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Short analyses of public policies: "What went wrong?"

Group for Legal and Political Studies

ROCK AND RULE: Dancing with EULEX





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“What went wrong?”

ROCK AND RULE: Dancing with EULEX

By: Group for Legal and Political Studies



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Forward

The EULEX rule of law mission in Kosovo is the largest Common Security and Defense Policy (CSDP) mission to date. EULEX's mission statement was set in 2008 in a Council Joint Action. EULEX's designated mission is to "assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices."¹ The EULEX rule of law mission, in addition to maintaining some executive functions, was built to support the capacity building and development of Kosovo's rule of law institutions. A core function of EULEX was to coach – monitor, mentor, and advise (MMA) – Kosovo's rule of law institutions in establishing institutional practices that support the country's overall democratization. However, "despite significant EU assistance, progress in improving the rule of law is limited".² The stakes are high – as the largest CSDP mission – "a EULEX failure in Kosovo would be a failure of the European project in Kosovo, and potentially in the entire region of the western Balkans."³ Some have argued that on an institu-

tional, foundational level, horizontal (political) conflicts between EU member states regarding Kosovo's status have caused 'ambiguous recognition' and low levels of cohesion in the justice and policing sectors– a 'handicapped actorness' – which has hindered its influence and effectiveness.⁴ Others, like the German Defense Minister Thomas de Maiziere, have argued that on an organizational level, EULEX Police in Kosovo are "on the wrong track" and have failed to carry out their rule-of-law mandate; he calls for a "new start, new name, new structure, and new mandate" which should be decided upon at the EU level.⁵ The mandate, of which MMA was an essential factor, was either not met or shifted in the meantime. On a ground level, EULEX has faced numerous distinctive challenges, many of which continue to hinder EULEX's work particularly in the north of Kosovo. What stakeholders and scholars from different regions and schools of thought clearly agree on is that EULEX has yet to successfully realize the objectives of their mandate. This policy brief aims to concisely and realistically identify ten areas where EULEX went wrong.

1 EULEX KOSOVO. EU Rule of Law Mission in Kosovo, EULEX/18. (October 2012). Retrieved from http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/121010%20Fact-sheet%20EN%20version%2018%20TC.pdf

2 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 15

3 Greicevci, Labinot. (2011). "EU Actorness in International Affairs:

The Case of EULEX Mission in Kosovo." *Perspectives on European Politics and Society*, 12:3, pp 301. Retrieved from <http://dx.doi.org/10.1080/15705854.2011.596307>

4 Ibid.

5 Indeks Online. (10 October 2012). "Berlin criticized EULEX Police failures." Retrieved from <http://www.indeksonline.net/?FaqeID=2&LajmID=32189>

EULEX has failed to properly deploy and establish rule of law in the north of Kosovo

EULEX has proven unable to establish rule of law throughout Kosovo's entire territory. Many have agreed that EULEX has largely failed in their rule of law mission in the north of Kosovo. According to the European Court of Auditors, "EU interventions [in the north] have been very limited and there has been almost no progress in establishing rule of law."⁶ In the north EULEX should have been minimally focused on reducing crime and smuggling and tackling a number of organized and violent crime cases. There are however a number of obstacles that have prevented EULEX from making meaningful advancements in these areas in the north. To start, EULEX's rule of law mission struggled to get off of the ground due to limited freedom of movement throughout the north which was caused by barricades and checkpoints that blanketed the north primarily between summer 2011 and summer 2012.

Networks of Kosovo Serbs in the north, some influenced or coerced by parallel receiving support from Belgrade and some who strategically aligned with the cause,⁷ erected barricades in summer 2011 that effectively prevented EULEX and Kosovo Customs and Police from reaching the northern border and prevented the people and goods from moving freely throughout much of northern Kosovo. While KFOR was able to travel relatively freely throughout the north by December 2011, networks of Kosovo Serbs continued to organize around remaining roadblocks preventing EULEX

and Kosovo Customs and Kosovo Police from moving throughout the north and to the northern border crossings.⁸ The inability of EULEX and Kosovo Police to travel freely throughout the north wholly prevented them from realizing their objective of instating rule of law in the north of Kosovo, and moreover from instating security and control (outside of the parallel structures) over the northern territory. Because the roadblock removal operations were halted in early 2012, clashes between international forces (EULEX and KFOR) and northern Kosovo Serbs were minimal until mid-February. Serbs even began to allow EULEX to pass the barricades twice a day.⁹ However, this practice makes manifest EULEX's lack of control in the north and indicates the mission's dependence on the cooperation of northern Serbs; for EULEX, this allowance of two-per-day crossings established a precedent of EULEX obedience to the barricades and the tactics of parallel structures and supporters in the north. This prior situation indicates EULEX's incapacity to exercise its core function while parallel structures and northern Kosovo Serbs remain committed to deterring their authority in the north.

The question remains as to why KFOR was able to travel freely but EULEX was still prevented from passing barricades and 'rallying points' in the north. According

6 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. page 29.

7 EULEX Political Office. Personal Communication. (October 2012).

8 NATOCHANNEL.TV (11 December 2011). "Kosovo Tests Freedom of Movement." Retrieved from http://www.nato.int/cps/en/natolive/topics_48818.htm

9 International Crisis Group. "Crisis Watch Database." <http://www.crisisgroup.org/en/publication-type/crisiswatch/crisiswatch-database.aspx?CountryIDs=%7BE549D816-1DF9-4BC0-B890-0F3A2B62FD1B%7D>

to KFOR officials, this likely stems from the fact that EULEX investigates and arrests northern citizens as a function of their rule-of-law mandate causing suspicion from citizens; KFOR's mandate only extends to security, without the function of arresting or investigating, allowing KFOR to be perceived by northern citizens as a more impartial international peacekeeping force. While additionally, there exists a perception that, in the north, EULEX is a partial proxy of the Government of Kosovo. The perception that EULEX is implementing the Ahtisaari Plan and not maintaining a status-neutral platform has also plagued EULEX in their border control and customs efforts. In this regard, Serbs in the north and Serbia have viewed functional customs as a sign of EULEX's implementation of the Ahtisaari Plan and acceptance of Kosovo's statehood. The EU struggled alongside EULEX to handle the issue of customs and border control. In fact, the status-neutral character of the CSDP was made manifest in the EU's inability to negotiate a customs and border control agreement in summer 2011; the inability to foster this agreement higher up led to the events and troubles that prevented EULEX from realizing their mission in the north during much of 2011 and 2012. However, with the EU's ability to foster a customs solution and implement border agreements in late 2012, EULEX customs and police officers have been able to operate relatively smoothly using air transportation rather than ground movements. Within the context of the June 2012 mandate, EULEX has done some basic steps to increase their presence in the north with more active involvement in the area of

the judiciary and with stronger presence of a new special police unit in northern Kosovo."¹⁰ EU expects to find the solution to the northern issue in the Kosovo-Serbia Dialogue. Catherine Ashton's Spokeswoman Maja Kocijancic announced that "a political solution is necessary" to resolve issue in the north of Kosovo and that this solution "can only be found through dialogue."¹¹

While EULEX's struggle in the north in part derived from the local desire to inhibit freedom of movement, EULEX obviously lacked a clear plan to instate rule of law in the north of Kosovo. EULEX allowed for precedents that led the public to believe that EULEX was biased against those living in the north. The public saw EULEX as prone to prioritizing political objectives and the Dialogue, thus losing credibility internally and externally. EULEX's utter failure to deploy properly and instate policing, customs and judicial functioning in the north made many local institutions and international stakeholders question why EULEX, as it stands, is needed if it cannot act and fulfill its objectives in the most criminalized part of Kosovo.

10 Kocijancic qtd in B92. (11 October 2012). "Germany criticizes EU mission in Kosovo." Retrieved from http://www.b92.net/eng/news/politics-article.php?yyyy=2012&mm=10&dd=11&nav_id=82609

11 ♦td in B92. Ibid.

The status-neutral approach has caused discrepancies in carrying out EULEX's rule of law mission

One of the most common criticisms of EULEX is their inability to navigate their status-neutral approach. The conceptual origination of EULEX existed in the Ahtisaari Plan and was in line with Kosovo's independence and political demands from many stakeholders including the Government of Kosovo and most EU-member states. However, the mission was re-envisioned by the UNSC and ultimately emerged as a status-neutral entity. Subject to political leadership and CFSP diplomatic goals, rather than technical leadership and rule of law objectives, EULEX remains in a status-neutral position.

Unable to garner the support of the UN Security Council for the Ahtisaari plan, the EU Council Joint Action for EULEX Kosovo was annexed by the UN's Belgrade-backed Six-point Plan which accepted Security Council Resolution 1244, was status-neutral and set to enforce relevant law. However, over time, the status neutral approach (and origins in Resolution 1244 and UNSG authorization letter) has led to inconsistent legal action and legal understanding of the mission. Some officials have "claimed that EULEX works under Resolution 1244 of the UN, while others suggested that the mission recognizes the reality in Kosovo and works based on the Joint Action of the EU Council and Ahtisaari's Proposal."¹² EULEX's appropriation of a dual legal basis detracts from the establishment of legal norms and procedures, and thus inhibits EULEX from achieving a core principle of their rule of law mission in Kosovo.

12 Greicevci, Labinot. (2011). "EU Actorness in International Affairs: The Case of EULEX Mission in Kosovo." *Perspectives on European Politics and Society*, 12:3, P. 295. Retrieved from <http://dx.doi.org/10.1080/15705854.2011.596307>

On all fronts "EULEX has to implement laws, this implies implementation of either Kosovo laws or former UNMIK regulations. This has political implications and illustrates the fact that Kosovo's status influences the EULEX input and therefore it cannot be claimed that EULEX is simply a technical mission."¹³ As such, it has been difficult to instate rule of law cooperation with local institutions without EULEX fully recognizing the legal status of these institutions as delineated in the constitution of Kosovo (as an independent state). Confusion and dissatisfaction relating to EULEX's status-neutral stance has hampered the mission and has prevented EULEX from enacting legal norms cohesively and consistently, from gaining the support of Kosovo citizens, and from successfully promoting a *common* foreign and security policy (CFSP).

Additionally, the status-neutral approach and dual rhetoric has alienated both parties, Kosovar and Serbian. The EULEX lexicon for Prishtina illustrates EULEX acting in accordance with Ahtisaari while the rhetoric used for Belgrade depicts EULEX as working in accordance with status-neutral UNMIK legislation and the Six-point Plan. An inability to demonstrate a cohesive stance regarding status has opened EULEX to criticism and dispute from both sides. Furthermore, EULEX has adhered to the diplomatic approach of the EU in maintaining its neutral approach to appease Belgrade in the Dialogue. Forced to balance its technical job with the political and diplomatic aims of the Dialogue has inhibited EULEX from carrying out a successful and technical rule of law mission.

13 Ibid.

Progress in tackling high-profile cases of organized crime and corruption has been insufficient

EULEX has the rather exclusive responsibility to prosecute and try serious crimes and high-profile cases of organized crime and corruption. However, EULEX has been “effectively hamstrung in its attempts to combat high-level corruption and organized crime.”¹⁴ While EULEX Head Spokesperson Nicholas Hawton has insisted that “success in rule of law cannot be measured in such simple terms,”¹⁵ increasing the rate and visibility of high-profile trials and prosecutions for organized crime and corruption remains an obvious starting place for improvement.

EULEX has defended its failure to prosecute ‘the big fish’ by merely rhetorically devaluing the necessity of prosecuting high-profile criminals, rather than ramping up efforts to do so. EULEX’s PPIO argues that even though “it may not make newspaper headlines or the evening news on TV,” EULEX is succeeding on the ground by “doing their work, either in an executive capacity or monitoring, mentoring and advising our local colleagues.”¹⁶ However, while success in rule of law may not be fully measured in such simple terms as EULEX’s inability to catch the criminal ringleaders, in order to gain public support and legitimacy, and curb

organized crime and corruption, EULEX must increase their efforts in the justice section and prove their ability to bring high-profile criminals to justice. EULEX’s response to this criticism is worrying. EULEX dismissed the weight of public opinion rather than strengthening their policy approach to address major cases of organized crime and corruption. Rather than attempt to escape public oversight, EULEX should have accepted that catching high profile criminals is a determining factor in gaining public legitimacy. EULEX should also fortify and reevaluate EULEX’s media campaign in order to publicize its on-the-ground successes.

EULEX has had low levels of success in prosecuting major cases of organized crime and corruption in Kosovo. According to EULEX, 202 verdicts were issued for serious criminal cases by mid-October 2011 with 14 related to organized crime and 30 related to major corruption. By April 2012, EULEX judges had handed down verdicts in more than two hundred serious criminal cases, 46 in major organized crime and corruption cases.¹⁷ However “when you measure these verdicts against the number of judges...it appears that a EULEX judge has on average resolved 0.17 cases a year of corruption and 0.07 cases of organized crime – this is way below what is expected of them.”¹⁸ EULEX has failed in tackling serious crime and corruption for a number of reasons. EULEX has had difficulty calling (and protecting) witnesses

14 Avni ♦ogiani qtd in Balkan Insight. (17 November 2011). “The Rule of Law in Kosovo: Mission Impossible?” Retrieved from <http://www.balkaninsight.com/en/article/the-rule-of-law-in-kosovo-mission-impossible>

15 Hawton, Nick. (April 2012). “In defence of EULEX.” *Prishtina Insight*. Retrieved from http://www.europarl.europa.eu/meet-docs/2009_2014/documents/afet/dv/201/201205/20120530_article_eulex_2_en.pdf

16 Ibid.

17 Ibid.

18 Balkan Insight. (17 November 2011). “The Rule of Law in Kosovo: Mission Impossible?” Retrieved from <http://www.balkaninsight.com/en/article/the-rule-of-law-in-kosovo-mission-impossible>

that could testify in high-profile cases of crime and corruption. With EULEX's "limited capacity to protect key witnesses in high profile cases...and the difficulties relocating witnesses abroad,"¹⁹ many witnesses are unwilling to provide evidence out of fear. Witnesses found dead throughout the course of a trial, and publicity surrounding such stories, directly impact EULEX's capacity to call witnesses and thus prosecute high-profile cases of organized crime and corruption. Thus far, EULEX has failed to offer the kind of incentives or protection that would compel witnesses to take the stand. Thus, EULEX has failed in successfully trying high-profile cases and carrying out their prosecutorial and judicial responsibilities.

Additionally, political interference and poor management has inhibited EULEX from being successful in tackling organized crime and corruption. In some cases, Pristina's political elite are preventing EULEX from tackling high-level cases of crime and corruption in Kosovo.²⁰ According to Andrea Lorenzo Capussela, former-Head of the ICO Economics unit between 2009 and 2011, "the broader EU presence has effectively chosen to appease a political elite."²¹ Indeed, EULEX's work in

19 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 19

20 Avni Dogjani qtd in Balkan Insight. (17 November 2011). "The Rule of Law in Kosovo: Mission Impossible?" Retrieved from <http://www.balkaninsight.com/en/article/the-rule-of-law-in-kosovo-mission-impossible>

21 Capussela, Andrea Lorenzo. (22 November 2012). "Why is the EU failing in Kosovo?" *EuropeanVoice.com*. Retrieved from <http://>

investigating serious crimes "is still ineffective due to limited experience and political interference."²² Also, limited experience and structural inefficiencies have hindered the fight against serious crime. The lack of a joint dataset between police and prosecutors "makes it impossible to track and coordinate their investigation of criminal cases."²³ EULEX has not been shown capable to institute these simple steps that would go a long way in streamlining work to tackle cases of organized crime. For these reasons EULEX has tried and prosecuted high-level cases of organized crime and corruption at a very low rate.

www.europeanvoice.com/article/imported/why-is-the-eu-failing-in-kosovo-/75764.aspx

22 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 18.

23 Ibid.

EULEX exhibits poor coordination with international actors, particularly KFOR

EULEX's inability to carry out its mandate, particularly in the north of Kosovo, has hindered the work of other international actors like KFOR and EULEX's relations with these actors therein. NATO Secretary General Anders Fogh Rasmussen has claimed that EULEX's insufficient capacity has plagued NATO's peacekeeping mission with additional tasks, particularly in the north, that were not anticipated or mandated.²⁴ In particular, EULEX's inability to halt illegal traffic across the northern borders has forced KFOR to take on additional responsibilities. While KFOR's mandate does not extend to border control or the direct objective of closing alternative routes, the closing of routes that allow for high levels of trafficking and smuggling across the northern border has been a highly convenient 'side-effect' of KFOR's establishing security zones that impede traffic along illegal cross-border routes. Picking up the slack for EULEX has placed KFOR in the line of fire for taking security actions that hinder illegal traffic across the northern border, a job that should be executed by EULEX.

EULEX's inability to meet their mandate in the north has undoubtedly placed additional pressure on NATO's KFOR. KFOR should have built upon their partnership with EULEX to pressure EULEX to take control over these alternative routes to prevent smuggling and trafficking once KFOR opened their security zones. The EU

24 B92. (24 April 2012). "NATO chief criticizes EU mission in Kosovo." Retrieved from http://www.b92.net/eng/news/politics/article.php?yyyy=2012&mm=04&dd=24&nav_id=79921

must heed Rasmussen's call to support EULEX with sufficient political support and funding so that it can meet its mandate.²⁵ KFOR acting alone to secure border areas and simply closing roads temporarily is an ineffective strategy and viable only in the short-term. Every week the illegal groups open new routes across the border in the interest of smugglers, according to Minister Rexhepi, of Kosovo's Ministry for Internal Affairs.²⁶ According to Minister Rexhepi, the Kosovo police could not be successful in closing these alternative routes; to attempt it, they would require the use of special units, which would likely incite violence.²⁷ Therefore, in the context of EULEX's responsibility to fight serious crime, there is an indispensable need for the EULEX rule of law authority to indict those who violate the border control laws to traffic in goods, illegal substances and arms.

EULEX failed to coordinate with KFOR to eliminate and indict high-level smugglers, traffickers and organized crime networks along Kosovo's northern border with Serbia. KFOR, acting under a security mandate, inhibited trafficking and isolated traffickers along certain routes, but EULEX, acting under a rule of law mandate, failed to act in close communication with KFOR to identify and arrest those smugglers and traffickers who frequent the alternative routes across the border. Indeed, Rasmussen called for "closer cooperation in order to ensure true division of work between NATO and the

25 Ibid.

26 Rexhepi, Bajram. Personal communication. (3 October 2012).

27 Ibid.

EU.”²⁸ In this sense, KFOR and EULEX could have served as perfectly complimentary actors in the fight against smuggling, trafficking, and organized crime while both acting under their mandates and supporting freedom of ‘legal’ movement and increased traffic through official border points. However, alone in its mandate, EULEX has been unable to reflect on its objectives to inhibit crime in the north of Kosovo.

28 Rasmussen, Anders Fogh qtd in B92. (24 April 2012). “NATO chief criticizes EU mission in Kosovo.” Retrieved from http://www.b92.net/eng/news/politics-article.php?yyyy=2012&mm=04&dd=24&nav_id=79921

EULEX's human resources are insufficient due to lack of capacity, structure and coordination

At the end of 2011, 1,087 out of 2,539 EULEX staff were employed as seconded staff, contracted by their respective member states.²⁹ While this is normal, as member states are individually participants in each ESDP mission, many policies related to the seconded staff from individual member states have opened EULEX to a number of problems including high staff turnover, poor local knowledge among staff, and member state influence over EULEX operational practices and standards.

While staff contracted by Brussels usually stay in Kosovo for a number of years, staff contracted by member states “are often seconded for too short periods,”³⁰ usually contracted for one year with limited opportunity for contract renewal. High turnover rate among EULEX staff causes a number of complications. High turnover rates among EULEX staff prevent the formation of trust and strong ties between EULEX staff and the staff of local institutions. Additionally, high turnover rates cause legal and operational inconsistencies as well as insufficient familiarity with local practices among EULEX staff. These short-term jobs are also more attractive to younger and less experienced professionals; this compounds the lacking expertise and “the necessary capacity building skills.”³¹ In essence, EULEX lacks the sufficient human and professional capacity to exercise its mandate. EULEX should have worked with member states to ensure that the mission operated with the au-

thorized number of staff and that staff are deployed for an appropriate time period and have the skills to be successful.³²

Compounding the staffing failures due to inexperience of staff and high turnover rates, there was no effective coordinated control mechanism, result evaluation, or external auditing that was used to translate output into accountable performance. Without an “adequate system to monitor and analyze the amount of time staff spend on individual MMA actions and on executive functions, and without information on payments made to seconded staff,”³³ EULEX was unable to evaluate the performance of staff in each respective action and was unable to “assess how cost-effective EULEX is compared with other forms of EU capacity building assistance.”³⁴

29 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*.

30 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 44.

31 Ibid.

32 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*.

33 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 39

34 Ibid.

Minimal focus on the justice sector has led to low levels of output

EULEX has not allotted adequate resources to the justice sector. Largely due to EULEX's inability to reallocate seconded staff to accommodate changing needs, "EULEX lacks staff in the Justice component, [while] it currently has more than necessary in the Customs component and, overall, in the Police component."³⁵ Moreover, EULEX judges and prosecutors have operated inefficiently. Kosovo has five times as many judges as EULEX who, on average, issue verdicts on criminal cases at a rate 21 times the rate of EULEX judges.³⁶ For each criminal case, EULEX spends 110 times more than Kosovo authorities. Clearly, EULEX has been inefficient institutionally and financially in the judicial sector. Inefficiency can also be seen in the "huge backlog of cases... [which] limits confidence and recourse to justice."³⁷ Additionally, EULEX has misallocated resources in the judicial sector. While Prishtina courts deal with more than 30 percent of all cases, judges and prosecutors are spread throughout Kosovo's territory, making those in Prishtina underequipped to deal with the high traffic of cases. EULEX's personnel structure is not appropriate in terms of the objectives that EULEX must reach.

While EULEX must improve the rate of prosecution and trial among their own staff, EULEX was also mandated to monitor, mentor and advise. However, while EULEX is now focused specifically on their executive functions in the justice sector, EULEX's focus on their executive functions throughout their initial mandate "limited the time

that they can devote to capacity building" and contributed to EULEX's failure to carry out their initial MMA functions, particularly those involving prosecutors, in the justice sector.³⁸ While EULEX judges and prosecutors can avoid political interference, they have not been able to curb political interference within the judiciary as a whole, which "remains a major problem in Kosovo, notwithstanding the presence of EULEX judges and prosecutors."³⁹ In part, political interference is due to "insufficient transparency in the allocation of cases among judges and prosecutors."⁴⁰ EULEX failed to institute pre-determined objective criteria and procedural safeguards that could have limited the nontransparent allocation of cases.⁴¹

Moreover, steadily low rates of satisfaction with Kosovo's judicial system suggests that EULEX did not fulfill their aim of supporting Kosovo institutions and judicial authorities in their progress towards accountability, political independence, and European best practice. KCSS's Security Barometer reports that almost 60 percent of Kosovo residents reported little or no trust in Kosovo's judicial system,⁴² suggesting that Kosovo judicial institutions maintain low accountability; half of

35 Ibid.

36 Ibid.

37 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 21.

38 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 20.

39 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 21.

40 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 22

41 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*.

42 Kosovo Center for Security Studies. (10 December 2012).

"Kosovo Security Barometer:"

respondents reported that they were dissatisfied or very dissatisfied with the work of Kosovo courts,⁴³ suggesting that European best practice has not taken hold; only 14 percent of respondents agreed that courts are independent,⁴⁴ indicating high perceptions of political influence over the judiciary. While EULEX must increase their focus on the justice sector in regards to its own performance, EULEX staff must also reclaim the monitoring, mentoring and advising (MMA) character of their mission in regards to the Kosovo judicial institutions and authorities.

In part, low satisfaction and confidence in Kosovo's justice sector stems from EULEX's inability to support the staffing of their local counterparts. At the end of the vetting and re-appointment process, 28 percent of empty posts remained vacant.⁴⁵ While international commissioners recommended many candidates to fill these posts, EULEX failed to prompt Kosovo authorities to appoint these candidates, which resulted in a low number of local judges and prosecutors and even lower numbers of judges and prosecutors from minority communities (with only a meager 33 percent of positions reserved for minorities filled).⁴⁶ EULEX failed on a most foundational level to support Kosovo's judicial institutions in garnering the human resources that would be required to carry out their rule of law functions.

43 Ibid.

44 Ibid.

45 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*.

46 Ibid.

EULEX has seen limited success in transferring authority and capacity to local institutions and achieving results from MMA actions

The central aim of EULEX “is to help the Kosovo authorities to strengthen the rule of law, specifically the police, judiciary and customs areas.”⁴⁷ While EULEX has spent years in the driver’s seat, ultimately local institutions should have the capacity and authority to ensure functioning rule of law in Kosovo in the areas of policing, justice and customs and EULEX should have helped them get there. However, EULEX has found it difficult to collaborate effectively with and transfer expertise and capacity to local institutions. The European Court of Auditors identified coordination between the EU institutions and with other donors and Kosovo authorities as an area where serious improvements should be made. As it stands, EULEX has shifted away from its duty of supporting the building of domestic capacities in Kosovo to fight crime and corruption; EULEX has chosen to do its own work almost independently and without engendering a sense of local ownership.

While EULEX is mandated to monitor, mentor, and advise (MMA), it maintains a number of executive powers over policing and in prosecuting war crimes and a number of high-profile cases of organized crime and corruption in order to ensure that the rule of law is strengthened. In reality, EULEX has done little to ensure that Kosovo authorities are themselves well-equipped in the areas of policing, customs, and the justice sector. EULEX has conducted 36 MMA actions with the Kosovo police since 2007. The twinning project, implemented in 2009 and 2010 supported border policing via techni-

cal advice and training. However, “its 18 month duration was not long enough to ensure that new practices introduced by the project were fully taken over by the Kosovo police.”⁴⁸ This suggests that while certain MMA actions have been taken, EULEX has not committed enough to these actions to ensure sustainable results. Other MMA policing actions such as the “Intelligence-led policing” were “hindered by the Kosovo authorities’ lack of necessary financial and staffing resources” and “the overall capacity of Kosovo Police in strategic planning and intelligence-led policing remains weak.”⁴⁹

EULEX has been more successful in their MMA efforts relating to Kosovo Customs. EULEX undertook four MMA actions for Kosovo Customs, and “the assistance provided by the Commission and EULEX has largely achieved its objectives of building the capacity of Kosovo Customs.”⁵⁰ However, while Kosovo Customs has increased revenue collection by nearly 50 percent between 2007 and 2012 and “actively participated in the fight against money laundering,”⁵¹ EULEX failed to support the coordination of Kosovo Customs and the Public Prosecution which “remains poor” and “hinders the effectiveness of the investigation and prosecution of cases of serious crime.”⁵²

48 Ibid.

49 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*.

50 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 23

51 Ibid.

52 Ibid.

47 Ibid.

However, EULEX was less successful in their MMA actions relating to the justice sector (which have now ceased with their new mandate). EULEX “utterly failed to improve the local judiciary or stem corruption and impunity.”⁵³ EULEX undertook six MMA actions for the Kosovo judiciary. While these interventions “helped build capacity...the judicial system continues to suffer from fundamental weaknesses.”⁵⁴ EULEX did not build internal mechanisms to ensure the transparency of judicial and prosecutorial allocation of cases, performance and decisions and to ensure oversight and internal control mechanisms over the work of the prosecution and judiciary. As mentioned above, there was “insufficient transparency in the allocation of cases among judges and prosecutors,”⁵⁵ as EULEX failed to institute pre-determined objective criteria and procedural safeguards for the allocation of cases to judges and prosecutors. This has allowed for political interference, and reveals EULEX’s failure to build sustainable mechanisms to ensure the political independence of domestic judges and prosecutors. Political interference remains a major problem to the point that “judges are not fully willing to render their judgments on the basis of the law only, but tend to act in anticipatory obedience to external influences.”⁵⁶ While EULEX’s presence can be credited

53 Capussela, Andrea Lorenzo. (22 November 2012). “Why is the EU failing in Kosovo?” *EuropeanVoice.com*. Retrieved from <http://www.europeanvoice.com/article/imported/why-is-the-eu-failing-in-kosovo-/75764.aspx>

54 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 19

55 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 22

56 OSCE: Independence of the Judiciary in Kosovo, Institu-

with removing some level of political interference in the courts, they have not enabled Kosovo courts to develop a sustainable capacity to act outside of political interference. Additionally, political interference in the form of threats and intimidation as well as insufficient expertise has rendered the local judiciary unable to handle serious cases of organized crime, corruption, and war crimes.⁵⁷ While these cases exist under the purview of EULEX’s executive functions, the insufficient expertise of local authorities to handle these cases reveals that EULEX did not exercise their advising function in building upon the professional education and professional capacities of domestic judges and prosecutors.

Lastly, EULEX has not been able to pass on significant expertise to Kosovo authorities in the north partly because EULEX has been unsuccessful themselves in Kosovo’s northern territory and partly because MMA actions did “not specifically [target] the north of Kosovo.”⁵⁸ No officer from the northern municipalities benefitted from the ‘Support to Public Procurement Reform’ project; the University of Pristina-Kosovka Mitrovica did not benefit from the ‘Legal Education System Reform’ project; ‘Task Force Mitrovica’ which was supposed to develop criminal investigations in the north relocated its officers south of the Ibar River.⁵⁹ EULEX also failed in estab-

tional and Functional Dimensions, January 2012, p. 7.

57 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*.

58 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 27

59 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 28

lishing a functional judicial system in the north via the local court in Mitrovica due to the pattern that Serbian judges made decisions based on Serbian laws while Albanian judges based decisions on Kosovo law.⁶⁰ On a broader, more encompassing level, EULEX inability to strengthen the capacity of local authorities in the north makes manifest in public perception, where only 35 percent of citizens in Leposavic, roughly 30 percent of citizens in Mitrovica ◆ubin Potok, and roughly 5 percent of citizens in Zvecan are satisfied or somewhat satisfied with the capacity of local authorities and civil societies to respond to violence in their northern municipality.⁶¹ Without functioning institutional foundations in the north, EULEX was unable to pass on any expertise or generate any higher capacity of authorities in the north of Kosovo.

60 Ibid.

61 European Center for Minority Issues, Kosovo. (2013 January). "Socioeconomic Conditions in Northern Kosovo."

Member states' agendas limit the cohesion of the mission

In the case of Kosovo and the EU's largest mission of their Common Security and Defense Policy, the EU has been able to achieve commonality and "consensus only at the level of satisfying the lowest common denominator."⁶² The differing political agendas of member states have detracted from the commonality of EU member states in regards to EULEX on a number of fronts. Horizontal conflicts over status differences necessitated the existence of a number of legal platforms for EULEX (Ahtisaari, Six-point Plan, Joint Action) that has plagued the cohesiveness of EULEX actions in rule of law. These same horizontal conflicts that led to the various status-differentiated legal platforms ultimately forced EULEX to emerge as the status-neutral entity that remains today. However, while the whole is status-neutral, the parts of this whole (the independent member-states) are not. Seconded staff often wish to follow their state's directions rather than the EULEX technical mission. The "lack of specific and clear objectives" has opened member states to address their own priorities within EULEX interventions.⁶³ The EU has struggled to maintain a common status-neutral (and supranationalist) front, and the intergovernmental EULEX staff has in most cases accepted the reality on the ground which is that Kosovo laws and constitution take precedent over

antiquated status-neutral UNMIK law.

EULEX was prone to some member state diplomacy towards the Kosovo Serbia Dialogue, leaving EULEX with limited power to intervene against Serbian criminal networks in the north. As the political Dialogue continues to shape the mandate, mission, and position of EULEX, it may be increasingly difficult for the EU to masquerade as a supranationalist, status-neutral unit. The next step may be and should be, as Greicevci argues, that the EU must resolve its horizontal conflicts (largely resulting from status differences) by convincing the last five non-recognizing member states to recognize Kosovo's independence.⁶⁴

62 Greicevci, Labinot. (2011). "EU Actorness in International Affairs: The Case of EULEX Mission in Kosovo." *Perspectives on European Politics and Society*, 12:3, P. 284. Retrieved from <http://dx.doi.org/10.1080/15705854.2011.596307>

63 European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 32

64 Greicevci, Labinot. (2011). "EU Actorness in International Affairs: The Case of EULEX Mission in Kosovo." *Perspectives on European Politics and Society*, 12:3, P. 300. Retrieved from <http://dx.doi.org/10.1080/15705854.2011.596307>

External political influence over EULEX is pervasive

In many ways, EULEX has been subject to higher-level EU diplomatic goals. EULEX has been subject to CFSP diplomatic goals rather than rule of law technical objectives. As the largest mission of the EU's CSDP, EULEX stands as the flagship for the EU's Common Security and Defense Policy. This has forced the EU to maintain EULEX as a status-neutral mission in order to satisfy member states as the lowest common denominator. The EU is pulled in another direction as it works to successfully continue facilitating the Kosovo-Serbia Dialogue. It appears that the EU expects to find the solution to the northern issue in the Kosovo-Serbia Dialogue. Catherine Ashton's Spokeswoman Maja Kocijancic announced that "a political solution is necessary" to resolve issue in the north of Kosovo and that this solution "can only be found through dialogue."⁶⁵As the context of rule of law in Kosovo and in the north and along the border shifts with advancements in the Dialogue, the shifting reality on the ground will continue to affect the foundations and implementation of rule of law. In this regard, the EU political agenda influences the "technical" rule of law EULEX mission.

Lastly, the United States remains as a stakeholder, even contributing prosecutors to the EULEX mission. Both the US and EU, to promote the success of their role in Kosovo's statehood and progress, have over exaggerated the success of the EULEX rule of law mission to veil

the remaining internal problems.⁶⁶ Just as the EU needs EULEX to succeed as the mascot for its CSDP, both the EU and the US have heavily invested in Kosovo's success diplomatically, politically, and financially. These being the circumstances, rather than maintaining a purely technical mission, EULEX is under constant political influence from the EU and member states.

65 ♦td in B92. (11 October 2012). "Germany criticizes EU mission in Kosovo." Retrieved from http://www.b92.net/eng/news/politics-article.php?yyyy=2012&mm=10&dd=11&nav_id=82609

66 Capussela, Andrea Lorenzo. (22 November 2012). "Why is the EU failing in Kosovo?" *EuropeanVoice.com*. Retrieved from <http://www.europeanvoice.com/article/imported/why-is-the-eu-failing-in-kosovo-/75764.aspx>

EULEX has been unable to garner public support and local legitimacy

The lack of a local ownership strategy and a cohesive, compelling media campaign to garner the support of public opinion has left EULEX with low levels of local legitimacy and public support. While KFOR has garnered a 60 percent approval rating, less than half of Kosovo inhabitants polled are satisfied with the Kosovo Police (42 percent), Customs (29 percent) and EULEX (22 percent).⁶⁷ Of all security institutions in Kosovo (besides the Kosovo Intelligence Agency for which 60 percent of respondents did not have enough information to judge), EULEX polled as the institution with the lowest levels of approval. EULEX has been unable to win over the hearts and minds of those living in Kosovo for a number of reasons. Kosovo inhabitants perceive EULEX to be unfair and biased. According to a poll conducted in November 2012, only a quarter of those polled believe that EULEX is fair and unbiased.⁶⁸ This distrust stems partly from EULEX's status-neutral mission, which has its internationally-recognized foundations in the six-point plan which was largely dictated by Serbia and its allies in the UNSC. Due to this perceived bias, EULEX has failed to get the Kosovo authorities and public to approve initiatives like the arranged 'Protocol of cooperation on policing issues' with Serbian authorities. In fact, this protocol caused Kosovo citizens to respond with mass objections in Pristina. This protocol was seen as surpassing Kosovo's independence and institutions. This caused institutional and public resentment against

EULEX's technical mission. No international rule of law mission can be successful in winning over public support in Kosovo if it does not clearly recognize Kosovo's independence and statehood.

Outside of the media, EULEX did little to garner local ownership and to convince people that the mission is really working to achieve tangible goals in Kosovo. While in the media, EULEX has led an unsuccessful campaign which has been unable to garner the support of Kosovo's public. According to EULEX Chief Spokesperson Nick Hawton, EULEX is judged on its lack of success in catching the big fish rather than its on-the-ground work and MMA which are not highlighted in the media. However, EULEX has done little to publicize its behind-the-scenes work and arguably EULEX's efforts in MMA have not been as successful as Hawton suggests. EULEX has ramped up their media campaign in the last year, but it has been met with mixed results. The summer campaign centered upon releasing thousands of leaflets that read "EULEX is doing nothing?" which stood in response to the criticisms that EULEX had been receiving from the public and in the media. However, in October 2012 EULEX launched a permanent media campaign that highlights a selection of EULEX achievements each month in ads on all major television channels in Kosovo. However, the effectiveness of EULEX's new campaign is still saddled with the need to live up to the high expectations that have been a result of EULEX's lofty mandate and rhetoric. EULEX's over-arching aims and objectives

⁶⁷ Kosovo Center for Security Studies. (10 December 2012). "Kosovo Security Barometer."

⁶⁸ Ibid.

have made it difficult to demonstrate achievement to the public. As “EU internal security objectives tend to be broad-ranging and action plans have largely focused on activities and outputs rather than on quantified results and impact,”⁶⁹ EULEX has failed in translating those outputs into tangible results for public consumption. Moreover, the broad objectives make even tangible results appear to fall short in the public eye.

⁶⁹ European Court of Auditors. (Special Report No18/2012). *European Union Assistance to Kosovo Related to the Rule of Law*. P. 32



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