures were scrupulously observed.¹⁸³ Nonetheless promising signals have emerged: in particular, while Eulex will soon be drastically reduced the task force shall remain in place – because, reportedly, ‘[t]he Kosovo government... agreed to exclude the operations of SITF from the on-going negotiations on the mandate of EULEX’, and any trials ‘deriving from investigations by the Special Investigative Task Force are not part of the scope of [the mission’s strategic review]’¹⁸⁴ – and, as we said, an *ad hoc* tribunal has now been established. An indirect indication that this investigation has made some progress may be drawn by the fact that the prime minister has recently returned to his polemic rhetoric about the Marty report, qualifying it as ‘science fiction’, on the argument that ‘[t]he KLA did not commit crimes, Serbia did. Our fight was clean’: his conviction is that Marty, and, by implication, the Council of Europe, ‘is trying to stain Kosovo’s image and to rewrite Kosovo’s history.’¹⁸⁵ The findings of the task force are expected to be unveiled within 2014.

From the perspective of an analysis of Eulex, however, the most important question raised by this case is why the mission did not *itself* conduct the investigation that Marty completed in 2010, with lesser means and no law enforcement powers. The information from which Marty’s investigation began is public: it is contained in a book published in April 2008, on whose basis the Council of Europe requested an inquiry.¹⁸⁶ The many categories of sources that Marty heard – listed in his report – were within Eulex’s reach too, and the mission could overcome many of the obstacles that Marty met in gathering

¹⁸² On such plans, see, e.g., Fatos Bytyci, ‘West plans special court for Kosovo organ harvesting charges’, *Reuters*, 4 April 2014, at <http://www.reuters.com/article/2014/04/04/us-kosovo-justice-idUSBREA3313820140404>. For two critiques of this solution from the perspective of Kosovo’s interests, see Xharra, ‘Kosovo needs to take out its own trash’, and Donikë Qerimi and Krenar Gashi, ‘War crimes and Eulex’s broken kettle’, *Balkan Insight*, 21 March 2014, at <http://www.balkaninsight.com/en/article/war-crimes-and-eulex-s-broken-kettle>; for a different critique, see my ‘The EU in Kosovo: crime and punishment’, *The European Voice*, 24 April 2014.

¹⁸³ *Report of the European Union High Representative for Foreign Affairs and Security Policy to the Secretary-General on the activities of the European Union Rule of Law Mission in Kosovo*, Annex to UN Secretary-General Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Doc. S/2012/818, 8 November 2012, at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2012/818, p. 18.

¹⁸⁴ Respectively, Qerimi and Gashi, ‘War crimes and Eulex’s broken kettle’, and UNMIK, *Media Monitoring Headlines*, 25 March 2014, at <http://media.unmikonline.org>.

¹⁸⁵ UNMIK, *Media Monitoring Headlines*, 28 March 2014, at <http://media.unmikonline.org>.

¹⁸⁶ Council of Europe, ‘Inhuman treatment of people’, p. 5 (the book is Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity’s Worst Criminals and the Culture of Impunity* (New York, 2009), first published in Italian in April 2008, in Milan, under the title *La caccia: io e i criminali di guerra*).

evidence, such as the ‘disappearance’ of witnesses for ‘security reasons’ or their relocation overseas.¹⁸⁷ Why did the mission not open an investigation already in 2008? Or in November 2009, when the whistle-blower’s confession cast penetrating light on the same criminal circles that appear behind the Medicus case and the Marty allegations? Eulex’s acknowledgement that the Marty report must be taken ‘very seriously’ implies that the mission was wrong not open such an investigation: yet this basic question has neither been asked nor answered. It presumably is the original choice *not* to conduct such a potentially explosive investigation that explains the mission’s disorientation when the Marty report was unveiled, the policy of passivity it then formulated, and the minimalist approach followed by its prosecutors in both the Medicus and the political assassinations case. These were good reasons to entrust this investigation to a separate task force.

2.18 The threats against an investigative journalist

In 2009 one of Kosovo’s best investigative journalists reported on administrative malpractice in the municipality of Skënderaj, where one year later the most evident episode of election fraud was observed (see § 2.6). Since this municipality was established it is administered by the ‘physically commanding PDK mayor Sami Lushtaku’, a former KLA commander and a feared and reportedly dangerous figure before whom

[o]pposition, civil society groups and media have to walk on tiptoe; the law is only sparingly applied to him. Under Skënderaj’s *Pax Lushtaka*, he polls 90 per cent of the vote... An [opposition politician who debated against the mayor in a television program just before the 2009 municipal elections] was allegedly beaten up and hospitalised on polling day, 13 November 2009; no police action followed... When [the mayor] was convicted in May 2008 to a four-month prison sentence for molesting and threatening a judge in 2006, criticism of him and demands for his resignation as mayor were constrained. It was left to him to volunteer to go to prison, which the government evaluated as a ‘courageous act’ of ‘self-sacrifice.’ ... There were additional cases, in which he was found to be in illegal possession of a firearm, which were not taken further.¹⁸⁸

After she published her findings the mayor and a newspaper which depends on the government’s advertising for the vast majority of its revenue insulted her and issued explicit threats to her life.¹⁸⁹

The government dismissed the gravity of this episode, whereas Kosovo’s civil society, Amnesty International, Human Rights Watch, Reporters without Borders and the international presence in Kosovo – with the exception of the US embassy, which ‘appeared to take the government’s side’¹⁹⁰ – stigmatized it and pressed Eulex to act. The mission indicted the mayor, the editor of the newspaper that published the incriminated articles and letters, and some of their authors. But its judges acquitted them.

The accused had repeatedly called the journalist a ‘slut’, a ‘treacherous’ and ‘sneaky’ person, a ‘betrayer’, a ‘traitor’ and a ‘Serbian spy’, who by her reporting ‘did it to herself

¹⁸⁷ Ibid., p. 10.

¹⁸⁸ Anderson, ‘State of constriction?’, pp. 12–13 and footnotes 47–48.

¹⁸⁹ See *ibid.*, pp. 19 and 35.

¹⁹⁰ Ibid., p. 35, who report also that the US embassy helped the government to draft its ‘inadequate’ statement on this episode.

not to have a long life' (or, in another version, 'has made herself to have a short life').¹⁹¹ The court judged that such words did not 'have a *hidden* threatening message'.¹⁹² The threat was both explicit and serious instead, and not only by reason of the characteristics and reputation of the mayor: the KLA had beaten, tortured and killed presumed Kosovo Albanian traitors and spies in 1998–2000; in the same period SHIK assassinated numerous political opponents of PDK (the convictions discussed in § 2.15 were issued well before this judgement was rendered); and, as we shall see in the next paragraph, SHIK and the elite are capable of intimidating and killing witnesses that threaten their interests, just as this journalist bravely did (disclosure: this journalist is a friend of mine).

The judges also established that the insults addressed to her were 'exaggerated hyperbole [that] cannot be considered slanderous'.¹⁹³ Admittedly, there was controversy on the interpretation of the Albanian word (*horr*) that the victim, the prosecutors, Oxford's English-Albanian dictionary, and the English-language media reports on this episode all translated as 'slut'.¹⁹⁴ The judges rejected this interpretation. They noted that, unlike Oxford's, two dictionaries published in Kosovo and Albania do not translate that word as 'slut' but give it blander meanings (person *of bad habits* or *without honour*, *poor* person, and *rich but stingy* person): on this basis, neglecting both the context in which that word was used and the fact that its common usage may differ from its received meaning ('slut' is probably an evolution of the 'without honour' meaning), they opted for 'the lenient translation because to use such a word as "slut" in the [*sic*] serious newspaper is against common sense'.¹⁹⁵ This conclusion is a *non sequitur* – seriousness does not *per se* exclude slander – and is drawn from a subjective, undemonstrated and therefore arbitrary assumption: the 'seriousness' of the newspaper that printed that word, together with the other (undisputed) insults and personal attacks against the journalist.

This reprehensible judgement (see p. 220 of the book) can only stem from a desire to acquit the accused at all costs, or from the conviction that moral freedom and human life and dignity have lesser value in Kosovo than in established liberal democracies, where such insults and personal attacks would not receive lenient treatment. No serious critique of the journalist's reporting accompanied them: qualifying them as the 'hyperbolic' expression of 'entirely legitimate' criticism is equivalent to granting to Kosovo's elite a licence to intimidate its critics.¹⁹⁶

Eulex's prosecutors appealed this judgement, however, and just before it was rendered the mission arrested the mayor in connection with a war crimes investigation (discussed in § 2.20). This would seem to exclude the interpretation whereby the acquittal of the mayor was motivated by Eulex's concern for his or the elite's possible retaliation against the mission: his acquittal could rather be the result of mere incompetence, or of a distorted understanding of the notions of moral freedom and human dignity. Before

¹⁹¹ Basic Court of Pristina, case No. 1656/12, *S.L. et al.*, Judgement, 5 June 2013, at [http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/BasiCourtPrishtina/1656-12/\(2013.06.05\)%20JUD%20-%20S.L.%20et%20al.%20\(BC%20Pristina\)_ENG.pdf](http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/BasiCourtPrishtina/1656-12/(2013.06.05)%20JUD%20-%20S.L.%20et%20al.%20(BC%20Pristina)_ENG.pdf), pp. 3–10.

¹⁹² *Ibid.*, p. 19 (emphasis added).

¹⁹³ *Ibid.*

¹⁹⁴ See, e.g., Anderson, 'State of constriction?', p. 35.

¹⁹⁵ Basic Court of Pristina, *S.L. et al.* Judgement, p. 18.

¹⁹⁶ *Ibid.*, p. 20; that such attacks have been proffered by journalists (writing for a newspaper that relies on government financing and advertising for about 90 per cent of its revenue) does not change this analysis: theirs was not criticism of the reporting of a colleague, but a sequence of personal attacks.

embracing this reading, however, it must be considered that – as we shall now see – Eulex consistently displayed greater determination in prosecuting war crimes than other crimes ascribable to the elite: those choices, therefore, may be only apparently contradictory, because they may be due to the fact that the prosecutors who worked on war crimes had better skills, or enjoyed (or acquired) greater *de facto* independence, than the rest of the mission’s judicial staff.

2.19 War crimes: a first very prominent case

Eulex investigated former transport minister Limaj also for war crimes, together with nine other former KLA fighters. The case concerned the torture and murder of civilians – both Serbs and Albanians: the latter were suspected of collaboration with the Serbian authorities – held prisoner at a KLA camp in the area under Limaj’s command. The charges closely resembled those brought against Limaj and two junior commanders during a trial held in 2003–05 at the International Criminal Tribunal for the former Yugoslavia (ICTY) – the *ad hoc* UN war-crimes court in The Hague, established in 1993 – which ascertained that prisoners of that camp had been mistreated and murdered but proved neither Limaj’s direct responsibility nor his command responsibility.

Eulex arrested Limaj’s co-suspects on 16 March 2011. He was not arrested because he was a member of parliament: Kosovo’s constitution provides that deputies cannot be arrested without the parliament’s consent.¹⁹⁷

At that time Limaj was still investigated for corruption, was no longer a minister, and was already a declared opponent of the prime minister within the PDK party. These investigations made him the target of joint efforts by the leading faction of the elite and some Western diplomacies to improve the public image of Kosovo: his exclusion from the cabinet was hailed as a sign that this country was moving towards ‘clean government’.¹⁹⁸ Both the international community and the leading faction of the elite wanted him to be arrested, therefore, but they did not wish the parliament’s consent to be asked because they expected that it would be denied, which would make the arrest impossible and harm Kosovo’s international reputation.

To solve this impasse the prime minister asked the constitutional court to interpret the immunity rule. Although the rule was clear, the elite evidently expected that Kosovo’s highest judges would find an exception to it: the (indefensible) judgement by which they allowed Limaj to be arrested – and (dangerously) deprived parliamentarians of their immunity – is described in a paper I published recently.¹⁹⁹ This judgement was issued on 20 September 2011, and Eulex immediately placed Limaj in house detention.

Both the elite – in public – and a large part of the population vehemently and repeatedly criticised Eulex for prosecuting a case that was perceived as tainting the supposedly immaculate ‘liberation war’ waged by the KLA. This was the public line of defence followed also by Limaj, who enjoys the reputation of a ‘war hero’.

¹⁹⁷ See Eulex, Press releases, 16 and 17 March 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0125.php> and <http://www.eulex-kosovo.eu/en/pressreleases/0126.php>, respectively.

¹⁹⁸ See Anderson, ‘State of constriction?’, pp. 32–34.

¹⁹⁹ ‘A critique of Kosovo’s internationalized constitutional court’, *European Diversity and Autonomy Papers – EDAP* No. 2/2014 (2014), at http://webfolder.eurac.edu/EURAC/Publications/edap/2014_edap02.pdf, pp. 25–29.

The case was based almost entirely on the statements and the diary of a cooperative witness: a middle-ranking KLA fighter who reported to Limaj and commanded the KLA camp where the crimes were committed.²⁰⁰ The press reported that ‘after an assault on [his home in March 2011, this person] was shot in the hand and leg and decided to testify and seek witness protection from Eulex’; in fact, this person had rendered to Eulex statements incriminating Limaj almost one year before these events, if not earlier, and was presumably already under protection.²⁰¹ As it is, a mere few days after this assault Eulex arrested the suspects. In parallel, the mission moved the witness out of Kosovo, to protect him. Witness intimidation is widespread in Kosovo, in fact, and despite Eulex’s presence the witness protection system is the weakest in Europe, according to a report adopted in 2010 by the Council of Europe (which remarks also that ‘witnesses are murdered’ in Kosovo).²⁰² In particular, witnesses who incriminate former guerrilla leaders are exposed to considerable psychological pressure – part of the population considers them ‘traitors’ – and a high risk of retaliation. Both trials held at the ICTY for crimes committed by the KLA – one against Limaj and one against AAK’s leader Haradinaj – demonstrated this eloquently: many of the crimes cited in the indictments were ascertained, but the responsibility of the accused could not be proved, presumably also because some witnesses were killed (by SHIK’s witnesses unit, most likely) or died unnatural deaths before they could testify, others could not be found, a vast number of them had to be either compelled to appear in court or granted protection measures, but many of them nevertheless refused to speak or gave confused, reticent or contradictory statements.²⁰³ Yet, commenting on an even more delicate investigation than this one (that

²⁰⁰ This emerges clearly from first instance judgement, which for instance quotes the prosecution as stating that without this witness’s evidence ‘there is no trial’: District Court of Pristina, case No. P 425/11, *N.K et al.*, Judgement, 2 May 2012, p. 28, at http://www.eulex-kosovo.eu/docs/justice/judgments/criminal-proceedings/DCPrishtina/2013-01-21%20DC%20Pristina%206%20Accused/2013-01-21%20DC%20Pristina%204%20Accused/Klecka%20Judgment%204%20Accused_02%2005%2012_FIN_AL%20-REDACTED.pdf.

²⁰¹ Matthew Brunwasser ‘Death of war crimes witness casts cloud on Kosovo’, *The New York Times*, 6 October 2011, at <http://www.nytimes.com/2011/10/07/world/europe/death-of-war-crimes-witness-casts-cloud-on-kosovo.html>; District Court of Pristina, *N.K et al.*, Judgement, p. 35 mentions the witness’s incriminating statements as the basis for a search order issued on 28 April 2010.

²⁰² Council of Europe, ‘The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans’, Doc. 12440 rev., 12 January 2011, at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=12581&lang=en>, para. 148.

²⁰³ The judgment acquitting Limaj – ICTY, case No. IT-03-66-T, *Limaj et al.*, Judgement, 30 November 2005 at <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>, p. 6 (emphasis added) – notes that ‘a significant number of witnesses requested protective measures at trial, and expressed concerns for their lives and those of their family. This context of *fear*, in particular with respect to witnesses still living in Kosovo, was *very perceptible throughout the trial*.’ The then ICTY chief prosecutor commented that ‘the impunity that feeds upon fear was allowed to prevail’ (Del Ponte and Sudetic, *Madame Prosecutor*, p. 26). The Haradinaj judgement – ICTY, case No. IT-04-84-T, *Haradinaj et al.*, Judgement, 3 April 2008, at <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf> – is more detailed: at p. 7 (emphasis added) it notes that ‘throughout the trial the Trial Chamber encountered significant difficulties in securing the testimony of a large number of witnesses. Many witnesses cited *fear* as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in *an atmosphere where witnesses felt unsafe*.’ Of 81 prosecution witnesses, 56 (almost 70 per cent) had to be either granted protection measures (34) or compelled to testify (18). Of the last-mentioned, 5 did not testify; one ‘began to testify but claimed that he was under a *great deal of stress* and *feared for his safety* and that he was therefore unable to complete his testimony’ (p. 14, emphasis added). Moreover, ‘[t]wo witnesses came to the Tribunal without being subpoenaed, only to refuse to testify when invited to do so. One witness refused to enter the courtroom... Another witness... entered the courtroom [but] refused to answer any questions [and when heard one second time by video-conference] the witness

on the Marty report, discussed in § 2.17), in January 2011 Eulex declared: '[w]e understand concerns about witness protection in the region but we have full confidence in our own witness protection unit.'²⁰⁴

On 28 September 2011 the witness hanged himself to a tree in a public park of Duisburg, where Eulex had relocated him six months earlier.²⁰⁵ Murder was suspected, but there is no reason to question the conclusions of the German authorities. Rather, the witness lived at his migrant brother's home, and his father, wife and children remained in Kosovo: both were unreasonable choices. Germany hosts the largest share – about one third – of Kosovo's diaspora, conservatively estimated at 400,000: as these emigrants tend to congregate in the same towns and neighbourhoods, the witness was potentially exposed to psychological pressure, because this trial was certainly discussed in the circles he may have frequented, or may have wished to frequent.²⁰⁶ More importantly, although his identity was (presumably) concealed, his departure from Kosovo – right after the assault and just before the arrests – was probably remarked, as well as his continued absence; his former comrades could potentially identify him also from his statements, for he ultimately reported to Limaj and was responsible for the prison where the crimes were committed. This witness was identifiable, therefore, and Limaj was free until a fortnight before his suicide, by reason of his parliamentary immunity. Had Limaj or his associates identified the witness, they would certainly have been able to reach either him or his family. Limaj is also likely to have interpreted the (wholly unjustified) judgement of the constitutional court lifting his immunity as the sign that, besides the international community, also the leading faction of the elite wanted him to be convicted: he might have concluded that his best chance to avoid a conviction was to silence the crucial witness, and he might have chosen to use the considerable resources at his disposal to identify and intimidate the witness or his family. The same inferences might have been drawn by the witness himself, incidentally, as he disposed of essentially the same information as Limaj. Consequently, suicide might have been the desperate choice of a man faced by even worse alternatives, whether feared, threatened or imminent ones.

It is to be presumed that the mission did attempt to organize an effective protection of the witness. From our perspective, however, what matters is that he did not enjoy protection that can plausibly be characterized as adequate: this is demonstrated less by the suicide – which might, conceivably, have other determinants – than by the objectively imprudent choice of relocating him, and only him, to Germany.

As it is, in Kosovo this suicide 'destroyed' trust in the mission.²⁰⁷ It sent also an intimidating signal to other witnesses in the same case and in other delicate ones: those involving other powerful members of the elite, widely believed to have armed men and an informal but effective intelligence agency at their service.

again refused to testify' (p. 17). See also Council of Europe, 'Inhuman treatment', p. 11, which notes 'the deaths of so many witnesses [in the two ICTY cases on KLA crimes], and ultimately a failure to deliver justice'.

²⁰⁴ See Eulex, Press release, 28 January 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0119.php>.

²⁰⁵ Brunwasser 'Death of war crimes witness'.

²⁰⁶ On Kosovo's diaspora and Germany's share of it, see United Nations Development Programme, 'Kosovo remittances study 2012', UNDP Kosovo, Pristina, 2012, at http://www.ks.undp.org/content/dam/kosovo/docs/Remittances/KRS2012_English_858929.pdf, pp. 24–26. Other sources indicate much higher figures – between 250,000 and 500,000 – for the number of Kosovo's emigrants living in Germany.

²⁰⁷ Ibid., quoting a Kosovar legal expert: this opinion was widespread in Kosovo, and seems well justified.

After this suicide the defence lawyers objected to the admissibility of the evidence of the witness, because they had not yet had the opportunity of questioning him as thoroughly as they would have desired. As a first step, they asked the court to release the accused from custody: on 21 March Eulex's judges accepted this request, on the argument that the witness's evidence was inadmissible.²⁰⁸

Predictably, on 30 March the court acquitted six defendants; but it decided to continue the trial against the other four, who included Limaj, because – Eulex's press release explains – enough evidence remained against them.²⁰⁹

On 2 May, conversely, the court acquitted also Limaj and the three other suspects.²¹⁰

The prosecutors challenged these judgments. Between November and December 2012 the appeals court upheld their appeals, on the argument that the witness's evidence was admissible, ordered the retrial of all ten defendants, and placed them in custody.²¹¹

But on 17 September 2013 another Eulex court acquitted all defendants again. The court established that at least seven civilian prisoners were mistreated and killed in that KLA camp, but judged that the responsibility of the accused was not proved. More surprising than the acquittal were the reasons for it, reported by Eulex's press release: 'the trial Panel found that, in important material respects, the evidence of [the main witness] was *wholly unreliable*'.²¹² This decision roundly contradicts all previous ones, which contradicted themselves only on the admissibility of the witness's evidence, not on its strength. The prosecution challenged this acquittal, and the appeal is pending.²¹³

Despite this acquittal Eulex cannot be criticized for having conducted this investigation, because the crimes were ascertained. Rather, the mission is to be commended for having pursued it with determination against the vehement and sustained opposition of a large part of Kosovo's public opinion: that the main target of this trial was an opponent of the leading faction of the elite does not alter this analysis, because the decision to investigate Limaj seems an entirely legitimate one. Unlike in most of the cases we have reviewed thus far, therefore, in this occasion Eulex acted in accordance with its mandate.

More clearly than those other cases, however, this trial illustrates the low overall efficiency of the mission (on which see, generally, Chapter 5 of the book). This is a very indicative case from this perspective, because when it began it was the mission's most sensitive investigation – second only to those on the Marty report, which was removed from the mission's jurisdiction – and because it remains the only high-profile one that led

²⁰⁸ See Eulex, Press release, 21 March 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0248.php>.

²⁰⁹ Eulex, Press release, 30 March 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0259.php>.

²¹⁰ See District Court of Pristina, *N.K et al.*, Judgement; see also Eulex, Press release, 2 May 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0275.php>.

²¹¹ See Eulex, Press releases, 20 November and 11 December 2012, at <http://www.eulex-kosovo.eu/en/pressreleases/0375.php> and <http://www.eulex-kosovo.eu/en/pressreleases/0384.php>, respectively.

²¹² Eulex, Press release, 17 September 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0485.php> (emphasis added). In theory, that evidence might have *become* unreliable, because it was contradicted by contrary and more reliable evidence: but as this was a retrial, it is unlikely that much (or any) fresh evidence emerged during it.

²¹³ Eulex's statement is reported by Edona Peci, 'Kosovo guerrillas' war crimes acquittal challenged', *Balkan Insight*, 26 September 2013, at <http://www.balkaninsight.com/en/article/eulex-prosecution-to-appeal-klecka-verdict>.

to a judgement. Although Eulex made a serious effort in this case, its conduct reveals grave negligence – in organizing the protection of the main witness – and probable incompetence: the perplexing sequence of contradictory decisions that we observed suggests that some of its judges or prosecutors may have misunderstood either the law (on the admissibility of evidence) or the evidence (strong for some, ‘wholly unreliable’ for others). If the points on which they differed were fine ones ‘mistake’ would be an inappropriate word, but such differences of opinion did little justice to the difficult choices – cooperation and suicide – of a witness whom the mission’s own negligence exposed to serious danger.

2.20 War crimes: a second very prominent case

In the spring of 2013 Eulex arrested a handful of other former KLA commanders and guerrillas, for war crimes.²¹⁴ Among them are two prominent members of the elite: the former head of Kosovo’s police and current ambassador in Albania, and especially the mayor of Skënderaj, and a more powerful figure than his office may suggest. Both are still detained at this writing. Like the previous one, also this investigation met strong and widespread public criticism. But although no indictment has yet been issued, there is no reason to doubt that Eulex acted in accordance with its mandate: it acted bravely, in fact, because unlike Limaj the two main suspects of this case are part of the leading faction of the elite.

The same may be said about an equally delicate case: the retrial of a 2003 conviction, annulled in 2005, which the mission inherited from UNMIK (and which we consequently excluded from our analysis, according to the criteria set out in § 1.1). The initial charges alleged that in 1998–99 a KLA unit known as the ‘Llapi group’ tortured and murdered several of its civilian prisoners, under the command of three guerrilla leaders who after the conflict formed a powerful faction of the elite, within the PDK party. In contrast with UNMIK’s cautious and slow handling of this very unpopular and politically sensitive case, Eulex acted with determination, even though the accused had the open support of the government, which proclaimed their innocence repeatedly. The mission issued a second conviction, in 2009, which upheld only the torture charges.²¹⁵ This judgement was appealed, and a partial retrial was ordered in 2011.²¹⁶ In 2013 the prosecutors obtained a conviction also on the remaining charges.²¹⁷

On war crimes, therefore, the mission acted with greater determination than in any other sector. A recent episode, however, suggests that also in this sector negligence and timidity affected Eulex’s performance. It concerns the detention of one suspect in the case we mentioned above, the mayor of Skënderaj, who currently is Kosovo’s most high-profile detainee.

On 20 May 2014 the mayor and two co-suspects escaped from a hospital where they were being treated, two days before the first hearing in the case was scheduled. Their families and supporters subsequently blockaded the clinic, in protest against Eulex’s decision to transfer the accused to a prison in north Kosovo, nearer the court where the

²¹⁴ See Eulex, Press release, 23 May 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0443.php>.

²¹⁵ See Eulex, Press release, 2 October 2009, at <http://www.eulex-kosovo.eu/en/pressreleases/0048.php>.

²¹⁶ See Eulex, Press release, 26 January 2011, at <http://www.eulex-kosovo.eu/en/pressreleases/0118.php>.

²¹⁷ See Eulex, Press release, 7 June 2013, at <http://www.eulex-kosovo.eu/en/pressreleases/0452.php>.

trial was to be held, which appears to have been the motive of their escape.²¹⁸ The decision does indeed seem imprudent, because north Kosovo – and, presumably, also its prison – is inhabited almost exclusively by ethnic Serbs, and the suspects are accused precisely of war crimes against Serb civilians.

On the following day, Kosovo's justice minister was quoted as saying that 'EULEX deals with this issue, they don't tell us.'²¹⁹ The mission responded to this statement and to pleas for a revision of that decision by stating that 'the rule of law is non-negotiable', and by calling on Kosovo's authorities to apprehend the three suspects.²²⁰ In parallel, Eulex's judges began the trial against four of the defendants, declared the other three 'fugitives from justice', and issued a (fresh) arrest warrant on them.²²¹

On 23 May, however, the press reported that 'after talks between the defence counsels of [the fugitives] and judiciary institutions, including EULEX' the three men handed themselves over to the police, and were taken to the prison where they were held previously; evidently, Eulex's decision to transfer them to north Kosovo was overturned: in fact, the press reported the son of the mayor of Skënderaj as saying that his father and his co-suspects

'decided to hand themselves over to authorities after receiving assurances that they would not be taken to the prison in the north of Kosovo and that their trial would not take place in the courthouse of [the main settlement in north Kosovo, where on 22 May the trial against the other four suspects had started]'.²²²

Such accounts seem plausible, and it is highly likely that such assurances were indeed given: the accused are not reported to have been transferred to north Kosovo, and – as of 5 June 2014 – no further hearings in the case seem to have been held. Such assurances starkly contradicted Eulex's statement of the previous day: 'the rule of law is non-negotiable'. Presumably this is not the first case in which the mission has negotiated non-negotiable issues with suspects, but it is the first case in which such negotiations have become public. The precedent this has set is worsened by that fact that such assurances concern also matters that fall within the competence of Eulex's judges, but can only have been granted by the mission's management: while on the run, the three suspects were hardly in a position to make an application about the place of their detention and trial, and 48 hours seem too short a time for such an application to be made, heard and decided upon. Such assurances, therefore, are promises about future judicial decisions: whether or not they will be honoured in full, by issuing them the management has breached the separation of powers within the mission and the independence of its judges.

2.21 War crimes: four Serbs

We have just concluded that – leaving this last episode aside – Eulex's performance on war crimes is commendable. As if to prove that the mission's conduct does not lend itself to univocal and all-encompassing interpretations, however, the case we are about to

²¹⁸ 'Fans of fugitive Kosovo fighters seize clinic', *Balkan Insight*, 22 May 14, at <http://www.balkaninsight.com/en/article/relatives-of-ex-kla-fighters-seize-clinic>.

²¹⁹ UNMIK, *Media Monitoring Headlines*, 21 May 2014, at <http://media.unmikonline.org>.

²²⁰ Ibid., 22 May 2014, at <http://media.unmikonline.org>.

²²¹ See also Eulex, Press release, 22 May 2014, at <http://www.eulex-kosovo.eu/en/pressreleases/0608.php>.

²²² UNMIK, *Media Monitoring Headlines*, 23 May 2014, at <http://media.unmikonline.org>.

discuss seems to disprove that conclusion. The discussion shall require some space, because the hypothesis is that the political interests of the mission influenced the conduct of this prosecutors and judges (see pp. 122–23 and 143–48 of the book).

In August 2009 Eulex and the Serbian government were negotiating a protocol on police cooperation. Once this information emerged, the mission became subject to daily attacks of unusual vehemence, from the authorities, the press, civil society and public opinion. This was an emotional reaction, sparked by an exaggerated perception of the political significance of the protocol. On the part of the government, such reaction was certainly motivated also by the desire to clip the wings of a mission whose mandate threatened the criminal interests of the elite; but police cooperation between Eulex and Belgrade may have been genuinely feared, because Serbian arrest warrants were pending against several of Kosovo's former guerrillas.

What matters from our perspective is the intensity of such attacks, which can be gauged by the fact that on 18 August Eulex had to issue a long and defensive press release, which describes the terms of the protocol and informs the public that the head of mission requested a meeting with Kosovo's president, in order to explain them.²²³ But the president refused to meet him and the attacks continued. On 11 September, when the protocol was signed, the mission issued two other press releases: one to 'underline that EULEX is here to *support* Kosovo in the Rule of Law area and would never take any steps that would *harm* Kosovo'; and one promising to 'restore full customs controls' in Serb-controlled north Kosovo, which is a *cause célèbre* of those who criticized Eulex for its reluctance to assist Kosovo in its difficult relations with Serbia (see, in particular, pp. 73–74 of the book).²²⁴ Despite these statements the attacks grew harsher in the following week, precisely because the mission had disregarded Kosovo's unanimous opposition to protocol: the issue was on the front pages of all newspapers and the government actively fuelled popular anger at the mission. On 11 September Eulex's 'diplomatic problems with the Kosovar government and public' were discussed also in Paris, in a meeting between senior US and French diplomats and government officials, alongside topics such as 'Russia... elections in Germany and Afghanistan, Turkey's EU Accession, NATO Enlargement and Strategic Concept, and Georgia and Ukraine.'²²⁵ The matter was included in that agenda because that was the worst political crisis faced by Eulex since its deployment (and remains the lowest point in its relations with its hosts).

Twelve days later, on 23 September 2009, at dawn, Eulex arrested four ethnic Serbs, for war crimes allegedly committed against ethnic Albanians in April 1999. Unusually, a unit of NATO soldiers supported the operation. This was the first occasion on which Eulex acted against Kosovo Serbs suspected of war crimes; since then, the mission has opened only two other cases of this nature (one is mentioned in § 2.23), presumably because most war criminals have fled Kosovo in 1999, when Serbian forces left it at the end of the NATO operation.

²²³ See Eulex, Press release, 18 August 2009, at <http://www.eulex-kosovo.eu/en/pressreleases/0016.php>.

²²⁴ Eulex, Press releases, 11 September 2009, at <http://www.eulex-kosovo.eu/en/pressreleases/0022.php> (emphasis added) and at <http://www.eulex-kosovo.eu/en/pressreleases/0021.php>, respectively,

²²⁵ Cable addressed by the US embassy in Paris to the State Department on 16 September 2009, at <http://wikileaks.org/cable/2009/09/09PARIS1254.html>, paras. 4 and 1, respectively.

By coincidence, a few weeks before they were arrested I was received at the home of two of the accused.²²⁶ They are brothers, in their 50s, who live in a rural house with their wives, some of their children, and the children of the latter. The third suspect is a woman in her 40s (the fourth one was soon cleared of all charges). The accused subsequently complained that Eulex used disproportionate force during their arrest: they alleged that they were physically assaulted, with kicks in the chest and stomach, that unnecessary damage was caused to their property, and that rifles were pointed at children. The mission's Human Rights Review Panel declared such complaints inadmissible.²²⁷

A few hours after the arrests Eulex issued a press release. Having indicated the essential details of the investigation, the text continues thus:

[t]he operation started at 6 AM. Four people were arrested [their initials are indicated]. All four suspects are of Serbian ethnicity. The charges relate to alleged inhuman treatment; *immense suffering* or violation of bodily integrity or health; application of measures of intimidation and *terror*, and illegal arrest and detention. During the search of the suspects' premises, *several items were seized*. Under order of the prosecutor, a fifth person was also arrested at the scene, for obstruction of official duty. The *interviews* of the suspects are *ongoing*. Both the *Kosovo police* (KP) and [the NATO contingent in Kosovo] took part in the operation.²²⁸

Clearly, informing the public about the arrests was not the only aim of the authors of this text. Indicating that NATO soldiers participated, that a fifth person was arrested for 'obstruction of official duty', and that the arrests were made at dawn all contribute to drawing the picture of a raid launched against a group of rather dangerous persons, who in fact opposed resistance. The charges are described in remarkably emphatic terms, which stimulate emotion in the reader and form an isolated exception among Eulex's usually neutral and detached public statements.²²⁹ The press release contains also two sentences – about the items seized during the arrest and the 'ongoing' interviews of the suspects – that seem deliberate, because they are unnecessary (an arrest is typically followed by searches, seizures and interviews): given the context in which they appear, they were presumably written to generate the impression that the case was both well founded – ten years after the crimes some useful pieces of evidence could still be seized – and prosecuted with determination. Understandably, if perhaps inappropriately, this press release aimed at improving Eulex's public image during a serious political crisis.

The media and the public commented positively on the arrests: the impunity of Serb war criminals is a *cause célèbre* in Kosovo and a recurrent item in its *cahiers de doléances* to the international community. The attacks against Eulex subsided and rapidly ended. The

²²⁶ A daughter of the family worked in an international organization as the assistant of a friend of mine: she received an important promotion and celebrated it with a luncheon, which I attended upon my friend's invitation.

²²⁷ Human Rights Review Panel, case No. 2011-11, *S.M.*, Inadmissibility decision, 23 November 2011, at <http://www.hrrp.eu/docs/decisions/Inadmissibility%20Decision%202011-11%20pdf.pdf>; Human Rights Review Panel, case No. 2011-12, *Trajković*, Inadmissibility decision, 23 November 2011, at <http://www.hrrp.eu/docs/decisions/Inadmissibility%20Decision%202011-12%20pdf.pdf>; and Human Rights Review Panel, case No. 2011-13, *Martinović*, Inadmissibility decision, 23 November 2011, at <http://www.hrrp.eu/docs/decisions/Inadmissibility%20Decision%202011-13%20pdf.pdf>.

²²⁸ Eulex, Press release, 23 September 2009, at <http://www.eulex-kosovo.eu/en/pressreleases/0023.php>.

²²⁹ See, e.g., the press releases cited at notes 116, 128, 155 and 161, above.

mission mentioned the protocol with Serbia one last time five days after the arrests, but by then the issue had disappeared from the front pages.

Although correlation is not causation, there is no doubt that this operation contributed to quieting such attacks, and it is probable that the contribution was significant, thanks also to the manner in which Eulex publicized the arrests. The mission was then accused of being pro-Serbia and anti-Kosovo: these were wrong and simplistic perceptions, but the (correct) arguments used by the mission and the rest of the international community did not succeed in dispelling them. If we place ourselves at the level of those popular sentiments, conversely, the arrests served both as a tangible confutation of those charges and as a confirmation of the mission's protestation that it intended to 'support' Kosovo and not to 'harm' it.

This is also the opinion of the only independent analysis that – to our knowledge – mentions this case:

In view of the need to preserve 'stability', it is obvious that EULEX will attempt to perform a balancing act by offsetting decisions which are unpopular with one community with decisions which are unpopular with the other. In this regard, the *brutal* arrest of four Serbs on 23 September 2009 by scores of policemen appears to some to be a way of 'compensating' for EULEX's signature of the agreement with Serbia. 'EULEX made in Serbia' says the graffiti outside the EULEX offices in the centre of Pristina. The four persons arrested have been living quietly in their ethnically mixed village for the last ten years, and in any case there was no fighting there in the war (1998 – 1999). It seems highly unlikely that war criminals could have been 'hiding' there so openly for so long without anyone bothering them. At the same time, no investigation has been undertaken into the murder and kidnapping of seventeen Serbs from this region in the period after 1999.²³⁰

The charges that justified the arrests appeared implausible, however. The accused are from a rare mixed village – named Novobërdë in Albanian and Novo Brdo in Serbo-Croatian – where Serbs and Albanians lived and still live next to each other. After Serb forces left Kosovo, in June 1999, the KLA controlled this village for several weeks, until UNMIK and NATO established their authority. In that period KLA guerrillas and others conducted a 'widespread' and 'systematic' campaign of revenge which killed about 700 Serbs throughout Kosovo, which caused more than one half of the Serb community to leave Kosovo, on the heels of the retreating Serbian military forces.²³¹ Naturally, such campaign targeted especially those who were suspected of having contributed to the repression of the Albanian population, and many crimes committed against Albanians remain unpunished precisely because who had reason to fear retaliation left Kosovo in June 1999. If they did commit war crimes against victims who remained alive, and could

²³⁰ Institut de la Démocratie et de la Coopération, 'Kosovo 2009: Dix ans d'administration internationale, un an d'indépendance: quel bilan?', Paris, 2009, p. 22: the quotation is from an English version published under the title 'Ten years of international administration one year of independence: an appraisal', at <http://www.idc-europe.org/en/KOSOVO-2009---The-Report> (emphasis added).

²³¹ See David Harland, 'Kosovo and the UN', *Survival* 52 (2010), pp. 75–98, p. 76; Iain King and Whit Mason, *Peace at Any Price. How the World Failed Kosovo* (London, 2006), pp. 52–57, 97 and 84; Phillips, *Liberating Kosovo*, p. 119. The two citations are from Amnesty International, 'Serbia (Kosovo): UNMIK's legacy: the failure to deliver justice and reparations to the relatives of the abducted' (London, 2013), at <http://www.amnesty.org/en/library/info/EUR70/009/2013/en>, p. 5.

accuse them, it seemed odd that they would neither leave Kosovo in June 1999 nor be punished by the KLA while it controlled the village.

The accused were detained for three months.²³² The indictment was issued on 2 December 2010, with a (14-month) delay which suggests that the charges and evidence on which the arrests were based required further elaboration.²³³ On 22 July 2011 an Eulex court acquitted all defendants.²³⁴

The question, therefore, is whether the political interests of the mission influenced the prosecutors' decision to order the arrests: the point, more precisely, is whether the charges or the evidence was weak already at the time of the arrests. The reasons for the acquittal could answer this question, but they are unknown: unusually, Eulex's website only published the enacting clause of the judgement.²³⁵ In the next paragraph we shall see that in one case the mission's management disregarded a judge's written order to publish a judgement, which revealed a serious error committed by another Eulex judge.

On 25 July 2013, Eulex's appeal judges annulled the acquittal and ordered a retrial, which is presumably still pending.²³⁶ This decision is published and contains sufficient information to reconstruct the main allegations and formulate a hypothesis on the question we have just raised.

The two defendants I met are accused of having detained two Kosovo Albanians in inhuman conditions, and of having beaten them repeatedly, in 'co-perpetration [with] other Serbian military or paramilitary members, including [the initials of six names follow]'.²³⁷ None of such other persons was tried, presumably because they fled Kosovo and could not be apprehended. The third defendant, the woman, is accused of having beaten the victims while they were detained.²³⁸ These crimes occurred between 19 and 22 April 1999, during the NATO bombing, and were committed in the village where Eulex arrested the accused ten years later.²³⁹

One of the two victims reported the crimes to UNMIK, on 21 September 2000, and provided a further statement to Kosovo's police in 2007.²⁴⁰ Eulex's prosecutors used these reports as evidence to support the indictment, and presumably also the arrest warrant, but they paradoxically became the main basis for the acquittal.²⁴¹ In those two

²³² Their release is mentioned by UNMIK, *Media Monitoring Afternoon Edition*, 16 December 2009, at <http://media.unmikonline.org>.

²³³ See the appeal judgement (quoted at note 236, below), p. 3, para. 1.

²³⁴ District Court of Pristina, case No. 445/2010, *Martinović et al.*, Judgement, 22 July 2011 (unpublished).

²³⁵ Like the judgement mentioned in note 50, above, also the enacting clause of the acquittal was removed from Eulex's website sometime in 2013 (the published judgments issued by this court are listed at <http://www.eulex-kosovo.eu/en/judgments/CM-District-Court-of-Pristina.php>). The enacting clause of this judgement – which was downloaded from Eulex's website – is available at <http://eulexannex.wix.com/draft>.

²³⁶ Court of Appeals, case No. PAKR 978/12, *S.M. et al.*, Judgement, 25 July 2013, at [http://www.eulex-kosovo.eu/docs/justice/judgments/civil-proceedings/CourtAppeals/978-12/\(2013.07.25\)%20RUL%20-%20S.M.%20%20\(Court%20of%20Appeals\)%20ENG.pdf](http://www.eulex-kosovo.eu/docs/justice/judgments/civil-proceedings/CourtAppeals/978-12/(2013.07.25)%20RUL%20-%20S.M.%20%20(Court%20of%20Appeals)%20ENG.pdf).

²³⁷ *Ibid.*, p. 1.

²³⁸ *Ibid.*, p. 2.

²³⁹ *Ibid.*, pp. 1–2.

²⁴⁰ Court of Appeals, *S.M. et al.*, Judgement, p. 4 (paras. 8–9) and p. 7 (paras. 17 and 20).

²⁴¹ *Ibid.*

statements, in fact, the victim ‘did *not* mention the defendants as participants’ in the crimes.²⁴² The court of appeal observes that although the victim

has in all his subsequent statements repeatedly stated that the defendants did take part in the beatings, yet it is the lack of their mentioning in the two very first statements that bears the heaviest weight for the Trial Panel.²⁴³

We thus learn that this discrepancy in the victim’s statements was the main reason for the acquittal. Although the appeals court mentions them without comment, however, two other factors probably carried some weight. First, ‘[t]he statements from 2000 and 2007 are very short and are lacking in detail.’²⁴⁴ Second, ‘the statement of 2007 [is] a handwritten statement handed in by the victim himself.’²⁴⁵

Both seem important elements: especially the second one, because during the trial the victim argued – to explain that discrepancy – that he did name the accused in 2000, when he rendered his report to UNMIK, but their names ‘might have been omitted by the person writing it down.’²⁴⁶ While this possibility cannot be excluded, it is less credible that, if the victim was beaten and inhumanely detained for four days by people whom he could identify, he would omit their names from his 2007 hand-written report. That report, in fact, could have no other purpose than that of stimulating an investigation against the culprits: if X tortured me, I do not tell the police that ‘someone’ tortured me: I tell them that X tortured me, because I want them to prosecute X. This implausible explanation harms the credibility both of the victim and of his post-2007 statements.

The appeals judgement mentions no other evidence against the accused. In particular, no statements by the other victim are quoted. We can infer that the case rests primarily – if not exclusively – on the statements we have just commented.

Eulex’s prosecutors challenged the acquittal because the victim’s 2000 and 2007 statements were received by UNMIK and by Kosovo’s police in a manner that breached several procedural rules: for these reasons, the prosecutors asked the appeals court to declare that such statements are ‘inadmissible’ evidence.²⁴⁷ The court confirmed the procedural breaches, but did not find that they made such evidence inadmissible.²⁴⁸ Conversely, the court annulled the acquittal and ordered a retrial because those breaches

may have influenced the rendering of a lawful and proper judgment, especially since the District Court Trial Panel has relied on these earlier statement to such a considerable extent.²⁴⁹

The victim’s earlier statements – and their discrepancy with the subsequent ones – shall therefore be part of the evidence to be considered in the retrial. The appeals court, however, contains also some guidance for the evaluation of that evidence, which is evidently addressed to the retrial judges. Such guidance is so misconceived that it bears reproducing it in full:

²⁴² Ibid., p. 7, para. 20 (emphasis added).

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid., p. 4, paras. 8–9.

²⁴⁸ Ibid., p. 7, paras. 17–18.

²⁴⁹ Ibid., p. 7, para. 21.

[i]t is acknowledged as a general rule that witness statements closer in time to the events usually are more trustworthy and reliable than later statements, as details may be forgotten with the passage of time. This is however dependent on certain conditions, one being that the *witness is free at all times to openly express what he knows*. In unclear and uncertain circumstances that usually appear in connection with *Wars and turbulent times as it was in Kosovo in 2000*, a witness may not have been in such a situation to freely express his knowledge when called upon to give a statement. Such circumstances may cause an exception to the general rule of accuracy in statements closer to the events. Based on this an earlier statement *may* therefore be more inaccurate than a later statement.²⁵⁰

Contrary to what the court writes, in September 2000 – when the victim rendered his first statement – there was no ‘war’ in Kosovo: the conflict had ended 15 months earlier, the country was at peace and was being reconstructed, and public order was ensured by 4,500 UNMIK policemen and 50,000 NATO soldiers (one for every 33 of Kosovo’s 1.8 million residents: an extraordinarily high ratio). Breaches of the peace were indeed frequent, but most were acts of revenge against Serbs and Roma: those were ‘turbulent times’ only for those small minorities, not for the dominant Albanian community. It is inconceivable that Eulex’s appeal judges did not know these facts: in 2000 the victim was no less ‘free’ to accuse his tormentors than he was in the course of the trial. Moreover, the court forgets that the victim omitted the names of his tormentors also in his hand-written statement, rendered in 2007, in quieter times and after long reflection. The court’s guidance is entirely and manifestly mistaken: there is no reason, in this case, to deviate from the general rule that makes earlier statements ‘more trustworthy and reliable’ than subsequent ones.

The rest of the judgement is convincing. The defence lawyers did not deny that the victims suffered terrible crimes, nor disputed that the officers who received the victim’s 2000 and 2007 statements breached several procedural rules: rather, they argued that such breaches are irrelevant, and that the prosecution was anyway barred from invoking them at such a late stage, after having relied on them statements in the indictment.²⁵¹ This argument may have some rhetorical force but – we can confidently assume – is legally weak.

The question, rather, is that such breaches do little to strengthen the credibility of the incriminating evidence, which was weakened by the discrepancy noted by the first instance court and was further harmed by the victim’s statements during the appeal proceedings. As his claim that he knew the names of his tormentors already in 2000 is hardly credible, because he omitted such names also in the 2007 hand-written report, his later statements lose much of their credibility. Consequently, one wonders what is the point of a retrial on such implausible charges if the remaining evidence is the two nameless statements, which are also ‘very short’ and ‘lacking in detail’. The retrial can result in a conviction only if fresh evidence emerges – which seems unlikely but cannot be excluded, and is probably the reason why a retrial is legally justified – or if Eulex’s judges will choose to follow the appeal court’s guidance on the evaluation of the evidence and will, on this basis, choose to disregard the earlier statements in favour of the subsequent ones.

²⁵⁰ Ibid., p. 7, para. 19 (emphasis added).

²⁵¹ Ibid., pp. 4–5, paras. 10–12.

Such perplexities grow based on documents I received from a former colleague of mine in the ICO, who in 2009 was in contact with the family of the accused. Such documents – all dating from September-November 2009, while the accused were detained – include a report sent by the family of the accused to Amnesty International, an open letter they sent to Kosovo’s media and institutions, an article published by a former KFOR official, and an email sent to Eulex by a former UN official.²⁵² Part of such information is confirmed by the independent report we quoted above (see the notes below). The information contained in such documents can be summarized as follows:

- 1) the victim-witness is from the same village where the defendants live and were arrested, and where the crimes occurred; the other victim is from another municipality;
- 2) the victim-witness is, and always was, a ‘neighbour’²⁵³ of the two main defendants; (my colleague clarified that their houses, which are in the countryside, are 350-400 meters away; that the accused and the victim know each other since well before the 1999 conflict, and were always in good relationships);
- 3) in 1999 the two main defendants were re-drafted in the Yugoslav army, which stationed them in their own village;
- 4) during the 1999 hostilities no murders or fighting were observed in that village: the few recorded war crimes were lesser ones, such as those that are the subject of this case;²⁵⁴
- 5) the KLA controlled that village between mid June and August 1999; in this period eight Serb residents were murdered and 18 were beaten, tortured or wounded in armed attacks;²⁵⁵ six Serb and two Albanian residents (accused of ‘treason’) disappeared, and are presumed dead; the whole Serb population of one settlement (about 300) fled to Serbia or Serb-held north Kosovo, and 42 homes were destroyed; overall, the Serb population of that village almost halved;
- 6) the two main defendants never left Kosovo or their village²⁵⁶, and were not molested by the KLA;
- 7) according to a former UN official who administered that village in 2000–05, in that period one of the two main defendants (the one in whose home I was received) played ‘a leading role’ in efforts to reconcile the Serb and Albanian communities of that village – he also drove ‘the inter-ethnic bus’, at the

²⁵² The documents are the following: ‘Report on the arrest of Kosovo Serbs on charges of war crimes in the municipality of Novo Brdo’, 9 December 2009, unsigned; emails by the former UN administrator of the village to Eulex’s prosecutors and chief of staff, dated 8 November and 9 December 2009; ‘Open letter to the prime minister and the people of Kosovo’, 3 November 2009, signed by Liliana Martinović (the wife of one of the defendants in whose home I was received). This letter is mentioned by UNMIK, *Media Monitoring Afternoon Edition*, 13 November 2009, at <http://media.unmikonline.org>; among the passages quoted is this one: ‘is it logical after ten years peaceful life in Novo Brdo that charges are suddenly brought out for war crimes? Is it possible that Kosovo Serb, who did anything bad to their Albanian *neighbors*, never left Kosovo?’ (emphasis added; the language imperfections are in the original). The letter in fact reads: ‘*immediate* Albanian neighbors’ (emphasis added).

²⁵³ See the previous note.

²⁵⁴ Institut de la Democratie et de la Coopération, ‘Kosovo 2009’, p. 22 confirms this piece of information.

²⁵⁵ Ibid. confirms also this, although it mentions a higher number (17) of murdered or disappeared Serbs; this report also adds that no investigations were conducted on these crimes.

²⁵⁶ Ibid. confirms also this.

request of that UN official (the accused is a bus driver) – and his ‘contribution in the direction of reconciliation was considerable’;

- 8) the other main defendant worked in Kosovo’s police since 2000 until his arrest;
- 9) the two main defendants were never questioned by either UNMIK or Kosovo’s police about the charges against them, and first learned of them upon their arrest;
- 10) Eulex’s prosecutors indicated that they had five witnesses in the case; during the first month of detention of the accused, the prosecutors heard only one witness;
- 11) finally, sometime after June 1999, the victim-witness allegedly ‘usurped’ a kiosk belonging to the third defendant (the woman).

If even part of this were true the victim’s incriminating statements would lose any credibility, and the charges would appear entirely implausible. In particular, it is inconceivable that if the two main defendants tortured a neighbour they would continue to live next to him; it is even more inconceivable that if the victim was tortured for four days by his neighbours he would not report them immediately after the end of the hostilities, to the KLA, UNMIK or KFOR, and would not indicate their names at least in the 2007 hand-written statement. This would explain also the silence of the second victim: if he or she did not identify the accused as the culprits, it presumably is because they are not the culprits. Equally, this would explain why UNMIK and Kosovo’s police did not act upon the victim’s 2000 and 2007 reports, and why no evidence from the other three witnesses is mentioned by the appeals judgement.

Such information cannot fully be trusted, however: even though most of it is verifiable, I did not verify it; such documents evidently aimed at favouring the release of the accused from detention; and my former colleague, as well as the authors of the documents I summarized, might have been biased.²⁵⁷ Only the 2011 acquittal could establish these points, and they shall presumably be dealt with by the retrial judgement.

Nevertheless, even if we disregard such information, serious doubts about Eulex’s conduct remain. First, what led the prosecutors to order the arrests? The evidence they had seems both weak and ambiguous, based on how the appeals judgement describes it. Moreover, it is presumable that only part of such evidence was available at the time of the arrests, because 14 months passed before the indictment was issued. In addition, after a murderous regime falls, or a civil war ends, charges of war crimes or political crimes are sometimes used to settle scores, or for personal gain: to acquire property, for instance. The accusations on which the prosecutors based themselves could conceivably have been intended to lead the accused to leave Kosovo, forcing them to sell their land in haste, at a low price: I am told that this phenomenon is not unknown in Kosovo. Did the prosecutors consider this possibility, when the victim identified his tormentors with an unusual nine-year delay?

Equally, the accused had not fled Kosovo after the alleged crimes, lived in their houses with their families, and such houses probably are they only valuable assets they possess: they were highly unlikely to abruptly leave Kosovo in September 2009. Why was

²⁵⁷ On 30 September 2009 he wrote to me that the arrests were ‘a COLOSSAL mistake... We are all in a state of shock and the families are devastated; I don’t know how they will recover. We have hired some lawyers on recommendations that they are good - but they are also very expensive. These are peasant families who don’t have much money.’

it urgent to arrest them at that time? And if it was urgent to arrest them, why have they been released after three months of detention, eleven months before the indictment was issued?

A hypothetical but rather plausible answer to these questions is that the political interests of the mission influenced the decision to order the arrests. The book (pp. 137–39 and 143–47) demonstrates that Eulex’s judicial staff operated under incentives that inclined it to follow the preferences of the management (see § 3.6, below); as in September 2009 the mission’s public image would have benefited from the arrest of Serb suspects of war crimes, it is conceivable that these interests inclined the prosecutors to focused on this file, and to order the arrests. Whether the prosecutors were convinced that their case was strong, or were aware that it was weak instead, is a secondary question from our perspective, and it only can be answered based on the unpublished 2011 acquittal.

Second, why was this judgement not published? If that hypothesis were correct, it would answer also this question, because that judgement could unveil a miscarriage of justice: the management would therefore have had an obvious incentive to avoid its publication.

Third, was the guidance of the court of appeal an innocent mistake, or was it an attempt to favour a conviction that would avoid a rather serious embarrassment for the mission? The gravity of the errors of logic and fact committed by the court corroborates that hypothesis, because it suggests that those were not innocent mistakes.

All this seems to point to a conspiracy, but the 2011 acquittal excludes this interpretation: had a conspiracy existed the first instance judges would have convicted the defendants. At this stage, therefore, it is pointless to discuss this hypothesis any further. Rather, I would note that Eulex now faces three possible outcomes, two of which entails an embarrassment for it. If the retrial will produce a convincing conviction, the arrests and the mission’s overall conduct will be vindicated. If the defendants will be acquitted, conversely, the questions we have raised shall remain, and shall hopefully find an answer in the retrial judgement. If the defendants will be convicted on weak evidence, or on the basis of the indefensible guidance issued by the court of appeal, the doubts about the mission’s conduct shall acquire a stronger justification.

2.22 Civil justice: two judgements about a national treasure

Most of Kosovo’s considerable mineral wealth is controlled by a company named Trepça, which holds mining licenses over virtually all known reserves of lead, zinc and precious metals (see pp. 197–98 of the book).²⁵⁸ Since the 1999 conflict this company operated at a small fraction of its capacity and consistently produced losses. Its quantifiable debts amount to a high multiple of any plausible valuation of its assets, and its environmental liabilities are probably even larger. In each of the past dozen years Trepça’s current liabilities far exceeded its current revenue and were covered by transfers from the Treasury, disbursed through the budget of the privatization agency in whose portfolio this ‘socially owned’ company is.

This company should have stopped trading long ago. Restructuring it would divert too large a portion of Kosovo’s limited public resources from its urgent development

²⁵⁸ On the history and reserves of Trepça, and for further bibliographical references, see Milovan Vukovic and Ari Weinstein, ‘Kosovo mining, metallurgy, and politics: eight centuries of perspective’, *Journal of the Minerals, Metals and Materials Society* 55 (2002), pp. 21–24.

priorities: Trepça should have been liquidated, transferring its licenses, pits and the few other usable assets to other (private, public or mixed-capital) companies capable of making better use of them, so as to generate employment, royalties and tax revenue.

UNMIK and Kosovo's authorities did not liquidate Trepça for four main reasons. First, Trepça holds an important place in the collective imagination of Kosovo, because of its past glory and because it was in its pits that the peaceful resistance of Kosovo's ethnic Albanians against Milošević's repression began: the flags of the Trepça miners are still flown at most public demonstrations. Second, this company also serves as an *ad hoc* welfare institution for the aristocracy of Kosovo's working classes, because it pays relatively generous stipends and pensions to its redundant or retired employees: these are considerable privileges in a country that suffers from high unemployment and has a very weak social security system. Third, Kosovo's elite used Trepça as a reservoir of patronage and, presumably, a flywheel of corruption. Fourth, Trepça is *de facto* divided into two parts: a northern branch, in Serb-dominated territory, and a southern branch, in Albanian dominated territory: as UNMIK and Kosovo's authorities only controlled the latter but claimed also the northern one, they feared that an attempt to liquidate the whole company would have failed and harmed their claim. Not even this last reason is convincing, of course, because careful rhetoric could allow the southern branch to be liquidated without harming that claim.

What could have precipitated the liquidation of Trepça was the enforcement of even one of its large commercial debts. This risk grew in 2005, when a Greek creditor invoked a €25 million claim (equivalent to more than twice of Trepça's yearly turnover, and to a multiple of the presumable value its assets).²⁵⁹ UNMIK then issued an *ad hoc* regulation on the restructuring ('reorganization') and liquidation of Trepça.²⁶⁰ As many similar pieces of legislation, this regulation contemplates a moratorium on creditors' claims during the restructuring: unlike in most other jurisdictions, however, the moratorium could be granted *before* the restructuring plan was formulated (precisely because UNMIK knew that no such plan was feasible). The privatization agency immediately obtained the moratorium but never appointed the 'administrator' who had to propose a restructuring plan and submit it the court and the creditors. As the moratorium had no explicit time limit – only the four-month deadline for appointing the administrator was indicated – it *de facto* became open-ended; and as only the rejection of the restructuring plan could provoke Trepça's liquidation, creditors' rights were effectively expropriated without giving them a hearing.²⁶¹ This well-crafted and politically convenient solution was economically disastrous for Kosovo, however: keeping Trepça afloat merely added fresh debts and environmental damage to the old ones, burnt scarce public resources, and impeded the development of a potentially large and rich market.

In 2010 Kosovo's government decided to privatize the state-owned telecom utility, which – besides offering valuable occasions for corruption (see §§ 2.5 and 2.10) – served as a source of financing for the elite's political apparatus and as an instrument to

²⁵⁹ The claim was against the Greek export guarantee agency, in fact, but the latter could be expected to act against Trepça for the reimbursement of any indemnity paid to Trepça's original creditor.

²⁶⁰ UNMIK Regulation No. 2005/48 of 21 November 2005: formally, it applies to all socially owned industrial companies, but is universally known as the 'Trepça regulation'.

²⁶¹ Creditors' rights were expropriated, and not just limited, because they *de facto* lose part of their claims as the insolvent company's debts rise: the greater such debts are, the lower is the percentage of each debt that can be satisfied out of the proceeds of the sale of the company's assets (hence the rule whereby insolvent companies must stop trading).

influence the private sector of the economy: expanding Trepça's operations with public money would have created a reasonable substitute for these functions (see p. 204 of the book). In addition, despite the absence of any serious study on this matter, the government seemed genuinely convinced that restructuring Trepça was a sensible plan.

In late 2010 the privatization agency asked an Eulex court in charge of such matters to extend both the moratorium and the deadline for appointing Trepça's administrator. This request – which was part of a broader application seeking the court's approval for the sale of some of Trepça's assets, as required by the moratorium rules – aimed either at giving a more solid footing to a possible restructuring plan, or at allowing enough time for the government and the parliament to pass a fresh law on Trepça's restructuring.

On 26 January 2011 Eulex's judges issued their judgement. They acknowledged that the moratorium was 'not in compliance with the law' and was 'not effective', and that after the four-month deadline for appointing the administrator expired, in 2006, Trepça should have been liquidated: nevertheless, they extended both the deadline and the moratorium (for three months) because Trepça 'has always been considered as of national interest for Kosovo', because of 'the economic importance of trying to reorganize' it, and because its 'reorganization... has to be resumed'.²⁶² This is the whole reasoning, in essence, and it is again manifestly wrong and contradictory. Trepça's reorganization could not be 'resumed' because it had never begun: on the same page the court itself remarks that 'no reorganization plan was ever defined'.²⁶³ Without such a plan the court could not establish whether 'trying to reorganize' Trepça was 'economically important', which therefore was a superficial and arbitrary assessment (on a point that was anyway secondary to the question whether a restructuring was financially feasible).²⁶⁴ Moreover, if the moratorium was illegal and *already* ineffective, how could the court extend it? And if the law *required* Trepça to be liquidated, why did the court not issue this order?

The three-month term passed and the court rapidly granted a nine-month extension. The half-page long reasoning differs from the previous judgement but is equally flawed.²⁶⁵ It deals less with the moratorium than with the deadline for appointing the administrator, a term which the court evidently charged with the function of carrying forward also the moratorium. Eulex's judges extended that deadline based on a rule of procedure of that particular court whereby

[w]ithout prejudice to its responsibility to handle matters before it expeditiously, the [court] may in exceptional cases, and if the interest of justice so requires, extend a time period prescribed by law if it determines

²⁶² Special Chamber of the Supreme Court of Kosovo, cases No. SCR-05-001-R008, R009 and R010, *PAK et al.*, Judgement, 26 January 2011 (unpublished), pp. 15–16. This judgement – which I received from a former Eulex official – is available at <http://eulexannex.wix.com/draft>.

²⁶³ *Ibid.*, p. 16.

²⁶⁴ This ruling therefore implies the conviction that whatever is 'economically important' must be lawful, irrespective of what the law says: like Molière's Monsieur Jourdain, this court seems to have followed economic analysis of law doctrines *sans le savoir*, but went a little too far in that direction.

²⁶⁵ Special Chamber of the Supreme Court of Kosovo, cases No. SCR-05-001-R008, R009 and R010, *PAK et al.*, Judgement, 19 May 2011 (unpublished). This judgement – which I received from a former Eulex official – is available at <http://eulexannex.wix.com/draft>.

that it is not reasonably practicable for a party or the [court] to dispose of the matter at hand within the time period prescribed by law.²⁶⁶

As the opening clause indicates, this rule allows only the extension of ‘time periods’ *within* the judicial proceedings, such as the deadline for filing pleadings or judgements.²⁶⁷ At any rate, an illegal six-year old moratorium is not ‘a time period prescribed by law’: it is an unfair expropriation of the creditors’ rights. Indeed, the court does not address the question why the ‘interest of justice’ would be served by prolonging for nine months a four-month term that expired five years earlier and had already been extended by three months.

In the meanwhile the parliament passed a law that changed the rules on the restructuring of Trepça and extended the moratorium indefinitely. Plans to restructure Trepça with public money are still debated, but the state of public finances will not allow any serious attempt over the medium term. The expropriation of creditors’ rights and the damage to Kosovo’s budget and economy will therefore continue for the foreseeable future. As they saved Trepça from liquidation, Eulex’s indefensible judgements contributed decisively to this outcome.

Besides upsetting the government and the elite’s plans, however, Trepça’s liquidation would have angered also public opinion, which would have blamed both the court and the government. The latter, in turn, would have certainly sought to divert popular discontent toward Eulex, accusing it to damage Kosovo’s economy and to take the side of Milošević-era foreign creditors: the episode of the police protocol with Serbia offers not too distant an example of the attacks Eulex was likely to face. These two judicial errors therefore also protected the mission from potential but serious political damage: and as such errors are too macroscopic to be ascribable to mere incompetence, it is possible that the elite’s preference for an extension of the moratorium was transferred to Eulex’s management and, by them, to the mission’s judges. Or at least to one of them, who was more likely than other ones to take the mission’s political interests into account.

Two months before the first extension of the moratorium, in fact, an Eulex appellate panel annulled a judgement issued by an Eulex judge who did not have the power to issue it: although the case was to be adjudicated by a panel, which had already been formed, one member of the panel issued the judgement single-handedly.²⁶⁸ Two months later this judge presided the panel that issued the two Trepça decisions.

Eulex took no disciplinary steps against this judge.²⁶⁹ The presiding judge of the appellate panel – who has this power – ordered the decision that quashed the single-handed judgement to be published on the mission’s website, which would have been a mild, indirect sanction for that (incredible) mistake.²⁷⁰ The management did not comply

²⁶⁶ Ibid., p. 3 quotes this provision.

²⁶⁷ I owe this clarification to a former member of Eulex’s judicial staff.

²⁶⁸ Special Chamber of the Supreme Court of Kosovo, case No. ASC-10-0052, *Bulatović et al. vs. PAK*, Decision, 1 December 2010 (unpublished): the judgement quashed by this decision is Special Chamber of the Supreme Court of Kosovo, case No. SCA-09-0022, *Bulatović et al. vs. PAK*, Decision, 13 July 2010 (unpublished). Both judgements – which I received from a former Eulex official – are available at <http://eulexannex.wix.com/draft>.

²⁶⁹ I received this information by two former members of Eulex’s judicial staff.

²⁷⁰ The order to publish the judgement on Eulex’s website is contained in Special Chamber of the Supreme Court of Kosovo, case No. ASC-10-0052, *Bulatović et al. vs. PAK*, Note to the file, 1 December 2010

with that order: on the contrary, this judge was later promoted to become a member of Eulex's Human Rights Review Panel. The management's choices might be explained by the conviction that this judge – for the reason discussed in pp. 137–39 and 143–47 of the book, which concern the tenure and salary of Eulex's judicial staff, and the informal accountability system they are subject to – was less likely than other ones to take decisions that would conflict with the preferences of the management or the political interests of the mission. As we shall see in the last paragraph, this episode is probably the example of a wider phenomenon.

3. Conclusions

3.1 Overview of Eulex' choices, errors and results

Section 2 reviews all cases of more than negligible importance that Eulex handled since the inception of its mandate. To summarize its findings and retrace them into Table 5.1 of the book, we can look at whether, why, how, and against whom Eulex acted in such cases, and what results it achieved.

I. (Whether and why). The set of cases to be considered comprises 23 criminal ones: it excludes the civil case discussed in § 2.22, and includes *two* cases from each of §§ 2.8 and 2.16, for the reasons explained below. Eulex:

- i) did not act in eight of such 23 cases: those discussed in §§ 2.1–2.7, and the conspiracy against the governor discussed at § 2.8 (the *dossiers* case), which therefore is counted twice in this 22-cases list;
- ii) acted under external pressure in seven of the remaining 15 cases: §§ 2.9–2.10 and 2.15–2.18 (the case discussed at § 2.16, about organ *transplants*, is also counted twice, for it involves both the trial of the medics and the probable investigation on the leaders of the organ-trafficking scheme);
- iii) acted of its own accord in the eight remaining cases: §§ 2.8, 2.11–2.14 and 2.19–2.21.

II. (How). The set to be considered comprises those 23 criminal cases and the civil one discussed in § 2.22. Eulex's judicial staff made demonstrably mistaken judicial or prosecutorial choices on important matters ('serious errors', in short) in 13 of such 24 cases. The number of serious errors is of course higher, for in several cases more than one error was committed.

Eulex's prosecutors committed 13 serious errors. Twelve were omissions, which occurred in the eight 'unopened' cases (§§ 2.1–2.8) and in those discussed in §§ 2.10, and 2.15–2.17. Demonstrating these errors does not require proving that crimes had been committed, but only that Eulex disposed of credible and well-documented evidence that serious crimes might have been committed, and did not investigate or prosecute them (properly or at all). The first condition is satisfied in all ten cases. The second one is equally satisfied, but with different degrees of probability (listed in descending order):

- § 2.10 (the *telecom* deal case): the prosecutors accepted the acquittal, which was indefensible instead (see below; moreover, they did not request – from me – evidence that might have been useful to support their case, which appears also

(unpublished; the order – which I received from a former Eulex official – is available at <http://eulexannex.wix.com/draft>).

to have been incompetently presented); this case was opened under external pressure;

- § 2.17 (the *Marty report* case): by announcing a ‘preliminary’ investigation on these allegations in January 2011 (subsequently removed from the mission’s jurisdiction), the prosecutors themselves proved that they ignored them during 2008–10;
- § 2.16 (the *organ transplants* case): the judgement itself proved that the prosecutors declined to acquire crucial information (Marty’s findings) that was offered to them;
- § 2.7 (the *first road-building* case): the prosecutors themselves proved – through their announcement about the findings of the April 2010 searches, and their subsequent decision to resurrect a segment of this investigation – that shelving this investigation was mistaken;
- § 2.6 (the *election fraud* case): Eulex itself announced that it was prosecuting ‘one’ episode of fraud, which proves, by implication, that it did not investigate the systematic manipulation of the elections;
- § 2.1 (the *highway* case): Eulex itself denied that an investigation was pending in 2013. The investigation might have been closed before that date, of course, but if so it cannot have been a serious effort, because: 1) unlike in the other road-building case no search was conducted; and 2) Eulex asked me for an interview on my report but never interviewed me, despite my availability;
- §§ 2.3 (the land *expropriation* case) and 2.4 (the case about the *threats* concerning a privatization): the prosecutors themselves advised me that they would not investigate these cases; in the *threats* case they informed me that they considered but rejected the fraud hypothesis (and therefore did not investigate it in any depth), but the reasons for this choice – as they are outlined in the judgement – were plainly mistaken;
- §§ 2.2 (the *cement* privatization case) and 2.5 (the *computers* tender case): the prosecutors never asked me for further information or analysis, as they did in most of the cases in which they used my reports (in the *telecom* cases and three other ones, mentioned in § 1.5), nor did they conduct any search: this strongly suggests that, if any investigation was opened, it was not a serious effort;
- § 2.8 (*dossiers*): likewise, the prosecutors never asked the governor for further information or analysis about the (obvious) conspiracy against him, strongly suggesting that, if any investigation was opened, it was not a serious effort;
- § 2.15 (the political *assassinations* case): according to the whistle-blower and two reliable sources, the prosecutors disregarded his confession twice (and, apparently, did not even make an official report of it); at any rate, it is proved that they were unjustifiably late in protecting him; this case was opened under external pressure;

The other serious was committed in the corruption case against the *governor* (§ 2.9), in which the prosecutors arrested, detained and indicted an innocent based on implausible charges, all of which proved either unsubstantiated or misconceived, and they used also anonymous letters and secret evidence to support them.

This list does not include some equally serious but less certain or less easily demonstrable errors, such as the arrests in the *Serbs* case (§ 2.21); the indictment in the *customs* case (§ 2.11), which was presumably based on a mistaken reading of the trade

regime; and the failure to indict any of the most prominent suspects in the *telecom* and *assassinations* cases, and in that against the anti-corruption *prosecutor* (§ 2.10).

Eulex's judges committed eight serious errors – all demonstrable on the basis of judgements they issued – in the following six cases:

- § 2.4 (*threats*): the conviction of Luka's aggressors – in first instance and on appeal – is based on manifestly wrong reasons;
- § 2.9 (*governor*): the detention of the governor was extended based on secret evidence (this ruling, however, was overturned);
- § 2.10 (*telecom*): the acquittal is both unmotivated and manifestly wrong; this case was opened under external pressure;
- § 2.18 (*journalist*): the acquittal is based on contradictory and manifestly wrong reasons; also this case was opened under external pressure;
- § 2.21 (*Serbs*): the guidance issued by the appeals court on the evaluation of the evidence is based on contradictory and manifestly wrong reasons;
- § 2.22 (*civil case*): both judgements are based on contradictory and manifestly wrong reasons.

Equally, this list does not include the 'single-handed' judgement issued by the judge who presided the panels that rendered the two civil judgements (§ 2.22), because the underlying case is of negligible importance and both the error and the absence of any disciplinary action about it concern Eulex's *interna corporis* rather than the performance of its mandate.

III. (*With what results*). The set to be considered comprises the eleven criminal cases that led to a judgement. This set does not include the conviction issued in the *threats* case, because, if viewed from Eulex's perspective, that was a case of negligible importance; if viewed under the perspective of the fraud hypothesis, conversely, that (indefensible) conviction is part (at least in an objective sense) of the mistaken choice not to prosecute the fraud. In such eleven cases Eulex issued four convictions, only one of which is final, and seven acquittals, three of which are final; more precisely:

- i) Eulex obtained one final conviction, in the *assassinations* case: that of the whistleblower who confessed (presumably, also the conviction of some of his accomplices is final); this case was opened under external pressure;
- ii) Eulex issued three other convictions, on which an appeal is pending: against the prosecutor, the medics who performed the transplants, and the Mayor of Prizren; two of these cases – *prosecutor* and *transplants* – were opened under external pressure;
- iii) Eulex issued three acquittals that have become final: those of the governor, the telecom officials, and the customs officials; one of these cases – *telecom* – was opened under external pressure;
- iv) Eulex issued four other acquittals, on which an appeal or retrial is pending: those of the three Serbs, the former health minister, the mayor of Skënderaj (in the case about the intimidation of a *journalist*: § 2.18), and Limaj (in the *Limaj war crimes* case: § 2.19); one of these cases – *journalist* – was opened under external pressure.

All four convictions seem convincing, moreover, whereas of the seven acquittals two (*telecom* and *journalist*) are manifestly mistaken and one (*Limaj war crimes*) seems mistaken.

IV. (*Against whom*). The set to be considered comprises all 23 criminal cases indicated above except the *Serbs* case, which concerns neither members nor interests of the elite. In such cases Eulex:

- i) indicted one (Limaj), and convicted none, of the ten or so highest members of the elite (ranked 1 in Table 5.1). The mission ignored seven cases (§§ 2.1–2.6, 2.8) likely to implicate another five or six of them, including the prime minister, all but one (Haradinaj) of whom belong to the leading faction. Limaj, conversely, is opposed by the leading faction of the elite. All three investigations against Limaj – the *war crimes* one and the two *road-building* ones (one of which failed) – were opened by the mission of its own accord;
- ii) indicted four – the governor, the former health minister, and the mayors of Prizren and Skënderaj – prominent members of the elite (ranked 2), and convicted one of them: the mayor of Prizren. The seven ignored cases were likely to implicate numerous other ones, mostly belonging to the leading faction. The governor was opposed by the leading faction of the elite; the other accused belong to it. One case against the mayor of Skënderaj – *journalist* – was opened under external pressure;
- iii) indicted half a dozen – the prosecutor, the telecom and customs officials, and the surgeon – associates of the elite (ranked 3 or 4), and convicted two of them: the prosecutor and the surgeon. The customs director was opposed by the leading faction of the elite; all other accused belong to it. All but one of such cases – *customs* – were opened under external pressure;
- iv) convicted a handful of lower operatives of the elite: those who committed the *assassinations*; this case was opened under external pressure.

3.2 The emerging pattern: a policy of passivity

All eight ignored cases and all seven ones that were opened under external pressure challenged important members of Kosovo's elite or important interests of it. More precisely, all but one – the *first Limaj road-building* case – of such 15 cases challenged the leading faction of the elite.

Of the eight cases that the mission opened of its own accord, four challenged opponents of the leading faction of the elite – Limaj (two cases), the governor and the customs director – and one concerned three ordinary Serbs. The other three did challenge the leading faction, but the two main ones – against the mayors of Prizren and Skënderaj (for war crimes) – were opened in 2013 or 2014, after Eulex's management changed.

With one exception – *Serbs*, on which we shall return below – all of the 21 serious errors committed by Eulex's prosecutors (14) and judges (8) have one common feature, besides their gravity: they either went to the benefit of persons belonging to Kosovo's elite or protected important interests of it (or advanced them, in the case against the *governor* and in the *civil case*).

More importantly, all but two of such 21 serious errors occurred in the 15 cases that the mission either ignored or opened under pressure, and they all went to the benefit of the defendants or suspects. Only in two of the eight cases that Eulex opened of its own accord serious errors were observed: in the *governor* and *Serbs* cases, and both the mission's errors went to the detriment of the defendants.

These striking correlations must be viewed together with the outcome of the seven cases opened under external pressure, which was the following:

- i) the very sensitive *Marty report* case was removed from the mission's jurisdiction, after a succession of contradictory statements about whether the allegations were credible or not, and whether or not the mission could investigate them;
- ii) the *telecom* case relied on irrefutable evidence but failed by reason of a combination of serious errors by both the prosecutors and the judges;
- iii) the *journalist* case led to an indefensible acquittal (which was appealed though);
- iv) the *assassinations*, *organ transplants* and *prosecutor* cases led to indictments and convictions, which represent a modest result, compared to the evidence that was disclosed and the likely involvement of more senior figures;
- v) the second *organ transplants* investigation is (probably) still pending, and was opened only after Eulex's management was changed.

The pattern that emerges from these observations strongly suggests that, until about 2013, Eulex followed a policy that can be reconstructed as follows. The mission generally sought not to encroach upon the interests of the elite (the eight ignored cases). Eulex did so only when this was necessary to protect its own credibility *vis-à-vis* both the public and its headquarters (the seven cases opened under pressure). In such cases, however, Eulex aimed at achieving the minimum necessary result, presumably identified by balancing its reluctance to challenge the elite against the need of safeguarding its credibility, at the cost also of committing serious errors. Thus, in three cases opened against associates of the elite (*assassinations*, *transplants*, *prosecutor*), the mission omitted to either investigate or indict the far more prominent figures who were probably implicated; it acquitted the only genuinely prominent member of the leading faction of the elite (Skënderaj's mayor, in the *journalist*), whose indictment was inevitable because it stemmed from his own public statements (the threats); and it acquitted even some associates of that faction, in a grand corruption case which involved very significant economic interests (*telecom*).

In § 3.5 we shall discuss the change in Eulex's policy that was observed in 2013. By reason also of the mission's passivity, however, in 2008–12 organized crime and corruption grew in Kosovo (see Chapters 5 and 7 of the book). In § 1.2 we quoted the jurist who served as Eulex's chief prosecutor in 2010–11 as saying that he was 'terrified' by the level of corruption in Kosovo, that he had a 'list' of high-profile cases, and that his plan was to bring corruption down to 'an acceptable level' by September 2011. Commenting on the prime minister's intention to fight corruption, this official used words – 'this expression of a wish should be translated into actions' – that can equally be applied to his mission.²⁷¹

3.3 The emerging pattern: Eulex's active policy

The hypothesis we just formulated offers a coherent explanation of Eulex's many omissions, and of its conduct in cases it was forced to open. Yet the mission acted of its own accord in eight prominent cases, as we noted, suggesting that it did seek to repress crime, if insufficiently. If we focus our attention on the 2008–13 period, however, the features of the cases opened by the mission of its own accord – six cases: *governor*, *Limaj war crimes*, *Limaj road-building I*, *customs officials*, *health ministry* and *Serbs* – do not contradict that hypothesis, but rather complete it.

²⁷¹ 'EULEX chief prosecutor "terrified" at level of Kosovo corruption'. The chief prosecutor also used a more demotic expression: 'the proof is in the pudding'.

Only one of such six cases challenged a member of the leading faction of the elite: the former health minister, who was acquitted recently and whose acquittal was challenged. One case (*Serbs*) concerned persons wholly unrelated to the elite, and the other four targeted either opponents of the leading faction (Limaj) or persons opposed by it (the governor and the customs director). On these four cases, these observations can be made:

- i) of the two opened against Limaj, only the *war crimes* case was pursued, with visible determination: the corruption one (*road-building*) was unjustifiably shelved by the prosecutors;
- ii) this investigation could unveil an organized corruption network, which may have generated bribes for €150 million over in 2008–10 (excluding the highway bribes), and from which also the leading faction of the elite presumably benefited;
- iii) the *governor* case was gravely mistaken and failed, but his arrest and long detention provoked his dismissal, which the elite desired;
- iv) the errors committed in this case by Eulex's prosecutors and the judges are among the most serious ones we reviewed, and are the only ones – apart that committed in the *Serbs* case – that went to the detriment of the defendant;
- v) objectively, such errors advanced crucial interests of the elite, linked to the supervision of the financial markets and, especially, to the management of funds – the privatization proceeds (about €600 million) and the public pension fund (€300 million) – which at the time of that investigation amounted to 21 per cent of Kosovo's GDP;
- vi) also the *customs* case failed, and should probably not have been opened because the charges themselves seem misconceived;
- vii) although this case certainly damaged the customs director, however, it did not provoke his dismissal or replacement, which the elite equally desired (and eventually obtained through ordinary means).

When it acted of its own accord, therefore, Eulex's actions generally advanced important interests of the leading faction of the elite: its investigations discredited Limaj, caused the dismissal of the governor, and weakened the customs director, whereas they caused only minor and episodic damage to such interests (the former health minister had to undergo a trial). This suggests that – aside from one exception (*health ministry*), which does not alone disprove this hypothesis – when Eulex acted spontaneously it consciously chose cases that would not damage the interests of the leading faction of the elite but rather advanced them.

This conjecture can be supported by other considerations. First, not all the choices we criticized may be ascribable to Eulex's own volition: the *prosecutor* case showed that the office where its serious-crimes prosecutors were deployed – SPRK, in charge of all 23 criminal cases we considered – was permeable both to criminal interests and to the direct influence of the elite. Second, Eulex had to produce at least some visible results, in order to safeguard its credibility in Kosovo and satisfy the demands of its Brussels headquarters and of the member states of the EU. Given the mission's reluctance to challenge the interests of the elite, the choice of the cases in which such results were to be achieved may have been negotiated with the elite, which naturally sought to direct the mission away from its main interests. If negotiations did take place, they might have involved also a form of set-off, a *do ut des*: in order for it to accept the opening of a damaging case, the elite might have asked the mission to open a useful one. Even if we exclude the possibility of such negotiations, however, the mission was anyway likely to

favour the leading faction of the elite. Eulex certainly adopted a discriminating approach, in fact, and calibrated its actions according to its perception of the divisions that run through the elite and the dangerousness of each faction: it was therefore rational for Eulex to focus less on the leading faction than on other ones, with the result of protecting its interests and weakening its opponents.

With the possible exception of the *governor* case, this conjecture does not imply that the mission's management instructed its prosecutors or judges to advance such interests: to achieve that result it was sufficient not to stop or restrain their actions when they targeted opponents of the leading faction, such as Limaj and the customs director. We shall return to these questions in the last paragraph.

In the *Serbs* case, conversely, the mission's own political interests are likely to have played a role. Such interests might have influenced Eulex's choices concerning Limaj too. After the first *road-building* investigation he became a symbol of Kosovo's rule-of-law problems, and the target of the joint efforts of the elite and some Western capitals to improve the public image of the country. Limaj thus became 'fair game' for Eulex, not just for his split with the prime minister but also because his exclusion from the cabinet could be hailed as a sign that Kosovo was moving towards 'clean government'. Our conjecture can therefore be completed by noting that in choosing the cases to be opened the mission took also its own interests into account.

3.4 War crimes

Eulex committed no serious errors in war crimes cases. It opened a number of such cases – 26 verdicts were issued, considering also non-important cases, or about one third of all verdicts – that is visibly disproportionate, considering also that such cases concern crimes that occurred 15 years ago and are therefore more difficult to prove than the corruption and organized crime episodes that occur now.

War crimes investigations differ from those on corruption or organized crime in some important respects:

- precisely because they concern crimes committed more than a decade ago, in exceptional circumstances, unlike corruption and organized crime investigations they do not disrupt existing criminal activities;
- by nature, they are also more surgical investigations, and thus unlikely to provoke the opening of parallel cases;
- equally, they do not rely on investigative instruments that can accidentally uncover other crimes: conversely, for instance, once an offshore bank account is located where a bribe has been paid, evidence of other corruption cases may be found;
- they are generally opposed by public opinion in Kosovo, which tends to side with the defendants out of a simplistic identification between their conduct during the 1998–99 hostilities and the cause of Kosovo's independence;
- corruption cases, conversely, are welcome by the public – often enthusiastically so (the *first Limaj road-building* case) – because the link between corruption and the difficult socio-economic conditions of the country is increasingly clear to it;
- finally, obtaining convictions is generally difficult in war crimes cases, as the two Kosovo cases heard by the ICTY eloquently illustrate: even though the crimes were mostly ascertained, both Limaj and Haradinaj were acquitted for absence of evidence on their own personal responsibility.

In short, such investigations are significantly less dangerous for the elite than corruption and organized crime ones: except, of course, if the war criminal is also involved in corruption and organized crime (as it is alleged in Limaj's case), or is one of the highest members of the elite. The perspective of the accused is of course different, because war crimes generally entail longer sentences: but what matters for our analysis is the relations between the mission and the elite taken as a whole.

Mirror-like, war crimes investigations have greater symbolic value to international public opinion than corruption or organized crime ones, and are more visible to it. Consequently, external pressure on Eulex was probably more intense in this field than on corruption and organized crime, and any results obtained would yield a greater dividend for the mission.

These two reasons offer an explanation of Eulex's superior performance on war crimes, which is compatible with our overall hypothesis: they entailed a lesser risk of sparking a serious confrontation with the elite, and they allowed the mission to deliver valuable results to its stakeholders. Again, this does not imply that the mission issued instructions to its prosecutors: it was sufficient for the management to pose no obstacles to their investigations. It is also possible that Eulex's better prosecutors served in the war-crimes unit, as a result of choice, chance, or the adverse selection phenomenon described in the book (pp. 137–39 and 143–47).

3.5 Eulex's changed policy

Between late 2012 and early 2013 Eulex's policy changed. Since then, the mission reopened a very important case that was mistakenly shelved, the *second Limaj road-building* case; it opened an equally sensitive war crimes case (§ 2.20), arresting two genuinely prominent members of the leading faction of the elite; it indicted and convicted for corruption another prominent member of that faction, the mayor of Prizren; it indicated the intention to prosecute some more prominent suspects in the *organ transplants* case. These cases were all opened without external pressure, moreover, and they are the most sensitive ones of this category, together with the two earlier Limaj cases. Limaj was again challenged, of course, but in circumstances that do not suggest other aims than that of enforcing the rule of law.

This change in policy followed a drastic change in the mission's management, itself presumably caused by the critical remarks of an audit report – discussed at length in Chapter 5 of the book – ordered by the EU, which was unveiled in early October 2012, and was previously shared with Eulex's supervisors. Between the autumn of 2012 and early 2013 the head and deputy head of mission, the head of the justice sector, the head of the police contingent, the chief prosecutor and the chief serious-crime prosecutor (and head of SPRK) were changed: some were physiological replacements, but most were not. Also the head of the mission's judges was replaced, but this was irrelevant from our perspective because, unlike the prosecutors, the judges are not organized into a hierarchy.

A large mission, however, takes time to alter its course. In this period, in fact, Eulex issued two indefensible acquittals (*telecom* and *journalist*), appealed only one of them (*journalist*), and issued the equally indefensible *Serbs* appeals judgment. These do not seem to have been random choices, moreover, for the acquittal which the mission did not appeal (*telecom*) is that which concerns the most significant interests of the elite (grand corruption), and the *Serbs* appeals judgment points towards a conviction, which would protect the mission from a potentially serious embarrassment. Equally, the focus on war

crimes seems to have remained, diverting resources from the more urgent and (arguably) more important task of repressing and deterring the crimes that occur in present-day Kosovo. Whether because the new policy has not yet percolated to all its officials, or because the mission's past *mésalliance* with the elite could not be ended abruptly, therefore, the change in policy has not yet translated itself into an equally radical change in the conduct of the mission.

As if to prove this point, in March 2014 the head of SPRK, appointed a year earlier, repeated more or less the same statements that appear in the 2010 interview of the then chief prosecutor: that 'there are ongoing investigations on very important people', and that '[i]t is very concerning that the people in power are so corrupt'. The speaker is the prosecutor who conducted the *transplants* case: he did not acquire the information that Marty had offered, which concerned precisely the involvement of some of those 'important people'; he issued the impossible request to waive Marty's immunity; he only obtained the conviction of the medics who were caught red-handed by UNMIK's police, in 2008; and he obliquely blamed this on Marty and the Council of Europe.

Likewise, the request for information and 'evidence' about some of the 'unopened' cases discussed at §§ 2.1–2.5 that an Eulex prosecutor sent me in March 2014 (see § 1.5, above) lends itself to opposite interpretations: it can reflect either a genuine intention to remedy past passivity, or a desire to formally close the file. In one case, for instance, the prosecutor sent me the draft of the ruling formally opening the investigation (an eight-page document which outlines in some detail the facts, the charges and the suspects). The case concerns the transfer of an asset by a public entity to a private one. The ruling asserts (correctly, in my view) that the transfer breached some provisions of the criminal code. The ruling, however, orders an investigation only on the public officials who implemented the transfer and decided some details of it: not also on the three members of the cabinet who decided the transfer, two of whom are still in government, and the officials of the private entity who received the asset and participated in defining and implementing the transfer (one of whom is a foreign citizen). I sought to explain to the prosecutor that the same reasons for which the lower officials merited to be investigated applied *a fortiori* to those who decided the transfer and benefited from it. The reply I received was entirely unpersuasive: 'I can only do the Ruling based on the evidence... I can expand as and when I get supporting evidence' (the evidence already exists, of course, for this prosecutor judged it sufficient to investigate the lower officials); and 'I have little hope of going after internationals who have left Kosovo... I don't expect they will be hurrying back to Kosovo' (criminal prosecution rarely relies on the consent of the prosecuted).

My dialogue with this prosecutor ended soon after this exchange, yet it cast some light on the *interna corporis* of the mission. This prosecutor's approach probably reflects that followed by the mission since the inception of its mandate: when it chose to open investigations, or to issue indictments, it tended to focus on the less prominent suspects involved (in this case, at the cost of some logical inconsistency). This approach emerges most clearly from the *telecom* and *transplants* cases.

At any rate, there is no doubt that Eulex did change its policy and gradually improved its performance: it certainly is for this reason that, as we already noted, the elite 'spent the last year negotiating with the EU on how to limit the work of [SPRK]'.²⁷² From the perspective of Kosovo's interests, therefore, it is somewhat regrettable that the mission

²⁷² See note 9, above, and the corresponding text.

shall soon lose its executive powers and be drastically reduced. Its recent results suggest that, if well directed, Eulex might achieve appreciable results. From the perspective of the EU's interests this choice is understandable, conversely, because the mission entails significant financial and political costs and is anyway unlikely to achieve its original objectives.

3.6 The interests of the mission and the choices of its management

The policy we reconstructed, which Eulex presumably followed until 2013, was shaped by the pressures and incentives under which the mission operated. In particular, its management was exposed to two opposing pressures: that of its Brussels headquarters and the member states, which demanded results; and that of the elite, which requested the same tolerance and assistance it received from UNMIK, and could retaliate if such requests were not satisfied, including by preventing the mission from performing even the least problematic part of its mandate, or by provoking unrest in Kosovo, north Kosovo or even Macedonia (see Chapters 2, 3 and 5 of the book).

Chapter 5 of book argues also that, by reason of the structural defects of the mission, the management operated under incentives that could incline it to pursue opportunistic policies, deviating from the mandate of the mission. The mission's management thus chose to compose those two opposing pressures into an equilibrium, which could maximize the satisfaction of their main interests: achieving some visible results, and obtaining the ensuing personal benefits (for their career, reputation, self-esteem, etc.). The line it followed, therefore, was to produce the minimum necessary results in the repression of serious crime, and to obtain them where its actions were least problematic for the elite, or its leading faction.

Hence the predominantly passive policy of the mission, at play also in the cases opened 'under pressure', because their publicity made it impossible or inadvisable to ignore them. Hence, too, the focus of its active crime repression policy on war crimes, and on cases targeting opponents of the leading faction or persons opposed by it. Only the *health ministry* case deviates from this pattern. It targeted a *former* minister, however, and did not concern grand corruption: alone, this exception does not seriously challenge our interpretation.

The question that remains to be discussed is how the management could implement the two-pronged policy we described. Chapter 5 of book argues that the structural defects of the mission generated rather strong incentives for the mission's prosecutors and judges to follow the management's preferences in the performance of their of judicial functions. Despite their formal autonomy and independence, therefore, the management could influence their choices (the book – at pp. 137–38 – quotes an instruction, issued by the head of mission, which directly breaches the independence of the mission's judicial staff; in § 2.20 we noted another episode, concerning the assurances granted to three fugitives). For the most part, as we already noted, the management could achieve its objectives by restraining those investigations that conflicted with its policy, and by merely allowing the mission's prosecutors to act according to their own judgement in those cases that such policy allowed. To transfer its preferences to the prosecutors, moreover, the management did not have to issue instructions, but could rely on the fact that such preferences could be inferred by the prosecutors, who generally had the incentive to spontaneously align themselves to them. Only if such this did not occur would the management have to intervene.

Some cases, however, require a different and more problematic explanation: those in which also the judges committed serious errors, and especially those in which the errors went to the detriment of the defendants. Namely, the *governor* and *Serbs* cases, the *threats* conviction, and the *civil cases*. Each of such errors advanced either the interests of the elite (*governor*), those of the mission (*Serbs*), or both (the *threats* conviction, which proved that the prosecutors were right to ignore the fraud hypothesis, and the *civil cases*). In these cases it is conceivable that the management went beyond the approach indicated above, and explicitly encouraged prosecutorial or judicial choices that it judged desirable. This is the most troubling aspect of our hypothesis, for in such instances innocents or probable innocents have been arrested, detained and sentenced by the mission.

* * *

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