



Will Mogherini decapitate Kosovo?

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Kosovo's elite might soon be facing justice, if of an imperfect kind. Whether and how justice will be made is up to the EU, writes Andrea Lorenzo Capussela.

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Tomorrow President Juncker, High Representative Mogherini, and Commissioner Hahn visit Kosovo. They will meet people over whose heads a sword of Damocles hangs menacingly.

The heads are those of the former leaders of the Kosovo Liberation Army (KLA), who now rule the country, and the sword is Kosovo's so-called 'specialist chambers', an *ad hoc* criminal court established by agreement with the EU. Whether its blade is made of sharp steel or pliable rubber is still unclear, however. It depends entirely on the EU.

This court was established in 2015 to hear the allegations contained in the so-called 'Marty report', published by the Council of Europe in late 2010. After some hesitation, the main Western powers chose to take it seriously. In September 2011 the EU established a Special Investigative Task Force (SITF) to conduct a 'full-scale investigation' into the report. Its conclusions were unveiled on 29 July 2014.

SITF declared that its findings were 'largely consistent' with the Marty report (including on the claim that the KLA financed itself also by harvesting organs from selected prisoners, who were murdered in the process, to sell them on the international black market: SITF found evidence of 'a few' such cases, but failed to identify the culprits).

More precisely, SITF concluded that after the 1999 conflict Kosovo witnessed 'a brutal attack' against the Serb and Roma minorities and many Kosovo Albanians who opposed certain KLA factions; that such crimes were committed in an 'organized fashion', under the direction of KLA commanders, and resulted in the 'effective ethnic cleansing of large portions' of those minorities; and that, besides constituting war crimes, the attacks were sufficiently 'widespread' and 'systematic' as to justify the charge of 'crimes against humanity'. On this basis, SITF announced that it was 'in a position to file an indictment against certain senior officials of the former [KLA]'.

No names were given, but the Marty report indicates many. In particular, half a dozen figures—which include the current parliament speaker, deputy prime minister, prime minister, and president of Kosovo—were both accused of war crimes and described as 'key players' of organised crime. In this last respect, the report quotes Western official confidential analyses, some of which have been leaked, which often single out Kosovo's president—Hashim Thaci—as 'the most dangerous of the KLA's "criminal bosses"'.

Despite the fact that those figures exercise tight control over the parties and party factions that they lead, which then jointly had a blocking minority in parliament, in 2015 Kosovo accepted the EU's request to set up the special court and legislated for its establishment.

So, why did the ex-KLA leaders willingly expose themselves to the risk of long prison sentences? One explanation may be found in the Marty report itself, which describes the two 'shocking dynamics' that have guaranteed their 'impunity', despite the availability of 'overwhelming documentation' on their crimes: 'first, they appear to have succeeded in eliminating, or intimidating into silence, the majority of the potential and actual witnesses against them...and second, there has been faltering political will on the part of the international community to effectively prosecute the former leaders of the KLA.' They may, therefore, have calculated that the risk was, in fact, negligible.

Yet, in 2014 SITF—an EU agency headed by a US official—had accused them of crimes against humanity and said it possessed enough evidence to convict (at least some of) them. Well before the court was established, therefore, the ex-KLA leaders had reason to fear that the Western powers' clemency for their crimes could no longer be counted upon.

The explanation might, therefore, lie in that 'at least some of them'. In other words, having committed to take the Marty report seriously, Western powers might have concluded that achieving merely low- or mid-level convictions was not a credible way to deal with its allegations. So the question became who, among those half a dozen figures, would be indicted and convicted. This ought to depend exclusively on the evidence, of course: but the past performance of both the UN and the EU missions suggests that in Kosovo politics does play a role in judicial decisions. A role that is aided by the rules governing appointments in

the special court, which are left to Mogherini's discretion (see articles 28, 32, 33, and 35 of the Kosovo [law](#) governing the court, and note that the members of the selection panel, whose role is merely advisory anyway, are picked by Mogherini herself). A plausible hypothesis, therefore, is that Western powers and Kosovo politicians held negotiations on how many, and which, senior figures would be indicted and convicted.

Western powers have firmly denied that any such negotiation ever took place. But let us assume, for the sake of argument, that such negotiations did take place. The whole story would become clearer.

In 2015 only the main ex-KLA political faction supported the establishment of the court: that led by Thaci, then prime minister. The two lesser ones were in opposition: their leaders were fair game for the court, therefore, as indicting them would not have harmed Kosovo's reputation and political stability too much. Indeed, they opposed the court vociferously and insistently.

But the conditions changed in 2017. In June Kosovo held elections, followed by a long political stalemate. In June the special court became fully operational and could be expected to issue indictments very soon (the evidence was on their desks since 2014). In parallel, Western powers seemed to have become more critical of Kosovo's elite.

The stalemate ended in September, when the three ex-KLA factions formed a government together, with the narrowest of majorities (one seat). The looming risk of the indictments was said to be one important explanation for the formation of such a weak cabinet. This may be read as a sort of castling move, by which all potential indictees joined forces, occupied all institutional positions, and left the court—and, in our hypothesis, the main Western powers—before the alternative between decapitating Kosovo's authorities and allowing some prominent suspects to evade justice.

But two months later they evidently judged that this defensive move did not suffice. On 22 December their parliamentarians joined in a [surprise attempt](#) to stop the special court through legislative measures. This sparked unprecedentedly forceful public EU and Western condemnation. The three factions resisted the pressure for three weeks, bemoaning the 'injustice' of the court, but eventually backed down.

So we have another puzzle. Why did the ex-KLA leaders feel that they had to move openly and aggressively against the court, only to back down three weeks later? The logic of our hypothesis suggests that the second round of negotiations took place, to update the 'judicial' agreement between Western officials and Kosovo's elite to changed conditions (dwindling Western patience with that elite, above all). This might also explain why the court has not issued an indictment yet.

This hypothesis will never be proved. But one reliable conclusion can nonetheless be advanced. Due to appointment rules that would be wholly unacceptable in any established democracy, the special court is entirely a product of Mogherini's choices and is exposed to her office's informal influence. No matter how the appointments were made, or that influence exercised, the EU should now encourage the court's prosecutors and judges to exercise their function impartially, with no regard for political considerations, even if this entails the decapitation of all of Kosovo's political authorities.

This shall harm nobody but the suspects. Although they are the fathers of the state, they are the leaders of an unaccountable, incompetent, predatory, and often criminal elite, whose main interests are antithetical to the needs of the country's development, to the EU's long-term interests, and, increasingly, also to its short-term ones.