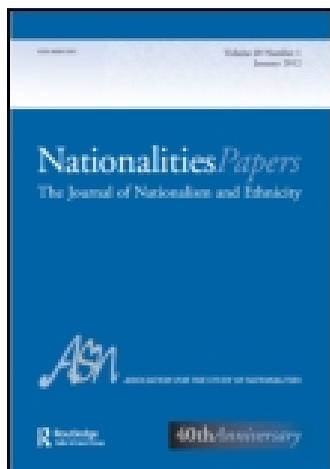


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### Analysis of current events: “towards the rule of law in Kosovo: EULEX should go”

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## Analysis of current events: “towards the rule of law in Kosovo: EULEX should go”

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Following Kosovo’s declaration of independence in February 2008, the European Union deployed a rule of law mission in Kosovo (EULEX). While EULEX and its supporters have argued that the mission has the potential to succeed, critics claim that the mission has failed to significantly improve Kosovo’s rule of law institutions, to address the rule of law vacuum in the north of Kosovo, and to prosecute high-level organized crime and corruption. I argue that the critics are correct, and explain that the mission is fundamentally flawed due to its neutrality about Kosovo’s independence, its rejection of conditionality and capacity building, and its difficulty investigating politicized crimes. Consequently, the mission cannot overcome the inherent challenges of building the rule of law in Kosovo, namely the desire of the Kosovo Albanian majority for independence and the connection between politics and criminality. The paper concludes that EULEX should not be renewed, since the mission’s main functions could be better fulfilled by other international organizations, namely the NATO-led Kosovo Force and the European Union Office.

**Keywords:** EULEX; Kosovo; rule of law

On 17 February 2008, Kosovo declared independence after nearly a decade of administration by the UN Interim Mission in Kosovo (UNMIK). Despite UNMIK’s efforts to build institutions and establish the rule of law, the international community remained concerned about criminality and instability in the territory and as a result established a European Union rule of law mission (EULEX) following Kosovo’s declaration of independence. EULEX had a mandate to strengthen Kosovo’s rule of law institutions through “monitoring, mentoring and advising” (MMA), and to exercise certain executive authorities, including prosecuting and adjudicating serious or politicized crimes (Council of the EU 2008). The mission also had extensive resources relative to Kosovo’s population of approximately two million, including a staff of over 2000 and a total budget from February 2008 to June 2013 of 613.8 million euros (Council of the EU 2012).

Despite EULEX’s authority and resources, several prominent analysts and observers have raised serious concerns about its efficacy. The European Court of Auditors (ECA 2012, 6), for example, found that EU assistance related to the rule of law “has not been sufficiently effective ... overall progress in improving the rule of law is slow, particularly with regard to the fight against organized crime and corruption, above all in the north of

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Kosovo". Many Kosovo Albanians were disappointed that the mission failed to successfully prosecute high-level officials for corruption, and local analysts criticize EULEX for prioritizing stability and European unity over its other objectives (Balkan Policy Institute 2011; Bennett and Saferworld 2011; ICG 2010, 20–21; KIPRED 2013). Despite the criticism, EULEX and its proponents have insisted that the mission is worth pursuing since it has made progress in prosecuting serious crime and in strengthening Kosovo's institutions (ECA 2012, 49–62).

This paper seeks to evaluate EULEX's effectiveness and understand the sources of its success or failure in order to offer prescriptions for how best to accomplish the international community's objectives in Kosovo and in other post-conflict societies. In brief, I find that the critics are correct. EULEX could be eliminated and replaced by the existing international organizations in Kosovo with little detriment to the mission's main objectives. I find that the mission's main limitations are inherent to its mandate and preferred methods. These limitations include EULEX's neutrality about Kosovo's independence, its rejection of conditionality and capacity building, and its difficulty recruiting officials with local knowledge and language skills. Consequently, EULEX cannot effectively deal with the challenges of building the rule of law in Kosovo, including Kosovo's contested independence status and the connection between politics and criminality. Two of the mission's main functions – strengthening Kosovo's rule of law institutions and providing public security – could be more efficiently provided by other international organizations, respectively the European Commission Liaison Office in Kosovo (EU Office) and the NATO-led Kosovo Force (KFOR). The only part of EULEX's mandate that is unique to the mission is the prosecution of politicized crime, yet there is little reason to believe that EULEX can be made more effective in this area.

By systematically characterizing EULEX's goals, limitations, and techniques, the paper also offers implications for possible future rule of law missions in countries such as Afghanistan, Libya, and Syria. For example, EULEX sought to strengthen Kosovo's institutions solely through offering them assistance, which could not deal with the tendency of Kosovo elites to obstruct reform to protect their own particularistic or criminal interests. Instead, if future missions hope to achieve reform in the face of elite obstruction, they must use conditionality and foreign-led capacity- building programmes. Furthermore, in societies where there is an international military presence that is effectively fulfilling public security functions, additional riot police may not always be necessary or beneficial.

The paper proceeds in five parts. I first briefly outline the origins and mandate of the mission. Second, I discuss EULEX's overall goals, including maintaining peace and stability in the territory, addressing politicized crime, and integrating the Western Balkans into the EU. Third, I explain two challenges related to Kosovo's domestic politics: the desire among the majority Kosovo Albanian population for independence and the connection between the leading political parties and criminality. Fourth, I discuss the specific techniques that EULEX used, including its MMA tasks as well as its executive mandate. I explain why EULEX hoped that these techniques would be effective and why they were not sufficient to overcome domestic opposition. A fifth section concludes and offers policy implications. It details why EULEX should be eliminated and offers implications for future rule of law missions.

## Background

EULEX was originally planned as part of Marti Ahtisaari's "Comprehensive Proposal for the Kosovo Status Settlement" (CSP), which specified a plan for several international

organizations to supervise Kosovo after it became independent. An EU Planning Team was deployed to Kosovo in 2006 and recommended the creation of a mission to improve the rule of law following a consensus about the “critical weakness of the justice and law enforcement sector in Kosovo” (Helly and Pirozzi 2006, 1). The CSP planned for EULEX to be under the authority of the EU Special Representative (EUSR) who would supervise the overall international effort in independent Kosovo (CSP 2007, Annex IX and X). EULEX’s mandate was formally specified by Joint Action 2008/124/CFSP of the Council of the European Union (EU) on 4 February 2008. The mission would focus particularly on the police, the judiciary, and the customs authority (ICG 2008, 1–18; Perritt 2009, 223–230).

The CSP was premised on the assumption that the UN Security Council would accept Kosovo’s independence, approve the plan, and restructure the international presence in Kosovo accordingly. Hence, when the Security Council failed to approve the CSP due to disagreement about whether Kosovo should become independent, EULEX’s deployment and mandate became more complicated. Kosovo unilaterally declared independence on 17 February 2008 and adopted the CSP into its constitution. However, 5 of 27 EU member states<sup>1</sup> did not recognize Kosovo’s independence, which meant that EULEX’s mandate could not be justified based on Kosovo’s constitution. After protracted negotiations, a compromise was reached between Serbia and the international community that enabled EULEX to deploy, known as the “Six-Point Plan”. Under the Six-Point Plan, UNMIK was reconfigured so that it no longer administered Kosovo, but it retained limited authority over six issues of particular concern to Serbia.<sup>2</sup> EULEX was deployed as part of UNMIK, under the UN Security Council resolution 1244 (1999), and maintained strict neutrality about Kosovo’s status (i.e. whether Kosovo was independent). Hence, EULEX was in the awkward position of assisting the Kosovo government while having no formal opinion about whether Kosovo was an autonomous region of Serbia or an independent state. So long as there was no consensus among EU members about whether Kosovo was independent, EULEX could not even implicitly recognize the territory’s independence. The negotiation of the Six-Point Plan also slowed the mission’s deployment, so EULEX did not begin operations until December 2008 and did not become fully operational until April 2009 (EULEX 2009a).

While the EU was divided about Kosovo’s independence, Kosovo nevertheless has the potential to join the EU. To be sure, disagreement about Kosovo’s status complicated its potential accession to the EU, but the EU followed a legal opinion that there was no obstacle for proceeding with a Stabilization and Association Agreement with Kosovo (European Commission 2012, 3). Hence, if Kosovo were to meet the established criteria for EU accession, it could incrementally make progress along each stage of the accession process and eventually be granted membership.

### Goals and effectiveness

EULEX sought to fulfil three basic goals in Kosovo. First, it sought to ensure a basic level of peace and security in the territory. While the NATO-led military presence, KFOR, had primary responsibility for providing a “safe and secure environment” (CSP 2007, 54, 59), EULEX’s mandate included “ensur[ing] the maintenance and promotion of the rule of law, public order and security” (Council of the EU 2008, Article 3). To this end, EULEX included the Special Police, which consisted of formed police units from various European countries who would act as riot police if unrest were to occur and the Kosovo Police was unwilling or unable to address it (EULEX 2010).

The greatest threat to peace and security was in the north of Kosovo, a region north of the river Ibar that contained a majority Serb population of approximately 60,000 Kosovo Serbs (ICG 2011, 1). Serbs in the north maintained closer links with the Serbian government in Belgrade and generally did not recognize the authority of the Kosovo government. The most serious violence of the post-independence period occurred in July and September 2011, when the Kosovo government sought to deploy police officials to two border customs posts between Kosovo and Serbia. Local Serbs attacked Kosovo Albanian and EULEX special police, and KFOR deployed to re-establish security (ICG 2012, 1–2). The situation was eventually mitigated by an agreement between Kosovo and Serbia on integrated management of borders in December 2011, but the agreement was only implemented beginning in December 2012 (ICG 2013, 1–4). Following the border incidents, EULEX was criticized for having insufficient numbers of riot police, in part because several member states had previously withdrawn their contributions (ECA 2012, para 85, 90). However, even with additional riot police in Kosovo, it is likely that EULEX would still have had to call on KFOR to deal with significant protests. Serb protestors would likely have access to heavy weapons and improvised explosives, and could escalate protest beyond the point that the riot police could contain. The murder of a EULEX police officer in the town of Zvečan in September 2013 also indicated that security in the north of Kosovo remained limited even years after EULEX’s deployment (*Reuters*, 19 November 2013).

Second, EULEX sought to address politicized crimes such as “war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, [and] financial/economic crimes” (Council of the EU 2008, Article 3). Among EU officials, Kosovo had a reputation for criminality, and EU officials believed that EULEX could succeed where UNMIK had failed in addressing politicized crime, both through strengthening Kosovo’s rule of law institutions and by deploying foreign officials to investigate and prosecute politicized crime themselves. EU member states were also particularly concerned about politicized crime in Kosovo because of Albanian organized criminal networks in Western Europe (European Commission 2011, 52–56). Furthermore, reducing politicized crime, especially corruption and illegal trafficking, was a key requirement for Kosovo to proceed with EU accession.<sup>3</sup>

EULEX did make some progress in increasing the number of investigations and trials for politicized crime through its executive mandate, which enabled EULEX officials to investigate, prosecute, and adjudicate criminal activity. In an email in November 2013, EULEX claimed to have 270 ongoing criminal investigations, to have “completed 370 judgements in criminal cases and more than 140 decisions in civil cases”, and have issued 90 verdicts “in the sensitive, difficult and time consuming areas of war crime, organised crime and corruption”. Despite these numbers, there appears to be a substantial consensus among the public and analysts in Kosovo, and even some EU officials that EULEX has largely failed to address politicized or serious crime. The ECA (2012, 17) report was particularly negative about this issue: “The investigation of serious crimes is still ineffective due to limited experience and political interference.” Kosovo Albanian public opinion also turned against EULEX for promising to arrest corrupt officials but failing to deliver.<sup>4</sup> Indeed, surveys indicate that public satisfaction with the EULEX police dropped from approximately 50% in 2009 to 25% in 2012 (Bennett and Saferworld 2011, 16; UNDP 2013, 20). Although EULEX adopted a public campaign to emphasize its efficacy in the fight against corruption, the Kosovo Albanian press remained unconvinced since few of the trials successfully targeted the “big fish” – senior officials who were widely believed to be corrupt or guilty of serious crimes (*Balkan Insight*, 14 June 2012; ECA 2012, para 49; *Prishtina Insight*, 13–26 April 2012).

EULEX's third objective in Kosovo was to ensure the long-term integration of the Western Balkans into the EU. Because of the mutual antagonism between Kosovo and Serbia, and disagreement within the EU about Kosovo's status, achieving this objective required carefully avoiding aggravating tensions. For example, EULEX participated in EU-led talks between Kosovo and Serbia to "promote cooperation, achieve progress on the path to the EU and improve the lives of the people" (ICG 2013, 12). These talks culminated in an April 2013 agreement normalizing relations between Kosovo and Serbia. To avoid risking violent protest from both sides, these talks focused on practical issues, including establishing joint posts at border crossing, enabling Kosovo to participate in regional conferences, and Serbia's recognition of documents issued in Kosovo. While the EU had significant leverage over both Serbia and Kosovo because of their desire to join the EU, any policy had to be carefully framed to avoid provoking conflict among the EU member states because of their disagreement about Kosovo's status.

In all, although EULEX avoided undermining the broad EU agenda in the region, there were serious questions about its record on ensuring security in the north and on addressing politicized crime. It is also important to note that EULEX's three objectives may have been in conflict. In particular, the need to prevent violence and to avoid undermining EU accession in the region may have led EULEX to avoid risky but transformative activities such as arresting popular politicians or strengthening the Kosovo rule of law institutions so they could exercise authority in the north.

### **Domestic challenges**

Kosovo Albanian nationalism and the connection between political parties and criminality were especially important in the domestic politics of Kosovo and were a major source of EULEX's failures to improve the rule of law. These same issues had posed a challenge for UNMIK and are also likely to limit reform in other post-conflict and war-torn societies.

### ***Kosovo's independence and status neutrality***

Kosovo's independence was perhaps the most important political issue in the territory. Kosovo Albanian nationalism, meaning the desire to make the territory of Kosovo its own state, was widely held among the majority Albanian population. Although there was a divide between the major Albanian political parties within Kosovo about how best to achieve independence, there was a clear consensus among Kosovo Albanians that independence was desirable. During the 1990s, the Democratic League of Kosovo (LDK) attempted to achieve independence by using non-violent opposition to Serbia to gather international support. Subsequently, the Kosovo Liberation Army (KLA) was formed and launched a violent insurgency against Serbia (Judah 2002, chap. 3–6; Perritt 2008, chaps. 1 and 8). After the war, the KLA disbanded, and former KLA leaders formed two major political parties – the Democratic Party of Kosovo (PDK) and the Alliance for the Future of Kosovo (AAK). The LDK, PDK, and AAK for the most part campaigned on their efforts to gain independence for Kosovo. An adviser to PDK leader Hashim Thaci noted that "It is almost impossible to differentiate among the [various parties'] platforms. They all have three key issues: number one, independence; number two, independence; number three, independence" (ICG 1999, 11; King and Mason 2006, 120–121).

EULEX's status neutrality alienated the pro-independence Kosovo Albanian population. Although it is impossible to say whether EULEX would have been more effective if it had recognized Kosovo's independence, my interviews in January 2010 indicated

that EULEX had lost the respect and good will of Kosovo Albanian officials in government, whose cooperation was essential for improving Kosovo's rule of law institutions. The most direct opposition to EULEX came from the leftist nationalist party Vetëvendosje. Albin Kurti, leader of Vetëvendosje, connected EULEX to the UNMIK police, who had been discredited after an incident in February 2007 when UNMIK police fired rubber bullets and killed two unarmed protestors. Kurti explained,

EULEX has the same cars, the same headquarters and many of the same staff as UNMIK and it is founded on the same legal basis as UNMIK. Not surprisingly, EULEX's employees are, like UNMIK, already demonstrating they believe they are above the law – here to implement it for us, but not for themselves. (Džihic and Kramer 2009, 19)

Protesters from Vetëvendosje would later engage in attacks against EULEX vehicles in August 2009 (B92, 26 August 2009).

Furthermore, the interaction between Serbian and Kosovo Albanian nationalism largely prevented EULEX from building the rule of law in the north of Kosovo. While Kosovo Albanians sought to extend the authority of the Kosovo government into the north, the Kosovo Serbs rejected these efforts and attacked EULEX officials for supporting the Kosovo government. In addition to the most violent protests at the border posts in 2011, EULEX personnel faced frequent roadblocks and threats. While EULEX had the technical authority under resolution 1244 to operate in the north, EULEX officials were concerned that greater activity in the north could provoke violent unrest that would undermine other EU objectives.<sup>5</sup> For example, in 2011, EULEX began to house more staff in the north of Kosovo, but security concerns soon led the mission to redeploy its staff south of the river Ibar. EULEX also deployed a small team of judges to the north, but a substantial backlog of cases remained, and the parallel Serbian justice system largely remained intact. The ECA (2012, 24) report concludes that in the north of Kosovo “EU interventions have been very limited and there has been almost no progress in establishing the rule of law” (see also ICG 2010, 21–23).

Finally, EULEX's investigations of serious crimes provoked domestic opposition because they often targeted wartime leaders with substantial public support. While the Kosovo Albanian population was largely opposed to its leaders' involvement in corruption or organized crime, they were generally supportive of individuals who had fought in the war to gain independence. For example, the prosecution of Fatmir Limaj, the former Minister of Transport and a KLA leader, provoked public support for Limaj and accusations from senior leaders. According to the think tank KIPRED (2013, 16–17), Thaci criticized EULEX's action as “arresting ‘war heroes behind our backs,’ and that ‘this was not justice but shame.’”

### ***Political connections with criminality***

To maintain their power in Kosovo, political parties allegedly made use of criminality, or had close associations with criminal actors. One report by the International Crisis Group (ICG 2010, i) explains, “Kosovo suffers from the widespread impression that it is run by a lawless political elite in control of every aspect of society.” During UNMIK, party leaders relied in large part on their connections from the war. Some of these connections were legal and legitimate – PDK and AAK leaders sought to ensure jobs for KLA veterans in the police and in the Kosovo Protection Corps (ICG 2000; Perritt 2008, 153–154). However, there were also allegations that political leaders had associations with KLA veterans accused of war crimes, organized crime, and other types of politicized crime. Analysts also alleged that political parties made use of corruption and smuggling to fund their

political activities and maintain political control (Covey, Dziedzic, and Hawley 2005, chap. 8; ICG 2006, 4–7; Perritt 2009, 230–237; *The New Yorker*, 6 May 2013, 46; Stefanova 2004).

After Kosovo's declaration of independence, analysts and international organizations continued to accuse Kosovo officials of interfering in policing and judicial proceedings. For example, the ICG (2010, 6) observed, "department chiefs receive[d] phone calls apparently from advisers to two separate ministers seeking information about specific investigations in which their family members or party associates were allegedly involved." The ECA (2012, para 65) similarly notes political interference in the judiciary surrounding the selection of cases, and highlights that there were "frequent changes in the senior management of the Kosovo Police, partly linked to political interference".

International organizations have also investigated senior Kosovo officials for committing serious crimes, although there tends to be little hard evidence and few reliable witnesses for such cases. The indictment of Limaj for corruption and money laundering in November 2012 was one prominent case.<sup>6</sup> Another investigation, mandated by the Council of Europe (2010, 16–17) and led by Swiss prosecutor Dick Marty, accused Prime Minister Hashim Thaci of involvement in a wartime organ-smuggling ring. Marty named Thaci and his associates in the "Drenica Group" as key leaders in "mafia-like structures of organised crime" and noted,

At a minimum, there is solid documentary evidence to demonstrate the involvement of this group, and its financial sponsors, in money laundering, smuggling of drugs and cigarettes, human trafficking, prostitution, and the violent monopolisation of Kosovo's largest economic sectors including vehicle fuel and construction.

Thaci and other major political leaders denied Marty's accusations and accused him of pro-Serb bias (KIPRED 2013, 16–17; Rustemi 2010).<sup>7</sup>

While there is little evidence for the most lurid accusations against senior Kosovo officials, there is good reason to believe that there are connections between political authorities and criminal actors. Phillips (2010, 93–98, 2012, 211–215), for example, notes that Thaci's party, the PDK, was closely connected to the Kosovo Information Service (commonly known by its Albanian acronym SHIK), a clandestine intelligence service that "generates huge sums from bribery, extortion, and racketeering" and was "largely responsible for the culture of corruption and criminality in Kosovo." Connections with criminality give Kosovo officials an incentive to gain greater influence over policing and to undermine reforms that would render them vulnerable to prosecution or lead to the arrest of key political allies.

### **EULEX's methods**

EULEX pursued its mandate by performing both "strengthening" and "executive" functions (Council of the EU 2008, Article 2). The strengthening function sought to improve the quality of Kosovo's rule of law institutions through MMA. The executive functions involved EULEX officials directly securing the rule of law through investigations, public security efforts, and judicial affairs.<sup>8</sup> EULEX identified the strengthening tasks as the "heart" of the mission and generally sought to de-emphasize its executive functions, although in practice most observers focused on the mission's executive activities.<sup>9</sup> The particular methods EULEX adopted, as well as the probably needlessly obscure terminology associated with them, stemmed from EULEX's desire to minimize its apparent imposition in Kosovo politics, its desire to maintain status neutrality, and the particular bureaucratic culture of the mission.

### *Strengthening*

EULEX narrowly interpreted its institutional strengthening mandate to include providing assistance, and excluding commonly used techniques in post-conflict and candidate countries such as capacity building and conditionality.<sup>10</sup> By avoiding capacity building, EULEX hoped that the reform process would be “locally owned,” meaning that Kosovo authorities would lead the process, and that EULEX could help the Kosovo authorities understand the weaknesses of their institutions, suggest remedies, and offer assistance in implementing them. The failure to use conditionality appears to have stemmed from the separation between EULEX, the EU Office, and the EUSR that emerged out of the adaptation of the Ahtisaari plan to Kosovo’s declaration of independence. While EULEX might not have been mandated to use conditionality, the EU Office could have linked progress with EU accession more closely to Kosovo leaders’ compliance with EULEX.

Observers, analysts, and Kosovo officials, however, interpreted EULEX’s “strengthening” activities as including capacity-building and conditionality, which led to confusion and raised expectations. For example, the ECA (2012, 26) criticized EULEX for “capacity building objectives and roles [that] are not clearly defined.” The European Commission and the European External Action Service (EEAS), which supervise EULEX’s activities, responded to the ECA that EULEX’s mandate did not actually include capacity building or conditionality.<sup>11</sup>

Beyond simple misunderstanding, limiting EULEX’s strengthening activities to assistance was a formula for failure, given the incentives for Kosovo officials to obstruct reform. EULEX effectively assumed that Kosovo officials would be fully willing participants in improving the rule of law. However, this assumption was seriously flawed, given the connections between political parties and criminality and Kosovo officials’ continuing efforts to politicize rule of law institutions. Consequently, since all reform objectives had to be mutually agreed, EULEX could only make relatively anodyne demands, such as improvements in strategic planning or information technology systems. Fundamental reform of the police or judiciary, in ways that would undermine political interference or would improve the institution’s ability to address politicized crime, was not possible.

While conditionality or capacity-building approaches may not have been fully effective in addressing the problems with the rule of law in Kosovo, they would have likely enabled EULEX to make more meaningful improvements. One concrete mechanism is that these approaches would not have been limited by the need to gain local agreement for reform objectives. For example, the European Commission used a conditionality-based approach in its dialogue on visa liberalization in Kosovo, which is an area where there is strong public support in the territory for reform. The European Commission (2013, 18–19) identified concrete problems related to corruption and organized crime, even if it could not force Kosovo officials to make the required improvements in these areas. Similarly, capacity-building programmes might have been less susceptible to obstruction by Kosovo officials.

EULEX was also limited by its “programmatic approach” – the centralized, complex, and overly bureaucratic policy the mission adopted to fulfil its MMA mandate. Under the programmatic approach, MMA did not simply mean placing advisors or mentors in the relevant organizations and having the advisors offer their own expertise. Instead, following the metaphor of a “conductor of a large orchestra,” the programmatic approach specified a formal process of assessment and remediation.<sup>12</sup> Although the programmatic approach might have sounded reasonable to a Western European audience, it was poorly suited to correcting the actual problems with the rule of law in Kosovo, namely politicized crime. In particular, the formal, algorithmic nature of the programmatic approach led it to

target areas where there could be measurable improvements, and where Kosovo officials and EULEX staff agreed that progress should be made. For example, actions under the programmatic approach included developing a crime prevention strategy, improving crime statistics, and improving databases and access to information.<sup>13</sup> The Programme Reports assigned letter grades to improvements in these target areas, and cited them as evidence of EULEX's achievements in improving the rule of law (EULEX 2012b, 7). Nevertheless, so long as political obstacles limited the scope of EULEX's actions under the programmatic approach, these metrics were not accurate measures of the Kosovo rule of law institutions' capability to deal with politicized crime in the future.

Furthermore, the complexity of the programmatic approach reduced support for the mission from within Kosovo. In interviews in 2010, representatives from the major think tanks repeatedly criticized the programmatic approach as overly complex and one interviewee observed that it was "unclear what MMA really means." Misunderstandings of EULEX's activities also facilitated conspiracy theories about its true intentions.<sup>14</sup> While senior government officials were more directly involved and probably had a better understanding of the programmatic approach, it is probable that a more straightforward approach would have been more effective.

Finally, EULEX was criticized for devoting more resources to policing rather than judicial institutions, despite the relative strength of the police compared with the judiciary in Kosovo.<sup>15</sup> Analysts note that the Kosovo Police Service under UNMIK was actually quite effective at day-to-day policing, especially compared to the rest of the region (ICG 2010, 5; Skendaj 2011, chap. 4). By contrast, EULEX's own reports (2009c, 83–102, 2012b, 7) repeatedly observed problems in the judiciary related to a large case backlog, insufficient numbers of judges, and the politicization of case selection (see also ICG 2010, 12). For example, while EULEX's assistance did help improve the case backlog, by 9.6% from 2010 to 2011, the Kosovo judiciary still had more cases admitted than completed during that year (EULEX 2012b, 21). To be sure, the police normally far outnumber the judiciary and deploying more international judges threatened to overload the relatively small Kosovo judiciary with foreigners.<sup>16</sup> Still, while it may have been more difficult to recruit judicial officials rather than police officers from EU member states, EULEX and EU member states could have done more to fill vacant positions.

### *Executive*

Separate from its strengthening mandate, EULEX also possessed an executive mandate to directly fulfil certain functions, including providing riot police and prosecuting and adjudicating cases related to politicized crime (Council of the EU 2008, Article 3). In order to reduce nationalist opposition to its presence, the mission minimized the importance of the executive role relative to the strengthening role. However, in practice, one EU official explained in a July 2012 interview that "99% of Brussels' political attention" focused on EULEX's executive role and many people in Kosovo judged EULEX mainly by its ability to arrest high-profile individuals for corruption or other crimes.

EULEX had only limited success prosecuting high-profile individuals for politicized or serious crimes in large part since EULEX, like UNMIK before it, had difficulty recruiting officials who had knowledge of the local languages or who would be willing to stay in Kosovo for a sufficiently long time to gain local knowledge. Without local language skills or knowledge, it was especially difficult for EULEX officials to investigate crimes, understand the political context, and find reliable witnesses. The problem of finding enough qualified staff members was especially present in the judiciary. There was a high

demand for qualified prosecutors and judges in their home countries and little tradition of judicial officials deploying abroad. The ECA (2012, 31) details how EULEX staffing levels were well below mandated levels, particularly because of declining numbers of seconded staff relative to contributors' pledges. In December 2012, for example, EULEX had 1389 international staff compared with its mandated 1950. While recruiting its full complement of judicial officials could have helped with problems such as the case backlog, additional personnel would likely not have helped already well-resourced efforts such as investigating politicized crime.

## Conclusion

This paper has sought to investigate EULEX's efforts to build the rule of law in Kosovo and determine why the mission succeeded or failed. It finds that EULEX has largely failed to achieve its goals in improving the rule of law largely because the mission's mandate and methods could not overcome the domestic constraints of Kosovo Albanian nationalism and the connection between politics and crime. Based on these observations, the paper offers implications for the future of the EU's role in Kosovo and for future rule of law reform missions in post-conflict countries.

## *Implications for EULEX*

There remain serious challenges to building the rule of law in Kosovo. Hence, this paper does not argue that Kosovo or the international community would be better off if assistance related to the rule of law was ended or if EULEX had never been deployed. Rather, it claims that other organizations could have fulfilled EULEX's tasks more effectively and can continue to do so in the future. KFOR can assure basic security in the territory, as it has done since its inception in 1999. The EU Office can more efficiently strengthen Kosovo's institutions using capacity-building programmes and conditionality, since the European Commission has extensive experience with similar programmes in other European countries. Based on the mission's limited contribution relative to its cost, the EU should allow EULEX's mandate to expire in June 2014.

EULEX's unique contribution, and its greatest potential added value, is its ability to prosecute politicized crime. Indeed, EULEX has conducted high-profile investigations and trials that would probably not have happened had EULEX not been present.<sup>17</sup> However, to justify maintaining the mission based on its executive judicial role, EULEX would need to successfully prosecute cases that would strengthen the rule of law in Kosovo in the long term. EULEX's work so far does not meet that bar. Given the limited local knowledge of EULEX prosecutors and the difficulty of working in Kosovo, it is hard to believe that EULEX will be able to conduct a sufficient number of investigations and prosecutions to significantly change the culture of politicized crime in Kosovo.

The most obvious way to address the mission's failings within its mandate is for member states to contribute additional staff or money, but greater resources cannot address several underlying flaws. First, status neutrality plagues the mission by undermining Kosovo Albanian support and by limiting its ability to address the situation in the north of Kosovo. Despite recent progress in the dialogue between Kosovo and Serbia, Serbia will continue to not recognize Kosovo, and EU member states will likely remain divided about Kosovo's status for the foreseeable future. Second, assistance alone cannot deal with intentional obstruction by the Kosovo authorities. For this impediment, conditionality and capacity-building approaches by the EU Office would be far more effective than

EULEX's MMA activities. Third, EULEX's riot police have not been effective in addressing the greatest threat to security in Kosovo – violence in the north. Local Serbs can easily escalate violence in the area to the point that KFOR troops are required to re-establish security, so EULEX special police end up contributing little if any additional capability.

### *Implications for future missions*

EULEX's experience offers at least four implications for future missions in post-conflict and developing societies. First, the events immediately following Kosovo's declaration of independence points to the need to better adapt mission mandates to changing circumstances. Once Serbia and the UN rejected the CSP, EULEX's position was seriously weakened. In retrospect, it probably was a mistake to deploy such a large status neutral rule of law mission that was separate from the other international organizations in post-independence Kosovo. However, institutional inertia meant that the EU persisted with its existing plans even though the situation had changed.

A second implication is that achieving reforms related to the rule of law is difficult with a mandate that only includes assistance. International organizations have repeated the same flawed assumption that domestic officials desire the same reforms as the international community (Zurcher et al. 2013, chap. 2). Political authorities in other post-conflict societies are similarly connected to informal criminal networks, so adopting mandates based on assistance is also likely to be problematic in other missions. For example, in Afghanistan, there are strong indications that senior Afghan officials undermined efforts to investigate high-level corruption and crimes committed by individuals connected to government officials (Giustozzi and Isaqzadeh 2013, 183–186; *The New York Times*, 28 November 2012, *The New York Times*, 28 April 2013).

A third implication is that highly centralized and bureaucratic techniques such as the programmatic approach are often wasteful and counterproductive in small developing societies. The programmatic approach may make sense from a technocratic perspective based on the experience of developed countries, since it specifies techniques to coordinate a large organization according to formal rules and procedures. However, in Kosovo, the programmatic approach identified problems at the central government level that were not the root causes of problems in the rule of law, provoked mistrust, and wasted limited resources.

The fourth implication is that constabulary units – effectively riot police – might not be necessary if there is an international military presence. Perito (2004, 5) has emphasized the need for constabulary units in post-conflict countries by noting that they “can serve as a bridge between military and civil police and can handle tasks that do not clearly fall within either camp”. The record of violence in the north of Kosovo, however, indicates that EULEX Special Police have provided little additional capability and that constabulary units may be unnecessary or duplicative if there are well-trained international military forces present.

States and international organizations often believe that well-trained and highly paid Western officials can build the rule of law in post-conflict societies. The experience of EULEX demonstrates the difficulty of these missions, since many of the challenges that EULEX faces commonly occur in post-conflict countries, including nationalism and a link between politics and crime. While EULEX may not be able to effectively build the rule of law, it may serve as a reminder of how to better deploy international resources in the future.

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## Notes

1. The non-recognizing EU member states were Spain, Romania, Slovakia, Greece, and Cyprus (Economides, Ker-Lindsay, and Papadimitriou 2010, 99).
2. These issues included (i) the police and (ii) courts in the north of Kosovo, (iii) customs, (iv) transportation and infrastructure, (v) boundaries, and (vi) Serbian patrimony (UN 2008).
3. For example, the European Commission Feasibility Study in October 2012 (8) stated that Kosovo needed to offer “concrete evidence of results in fighting organised crime ... [and] in its fight against corruption.”
4. One report by the Pristina-based Balkan Policy Institute (2011, 15–16) explains, “EULEX public appearances with promises to arrest the so-called [*sic*] ‘big fish’ has caused citizens to believe in the work of EULEX into Kosovo.” However, this public confidence in the mission soon declined due to a “failure to punish people involved in high level corruption”.
5. For example, in response to criticisms in the ECA (2012, 55) report, the Commission and the EEAS noted that EULEX operations in the north were hampered by “the lack of freedom of operations since July 2011 and, more generally, by the impossibility of imposing policing and the rule of law upon the local population.” From this perspective, given the potential for protest by the Kosovo Serbs, EULEX could do little to deploy in the north.
6. Separately, Limaj had been twice tried and acquitted for war crimes by the International Criminal Tribunal for the former Yugoslavia in cases where there were allegations of threats and murder of key witnesses. A key witness in the war crimes trial, Agim Zogaj, was found dead of an apparent suicide in Germany in September 2011 (*The New Yorker*, 6 May 2013).
7. The Marty report did offer limited hard evidence, and one key witness in the wartime organ smuggling case appeared to be a Serbian plant (*The New Yorker*, 6 May 2013).
8. Although EULEX was initially structured based on the three major institutions it sought to assist – the police, judiciary, and customs – EULEX (2012a) was restructured in June 2012 into “strengthening” and “executive” divisions that more closely corresponded to its major activities.
9. In March 2009, for example, the EULEX (2009b) website explained, “The aim of the mission is to strengthen the rule of law institutions within Kosovo for the benefit of all its people. The heart of our strategy is to offer support through monitoring, mentoring and advising our local colleagues in the police, judiciary and customs following best European practices. Local ownership is the key. EULEX will maintain a number of executive responsibilities but these will only be used in exceptional circumstances.”
10. Capacity building refers to externally designed programs including placing advisers in institutions, training, or equipment purchase. Conditionality means offering progress with EU accession based on the achievement of particular reforms. One internal EULEX Programme Office (2009, 12) document explained that EULEX’s strengthening activities “should be characterized as assistance, rather than formal capacity-building or more interventionist methods”.
11. The Commission and the EEAS obliquely explain,

As concerns the recommendation for the Commission to take over EULEX’s capacity-building functions, the mandate of the EU mission is to mentor monitor and advise the Kosovo authorities on the rule of law. EULEX also has some executive functions.

With regard to conditionality, they explain

EULEX is not mandated to use “conditionality” instruments to promote progress in rule of law in Kosovo; however, the aforementioned Visa Road Map and the Feasibility Study, to which EULEX fully contributes, are excellent tools to encourage the necessary reforms (ECA 2012, 26, 51, 59).

12. According to the programmatic approach, “MMA actions” were developed in consultation with Kosovo officials based on the staff’s initial assessment. The MMA actions were in turn implemented through a formal process of proposal, specification, implementation, final reporting, and evaluation. EULEX’s major statement of its effectiveness at strengthening Kosovo’s rule of law institutions were yearly “Programme Reports”, in which the mission evaluated the fulfilment of its MMA actions (EULEX 2009c, 7–10).
13. Other MMA actions related to the police are similarly focused on technical bureaucratic issues. The MMA actions on patrols emphasized the absence of planning or systems or management, while those related to a “sustainable organization” focused on budget administration, fleet management, the overall organizational structure of the Kosovo Police, and information technology staffing (EULEX 2012b, 11–17).
14. For example, see the discussion of the release of intercepted conversation between high-ranking PDK members in the KIPRED (2013, 17–20) report.
15. For example, in April 2009, approximately 60% of staff was associated with the police function, compared with only 13% to the justice function. Jobs associated with judicial functions also remained disproportionately unfilled (KIPRED 2013, 12).
16. In an interview in July 2012, one EU official noted that EULEX already accounted for some 10% of Kosovo’s judiciary.
17. For example, in May and June 2013, EULEX arrested five former KLA members on suspicion of war crimes, and convicted three others (*Reuters*, 23 May 2013; EULEX 2013).

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