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A COMPREHENSIVE ANALYSIS OF EULEX: WHAT NEXT?

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1. INTRODUCTION

After Kosovo's supervised independence ended on 10 September 2012, the European Union's (EU's) largest and most ambitious rule of law civilian mission – EULEX¹ – continues to function on the ground. It continues to operate mainly based on its initial mandate provided by the Council Joint Action 2008/124/CFSP (“the Joint Action”) of February 2008² and besides some follow up amendments made to it, the mission's *raison d'être* remains unchanged. In addition to its overall aim of assisting Kosovo in strengthening its rule of law institutions and ensuring their independence, the mission continues to hold some executive powers. It enjoys such powers especially when dealing with war crimes and organized crime and corruption while covering police, customs, and judicial sectors. In many respects, the mission has come to function as a legitimate parallel international executive and judicial structure of the unsupervised independent Kosovo.

Up until now, the EU has invested 613.8 million Euros for its rule of law mission in Kosovo.³ But, EULEX has faced a bumpy road in executing its mandate ever since it deployed, and was not spared from harsh criticism. Its overall budget and the large number of staff, at least compared to other EU missions abroad, have, by default, increased expectations both among the local population and among the policy makers in Brussels and the EU Member States. The initial overambitious bombastic statements by some of the mission's high profile officials about mission's intentions and capabilities to fight corruption and organized crime in Kosovo, not only have they increased expectations, but they have also provided hopes that dramatic improvements would unfold on the ground. The hopes and trust that the people in Kosovo have lost in their own institutions to fight some of its biggest societal problems, organized crime and corruption and political interferences in independent institutions, have shifted over to EULEX.

Regardless of whether or not these expectations were realistic; they have not been met, and hopes began to diminish soon. The organized crime and corruption continue to be present at worrying levels within the institutions of Kosovo and political pressure on the judicial and other independent institutions persists, regardless of some improvements. One of the basic problems is that there are almost opposing perceptions about EULEX's work between Kosovo's local population and institutions⁴, those in Brussels not directly involved with the mission but who bear the cost on one side⁵, and those who are directly engaged with the mission in Kosovo and Brussels on the other side. Public satisfaction with the work of the mission in Kosovo stands at 22 percent⁶, while in Brussels the perception is that 70 percent of the Kosovar public opinion wants EULEX's presence.⁷ Among many others, the Secretary General of North Atlantic Treaty Organization (NATO), Anders Fogh Rasmussen, has voiced his criticisms that the mission is under-resourced and that it is hindering NATO's work in Kosovo as well.⁸ Similar remarks

¹ “EULEX” and “the mission” will be used interchangeably throughout this paper

² Council Joint Action 2008/124/CFSP, 4 February 2008, Article 3 (b)

³ Council Joint Action 2008/124/CFSP, 4 February 2008 and all the Council Joint Actions amending the first one.

⁴ Among the local institutions critical voices have been heard from and among:

The President of Kosovo, [Artifete Jahjaga](#);; Kosovo's Interior Minister, [Bajram Rexhepi](#), Kosovo's Deputy Prime Minister and Minister of Justice [Hajredin Kuci](#) and others

⁵ Among those are Members of the European Parliament (MEP), some of the Member States, NATO, European Court of Auditors, etc.

⁶ KCSS, “Kosovo Security Barometer”, 10 December 2012

⁷ KIPRED interview with high official at CMPD, Brussels, 4 December 2012

⁸ “NATO chief criticizes EU mission in Kosovo,” EuroTribune, 24 April 2012, <http://www.eurotribune.eu/index.default.php/?p=26828> accessed 7 December 2012

have been made by Germany's Defence Minister, Thomas de Maiziere, who has criticized the mission for being "in the wrong track".⁹ A number of Members of the European Parliament (MEPs) have also expressed their concerns about EULEX's inability to meet their expectations.¹⁰ It is also clear that mission's reconfiguration and downsize in mid-2012 did not change the prevalent perceptions or hold up criticisms.

The criticisms addressed towards EULEX have often disregarded the substantial problems the mission itself faces. The mission is not adequately resourced; it has to deal with its presence's legal implications and the complications with over which laws really apply in Kosovo; there is a lack of proper hiring procedures; the staff secondment and their accountability to the mission versus the sending Member State remains problematic; as well as the mission's overall lack of accountability to the local institutions, the lack of a substantive democratic control and oversight of the mission, and the risks this entails. Furthermore, little light has been shed on the extent to which these shortcomings are the real causes of EULEX's inability to meet expectations and fulfil its own mandate. Have the expectations been set up too high to start with and were they compatible with the mission's mandate? Or do the problems lay with the mandate itself? Is it the local and regional political contours and context that impact the mission's incoherent functioning vis-à-vis its mandate? Or is it the political direction from Brussels that derails the mission from its general purpose and mission statement and to what extent does the division between the Member States on Kosovo's status have an impact on this? A combination of these may provide an answer.

EULEX's lack of performance in different aspects comes from the fact that besides that it has tried to maintain its technical and non-political status, the mission was not spared from the EU's overall political agenda in Kosovo and the region. The EU's reports, conclusions, and recommendation on Kosovo do give a priority to the strengthening of rule of law, public administration, and economic problems. But even in official documents there is a considerable attention being paid to the dialogue between Kosovo and Serbia. The dialogue process between Kosovo and Serbia is very high on the EU's agenda; the frequent personal engagement of the High Representative (HR) of the Common Foreign and Security Policy (CFSP), Catherine Ashton in this process shows an unprecedented political capital invested in supporting the dialogue. This is clear because of three reasons: (1) the EU views the dialogue as the only path for solving major problems in relations between Kosovo and Serbia, (2) these relations are key for regional stability; and most importantly (3) there is no 'Plan B' should the dialogue fail.¹¹

Ahead of the 2013 strategic review for the future of EULEX, this policy paper aims to contribute to this process. This report provides a comprehensive analysis of the causes behind EULEX's inability to meet expectations and fulfil its mandate. By examining legal impediments; its operations in local context; its relationship with the local institutions; as well as the effects of the EU's broader agenda for Kosovo and the region; this paper outlines a clear path towards reshuffling mission's efforts to help local institutions take matters into their own hands. Considering the local context and the experience from EULEX's operations so far, it is clear that it is very difficult for an international mission to actually strengthen and bring about rule of law in Kosovo. Strengthening wider rule of law shall be the responsibility solely of the local institutions, who shall be kept

⁹ "Germany says EU Kosovo police force failing, hurting NATO," Reuters, 10 October 2012, <http://www.reuters.com/article/2012/10/10/oukwd-uk-kosovo-germany-idAFBRE8990R020121010> accessed, 7 December 2012

¹⁰ [Doris Pack](#) of [European People's Party], [Eduard Kukan](#) of [European People's Party], [Ulrike Lunacek](#) of [The Greens/EFA Group]

¹¹ Various KIPRED interviews with MEP's, officials at the Council, and journalists, Brussels, 3-7 December 2012

accountable for the progress in this area by the local population, as well as by EU's support and conditionality for these changes to take place.

2. THE SCOPE OF LEGAL IMPEDIMENTS AND THE EVOLUTION OF EULEX'S LEGITIMACY

This part of the paper does not aim to give a legal opinion on EULEX's presence in Kosovo; it aims, however, for the purposes of this analysis, to provide the evolutionary milestones of its legitimacy and their implications for the mission's work.¹²

2.1 A chameleonic deployment of EULEX

EULEX has been established under unique and complex political circumstances, which have had local and international legal implications for the functioning of the mission. EULEX needed to make its deployment acceptable to both Kosovo and Serbia. From Kosovo's point of view, EULEX's presence is legally and practically justified by referring to the Declaration of Independence of the Republic of Kosovo, the Ahtisaari Plan ("the Plan"), and the Constitution of the Republic of Kosovo ("the Constitution"), all three rejected by and unacceptable to Serbia. While from Serbia's point of view, EULEX's presence is justified under the latter's acceptance to operate under "status neutral" mandate and participate in the implementation of the United Nations Secretary General's (UNSG) Six Point Plan, all two rejected by and unacceptable to Kosovo. Nonetheless, EULEX adopted a "chameleonic pragmatism" in order to be suitable to both parties' demands, thus making its presence possible. This approach, although ambiguous and complex, has helped EULEX establish its presence and slowly build up its full operational capabilities in most of Kosovo's territory. It was, moreover, conducive to the complex situation which unfolded during its planning phase.

The complexities stem from the fact that the situation on the ground changed drastically between the phase of planning of the deployment and the actual deployment. The planning phase began on 10 April 2006 with the launch of the EU Planning Team (EUP) which aimed at ensuring smooth transition of responsibilities from United Nations Mission in Kosovo (UNMIK) over to a future European Union (EU) mission in Kosovo. The intricacy of the period in which the planning phase began was that: (1) the EUP was launched less than two months after the status talks between Kosovo and Serbia had begun in Vienna; and (2) that it was anticipated that the talks would end up with an agreement between the parties which would, as a result, ensure smooth transition of the responsibilities from UNMIK and an uninterrupted deployment of EULEX. In the end, the status talks failed¹³; thus, removing an important domino card in the mission's initial intentions during its planning phase.

This is when the first tweaks in the system and more improvised solutions began to unfold in order to make the mission's deployment possible. Serbia's rejection to the Ahtisaari Plan led to Russia's refusal to approve it in the UN Security Council (UNSC). Given that the Ahtisaari Plan provided for the deployment of an European Security and Defence Policy (ESDP) mission in Kosovo, the lack of consensus for the Ahtissari Plan

¹² For more detailed legal analysis and opinions on and for EULEX's presence see: Robert Muharremi, "The European Union Rule of Law Mission in Kosovo(EULEX) from the Perspective of Kosovo Constitutional Law," 2010 and Wolfgang Koeth, "State Building without a State: The EU's Dilemma in Defining its Relations with Kosovo," 234, Kluwer Law International, 2010

¹³ The UNSG's Envoy, Marti Ahtisaari, had submitted his proposal to both Kosovo and Serbia in late 2007. It became clear that Serbia and Russia will not endorse the proposal. Immediately after, the Troika (US, EU, and Russia) attempted to mediate as a final attempt for parties to reach an agreement but failed in the end of 2007.

in the UNSC, meant that there would be divisions within the EU on whether or not to deploy the mission in accordance with the Ahtisaari Plan which proposed for Kosovo to become an internationally supervised independent state. It also became clear that the failure to endorse the Plan in the UNSC would lead to Kosovo declaring its independence unilaterally in accordance with the Plan and in coordination with its western partners. The mission's deployment in an independent Kosovo as envisaged by the Ahtisaari Plan would risk some of the EU Member States blocking a decision in the Council, as some of them viewed it as an open breach to the UNSC Resolution 1244.¹⁴ Acknowledging this fact, the EU rushed to adopt the decision for deployment before Kosovo declared its independence so as to use the UNSC Resolution 1244 as a legal basis acceptable to all the Member States.¹⁵ This was done through the Joint Action on the European Union Rule of Law Mission in Kosovo – EULEX Kosovo dated 4 February 2008.¹⁶ This can be considered an important move which made the mission's actual deployment possible while skilfully spiralling away from one or more Member States blocking the mission's deployment.¹⁷ Less than two weeks after EULEX's deployment, Kosovo declared its independence on 17 February 2008.

2.2 Evolutionary milestones of EULEX's legitimacy

Before the end of supervised independence

In its Declaration of Independence, Kosovo welcomed “the international community's continued support of [its] democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999).”¹⁸ It also invited and welcomed a European Union-led rule of law mission.¹⁹ This, to a certain extent, has given EULEX's presence a level of legitimacy (not legality).²⁰ There is a caveat however; the initial legitimacy of EULEX could be considered to have been even dimmer when taking into account that such an invitation was part of a larger package declaring Kosovo independence²¹. In reality, it would have been inconceivable for any Member of the Kosovo Assembly (Kosovo MPs) present at the time of declaration of independence, to refuse to endorse the very package that declared Kosovo independent, just because it included the provisions for EULEX's presence. As such, EULEX's legitimacy at its inception phase was ensured by clandestinely fusing it in the package which declared Kosovo independent. Therefore, at the time it was difficult to say which elements of the package, if they were to be voted as stand-alone, the Kosovo MPs would really endorse. The ambiguous endorsement of EULEX by Kosovo authorities at its initial phases was not an impediment for the mission to deploy and operate, however.

It was the lack of endorsement by Serbia that made EULEX's deployment difficult, if not impossible, in Serb majority populated areas throughout 2008. Its deployment in these areas was possible and accepted by the Kosovo Serbs only after EULEX agreed to work under “status natural” mandate and implement the UNSG's Six Point Plan.²² In

¹⁴ Wolfgang Koeth, “State Building without a State: The EU's Dilemma in Defining its Relations with Kosovo,” 234, Kluwer Law International, 2010

¹⁵ Robert Muharremi, “The European Union Rule of Law Mission in Kosovo(EULEX) from the Perspective of Kosovo Constitutional Law,” 2010

¹⁶ Council Joint Action 2008/124/CFSP, 4 February 2008

¹⁷ Only Cyprus abstained from the Council Joint Action 2008/124/CFSP, 4 February 2008

¹⁸ Declaration of Independence, note 5, 17 February 2008

¹⁹ Declaration of Independence, note 5, 17 February 2008

²⁰ Note: Kosovo authorities view EULEX's mandate as provided by the Ahtisaari Plan, while EULEX does not base its presence on any of Kosovo legal documents, neither the Declaration of Independence, nor the Ahtisaari Plan, nor the Constitution of the Republic of Kosovo.

²¹ The package included: the Declaration of Independence, the international presence in Kosovo, the flag, state symbols, the National Anthem, etc.

²² During this period EULEX was placed under Resolution 1244 and thus adopted the status neutrality framework of the UN. Also The UN Secretary-General reported in March 2009 that the UNMIK SRSG has taken steps to ensure

order to ensure that there would be no further problems with the mission's deployment and work, the Council endorsed a new line that called the EULEX to refer neither to the Ahtisaari Plan, nor to Kosovo's Constitution.²³ Placing EULEX under the Resolution 1244 also gave the authority to the Special Representative of the Secretary General (SRSG) in appointing EULEX judges who would also ensure that this is consistent with applicable law under Resolution 1244.²⁴ This replaced the International Civilian Representative (ICR) who was supposed to have such powers under the Ahtisaari Plan and who was the only international representative recognized by the Constitution. The ICR was only notified with EULEX's selections and SRSG's appointments, but it is clear that EULEX has acknowledged the existence of the ICR provided in the Ahtisaari Plan. Under such legal setting, EULEX would also have to ignore laws coming out of the Assembly of the Republic of Kosovo, and thus use the UNMIK legislation and legal acts as established after 1999.²⁵ However, practically, this was not possible, and in the end it remained with the EULEX judicial personnel to judge which laws they should use.²⁶

The "status neutrality" approach per se was more of a practical step taken to ensure that the mission is deployed throughout the territory of Kosovo, which apart from its limited access in the north, it did. However, given that the SRSG's authority is not recognized by Kosovo's Constitution and the Ahtisaari Plan, the court decisions taken by EULEX judges appointed under the authority of the SRSG risk being challengeable before Kosovo's Constitutional Court.²⁷ Therefore, while making its deployment possible on the one hand, the agreement to work under the Resolution 1244 and the authority of the SRSG to appoint judges questions the legality of EULEX judges' decisions in courts on the other hand.²⁸ Many of legal rearrangements continue even today; nonetheless, the end of supervision for Kosovo's independence changed the reality on the ground to which EULEX had to be adjusted.

After the end of supervised independence

The end of supervised independence on 10 September 2012 and the eventual closing of the International Civilian Office (ICO) led to constitutional changes that would reflect the departure of the ICO and transfer of ICR's responsibilities over to local authorities. Besides that EULEX's legal basis has not changed, questions arose about the continued role and mandate of the mission in Kosovo's new reality and constitutional set-up. One of the proposals that came from Brussels was that EULEX should be integrated in Kosovo's Constitution²⁹, the one which EULEX had previously been instructed to not even refer to. Although such a proposal seems to have come from a representative of a state that has recognized Kosovo, there was no objection from EULEX or the Council to such a solution. Far from considering this as a silent consent on the part of EULEX

that the appointment of EULEX judges and prosecutors is made under his authority and consistent with applicable law under Resolution 1244.

²³ Wolfgang Koeth, "State Building without a State: The EU's Dilemma in Defining its Relations with Kosovo," 236, Kluwer Law International, 2010

²⁴ Email communication with EULEX, 18 December 2012

²⁵ Even though there is evidence that EULEX staff in some cases ignore the Republic of Kosovo laws and use UNMIK laws, but they do so only on specific cases – especially in the northern Kosovo. However, there are also cases where EULEX has used the Republic of Kosovo laws in the north – i.e. cases in which subjects are both Albanian and Serbian.

²⁶ Ariana Qosaj-Mustafa, Strengthening Rule of Law in Kosovo: The Fight Against Corruption and Organized Crime, KIPRED, 2010, http://www.kipred.org/advCms/documents/40064_RoL_fight_against_corruption.pdf

²⁷ Robert Muharremi, "The European Union Rule of Law Mission in Kosovo(EULEX) from the Perspective of Kosovo Constitutional Law," 2010, p.376.

²⁸ In the reply of an email sent by KIPRED to the Constitutional Court, the President of the Court responded that he was not able to provide a statement regarding the issues that have to do with the constitutionality and legality of EULEX in Kosovo, 14 December 2010

²⁹ "Kërkohet futja e EULEX-it në Kushtetutë," KohaNet, 4 July 2012, <http://www.koha.net/?page=1,13,105829> accessed 7 December 2012

or the Council to implicitly recognize the Constitution, it is indicative, however, of how EULEX's stance has evolved according to the reality on the ground.

In the end, the Government of Kosovo (GoK) backed by the United States Embassy to Prishtina³⁰ did not approve the idea of making EULEX an integral part of Kosovo's Constitution, but has agreed that the mission's legal basis be established with a letter of exchange between Kosovo's President and the HR of CFSP.³¹ In her letter dated 4 September 2012, Kosovo's President, Atifete Jahjaga, invited the HR of CFSP, Catherine Ashton, to respond with the EU's readiness to continue sending personnel to serve as part of EULEX.³² Throughout her invitation, Kosovo's President referred to Kosovo's Constitution when referring to both her authority and EULEX's fitness in Kosovo's legal and judicial set-up. On 7 September 2012, the Kosovo Assembly voted the President's invitation to EULEX into a law, as an "international agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo"³³ in order to create a "sufficient" domestic legal basis for the mission to continue to operate. Compared to the previous invitation which was approved as part of the package of the Declaration of Independence; the approval of the EULEX's presence by 2/3 voting in the Assembly as a stand-alone (single) issue has strengthened its legitimacy. Although the Kosovo Assembly has ratified the invitation as an international treaty, it cannot be considered a treaty due to the fact that the European Union did not ratify the same agreement Kosovo did with the set procedures;³⁴ nonetheless, it presents several steps forward taken on the part of Kosovo in an attempt to strengthen EULEX's legitimacy and legal basis.

When it comes to EULEX's "status neutrality" stance, maintaining it was difficult right from the beginning. EULEX judges have worked with the Kosovo laws approved by the Assembly of Kosovo and have sat together with Kosovo Judges appointed in accordance with Kosovo's Constitution in the same courts and chambers created with Kosovo's legal acts. However, after the end of supervised independence the "status neutrality" stance proved even more difficult to maintain. In her invitation, the President of Kosovo has asked that the appointed EULEX judges, prosecutors, and police officers should notify relevant Kosovo authorities before they join the mission.³⁵ In her reply, the HR of CFSP has neither endorsed nor did she object the terms of the President. These procedures are in fact being followed at least in the case of Kosovo Judicial Council³⁶, which is helping them know how many judges are being sent by EULEX, since before they were not aware of the details of EULEX's staff presence.³⁷ While the legal procedures for selection of judges and other appointed EULEX staff remains the same, the President's invitation reflected the departure of ICR; thus, leading to EULEX acknowledging the existence of the President of Republic of Kosovo elected in accordance to the Constitution.

³⁰ KIPRED interview with a high official from the Presidency of the Republic of Kosovo, Prishtina, 7 January 2013.

³¹ "EULEX-i nuk do të futet në Kushtetutë," Telegrafi, 7 July 2012, <http://www.telegrafi.com/lajme/eulex-i-nuk-do-te-futet-ne-kushtetute-2-23677.html> accessed 1 December 2012

³² Letter of Invitation by President Atifete Jahjaga addressed to Catherine Ashton HREU, 4 September 2012

³³ Assemb. of the Rep. of Kosovo, Law Nr. 04/L-148, Prishtina, 7 September 2012. <http://www.assembly-kosova.org/common/docs/ligjet/Ligji%2004-L-148.pdf>

³⁴ Consolidated Version of the Treaty on EU and the TFEU, Title V <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>

³⁵ When appointing judges, the Kosovo Judicial Council should be notified. When appointing prosecutors, the Kosovo Prosecutorial Council should be notified, and when appointing police officers, the Ministry of Internal Affairs should be notified.

³⁶ The head of EULEX directly notifies the President of the Republic of Kosovo of the appointment of EULEX judges. KJC is kept under cc in such communication. Source: KIPRED interview with a high official from the Presidency of the Republic of Kosovo, Prishtina, 7 January 2013.

³⁷ KIPRED interview with a high official from Kosovo Judicial Council, Prishtina, 23 November 2012.

Some challenges still remain. EULEX continues to operate based on the initial Joint Action which too was endorsed by Kosovo's President in her invitation to HR of CFSP.³⁸ This presents a problem in a new post-supervised independence environment, in spite of the fact that the Constitution of the Republic of Kosovo provides provisions which allow the President to delegate certain powers to international mission. The trouble is that the Joint Action still does not consider nor does it establish any links to Kosovo's legal instruments. Moreover, it still holds the provision which gives EULEX the power, in coordination with other international presence in Kosovo, to reverse and annul operational decisions taken by Kosovo authorities.³⁹ This has never been amended nor was it requested in President's invitation – something which is not in the spirit of the end of supervised independence. In practice, EULEX has never used the powers vested in this article; legally it can, however today it does not possess the capability or the will to enforce the use of such article.

A serious challenge for EULEX remains with the appointment of judges outside Kosovo's Constitutional order. On 12 December 2012, the European Court of Human Rights ("ECtHR") held a Grand Chamber hearing in the case of *Maktouf and Damjanovic v. Bosnia and Herzegovina*. Mr. Maktouf who had been found guilty by the Court of Bosnia and Herzegovina of war crimes, and relying on Article 6(1) (right to a fair trial), alleged that "the proceedings against him were unfair, notably because the international judges who decided on his case on appeal were not independent as they were appointed by an international administrator (the High Representative) for a term of only two years."⁴⁰ The ECtHR's decision on Mr. Maktouf's case in the future may build a case under which either EULEX judges' or Kosovo judges' decisions may all be affected.⁴¹ In the case of Kosovo this can have a two sided effect. On the one hand, as stipulated earlier, the decisions by EULEX judges appointed by the SRSG may be challengeable in Kosovo's Constitutional Court, because the SRSG is not legally recognized by Kosovo's Constitution. On the other hand, decision taken by Kosovo's judges may be challengeable in international courts, because the President of the Republic of Kosovo's powers to appoint judges is provided by the Constitution which is not recognized by international law.⁴²

Overall EULEX's legitimacy has increased over time and its "status neutral" stance proved to be difficult to maintain owing to the new realities created on the ground. The legal ambiguity and political complexities under which the mission deployed and later changed were a challenge from operational perspective. However, in practice, these legal challenges and political complexities could, under no circumstances, be justifiable for mission's inability to meet the expectations. The Kosovo authorities' flexibility not to or rather their inability to challenge EULEX's legality and its "status neutral" stance helped remove many impediments for the mission and eased mission's operations and overall functionality in parts other than the northern Kosovo.

³⁸ Letter of Invitation by President Atifete Jahjaga addressed to Catherine Ashton HREU, 4 September 2012

³⁹ Council Joint Action 2008/124/CFSP, 4 February 2008, Article 3 (b)

⁴⁰ Kirsty Sutherland, "ECtHR holds Grand Chamber Hearing About Court of Bosnia and Herzegovina," 13 December 2012, <http://www.internationallawbureau.com/index.php/ecthr-holds-grand-chamber-hearing-about-court-of-bosnia-and-herzegovina/>

⁴¹ This is without prejudice to a more thorough legal analysis of the case and either its similar or identical future provisions

⁴² The aim in this section of the paper is to present the challenges and problems that may unfold in the future, and it does not aim to provide a legal expertise from international law perspective.

3. THE MANDATE, RESOURCES, RESULTS, AND THE GAPS IN BETWEEN

EULEX's mandate is both broad – compared to state functions, it includes activities that a range of ministries and departments usually deal with; and ambitious – it takes a lot of “ensuring”, “helping”, “contributing to”, and “assisting” responsibilities.⁴³ It also goes as far as tasking itself with “other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security [...]”.⁴⁴ In principle, the wider area of rule of law especially the combating of organized crime, corruption, dealing with war crimes, and ensuring that rule of law institutions remain free from political interference requires both broad and ambitious mandate. But in reality, there are several shortcomings that have made and continue to make EULEX unable to realize this mandate, especially in the “ensuring” part of it.

3.1 The Head(s) of Mission

Right from its deployment it was obvious that there is a serious lack of strategy and strong political will for the mission to realize its mandate. Up until today, the rule of law mission has not been led by a rule of law person. On 7 February 2008, when the mission started deploying, the Political and Security Committee (PSC), a Council body responsible for defining the role for and following up on the mission, decided to appoint the former KFOR Commander, French General Yves de Kermabon, as the head of mission (HoM)⁴⁵. Some in Brussels argue that an army General was needed because of the experience army Generals have with mission deployments;⁴⁶ however, two and a half years after mission's deployment, on 27 July 2010, the PSC appointed yet another former KFOR Commander, French General Xavier Bout de Marnhac to lead the mission.⁴⁷ Moreover, after mission's restructuring in mid 2012, struggling to find a suitable candidate to replace Mr. de Marnhac, the PSC decided, on 12 October 2012, to extend Mr. de Marnhac's mandate until the end of January 2013, making the largest EU's rule of law mission be led by army Generals for 5 years in a row.⁴⁸

The General's experience with deployment did not prove to be entirely useful as EULEX struggled to properly deploy in northern Kosovo; its presence remains weak even today. Even after strong objections by Brussels that EULEX's lack of presence in that part of territory is a political issue, in the end it turned out to be so. The extension of the rule of law in northern Kosovo has become one of the key issues to be discussed in the EU facilitated political dialogue between Kosovo and Serbia, which aims at defining the future of northern part of Kosovo, an issue the paper deals with in later on. Recently, it was decided that the leadership of EULEX be transferred from military hands over to a political one. On 4 December 2012, Brussels decided to appoint the former German Ambassador to Albania, Mr. Bernd Borchardt, as the HoM.⁴⁹ Mr. Borchardt was involved with the Kosovo Verification Mission (KVM) back in the late 90s and has extensive experience in the region; however handing the leadership of the mission over from military figures to a political figure will not help in dealing with “misperceptions” that the mission is a political one. With this new set-up, the two EU missions in Kosovo,

⁴³ Council Joint Action 2008/124/CFSP of 4 February 2008, Article 3.

⁴⁴ Council Joint Action 2008/124/CFSP of 4 February 2008, Article 3(h).

⁴⁵ Political and Security Committee Decision EULEX/1/2008, 7 February 2008

⁴⁶ KIPRED various interviews in Brussels, 3-7 December 2012

⁴⁷ Political and Security Committee Decision EULEX/1/2010, 27 July 2010

⁴⁸ Political and Security Committee Decision EULEX/2/2012, 12 October 2012

⁴⁹ Council of the European Union, New Head of Mission for EULEX Kosovo, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/134017.pdf accessed 5 December 2012

the EU Office and EULEX, although comparatively different in nature (political/diplomatic vs. technical/rule of law) will both be led by diplomats. EULEX has been perceived but also criticized for being prey to Brussels' political agenda, and the new appointment will not help change that perception.

3.2 Resources and efforts: the challenge of collective mentality in Brussels and local mentality in Kosovo

The hitch of collective mentality

Though the mandate is broad and ambitious, it is difficult to miss that it has almost entirely to do with rule of law. Regardless, after reaching its full operational capabilities in April 2009, an international staff of around 1,700 was downloaded, of which around 60% were allocated to the Police Component and only 13% to the Justice Component.⁵⁰ This was done besides that at the time the justice sector was not only one of the weakest links in rule of law but also one of the least trusted among the public.⁵¹ Kosovo Police at the time was one of the highest ranking trusted law enforcement institutions after KFOR. Even nowadays, the justice sector continues to be one of the spots most exposed to political pressure, interference, and it goes without saying, corruption and unfairness.⁵² When the mission reached its full operation capabilities, around 75-80% of the positions were filled,^{53and54} which is common among international missions.⁵⁵ However the Justice Component was yet again one of the sectors that suffered the most – falling short on staffing by about 40%.⁵⁶ The high number of police officers serving with UNMIK at the time made it easier for EULEX to adopt them;⁵⁷ while there was no such comfort with the justice personnel.⁵⁸

After its programmatic restructuring in mid 2012, in which the Police, Justice, and Customs components were rearranged into strengthening and executive departments, the mission decreased the number of its international staff by about 25%. Most of the reductions did happen with the police officers; nonetheless, there was no increase of personnel in the justice sector. To date, there are only 36 judges and 24 prosecutors⁵⁹ working with the mission.⁶⁰ On average this means that there is around 1 judge sitting in each of the regular courts which deal with criminal proceedings.⁶¹ EULEX has also spread the number of judges evenly throughout the territory of Kosovo (save the north),

⁵⁰ This sort of miss-allocation of resources led to, for instance, judges and prosecutors getting caught late hours of work on the one hand, and those in the Police Component and administration enjoy the vacuum of not much to do in comparison. More information can be found at: Ariana Qosaj-Mustafa, Strengthening Rule of Law in Kosovo: The Fight Against Corruption and Organized Crime, KIPRED, 2010, http://www.kipred.org/advCms/documents/40064_RoL_fight_against_corruption.pdf

⁵¹ "A matter of trust: Report Public perceptions of safety and security in Kosovo, 2009/2010," FCIS, http://www.saferworld.org.uk/downloads/pubdocs/A%20matter%20of%20trust_ENG_WEB.pdf, November 2010 p.16.

⁵² "The Justice and the People Public Opinion Poll Kosovo 2011," http://www.justiceandthepeople.org/wp-content/uploads/First_Polling_Report_ENG.pdf

⁵³ Derks, M and M, Price "The EU and Rule of Law Reform in Kosovo": CRU, November 2010, http://www.clingendael.nl/publications/2011/20110106_CRU_publication_mderks.pdf, p.29.

⁵⁴ European Court of Auditors, Special Report Nr.18, (Luxembourg 2012), <http://eca.europa.eu/portal/pls/portal/docs/1/17764743.PDF>, p. 37

⁵⁵ According to European Court of Auditors, p. 37, only 47 % of the vacancies were filled with new seconded staff.

⁵⁶ Derks, M and M, Price "The EU and Rule of Law Reform in Kosovo": CRU, November 2010, http://www.clingendael.nl/publications/2011/20110106_CRU_publication_mderks.pdf, p.30.

⁵⁷ There were around 3,000 Police Officers with UNMIK

⁵⁸ There were around 12 international judges and 11 prosecutors working with UNMIK. For more information on reasons why staffing the justice sector in EULEX was difficult see: CRU - Maria Derks and Megan Price, The EU and Rule of Law Reform in Kosovo, November 2010, p.30

⁵⁹ KIPRED Interview with high officials at CMPD, Brussels, 4 December 2012

⁶⁰ In 2011 EULEX had 31 judges and 15 prosecutors according to a US State Department report: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>

⁶¹ In Kosovo there are 24 municipal courts and 2 additional branches, 5 district courts, 1 economic court, the Supreme Court, and the Special Chamber of the Supreme Court

besides the fact that courts in Prishtina deal with more than 30% of all the cases in the country⁶² including the “most difficult” ones – those of corruption and organized crime. Most of the cases that EULEX officials consider to be of “high profile”⁶³ are, or have been, treated in Prishtina. There are indications that recently EULEX has engaged a mobile unit which can easily be dislocated from one place or another depending on the circumstances and needs.

EULEX’s performance is also challenged by the lack of collective mentality stemming from the influence the Member States still enjoy vis-à-vis Brussels in dealing with missions abroad. The mission largely relies on seconded staff that comes from the Member States⁶⁴ as well as other contributing non-EU Member States.⁶⁵ The seconded staff represents more than 80% of the entire mission corps,⁶⁶ and key positions especially those of the judicial are almost entirely filled by seconded staff.⁶⁷ Compared to contracted staff by Brussels, the seconded staff are usually contracted for a period of one year with less flexibility for contract renewals.⁶⁸ Also, the seconded staff heavily relies on procedures of individual contributing states.⁶⁹ Judges are reported to stay usually from one to two years and others involved in the judicial sector unusually stay shorter periods. Such short durations are insufficient for those involved in investigating organized crime and corruption or other cases in criminal justice. For instance, Kosovo’s Criminal Procedure Code allows for investigations to last for up to two years.⁷⁰ When adding up the period that a trial of a criminal case may last, it turns out that shortly after the judicial staff familiarize themselves with cases and the local environment, they may have to leave. This cyclical cut-off from duty while cases are ongoing will not help the cases be dealt with seriously, nor can it lead to a serious fight against organized crime and corruption.

Besides, the lack of a collective architecture in Brussels has also led to the seconded staff usually being not as qualified as one would expect. In addition to short durations, factors such as (i) the unlikelihood of the justice personnel being redeployed; (ii) the lack of rewards on the part of contributing states for a professional staff that takes part in an international mission; and (iii) the different domestic labour laws and procedures in individual contributing states for (not) allowing longer term leaves without losing their job;⁷¹ all provide little incentive for qualified staff to deploy.

In such circumstances these jobs become more attractive for trainees or younger professionals who are supposed to carry out, i.e. their MMA functions, but lack the experience and expertise compared to the “beneficiary” local staff.⁷² In the eyes of many

⁶² Trem II 2012: Statistika e gjykatave te rregullta, http://www.kgjk-ks.org/repository/docs/Raporti-I-3-mujorit-te-II-2012-Komunale_800338.pdf, p.5

⁶³ (1) Ministry of Health: Tolaj and Bukoshi; (2) Office of the Prime Minister: Nazim Mustafi; (3) Medicus case: Lutfi Dervishi, et. al.; (4) Kosovo Assembly: Nexhat Daci; (5) PTK: Shyrqi Haxha; (6) Blanca case; (7) Sekiraqa case, etc.

⁶⁴ There are 26 contributing EU Member States. Cyprus has abstained

⁶⁵ There are 5 non-EU Member States: Norway, Switzerland, Turkey, Croatia, and the US. Canada withdrew.

⁶⁶ Sylvie Kormoss, Nato Committee on Gender Perspectives Annual meeting, 25 May 2010

⁶⁷ KIPRED Interview with a legal expert previously involved with EULEX, Prishtina, 21 November 2012

⁶⁸ KIPRED Interview with a legal expert previously involved with EULEX, Prishtina, 21 November 2012

⁶⁹ Individual Member States manage their seconded staff differently. For instance Germany may send staff from various ministries as the seconded staff may include police officers, customs officers, judges, prosecutors, etc. and it manages its seconded staff through the Ministry of Foreign Affairs. Sweden manages its seconded staff through an Independent Agency that deals with Swedish staff deployed abroad. Also accountability is applied differently; While Sweden rarely asks for reports, except to check how are the staff generally doing, Germany, on the other hand, asks for more detailed reports on the seconded staff work. Besides that seconded staff management and accountability depends on the individual Member States, they also depend on the sector the seconded staff works. For instance there are different reports required from those involved with the police, customs, justice, etc.

⁷⁰ Assemb. of the Rep. of Kosovo, Law No. 04/L-123, Article 159.1 Time Limits of Investigation, 13 December 2012

⁷¹ Derks, M and M, Price “The EU and Rule of Law Reform in Kosovo”: CRU, November 2010, http://www.clingendael.nl/publications/2011/20110106_CRU_publication_mderks.pdf, p.30.

⁷² Derks, M and M, Price “The EU and Rule of Law Reform in Kosovo”

civil and other professional beneficiaries in the public sector in Kosovo, EULEX staff has not provided any significant expertise to them.⁷³ Nonetheless, EULEX's presence in some of Kosovo's institutions has had a significant impact on protecting the independence of the institutions. For instance, some customs officers report that, although there has been no significant benefit from EULEX's expertise in customs per se, they have been incredibly useful in protecting the independence of the institution. It was reported that political pressure on the institution was made much less likely because the high ranking officials in Kosovo Customs feared that they may be prosecuted by EULEX.⁷⁴ Not only was EULEX's staff presence useful on the 'receiving end of pressure' (i.e. Customs), but also on the 'sending end of pressure' (i.e. higher officials in the GoK) – all on the basis of caution that EULEX may launch investigations against them.

EULEX has treated a fair deal of criminal cases; however, the number and quality of cases that have to do with “high profile” organized crime and corruption remain at disappointing levels. About 380 verdicts have already been handed down, of which there are about 306 verdicts on criminal justice, including 51 verdicts in high level organized crime and corruption cases.⁷⁵ This means that since its deployment in 2008, EULEX judges have, on average, handed down 78 verdicts per year (or around 2.1 yearly verdicts per judge), of which only around 10 verdicts were on high profile organized crime and corruption cases (or around 0.29 yearly such verdicts per judge). EULEX prosecutors have been involved in more than 2,078 cases.⁷⁶ This means, that EULEX prosecutors have, on average, been involved in around 430 cases per year (or around 18 yearly cases per prosecutor). Most of these cases have been dealt with in cooperation with local counterparts, which is part of EULEX's mandate to increase capacities on the one hand, and ensuring that there is no outside interference in the process on the other.

The least of EULEX resources to complain about is its budget. Since its initial deployment in February 2008 the mission was allocated 613.8 million Euros approved until June 2013.⁷⁷ On average, the mission's yearly budget is estimated to be at around 114 million Euros. This means that on average, EULEX has spent 2 million Euros per criminal proceeding. If “high profile” organized crime and corruption cases are alone taken into account (those in which there were highest expectations for the mission to deliver) the mission has spent 12 million Euros per high profile case.⁷⁸ The mission, who has with time adopted “we are here just for support” line, sits on a comfortable budget that is around 75% of the entire Kosovo's budgetary allocation (which is discussed next) for wider rule of law activities that are included in EULEX's mandate.

Adding up the hitch to local mentality

Kosovo dedicates 192 judges⁷⁹ in regular courts⁸⁰ that deal with criminal proceedings. In 2011 about 8,378 verdicts on criminal proceedings⁸¹ have been handed down, of which there were 182 verdicts on high profile organized crime and corruption cases.⁸² This

⁷³ KIPRED various interviews with Government officials.

⁷⁴ KIPRED interview with a custom officer, Prishtina, 30 November 2012

⁷⁵ Email communication with CPCC, Brussels, 4 December 2012

⁷⁶ Email communication with CPCC, Brussels, 4 December 2012

⁷⁷ Council Joint Action 2008/124/CFSP, 4 February 2008 and all the Council Joint Actions amending the first one.

⁷⁸ The budgets per case include the mission's entire budget divided by cases dealt with; it does not include the specific budgets spent on specific cases. As such these numbers serve only for indicative and comparative purposes.

⁷⁹ Trem II 2012: Statistika e gjykatave te rregullta, http://www.kgjk-ks.org/repository/docs/Raporti-I-3-mujorit-te-II-2012-Komunale_800338.pdf, p.3

⁸⁰ Supreme Court, the Special Chamber of the Supreme Court, District Courts, Economic Court, and Economic Court

⁸¹ These are criminal proceedings that the Supreme Court, the District Courts, and Municipal Courts have dealt with.

⁸² See the First Readiness Report of the Rep. of Kos. on Implementation of the EU Roadmap towards a Visa- Free Regime with Kosovo

means that in Kosovo judges have handed down around 44 yearly verdicts per judge, of which 0.94 yearly verdicts per judge on high profile cases of organized crime and corruption.⁸³ Kosovo employs around 100 prosecutors. Besides being involved in other cases, in 2011, Kosovo prosecutors have dealt with 792 cases of organized crime and corruption.⁸⁴ Fourteen prosecutors are dedicated for corruption cases.⁸⁵

When it comes to the budget, in the last four years Kosovo has allocated an average of 151 million Euros a year in the entire state machinery involved in the wider rule of law structures and activities. This includes total budgets of: (i) the Ministry of Interior (MoI), (ii) the Ministry of Justice (MoJ), (iii) customs, and the budget for (iv) all of the independent judicial institutions and other relevant agencies. This entire machinery employs close to 17,000 personnel.⁸⁶ Accordingly, Kosovo has spent around 18,000 Euros per criminal proceeding. If organized crime and corruption cases are alone taken into account, Kosovo has spent close to 830,000 Euros per such a case.⁸⁷

Illustrative table (on activities pertaining to wider rule of law)⁸⁸

Yearly figures	EULEX	Kosovo	Kosovo to EULEX
Personnel	2,153	17,000	~ 8 times higher
Judges dealing with criminal cases	36	192	~ 5 times higher
Veridcts per judge on criminal case	2.1	44	~ 21 times higher
Veridcts per judge on high profile cases	0.29	0.94	~ 3 times higher
Procecutors	24	100	~ 4 times higher
Prosecution cases criminal case	430	792	~ 2 times higher
Budget	114,000,000€	151,000,000€	~ 1.3 times higher
Euros per criminal case	2,000,000€	18,000€	~ 110 times lower
Euros per high profile case	12,000,000€	830,000€	~ 15 times lower

Table (a)

EULEX and Kosovo authorities' efforts are under no circumstances directly comparable, nor it is the intention of this paper; however, couple of conclusions can be drawn. For courts that deal with criminal proceedings, local authorities dedicate around 5 times more judges than does EULEX, yet they issue only 3 times more verdicts on high profile cases compared to EULEX judges. This means that the local judges are either less efficient, hesitant, or are more unwilling to deal with high profile cases compared to EULEX judges.⁸⁹ The same reflection can be noted on the work of prosecutors. For prosecutors

⁸³ Some of these cases cannot be separated between Kosovo authorities and EULEX because they work together in some of them. It is difficult to dissect cases that either EULEX or Kosovo authorities work independently.

⁸⁴ See the First Readiness Report of the Rep. of Kos. on Implementation of the EU Roadmap towards a Visa- Free Regime with Kosovo

⁸⁵ "Kundër korrupsionit në Kosovë vetëm 14 prokurorë," KohaNet, 13 January 2012 <http://www.koha.net/?page=1,13,83811> accessed 27 November 2012

⁸⁶ Kosovo Police only, employs 8,458 members, of which 7,333 are in uniforms and 1,125 are civil staff.

⁸⁷ The budgets per case include the GoK's entire budget spent on wider rule of law divided by cases dealt with; it does not include the specific budgets spent on specific cases. As such these numbers serve only for indicative and comparative purposes.

⁸⁸ The table should be viewed as illustrative only for comparative purposes since it depicts only approximate figures due to various reports providing varying data. KIPRED has gathered up the ones it deemed to be more reliable and reflected them on this table which should in turn reflect the reality in general. The budgets per case illustrated in this table are not the amounts EULEX and Kosovo spend specifically on such cases, but the total budgets of both are taken and divided by the cases they have dealt with which includes all the administrative expenses, helicopters on part of EULEX, and other capital resources.

⁸⁹ There has also been criticism from former EULEX toward locals. A former German EULEX police officer has hinted on the incapability of the Kosovo Police to fight crime high profile organized crime cases, since as he asserted, those cases usually have to do with former KLA members and they don't want to investigate their former

that deal with criminal cases, local authorities dedicate around 4 times more prosecutors than EULEX, yet they prosecute only 2 times more case compared to EULEX prosecutors. Similarly, this means that the local prosecutors are either less efficient, hesitant, or are more unwilling to deal with criminal cases compared to EULEX prosecutors. Finally, Kosovo dedicates a budget which is only 1.3 times higher compared to EULEX's for the entire state machinery that deal with aspects that EULEX is mandated to deal with – wider rule of law. Yet, Kosovo spends around 111 times less per criminal proceeding and around 15 times less on high profile cases.

The criticisms that are addressed to EULEX about it being under-resourced, therefore, do not stand; there is rather a serious misallocation of resources on the part of EULEX. There is an overwhelming amount of budgetary resources dedicated to the mission, yet a serious lack of staffing strategy – especially in the judicial – which results into low turnout of cases dealt with and solved. The misallocation of resources is evident on the part of Kosovo authorities as well. The budget dedicated to the wider rule of law cannot support judicial personnel who are one day willing to deal with high profile sensitive cases, neither does it support a legal and physical infrastructure to properly deal with such cases. There is an urgent need for re-allocation of resources with the local personnel involved in wider rule of law, especially in the number of prosecutors, judges, and investigative police. As such, EULEX's budget is high enough to meet the initial expectations, which it has not, while Kosovo's budget is low enough to fulfil the conditionality pertaining to wider rule of law, which it cannot. It is clear that there is general disinterest on both parties to seriously tackle the shortcomings in the judicial.

4. EUROPEANIZATION VS BALKANIZATION

4.1 Interference, conspiracy, and politics

It was clear right from the beginning, after the declaration of independence, that it was too much to expect the locals to strengthen the wider rule of law and especially fight organized crime and corruption, as it is generally believed to be clinging at the top. The table above illustrated the reluctance of local judicial personnel to deal with high profile cases, let alone war-crime cases, compared to EULEX as part of the percentage of all the cases they deal with. Incidents of threats and political pressure are known to exist, though difficult to confirm specifically. Cases where judges and prosecutors get assassinated have never been a major social problem. It is far from the extent to which such events occur(ed) in Italy for instance; and actually it is very difficult to confirm one. Nonetheless, there is a general fear and reluctance among judicial personnel to deal with high profile cases. It could be that extreme cases of loss of life among judicial personnel has been spared by the sheer fact that they might have “positively” responded to threats and political pressure.

The recent case of indictment of the former Minister of Transport, Fatmir Limaj, has illustrated the extent to which voices pointing at political interference are credible, however. After a number of retrials, Limaj was indicted again in late November 2012 for his alleged involvement in crimes against humanity. This was done after the prosecutor's appeal, which Supreme Court partially accepted. Being considered a hero by many, his indictment sparked dissatisfaction not among Limaj's sympathizers only, but also among his political party peers. The PDK Chair and Prime Minister, Hashim Thaçi, has accused

commanders, <http://www.spiegel.de/international/europe/veteran-insider-provides-grim-account-of-eulex-efforts-in-kosovo-a-865650.html>

EULEX for arresting “war heroes behind our backs”, and that “this was not justice but shame”, and he considered this to be “an insult.”⁹⁰ The Chair of the Kosovo Assembly, Jakup Krasniqi, called EULEX’s action as “a massacre of justice.”⁹¹ One of the most vociferous in this case was the Chairman of the PDK Group in the Kosovo Assembly, Adem Grabovci, who called for reviewing EULEX’s mandate.⁹² Now, when high ranking political figures blame and shame a criminal proceeding which is ongoing, it demonstrates the extent to which the independence of the judiciary is embattled. These reactions have also sent a strong message to the local judicial personnel who one day would want to take the courage to deal with these high profile cases. This will definitely make them reconsider their wishes.

While on the one hand EULEX is challenged by the local context and mentality, it has certainly begun to adopt them with time in their dealings with rule of law issues. A week after blaming and shaming EULEX, the intercepted conversations between the most vocal Grabovci and three other high ranking political figures in PDK were released in public.⁹³ The released materials included conversations of public and private matter and highlighted the official’s involvement in nepotism, as well as gossiping around the other party members. The general perception created in public opinion but also in public institutions was that the intercepted materials have shamed the protagonists – to say the least. EULEX confirmed that the released interceptions have been carried out by the mission during corruption investigations of Fatmir Limaj case,⁹⁴ but denied any responsibility for their release.⁹⁵ The GoK and other institutions felt they were being blackmailed by the mission, and two generally accepted theories were built around this case: (1) EULEX wanted to send a message to those who blamed and shamed the mission for its independent work on judicial proceedings – since those who were most vociferous against the mission during Limaj’s latest indictment were the main protagonist of the “leakage”; and (2) Few days after, Kosovo Prime Minister, Hashim Thaçi, was planned to meet Serbian Prime Minister, Ivica Dačić, and HR of CFSP, Catherine Ashton, in Brussels as part of Kosovo – Serbia dialogue, and thus weakening Thaçi before this important meeting. While these are long to remain conspiracies, it has without doubt affected the future work and credibility of these high ranking government officials, as only few of the conversations were released out of many others.

Only few days after the released intercepted conversations, the GoK attempted to stretch its sovereignty muscles. The GoK retaliated by approving the draft law on interception of telecommunications which was drafted more than a year ago, but was kept pending due to EULEX’s dislike about the law. Keeping the law pending meant that EULEX and other international organs present in Kosovo would use the legal vacuum pertaining to their competences on executing interceptions.⁹⁶ The GoK also needed to cooperate with

⁹⁰ Fatmir Limaj’s arrest took place few days before celebrations for the 100th anniversary of Albania’s independence took place.

⁹¹ “Krasniqi paraburgosjen e Limajt e quan masakër të drejtësisë,” KohaNet, 26 November 2012, <http://www.kohaditore.com/?page=1,13,124786>, accessed 25 November 2012

⁹² “PDK kërkon rishikimin e mandatit të EULEX-it,” Telegrafi, 26 November 2012 <http://www.telegrafi.com/lajme/pdk-kerkon-rishikimin-e-mandatit-te-eulex-it-2-26767.html> accessed 1 December 2012

⁹³ Four different videos were released, each per conversation: (1) Ademi Grabovi and Hashim Thaçi; (2) Adem Grabovci and Vlora Çiaku (Minister of European Integration); (3) Ademi Grabovci and Sami Lushtaku (Mayor of Skenderaj); and (4) Adem Grabovci and Kadri Veseli (former head of SHIK)

⁹⁴ Fatmir Limaj is also charged for corruption

⁹⁵ “EULEX: Përgjimet i bëmë me urdhër gjykatë,” Zeri, 4 December 2012, <http://www.zeri.info/artikulli/1/1/63404/eulex-pergjimet-i-beme-me-urdher-gjykate/> accessed 10 December 2012

⁹⁶ See: Shpend Kursani, Lawful Interception of Telecommunications in Kosovo:

Security Implications, KCSS, 2011,

[http://216.67.253.126/repository/docs/Lawful Interception of Telecommunications in Kosovo-Security Implications_333536.pdf](http://216.67.253.126/repository/docs/Lawful%20Interception%20of%20Telecommunications%20in%20Kosovo-Security%20Implications_333536.pdf)

EULEX and keep the relations satisfactory as the GoK is reminded by the EU to increase its cooperation with EULEX. Nonetheless, after the latest release of intercepted conversations targeting and shaming government officials, the GoK hastened to approve the pending draft law which would centralize the authority to intercept with the Kosovo Intelligence Agency (KIA) who reports directly to the Prime Minister and the President.⁹⁷ As the Minister of Interior has put it: “the law imposes limitations on EULEX”.⁹⁸ Regardless, the law will be one of the debates between Kosovo and the European Commission when the time comes. Passing the law in the Assembly, which the GoK strongly wants to pursue will legally, but not practically, prevent EULEX from using this method of investigation.

Indicting Limaj presents another side of the complex local environment. EULEX is usually criticized for dealing mostly with low-to-average criminal cases while hesitating to take up on “big fishes” at the top. Fatmir Limaj, as a former Minister of Transport, and the second most voted person in PDK, presents a stark case of EULEX’s ability to take up on those at the top. Regardless, there are those who believe that the latest indictment of Limaj occurred just before the elections in PDK took place; taking into account that Limaj was causing polarization within the party after he was earlier acquitted, EULEX wanted to “protect” the largest party from “falling apart” – removing Limaj from political scene would allegedly do that.⁹⁹ They believed it was done on the name of stability. But the release of the intercepted conversions allegedly by EULEX would not be conducive to stability the others claim the mission wants to keep. The mission, therefore, is caught in what a high official at the Civilian Planning Conduct Capability (CPCC) called “damn if you do, damn if you don’t”¹⁰⁰ situation. EULEX officials claim that on the one hand, public opinion expects EULEX to do more on high profile cases, and when they deal with Limaj, they encounter dissatisfaction and conspiracy against the mission on the other hand.¹⁰¹

At the same time EULEX should not build on the case of Limaj and handful of other cases¹⁰² to justify that in fact, unlike the general belief, it has truly dealt with high profile cases.¹⁰³ EULEX has also wisely diversified the “high profile” cases it has dealt with as they include a mix of people belonging or with links to major political parties and businesses. Many of these cases would have been inconceivable for the local judicial

⁹⁷ “Projektligji për përgjime”, Jeta në Kosovë, 13 December 2012, <http://www.jetanekosove.com/sq/Debate/Projektligji-per-pergjime-1020> accessed 18 December 2012

⁹⁸ Parim Olluri, “Fuqizimi I spiunazhit shtetëror shpërfill BE-në,” Jeta në Kosovë, 10 December 2012, <http://gazetajnk.com/?cid=1%2C3%2C4066> accessed 18 December 2012

⁹⁹ “Thaçi i lehtësuar pa Limajn,” KohaNet, 26 November 2012, <http://www.koha.net/index.php?page=1,13,124800>

¹⁰⁰ KIPRED interview with high officials at CPCC, Brussels, 3 December 2012

¹⁰¹ It is also a matter on how EULEX occupies public space and how it promotes its activities. For instance when Limaj was arrested for his alleged involvement in corruption, there was minimal reaction by the public, and there was not as much occupation of public space by EULEX at the time. However, when Limaj was arrested for war crimes there was much reaction by the public, because on how Limaj’s involvement in war is perceived (a hero), but also because of how EULEX promoted his indictment for war crimes.

¹⁰² Bukoshi – Deputy Prime Minister (indictment confirmed – seen in town);

Tolaj – high official at the Ministry of Health (indictment confirmed);

Mustafi – Office of the Prime Minister (on trial);

Zharku – former Mayor of Kacanik (guilty – escaped);

Puka – municipal judge (guilty of abuse of position);

Daci – Former President of the Assembly (guilty – continues to lead LDD party);

Alishani – advisor to the Speaker of the Assembly (guilty);

Haxha – former CEO of PTK (on trial);

Gashi – Llapi group (in retrial)

Gashi and Rama – alleged members of SHIK (guilty);

Johansen – representative of a Norway Company (guilty);

Geci – PDK activist (guilty); Hoxha – judge (guilty for bribery)

¹⁰³ KIPRED interview with high officials at CPCC, Brussels, 3 December 2012

personnel to deal with. Yet, treating a number of what EULEX believes to be high profile cases in a period of five years would under no circumstances be able to challenge local impunity. The Head of EULEX Prosecutors, Jaroslava Novotna, has stated that justice takes time and dealing with “high profile” cases is a longer process.¹⁰⁴ Conversely, EULEX’s resume on high profile cases in these past five years, and the justifications provided will not serve as a good lesson for the locals who, in the future when left “alone”, would have to show swift progress on fighting organized crime and corruption to meet Brussels’ criteria. If it takes this long for EU’s specialized rule of law mission to deal with high profile cases, it is not going to be a good benchmark for the locals to measure their success on, which will need to be presented to Brussels in the future.

Just like the local judicial institutions, EULEX’s judicial personnel (judges and prosecutors) are committed to their independent work and profession. Yet, just like the local judicial institutions EULEX has not been spared from outside interference either. There were times at which EULEX has taken over an ongoing case investigated by locals¹⁰⁵ only for the case to end up in despair shortly after.¹⁰⁶ It may have been the inability (or difficulties encountered¹⁰⁷) of the EULEX prosecutor to knot the pieces together of the complex case; however dropping such a case soon after it has been taken over has only strengthened the belief for those (locals) who have dealt with the case that there must be an outside interference on EULEX’s part. A former EULEX German police officer working with the investigation unit was also reported to have been told to drop a case.¹⁰⁸ He was asked to do so by his superior, but it was difficult for him to say where the exact source was coming from: EULEX or Brussels.¹⁰⁹ Another case that illustrates the problems with EULEX’s (in)dependence is the case in which an EULEX prosecutor was called by the HoM during a court hearing, only to be asked by an EULEX judge who at the time was the preceding judge, for the prosecutor to hung up.¹¹⁰ Kosovo Chief State Prosecutor, Ismet Kabashi, has also asserted that there is a degree of political interference from Brussels on the work of EULEX prosecutors.¹¹¹

The general beliefs around the publication of EULEX’s intercepted materials, and those around Limaj are long to remain conspiracies. Cases of outside interference with the mission provide little room for conspiracy. Regardless, few conclusions can be drawn. First, in the interception scandal, EULEX has thrown the ball on to the defence court by claiming that the 31 CDs containing the released recordings were handed to the defence; thus, hinting that the defence might be behind the scandal. EULEX should have never handed over the entire material collected for the suspects, especially those that are not considered as evidence for the said case. The defence lawyer of one of the suspects investigated in the case indicated that he has never in his entire experience received intercepted materials that include all the conversations, and especially the private ones.¹¹²

¹⁰⁴ Më lehtë me “peshqit e vegjël,” KosovaAlbaner, 4 April 2012, <http://web.kosovalbaner.com/vm/2012/04/me-lehte-me-peshqit-e-vegjel-2/> accessed 17 December 2012

¹⁰⁵ EULEX’s executive mandate, as well as the Republic of Kosovo law on EULEX’s jurisdiction allows for the mission to both choose (prioritize) cases which they deal with, but also intervene in ongoing cases the locals are dealing with. This is done to generally ensure that there is not outside interference on cases the locals deal with.

¹⁰⁶ KIPRED interview with former high official at Kosovo police, Prishtina, 22 November 2012

¹⁰⁷ One of the problems with EULEX investigators and prosecutors is the local language. It is very difficult for them to run after a case for which they have limited information about the social network, the language itself, and overall culture

¹⁰⁸ KIPRED interview with a reporter on Kosovo, Brussels, 3 December 2012

¹⁰⁹ KIPRED interview with a reporter on Kosovo, Brussels, 3 December 2012

¹¹⁰ Two Sources: a legal expert previously involved with EULEX, former official at the Presidency of the Republic of Kosovo.

¹¹¹ Selville Bajrami, “The Rule of Law in Kosovo: Mission Impossible?,” BalkanInsight, 17 November 2011, <http://www.balkaninsight.com/en/article/the-rule-of-law-in-kosovo-mission-impossible> accessed 25 November 2012

¹¹² Rubikon, KTV, 6 November 2012, <http://www.kohavision.net/video/rubikon/5100/>

This has never happened with the materials handled by either UNMIK or Kosovo authorities since 1999. Second, there are more than 400 cases that are under EULEX's investigation¹¹³, which include around 20% of Kosovo MPs.¹¹⁴ EULEX judicial personnel and the Kosovo society are to remain hopeful that the selection of these cases are done on basis of urgency – “big fish” and not on wishes or level of difficulty or political comfort.¹¹⁵ Lastly, these sort of cases have stressed the missing component in the relations between EULEX and Kosovo, that of the democratic control and oversight.

4.2 Democratic Accountability

Those involved with planning the mission in Brussels believe that the mission is democratic, “even too democratic”.¹¹⁶ This is true before the mission leaves Brussels for deployment. Also from the planning and deployment perspective all the Member States' approval (or not blocking) is needed and there is a serious back and forth activities before one convinces them. European Parliament is not directly involved in such matters, but national Parliaments are indirectly involved through the Council. This makes the process in itself democratic in Brussels. However, as soon as the missions are deployed there is a lack of post-deployment democratic accountability for the missions abroad. For almost five years of its operations, there has been but one case, on 15 March 2011, in which the EULEX HoM reported to the European Parliament Subcommittee on Defense and Security.¹¹⁷ The democratic face of the missions diminishes further away from Brussels they move, and the case of the lack of internal accountability in Kosovo is of serious concern.

The lack of EULEX's democratic accountability challenges the very idea of the end of supervised independence of Kosovo. Perhaps, it is difficult to perceive a foreign mission, especially the one voluntarily invited, to press it with democratic accountability. However, EULEX presents a specific case. Given mission's executive powers on wide range of issue including investigations, indictments, prosecutions, and other activities pertaining wider rule of law, where private and other state sensitive information fall under the mission's hands, there are no mechanisms with which to either oversee or keep the mission accountable. EULEX was invited and its executive functions were approved so by the Assembly of Kosovo; however there is no mechanism established whereby EULEX can be invited to report along with other state executive bodies on matters pertaining to their executive activities. EULEX is exempt from all Kosovo's oversight and control bodies including: parliamentary oversight, the Ombudsperson; the Auditor General, as well as judicial control and complaint mechanisms. As such, people in Kosovo cannot oversee and control wide range of executive functions carried out by an internationally invited body.

EULEX has the Human Rights Review Panel (HRRP) which deals with reviewing complaints submitted over potential EULEX violations of human rights.¹¹⁸ If a parallel is drawn, this is almost like the GoK having an internal review panel that deals with complaints and oversees and controls the work of its own. Moreover, EULEX holds that

¹¹³ Më lehtë me “peshqit e vegjël,” KosovaAlbaner, 4 April 2012, <http://web.kosovalbaner.com/vm/2012/04/me-lehte-me-peshqit-e-vegjel-2/> accessed 17 December 2012

¹¹⁴ KIPRED interview with high official at EULEX, Brussels, 13 November 2012

¹¹⁵ EULEX head of prosecutors has states that “small fishes” are easier to deal with <http://web.kosovalbaner.com/vm/2012/04/me-lehte-me-peshqit-e-vegjel-2/>

¹¹⁶ KIPRED interview with high official at CMPD, Brussels, 4 December 2012

¹¹⁷ Head of Mission briefs European Parliament, EULEX News, 15 March 2011, <http://www.eulex-kosovo.eu/en/news/000280.php>

¹¹⁸ Human Rights Review Panel of EULEX, 2011.

they are accountable to the political authorities in Kosovo through regular contacts in the Joint Rule of Law Board (JRLB) meetings; while maintaining that they remain accountable to the people through information provided to the civil society, media, etc. Again, if a parallel is drawn, this is just like the GoK bypasses the Assembly and considers being accountable to the people through information provided to civil society and the media. While President Jahjaga's invitation to HR Ashton about EULEX's presence referred to many Constitutional Provisions, it failed to refer to the very provisions which establish democratic accountability and the division of power in Kosovo.

For instance, going back to the case with the released intercepted materials: EULEX contends that they have handed over the released intercepted materials to the defence; however it will be impossible for the local authorities to knock on EULEX's doors should the investigations exhaust all other addressees. The Minister of Interior, Bajram Rexhepi, who rhetorically appears in public to trust the mission the least, stated that he will launch investigations over the case of leakage of intercepted materials. He is doomed to enter a dead end because of the immunities vested on EULEX – also reiterated on Jahjaga's invitation to Ashton.¹¹⁹ Agim Zogaj's (witness X in Limaj case)¹²⁰ family issued a complaint with EULEX's HRRP for what they believe to be a maltreatment of his family member, but never got a response.¹²¹ The family has also asked for the prosecutor involved in the case to be waived of his immunities so that their complaint with SPRK can move on, only to be told that such procedures rest with the Member State that seconded Salustro (the prosecutor) in Kosovo and not with the mission.¹²²

In general, it seems as if EULEX's force of Europeanisation is being challenged by the local forces of Balkanisation. The mission has faced difficulties on the ground; its activities were especially hindered by the local context in which it operates. Moreover, with time, EULEX officials have adopted a more laid back stance by justifying the inability to properly operate on the grounds that "it takes time to fight high profile crime". While trying to challenge impunity, they have also fallen prey to the challenges in the local level, and with time began to adopt some of the practices. The mission has not been spared from outside interference, which according to the outgoing Deputy HoM, Andy Sparkes, was done on behalf of stability.¹²³ Many working with the mission rightly assert that "EULEX is not here to clean up the local's mess"; however, it is evident that the local forces of Balkanization are swallowing the European mission down to their level and, as such, the mission risks being beaten with the "experience".

5. THE DUBIOUS RELATIONSHIP: SELF-CONDITIONALITY, FINGER-POINTING, AND CONTAINMENT

The relationship between Kosovo authorities and EULEX are important in so many ways. Yet, at the same time they have grown their relationship, as some of the above mentioned cases show, into a dubious one. On the one hand Kosovo's cooperation with EULEX is not a matter of choice; it's a must. In its Enlargement Conclusions, the

¹¹⁹ Letter of Invitation by President Atifete Jahjaga addressed to Catherine Ashton HREU, 4 September 2012

¹²⁰ Witness X has provided in what seemed to be very credible information accusing Fatmir Limaj of being involved in crimes against humanity. He was under EULEX's witness protection scheme. He was later found dead in Germany.

¹²¹ Dokumentar: Agim Zogaj- Deshmitari X, Pjesa 2, <http://www.youtube.com/watch?v=ivyKeXwTbus> accessed 15 December 2012

¹²² "Familja e dëshmitarit X akuzon Salustron", KosovaTimes, 13 November 2012, <http://www.kosovaitimes.net/index.php?page=1,17,19593> accessed 5 December 2012

¹²³ "Një pjesë e elitës nën hetim", Zëri, 3 January 2013, <http://www.zeri.info/artikulli/1/1/65261/nje-pjese-e-elites-nen-hetime/>

Council “underline[d] the importance for Kosovo to strengthen its close cooperation with EULEX and respect the renewed mandate of the mission.”¹²⁴ This is also in line with Commission’s suggestions to Kosovo in the 2012 Feasibility Study. Moreover, the mission did not get the local support to become an integral part of Kosovo’s Constitution, but it did get the overwhelming majority in the parliament to become an integral part of Kosovo’s (mainly) executive and judicial system. On the other hand, the previously mentioned autonomous measures taken by EULEX with which the GoK believed it was “shamed by the mission” it makes it look as if the GoK would throw the mission out at an instance. Were it not for the European Accession “gravity”, which the GoK believes it exists, or for the visa liberalization process, which is a strong political chip for a European political rhetoric, they would perhaps do that. But it was understood that any serious “misconduct” by the GoK towards the mission would not be good for Brussels support, in other words, it would not be good for political outcome. Therefore, if anything, it is the European face of EULEX that has made the GoK push for a 2/3 majority in the Assembly when voting for the mission’s mandate and presence in Kosovo.

Three instruments help the EU keep the strings together in and with Kosovo: (1) the Visa Liberalization dialogue, which began in January 2012; (2) the Structured Dialogue on the Rule of Law with Kosovo, which began in May 2012; and (3) Kosovo – Serbia relations managed through the dialogue, which began in March 2011. There are conditions attached to all three instruments which attempt to push reforms in Kosovo. However, by conditioning Kosovo in reforming wider rule of law, the EU is self-conditioning itself through the mission it mandated with its executive powers and other responsibilities it can take independently from Kosovo authorities to “ensure” that wider rule of law is strengthened in Kosovo. A Compact, which lays out joint rule of law objectives until June 2014, was sined between Kosovo Justice Minister, the EU Special Representative (EUSR), and the HoM, who commit to strengthen the wider rule of law in Kosovo. It is an important document which sets detailed criteria which Kosovo, assisted by EULEX through its Monitoring-Mentoring-Advising (MMA) mandate, have to meet.¹²⁵ In this case, it appears as if EULEX strips itself off its responsibilities vested on it through its executive mandate, which it never mentioned in the Compact, but which is so important to fight “high profile” organized crime and corruption.

As for the third instrument, Kosovo – Serbia relations, EULEX also plays a significant role, and its responsibilities in this regard are difficult to minimize. EULEX is one of the key actors present at Gates 1 and 31 border crossings with Serbia, and it continues to be so even after the Integrated Border Management (IBM) began being implemented. The HoM has recently visited Belgrade to talk to Ivica Dačić about the implementation of the IBM agreement reached in Kosovo – Serbia dialogue.¹²⁶ The mission also continues to send Kosovo customs officers to these gates and back through an everyday helicopter ride. Smuggling legal and illegal goods through the border between Kosovo and Serbia is a serious concern which is acknowledged in various reports;¹²⁷ cross-border organized crime also flourishes. Given that the relations between Kosovo and Serbia have not reached the level where they can sign international agreements, EULEX did sign a protocol with Serbia’s Ministry of Interior on police cooperation. The protocol commits parties to fighting criminal activities such as “trafficking of persons, arms and narcotics,

¹²⁴ Council Conclusions, Brussels, 11 December 2012, Note 60.

¹²⁵ See Compact on Joint Rule of Law Objectives for the period until June 2014, Prishtina, 9 November 2012

¹²⁶ “Head of EULEX visits Belgrade”, EULEX Press Releases, 16 November 2012 <http://www.eulex-kosovo.eu/en/pressreleases/0374.php>

¹²⁷ [Serb-Run North Kosovo Remains Smugglers’ Paradise](#), [North Kosovo: Dual Sovereignty in Practice](#), pg. 13, [Kontrabanda në Veri ka gjetur rrugë të papenguar](#).

organized crime and all other illegal activities across borders”¹²⁸ As such, EULEX has almost a “natural monopoly” powers when it comes to cooperating with Serbia in preventing and fighting various forms of organized crime and cross-border crime.¹²⁹ With these responsibilities, it is difficult to view EULEX from the recently adopted line “we are here only to assist”, since it’s mandate but also its activities do not give the mission that sort of comfort.

Besides the almost half a decade joint efforts to fight organized crime and corruption, Kosovo is still viewed with distressed eyes by the Member States and even wider. Kosovo is the only state in the Western Balkans not to enjoy liberalized visas, for many good reasons¹³⁰, but also on strong views that it is the centre of human and drug trafficking and other criminal activities. Kosovo is surrounded by states that already enjoy liberalized visas at its near neighbourhood and by the EU Member States and waters at its wider neighbourhood. Organized crime and corruption are at worrying levels, but baring the sole responsibility of being the source and centre of, as it is widely viewed, heroin and other illicit and expensive drugs and human trafficking is close to being paranoid; some of these kinds of illegal goods and services must be passing through its near and wider neighbourhood before Kosovo gets baptized as the centre and/or source of the illicit goods that can naturally and under no circumstances be domestic.

Regardless, the inability of Kosovo and EULEX to jointly fight these criminal activities raises the question whether the efforts vested are for fighting or containing criminal activities in Kosovo. The spill-over of migrants in some Member States from the countries caught up in the Arab Spring exposed individualist self oriented approach of Member States to deal with the problem. Many of them announced that they would erect borders if those in the South did not prevent them from entering the Schengen Zone.¹³¹ As such, and given their views on Kosovo and the high probability of potential asylum seekers should Kosovo obtain liberalized visas, this raises more concerns on Member State level. Member States’ seconded staff in the mission, in addition to official channels, are a good source of information for when Member States assess the level of criminality in Kosovo and the probability of spill-over effects of these activities on to a given Member State.¹³² The information they provide to their respective Member States may be correct and not necessary illegal given that Jahajaga never asked for such exchange to be restricted on her invitation to Ashton; however the joint inability (Kosovo and EULEX) to fight these criminal activities leaves enough room to conclude that the end result is containing these activities more than fighting them.

The local law enforcement authorities reiterate some of the success stories in fighting organized crime and corruption. Many times they are proud at pointing at some anti criminal activities which they successfully finish without the help of EULEX judges and prosecutors.¹³³ They tend to point at the amount of drugs they confiscate and, for

¹²⁸ “MUP-EULEX protocol signed”, b92, 11 September 2009, http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=09&dd=11&nav_id=61706 accessed 10 December 2012

¹²⁹ The protocol was signed in September 2009 which Kosovo authorities have strongly objected

¹³⁰ In the Visa Liberalization Roadmap which Kosovo received in mid 2012, there is a list of close to 100 criteria that Kosovo has to fulfil. It has progressed in some, and in some other lacks far behind

¹³¹ The case of Denmark is illustrated here:

<http://www.telegraph.co.uk/news/worldnews/europe/denmark/8514180/Denmarks-defiance-over-frontier-controls-has-left-European-Union-bordering-on-crisis.html>

The case of France is illustrated here: <http://euobserver.com/justice/115556>

¹³² KIPRED interviews with former high official at Kosovo Police, and a high official at the Kosovo Ministry of Interior, Prishtina, 22 November 2012

¹³³ KIPRED interview with officials from Kosovo Police, Prishtina, 22 November 2012.

instance, the cracking of an organized group which was forging identification cards and passports without EULEX being involved in it.¹³⁴ TV show cases of the local law enforcement authorities involved in fighting such criminal activities have certainly become more frequent; however the numbers submitted to the EU for the purposes of showing progress in meeting the Visa Liberalization criteria, although in some areas there is clear progress, in some they are still disappointing.¹³⁵ One thing that the local authorities have misunderstood is that improving on these numbers and showing more progress in those already shown is more important and sustainable than “being nice” to Brussels’ wishes on the dialogue. This misapprehension can be best illustrated by Prime Minister Thaçi’s rage on the Brussels inability to keep its “promise” for opening the dialogue on the SAA. Impressing Brussels with cooperative attitude in the dialogue is one thing, and impressing the Member States by changing their general views on Kosovo by improving the numbers is a different case. The latter is both more urgent and beneficial for the people in Kosovo and the Member States in the EU.

6. THE BRUSSELS EFFECT

The legal and political intricacies preceding the establishment of EULEX and the local context in which it operates are not the only bumps on EULEX’s road to fulfilling its mandate and meeting expectations. The mission was established as a technical rule of law mission, but it did not remain immune from the very circumstances under which the mission was established and the political agenda of its birthplace. Brussels has identified its top five security threats in its latest European Security Strategy of 2003: (1) terrorism, (2) proliferation of weapons of mass destruction, (3) regional conflicts, (4) state failure, and (5) organized crime. While the first two have no potential to unfold in the Western Balkans, at least not in mid-to-long term, the last three are the very threats that are either present, or risk unfolding in EU’s immediate neighbourhood. The last three are also interconnected in the fashion that one may trigger the other – excessive levels of organized crime can most probably lead to state failure, and state failure risks regional conflicts which, as an end result, leads to regional instability. Therefore, putting the fight against organized crime in Kosovo as a focal point in EULEX’s mandate was an accurate decision on the part of Brussels as it prevents the other two from unfolding and destabilize the region.

It seems however, that regional political circumstances, especially the fragile relations between Kosovo and Serbia, have led Brussels to swap this bottom up approach in dealing with its threats. Brussels fears that the fragile relations between Kosovo and Serbia may lead to regional instability quicker than does the organized crime via its earlier mentioned bi-products. It has thus leaped to dealing with potential regional conflict and has prioritized it on the expense of fighting organized crime as a matter of priority. This does under no circumstances mean that the EU has given up on fighting organized crime in Kosovo; regional stability as a priority has merely elbowed the fight against organized crime an item down the list of priorities. The fears of regional instability spreading from the fragile relations between Kosovo and Serbia become even more “legitimate” knowing that there is no Plan B on Brussels tables should the dialogue fail. The lack of

¹³⁴ KIPRED interview with senior official at the MoI and Customs official, Prishtina, 22 November 2012.

¹³⁵ For instance the number of those convicted on corruption charges dropped from 103 in 2009; 78 in 2010; 80 in 2011; and 52 in 2012. Or convictions for smuggling of migrants went from 20 in 2009; 18 in 2010; to 8 in 2011. Some progress, for instance, has been shown in the number of those prosecuted in organized crime cases which went from 219 in 2009; 268 in 2010; 426 in 2011; and 290 in 2012. Another example of progress is the cross border criminal cases of trafficking in weapons which went from 18 in 2009 to 63 in 2011. Source: First Readiness Report of the Rep. of Kos. on Implementation of the EU Roadmap towards a Visa- Free Regime with Kosovo

Plan B has made Brussels anxious, and as a result has led to the rearrangement of the bottom-up approach of threat assessment and re-prioritization of dealing with them.

This is clear if one compares the political capital being invested in EULEX and the dialogue between Kosovo and Serbia. Brussels provides unquestionable support to both EULEX and the dialogue. However, while budgetary support goes to EULEX, political support goes to the dialogue. Brussels financial support to EULEX is around 45% higher compared to the IPA funds it provides to Kosovo through its EU Office (i.e. Delegation) in Prishtina. At the same time, the HR of CFSP is betting almost her entire political capital on the dialogue¹³⁶ which has become the only instrument to deal with Kosovo – its accession gravity is weak with Kosovo due to the five non-recognizers. As a result, ‘drought’ is what would characterize political support, and ‘flood’ is what would characterize financial support to EULEX on the part of Brussels.

Most of those involved inside the institution doubt that their work in EULEX is being prey to or in function of Brussels’ priorities for stability in expense to wider rule of law. However, while this is true in so many respects, those within the institution have little to do with the political direction of the mission which goes through the Council’s PSC represented in ambassadorial level of each Member State (including the non-recognizers). It has been reiterated couple of times that Ashton’s and Füle’s congratulatory note to Kosovo for “calm and orderly manner in which the majority of the voting took place”¹³⁷ best exemplified Brussels’ priorities in Kosovo and the region. The elections had nothing to do with organized crime per se, but they were widely evaluated to be an organized theft of the basic element of democracy. Those in Brussels keeping the mission’s bridled opinion that Ashton and Füle “were happy for the elections not to turn into violence”¹³⁸, which is a mere defence to the “new prioritization” given that previously Kosovo had never seen election violence; thus, having such expectations would have been baseless to start with. While there is evidence that there is a good number of EULEX staff dedicated to the mission’s technical nature, little can they influence when it comes to the bigger picture of Brussels’ approach to Kosovo and the region.

In a direct question “in what cases and when does the mission’s focus on wider rule of law began to be traded off with political stability?”, one of the EULEX’s former dedicated staffers’ answer was “never.”¹³⁹ While these seem to be very genuine feelings about the mission’s overall direction, it is the northern part of Kosovo that betrays these very feelings. Besides adopting the “status neutral” approach, the mission failed terribly in extending and operating in accordance with its mandate in the northern part of Kosovo.¹⁴⁰ Once more, those in Brussels with the mission’s bridles believe that the mission is well established in the north and “its presence there is no different from the mission’s presence in other parts of Kosovo.”¹⁴¹ Conversely, those with planning the mission in Brussels acknowledge the mission’s epic failure to properly establish in the north and that it was “implausible why it took the mission so slow to begin operating there”.¹⁴² It took the EU to draw its political carrots to convince Serbia not to obstruct EULEX’s deployment in the north with its parallel security structures. In order to keep

¹³⁶ KIPRED various interviews in Brussels, December 2012

¹³⁷ Joint statement by the EU High Representative Catherine Ashton and Commissioner for enlargement Štefan Füle on Kosovo elections, (Brussels: Memo 2010).

¹³⁸ KIPRED interview with high officials at CPCC, Brussels, 3 December 2012

¹³⁹ KIPRED interview with former employee of EUPT and later EULEX, Brussels, 4 December 2012

¹⁴⁰ The following is the ranking of Kosovo Serbs’ most favourite institutions in Kosovo: (1) Kosovo Police (23%); Kosovo Security Forces (22%); KFOR (22%); EULEX (12.5%); and Customs (8%). Source: Analysis of the raw data from KCSS, “Kosovo Security Barometer”, email communication on 15 December 2012

¹⁴¹ KIPRED interview high officials at CPCC, Brussels, 3 December 2012

¹⁴² KIPRED Interview with high official at CMPD, Brussels, 4 December 2012

the stability in the north, EULEX's officials claim that "EULEX would never go against people's will in the north", besides the awareness that "people's will" was being driven by 200 people driven by Belgrade. The north continues to be one of the key topics in Kosovo – Serbia dialogue, and the mission's full functionality there will depend on the political outcome of the dialogue.¹⁴³

Paradoxically, what is draining Brussels off of its political capital has come to be seen as a good solution to managing EU's relations with Kosovo and Serbia. On the one hand, the divisions within the EU on Kosovo's status disable the EU from entering into contractual relationship with Kosovo and attracting the latter with other benefits of the accession process. On the other hand, the EU has come to understand that maintaining this division helps the Union remain credible for Serbia. Many policy makers in Brussels believe that unified position on the status of Kosovo would derail the EU's relations with Serbia; hence losing credibility towards Serbia.¹⁴⁴ Regardless of whether or not this approach is counter-productive, the source of division within the EU remains with sovereign decision of non-recognizers and Brussels can have little influence in this regard. It is also viewed that this sort of byzantine approach would also make EULEX's job easier on the ground; it would allegedly keep EULEX legally safe with its "status neutral" stance when dealing with Serbia, and legitimately safe with its EU face when dealing with Kosovo.

Leaving the mission swim on such ambiguous waters raises more questions about the nature of EULEX's functions and its overall ability to live up to its mandate. EULEX's ability to implement its mandate is also being challenged by what Brussels (mis)estimates to be a higher threat to regional stability. The fragile relations between Kosovo and Serbia are a legitimate threat to regional stability and it does test the CFSP's ability to respond to such threats and its overall success in the region. Political instability and leadership unpredictability in Kosovo is a threat to Brussels legitimate first threat. Strengthening rule of law in Kosovo does not necessarily and always threaten political stability. As such wider rule of law and the fight against organized crime and corruption remain EULEX's priority in Kosovo; but the ability of the mission to tackle and deal with its priority is being challenged by Brussels priority in the region. The priorities the EU has set for the region are under no circumstances to be prejudiced, as they are legitimate, but it should be recognized that the EU's priorities in the region, at times, challenge EULEX's ability to realize its mandate.

7. FINAL REMARKS

EULEX's mandate was ambitious to start with, but the expectations of its ability to realize its mandate were raised by the budget dedicated to the mission but also by the initial statements from its staffers. They have served good for the momentum; however, the mission came to disappoint many in Brussels and in Kosovo. Voices contemplating that the mission "has done nothing" are overstretched. It should be acknowledged that the mission has, to a certain extent, realized the "assisting", helping", and "contributing to" parts of its mandate. In many cases it has managed to prevent political pressure being waged on judicial and other independent institutions, challenging local impunity. This has been the case only when and where the mission personnel were present. There are a lot

¹⁴³ See KIPRED's policy paper "Autonomy for the Northern Part of Kosovo" *Unfolding Scenarios and Regional Consequences* July 2012, http://www.kipred.org/advCms/documents/46046_Autonomy%20for%20the%20northern%20part%20of%20Kosovo%20-%20Unfolding%20scenarios%20and%20regional%20consequences.pdf

¹⁴⁴ KIPRED various interviews in Brussels and the Embassy of Kosovo to Brussels, 6 December 2012

of cases that the local law enforcement and independent institutions deal with, and EULEX's staff presence in all the necessary institutions and cases has been weak – especially in the judicial sector.

The “ensuring” part is where the mission generally failed. In the past five years, the strengthening of wider rule of law has moved forward, but incrementally. There is a serious amount of legislation being passed, but a serious lack of implementation. Only 40% of court rulings in Kosovo were enforced.¹⁴⁵ Some of the biggest threats to Kosovo and the region, organized crime and corruption, generally cling at the top, which is something that has tested the mission's ability to deal with them. In very few cases it has shown that it is able to, and in many others people have just remained hopeful. The “ensuring” part is also one of the elements based on which expectations were raised, but the mission began to shy away from the “ensuring” responsibility by adopting “we are here only to assist” rhetoric.

The local context in which EULEX operates provides little hopes for such an international mission to realize the mandate vested on it. Fighting organized crime and corruption in a vibrant yet connected society in so many levels provide little hopes for such threats to be dealt with from abroad. The mandate that EULEX has should be gradually transferred to the locals to implement. A frequent question pops up by EU and EULEX representatives in a fashion: “what would Kosovo do were EULEX to leave?”¹⁴⁶ Statements coming from Brussels have stronger effects on the society's ability to have the courage to strengthen rule of law, than does EULEX itself. EULEX's work has been undermined by Brussels positive statements on forged elections –the basic point where rule of law can begin to strengthen. It is not Brussels' fault that elections get forged in Kosovo, but it starts taking the responsibility when it does not condemn such acts which go against strengthening rule of law for which it has sent its largest mission abroad to deal with. The strengthening of the wider rule of law should rest with the locals, but without genuine support from Brussels (even in declaratory level), the locals are doomed to fail together with EU's mission in Kosovo.

8. RECOMMENDATIONS

The state institutions must have the primary responsibility on ensuring the proper implementation of all aspects of rule of law should Kosovo ever wants to be fully capable to function on its own, and be prepared for the EU accession. The day when Kosovo's institutions begin fulfilling their responsibility and offer concrete results in fighting corruption and organized crime will be a mark of the maturation of the state and the society overall. In order to achieve this, KIPRED proposes the following policy recommendations to gradual transformation and eventual withdrawal of EULEX.

Steps to gradual transformation of EULEX and eventual closing of the mission:

(1) Transform MMA functions into MR (monitoring and reporting) functions (by the end of 2013):

- Reshuffle current EULEX staff without necessarily increasing the number of staff in a way that there would be more dedicated staff working with their MR functions with special focus on the judiciary;

¹⁴⁵ European Court of Auditors, Special Report Nr.18, (Luxembourg 2012)

<http://eca.europa.eu/portal/pls/portal/docs/1/17764743.PDF>, p.22

¹⁴⁶ Nick Hawton, Chief Spokesperson of EULEX, “In defence of EULEX“, Prishtina Insight, 13-26 April 13-26 2012, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/afet/dv/201/201205/20120530_article_eulex_2_en.pdf

- EULEX personnel should be dedicated 100% to the MR functions of the mission without using the executive powers;
- Those dedicated to carrying out MR functions should be placed in “critical political pressure points” in the police investigation units, prosecutors, judges, customs, and central election commission.

(2) Create a “monitoring centre” that initially sits with EULEX and then transfer it on to the EU Office (by mid 2014)

- The “monitoring centre” should be responsible for gathering information from “critical political pressure points” in Kosovo’s institutions;
- EULEX staff engaged in their MR functions shall report to the EU Office and the EU Commission;
- The “monitoring centre” shall also be used by Kosovo staff who encounter political pressure and outside interference who as a result should report all the details back to the “monitoring centre”;
- The “monitoring centre” shall be the database of progress made within Kosovo’s institutions without the need for EULEX’s help or interference with its executive mandate.

(3) Increase the number of competent local judges and prosecutors (between the beginning of 2013 and the end of 2014):

- The local institutions in Kosovo should increase the number of local judges and prosecutors dealing with criminal cases. They should gradually, within a period of 2 years, increase the number of judges and prosecutors that deal with criminal cases by at least 50%;
- EULEX judges and prosecutors who are involved with their executive powers should shift over to providing rigorous professional training on best European practices to Kosovo judges and prosecutors. This should be done by those involved for longer in Kosovo and understand the local context;
- The GoK should provide the adequate budget and facilities to support the increase of number of judges and prosecutors.

(4) Gradually shrink the executive powers of the mission (by the end of 2014):

- Gradually shrink the executive mandate and limit it to dealing with war crimes only (*within 2 year*);
- During this period EULEX should initiate as many investigations and take as many cases to the court, which should, by the end of this period, be handed over to the locals to deal with. The successful take over and closing of these cases, monitored by the EU Office, should be used as a benchmark for measuring Kosovo’s progress in the area of wider rule of law;
- Gradually transfer the entire executive mandate for dealing with war crimes to a Kosovar special court that will deal with transitional justice where 1-2 EU judges may have to sit for a temporary period (*after 2 years*);
- Introduce the topic of police cooperation between Kosovo and Serbia in the current ongoing dialogue. This should shift the responsibilities from EULEX over to Kosovo for jointly fighting cross border organized crime with Serbia (*within 1 year*);
- In the spirit of Kosovo – Serbia IBM agreement, ensure that Kosovo Customs officers have free and uninterrupted access to gates 1 and 31.

(5) Enhance the democratic accountability of EULEX:

- The Kosovo Assembly should be able to invite the EULEX HoM in the Parliamentary Committee for Security, Internal Affairs, and KSF's hearings;
- While holding immunities, the mission shall not be exempt from independent oversight and control such as the Ombudsperson and other oversight and control mechanisms laid down in Kosovo's Constitution.

(6) Full replacement of EULEX with conditionality based policy (by end 2014);

- The new MR functions should be transferred over to EU Office which shall closely monitor and report back the progress or shortcoming on the ground;
- Information from the “monitoring centre” shall be the database of progress made on the ground and measurable criteria shall be introduced to Kosovo authorities as a result;
- Given that the EU Office and the EU Commission currently have all the necessary information from EULEX; the EU Commission should be able to set these measurable criteria based on the reports it receives from its “monitoring centre” but also based on exact improvements that should be made;
- These criteria should include (1) the frequency of political pressure and outside interference that should decrease (this is measurable from the reports the monitoring centre receives from the locals working in the judicial sector); (2) track the number (and the names) of high level officials that are prosecuted (this is measurable from the information EULEX already possesses from its operations in the past 5 years); (3) track the number of cases reported on confiscation of illicit goods and measurable increase of the illicit goods confiscated in border-crossings;
- The GoK should in response produce tangible results on EU Commission's criteria;
- All executive powers of EULEX should gradually diminish and the entire EULEX operations should cease by the end of 2014.

There are also some lessons that can be drawn in general for the EU to improve on its future CSDP missions abroad:

1. The EU should not increase expectations neither through direct statements from its high officials nor through ambitious mandates it provides to its missions;
2. Before mission deployments and during their operations, the HoMs and other EU officials should clearly state the missions' intentions and responsibilities when in contact with local authorities and population;
3. The mandates of its missions should be devised from the actual capabilities and they should take into account the legal impediments on the Member State level and the EU treaty level;
4. The EU should gradually shift the sense of CSDP missions staff accountability from Member States over to the missions themselves;
 - a. The staffing and budgeting for the CSDP missions should gradually centralize on the EU level;
 - b. Member States shall retain their veto powers on mission's mandates and budgets, but once approved, the missions should retain their staffing and budgeting independence. Member States will still have to provide for most of the mission costs, but they will have to do so with minimal interference afterwards;

