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EULEX-TOWARDS AN INTEGRATED EXIT STRATEGY

- Strengthening the rule of law
through EU integration



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EULEX -Towards an integrated exit strategy: Strengthening the rule of law through EU integration

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EULEX-TOWARDS AN INTEGRATED EXIT STRATEGY: STRENGTHENING THE RULE OF LAW THROUGH EU INTEGRATION

EXECUTIVE SUMMARY

The European Union rule of law mission in Kosovo, EULEX, deployed in 2008, presents the largest Common Security and Defense Policy mission to date, and one of the most expensive. It was meant to combat existing rule-of-law problems in Kosovo, including lack of capacity, political interference, corruption, organized crime, war crimes and the lack of rule of law in the new state's north. However, EULEX has also been one of the most criticized missions. Critique has come from former EULEX employees, the European Parliament and the European Court of Auditors as well as from other international organizations in Kosovo such as KFOR. EULEX has also been heavily criticized by political actors and the general public in Kosovo.

EULEX from the moment of deployment has suffered from structural contradictions and constraints, many of which persist until today. It works on a legal basis that on one side is rooted in the so-called Athisaari plan and the constitution of the independent Republic of Kosovo, and on the other on UN Resolution 1244, that is on neutrality regarding the status of Kosovo. In the north of Kosovo, the mission is deployed under a more status-neutral umbrella, dividing the mission ethno-territorially. The EULEX bureaucratic apparatus has been too large and the organizational culture too opaque. The relations between the executive and capacity building functions have been problematic, leading to structural changes and disputes that remain ongoing. The judicial part of the mission has been perpetually understaffed, precipitating a weak record prosecuting war crimes, organized crime and corruption. In fairness, EULEX had limited ability to link its work with EU integration tools in promoting the rule of law and an independent judiciary. Kosovo's integration path has been blocked for years due to the EU's disunity over its independence and the EU's subsequent passivity in solving the frozen Serbia-Kosovo conflict.

EULEX underwent a major structural reorganization based on a strategic review of its mandate in 2012 that brought some structural improvement. However, it was only in 2013 when the political framework of EULEX's work substantially changed. Led by Germany and supported by the UK and US, the EU started to overcome its divisions over Kosovo and to develop into a more serious actor. The high-level political dialogue between Belgrade and Prishtina, facilitated by the EU, led to a first agreement on the normalization of relations between Kosovo and Serbia. This opened the way for the partial integration of the Serb-majority north, previously administered from Belgrade, into the Kosovo state. Moreover, the dialogue resulted in the EU opening accession talks with Serbia and negotiations over a Stabilization and Association Agreement (SAA) with Kosovo, unblocking its integration process. These changes have caused the Government of Kosovo to agitate for the transfer of authority from EULEX to Kosovo institutions in order to gain full sovereignty.

In light of these new events, when the EU started a new Strategic Review of EULEX in 2013 to decide the mission's fate after the current mandate ends in June 2014, it had to account for an exit strategy that fits in the overall EU policy in Kosovo. The Strategic Review sent to EU member states for discussion end of January this year proposes to replace EULEX with a smaller mission with a new name and a two-year mandate. The mission shall concentrate on its Strengthening role and better coordinating that role with EU-integration tools, especially the upcoming IPA II program; executive staff in judiciary and police would remain only to finish cases on which work has already begun and international judges and prosecutors would be integrated

into Kosovo's judicial system. Only in the north would executive function be strengthened and joined with MMA measures to assist the integration of the region according to the Brussels agreement. The Strategic Review lists a couple of reasons for such a reduced mandate at this point in time: The Belgrade-Brussels dialogue, the beginning of negotiations over an SAA for Kosovo, improvements in policing, customs and the judiciary, and finally strengthened demands from the Government of Kosovo for the transfer of authority from EULEX to Kosovo institutions in order to gain full sovereignty.

The Strategic Review however is problematic in several aspects. It is not as strategic as it claims through its very name. It does not clearly define the strategic interest of the European Union in a future EULEX (or post-EULEX) mission. It does not fully take into account the specific needs on the ground in Kosovo or of the new opportunities that arise for EULEX from the change of the political framework. According to many EULEX judges and prosecutors and domestic experts, Kosovo judges and prosecutors are not yet ready to take on sensitive cases of war crimes, organized crime and corruption. The Serbia-Kosovo dialogue is currently stuck and may be frozen for the whole of 2014. The EU's leverage over rule of law issues through its integration toolbox is limited at the current integration stage (SAA) and Kosovo's further progress is uncertain given the persistence of the Union's internal divide.

Meanwhile, the decision-making process on the post-June 2014 mission is moving towards a serious timing problem. The Strategic Review was originally to be published in September 2013 to allow an orderly transition to the new mission, but it was only sent to the member states on 29 January 2014. The proposed mission met substantial resistance from some member states, dashing hopes of finishing the internal opinion-making process in February. To prepare the budget for the new mission, the decision-making process must be finalized in April. As the campaign for the upcoming parliamentary elections has already accelerated, it is questionable whether an agreement between the EU and the Kosovo Government on a new EULEX mission can get a majority vote in the Assembly before the current mandate ends.

RECOMMENDATIONS

1) Timing

The EU should ask for a six-month extension of the current EULEX mandate to be passed by the current Kosovo Assembly as soon as possible so as to avoid EULEX becoming a local campaign issue. The new mission could be seriously prepared after the Kosovo elections and negotiated with the new Government and Assembly.

2) The new mission

The new two-year mission should be substantially smaller, but should maintain its executive function in sensitive cases, especially in the judiciary and police. Sensitive cases should be gradually handed over to domestic judges, prosecutors and police officials to and force them to deal with those cases. EULEX should continue to take on new cases, but executive functions should almost exclusively be organized in mixed teams/panels. Clear benchmarks, based on domestic staff's performance shall define the speed of transition.

A. Executive functions

- Maintain EULEX judges in Appellate Court, Supreme Court and the Kosovo Judicial Council. Maintain EULEX prosecutors in the SPRK, including the EULEX co-Chief Prosecutor.
- International judges should be maintained on the Constitutional Court and brought into the EULEX system.
- EULEX judicial officials should not be integrated into Kosovo justice recruitment system, but they should exercise their function under Kosovo's constitutional bodies. EULEX judges should remain on the Kosovo Judicial Council until certain benchmarks are passed.
- Reduce police executive functions outside the north to investigating organized crime, financial crimes, corruption and war crimes. Reduce customs executive functions to administering Border Crossing Points 1 and 31.

B. MMA Functions

- MMA functions should only partially be handed over to the EU Office – IPA-project related activities should be entirely handed over to EU Office; mentoring and monitoring activities should remain stay with EULEX.
- The current number of five monitors for all Kosovo judges and prosecutors should increase.
- MMA presence in the Ministry of Interior should be strengthened in Professional Standards Unit (PSU).

C. The North

- EULEX needs to have a strong executive and MMA presence in the north.
- EULEX judges, prosecutors and investigative police units with an executive mandate should have a strong presence in the region's judicial and police institutions. They should take the lead role in highly sensitive cases of war crimes, organized crime and corruption.
- Albanian judges and prosecutors and local branches of the Mitrovica basic court located south of the Iber should be treated under the same EULEX regime as proposed for the Serb majority territories north of the Iber.

D. Special Investigation Task Force

As SITF will complete its report and may result in indictments as necessary, the international community should find an adequate solution for a possible mechanism within EULEX-Kosovo structures to try SITF's investigations.

3. The EU's wider institutions and toolbox

- The EU Office should substantially raise the number of its legal staff dealing with judicial issues.
- The EU should streamline and reduce the overall number of tools and forums dealing with rule of law issues, especially when it will have signed the SAA with Kosovo.
- Future EU Progress Reports should strongly rely on the insight of EULEX's judicial monitoring team regarding assessment of the judiciary's performance.

I. INTRODUCTION

In December 2008, the European Union launched the EU Rule of Law Mission in Kosovo, or EULEX. In EULEX, the EU undertook its largest Common Security and Defence Policy (CSDP) mission ever. It demonstrated EU interest in being a serious actor in crisis management in a region where it failed to provide such management in the 1990s. However, from the beginning EULEX has been heavily and justly criticized by both international and local actors. Among them was the European Court of Auditors, which published an in-depth report in October 2012. EULEX has suffered from a multitude of structural contradictions and constraints, many of which persist. They have hobbled EULEX in accomplishing the challenging tasks to “ensure the maintenance and promotion of the rule of law, public order and security” through training and support for the local judiciary, police and customs service and through executive responsibilities.

EULEX is now entering a key period in its mission. With the formal end of the mission currently set for June 2014, a review of EULEX’s work is underway that will decide a new mandate and mission design. Pressure for an exit strategy for EULEX is higher than ever, but with the Belgrade-Prishtina dialogue resulting in the 2013 April Agreement and the unblocking of Kosovo’s EU-integration process, EULEX can still play a critical role and could overcome many of the constraints that have hampered the mission.

This study, jointly prepared and written by the Group for Legal and Political Studies (GLPS), Prishtina, and the Democratization Policy Council (DPC), Washington-Berlin, takes a thorough look into EULEX’s past mistakes and future opportunities. It looks into the ongoing review process of EULEX’s current mandate and the decision-making process of the EU on the mission’s future mandate. In that context it particularly examines the linkage between that debate and two recent developments – the Prishtina-Belgrade dialogue and the initiated integration of the north of Kosovo and the impact of the EU-integration process on the Rule of Law and the judiciary in Kosovo.

The first and second chapters deal with the challenges of establishing the rule of law in Kosovo and EULEX’s performance in the past. The third chapter analyses the review of the EULEX mandate and decision-making process on the future mission ongoing within the EU. The fourth chapter takes a brief comparative look at the phasing out of international judges and prosecutors in Bosnia-Herzegovina as a lesson to be learned for the future transition of EULEX. In the concluding section the authors lay out an alternative proposal for the future EULEX mission that is guided by one of the key demands from the European Court of Auditors’ report – to design an exit strategy for EULEX integrated into the wider EU-toolbox available to promote the rule of law and thus make EULEX’s achievement sustainable. The study aims to inform the ongoing debate within the European Union on the future of EULEX as well as to promote a debate in Kosovo on the challenges of strengthening the rule of law.

The study is based on the analysis of public and non-public sources and on a large number of interviews conducted with EULEX and other EU officials, European and other Western diplomats and officials and other relevant actors in Kosovo. Interviews were conducted in Kosovo, Serbia, Brussels, Berlin and London.

II. ESTABLISHING THE RULE OF LAW IN KOSOVO

Kosovo faces extraordinary challenges in keeping the rule of law and doing so free of political influence. Its rule-of-law institutions were washed away in the war and ensuing violence of 1998-1999. In general, rule of law officials must be free of political influence in a close-knit society with frequent conflicts of interest. Kosovo officials are often perceived as corrupt and feed into low local expectations. On the other hand, weak institutions allow organized crime to flourish. War

crimes cause political problems, but must be addressed to end impunity and uncertainty. Finally, Pristina cannot regulate recalcitrant Serb communities in the north, creating an unsecured space. This chapter will cover how these difficulties undermine Kosovo rule of law.

A) Capacities

The decline of Kosovo's rule of law institutions was inevitable. The Milosevic regime kept Kosovo Albanians out of the police and judiciary. Most rule-of-law officials came from minority groups and fled Kosovo during the war, leaving few police, prosecutors or judges.¹ The UN Mission in Kosovo (UNMIK) did not resolve the problem. While UNMIK attempted integrating Kosovo Albanians into the judiciary using hybrid international-local tribunals with Kosovo Albanian judges in the majority, the system degraded as Kosovo Albanian judges outvoted their international counterparts, often giving dubious rulings in cases involving ethnic minorities.² UNMIK reacted by changing the hybrid panels to be majority international justices and allowing locals to appeal to UNMIK to assign international justices and international prosecutors to a case.³ Local officials shifted risky cases to international justices and prosecutors.⁴ UNMIK officials thus spent little time with their Kosovo counterparts and even less training and advising them.⁵ Skills in the police stagnated under UNMIK. After they established a basic level of safety, training for the Kosovo Police Services (KPS) became sporadic.⁶ Accountability metrics were rarely used in rule-of-law institutions and when they were, the resulting assessments were not used to improve efficiency.⁷ Customs was the lone bright spot where UNMIK established its authority and was able to build some local capacity.

Independence and the next six years crystallized these failures. Existing skills in the judiciary were rendered null with a new system shifting Kosovo's institutions from one to another institutional design. The change forced judges and lawyers to be retrained. Kosovo's legal codes, which have repeatedly undergone wholesale changes, have made training more difficult as prosecutors and judges must keep up with a legal system that consistently undergoes fundamental changes.⁸ As for the police, KP was not prepared to tackle serious crimes and continues to struggle.⁹ This lack of training left a judiciary with low confidence and a police force without the training and resources to attack anything above low-level crime. The Kosovo government exacerbated the problem by not filling judicial positions, giving undertrained judges and prosecutors too large a workload. While institutions often lack qualified candidates, they

¹ United Nations Security Council, "Report of the Secretary-General on the United Nations Interim Administration in Kosovo," (12 July 1999), UN Doc S/1999/779, available at: <http://www.unmikonline.org/SGReports/S-1999-779.pdf>.

² International Crisis Group, "Finding the balance: the scales of justice in Kosovo," (12 September 2002), Balkans Report no. 134, available at: <http://www.crisisgroup.org/~media/Files/europe/Kosovo%2032.pdf>.

³ United Nations Mission in Kosovo, "Regulation no. 2000/64 on assignment of international judges/prosecutors and/or change of venue," (15 December 2000), UN Doc UNMIK/REG/2000/64, available at: <http://www.unmikonline.org/regulations/2000/reg64-00.htm>.

⁴ Tom Perriello and Marieke Wierda, "Lessons from the deployment of international judges and prosecutors in Kosovo," International Center for Transitional Justice, (March 2006), p. 19, available at: http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Courts-Study-2006-English_0.pdf.

⁵*Ibid.*, p. 9-10.

⁶ Eric Scheye, "UNMIK and the significance of effective program management: the case of Kosovo," in *Security Sector Reform and UN Integrated Missions*, eds. H. Hänggi & V. Scherrer, (Geneva, Switzerland: DCAF, 2008), p. 181-182.

⁷*Ibid.*, p. 197.

⁸ Interview with a USA diplomat, Prishtina, 6 December 2013.

⁹ European Commission, "Kosovo*: 2013 Progress Report," available at: http://ec.europa.eu/enlargement/pdf/key_documents/2013/package/brochures/kosovo_2013.pdf.

tend to reject qualified ones for political reasons.¹⁰ The judiciary and police are not adequately staffed or trained to handle Kosovo's other rule-of-law issues.

B) Political Influence

Beyond basic capacity issues, Kosovo's rule-of-law institutions suffer from brazen political influence. Defense attorneys regularly leak trial material to the media to pressure the judiciary.¹¹ Judges and prosecutors lack adequate security, making them vulnerable to intimidation. Judges give unfettered access during public office hours, allowing individuals to make emotional or political appeals affecting their judgment. Government officials impugn courts' impartiality in the media, fail to implement rulings and debate court rulings to embarrass judges.¹² The lack of confidentiality, threats, personal appeals and public second-guessing cause judges and prosecutors to act on political concerns, not legal ones.

Incentives to resist pressure are low. Local judges and prosecutors were not held to ethical standards nor allowed to take ownership of the rule of law in Kosovo under UNMIK, leaving no motive to establish judicial independence. Post-independence institutions did little to free judges and prosecutors of political influence. Case allocation rules do not exist and there is no system to automatically assign cases to prosecutors and judges.¹³ Conflicts of interest go unnoted.¹⁴ Procedural loopholes prevent resolutions in sensitive cases. Prosecutors fail to submit indictments against influential defendants; judges sometimes delay hearings for months; cases where judges and lawyers plead ill for extended periods are not exceptional.¹⁵ Prosecutors and judges committing ethical violations are rarely disciplined and almost never dismissed.¹⁶ When political pressure is so high and the costs of submitting are so low, political influence distorts the rule of law.

C) Corruption

At 33 out of 100, Kosovo is closer to despotically corrupt Uzbekistan (17) than model Estonia (68) in Transparency International's Corruption Perceptions Index.¹⁷ Abuse of official position is the most common form of corruption, though bribery and embezzlement occur as well.¹⁸ Few have faith that the government or judiciary will fight corruption.¹⁹ Institutions validate this cynicism with few investigations in spite of the indicators of widespread corruption such as Assembly members' multiple professions and discrepancies between politicians' reported incomes and their expensive assets.²⁰ Political pressure inhibits local judges and prosecutors

¹⁰ Organization for Security and Cooperation in Europe Mission in Kosovo (OSCE), "Independence of the judiciary in Kosovo: institutional and functional dimensions," (January 2012), available at: <http://www.osce.org/kosovo/87138>.

¹¹ Interview with EULEX official, 31 January 2014.

¹² OSCE, "Independence of the judiciary in Kosovo"; Muhamet Brajshori, "Kosovo parliament withdraws from court case involvement," *SETimes.com*, (28 March 2013), available at: http://www.setimes.com/cocoon/setimes/mobile/en_GB/features/setimes/features/2013/03/28/feature-03.

¹³ European Court of Auditors (ECA), "European Union assistance to Kosovo related to the rule of law," (2012), Special Report No. 18/2012, available at <http://eca.europa.eu/portal/pls/portal/docs/1/19168748.PDF>; Interview with European legal expert, Prishtina January 2014.

¹⁴ ECA, "European Union assistance to Kosovo."

¹⁵ OSCE, "Independence of the judiciary in Kosovo."

¹⁶ European Commission, "Kosovo*: 2013 Progress Report."

¹⁷ Transparency International, "Corruptions Perceptions Index 2013," available at: <http://transparency.org/cpi2013/results>.

¹⁸ Republic of Kosovo Anti-Corruption Agency, "Annual Report: January-December 2012," (March 2013), available at: http://www.akk-ks.org/repository/docs/ENG_Raporti_2013-vp.pdf.

¹⁹ Transparency International, "Global Corruption Barometer 2013: Kosovo," available at: <http://transparency.org/gcb2013/country/?country=kosovo>.

²⁰ European Commission, "Kosovo*: 2013 Progress Report."

from acting on corruption cases, which are instead handed off to international prosecutors and judges, be they UNMIK before independence or EULEX after.

Beyond institutions' reluctance to fight corruption, anti-corruption efforts in Kosovo fight two systemic forces encouraging corruption. First, low expectations of institutions enable a lack of accountability. Since citizens assume official corruption, they do not trust government officials to fight it reliably. When anti-corruption programs meet low expectations, citizens accept the result.²¹ Second, widespread corruption begets more corruption. Officials justify corruption because peers engage in it and suffer few consequences. The culture of corruption replicates itself.²²

D) Organized Crime

Organized criminal enterprises are very active in Kosovo. In the collapse of the rule of law following the 1998-1999 war, the absence of law enforcement, the dominance of the informal economy and the scarcity of goods bred competition between criminal 'organizations' for market share.²³ They became entrenched in Kosovo and UNMIK proved unsuccessful at rooting them out. After independence, organized crime continued with little interference. The lack of security for witnesses makes them easy targets for intimidation. Afraid for their safety, occasionally prosecutors and judges engage in the same behaviors caused by undue political influence: accepting external preferences, delaying cases and omitting conflicts of interest. They often fail to prosecute organized crime cases, either ignoring them or handing them to international judges and prosecutors. The police lack regular training to concentrate resources to combat organized crime. They often avoid investigating financial crimes and confiscating assets, which is especially problematic as the easiest way to deter organized crime is to increase the risk of financial loss.²⁴ Given an entrenched position by the war, organized crime groups are still exiting and active in Kosovo with cowed rule-of-law institutions allowing them to continue.

Disputes outside and inside Kosovo make the organized crime problem more acute. Outside Kosovo, disagreements over its status impede information sharing with Kosovo's institutions. Kosovo must fight a problem on its own for which most states pool resources.²⁵ Inside Kosovo, institutions rarely cooperate, hampering officials who do fight organized crime. For example, while prosecutors and police officers need to cooperate to investigate organized crime, they do not use a common case reference number system, meaning they likely have no knowledge of each other's activities, preventing coordination.²⁶

E) War Crimes

War crimes provide a particularly vexing problem in Kosovo. The war and the collapse of the rule of law allowed a breakout of interethnic and intra-ethnic violence. During that time, thousands of

²¹ For a fuller explanation of the relationship between public trust and corruption, see Stephen D. Morris and Joseph L. Klesner, "Corruption and Trust: Theoretical Considerations and Evidence from Mexico," *Comparative Political Studies*, 43(10), 1258-1285. Available at: <http://vanderbilt.edu/lapop/news/092410a.pdf>.

²² For a fuller explanation of the relationship between a culture of corruption and further corruption, see Margit Tavits, "Causes of corruption: testing competing hypotheses," (23 March 2005), available at: <http://www.nuff.ox.ac.uk/politics/papers/2005/Tavits%20Nuffield%20WVP.pdf>.

²³ United Nations Security Council, "Report of the Secretary-General on the United Nations Interim Administration in Kosovo," (12 July 1999), UN Doc S/1999/779, available at: <http://www.unmikonline.org/SGReports/S-1999-779.pdf>.

²⁴ European Commission, "Kosovo*: 2013 Progress Report"; Bruce G. Ohr, "Effective methods to combat transnational organized crime in criminal justice processes," 116th International Training Course, United Nations and Far East Institute, (2000), available at: http://www.unafei.or.jp/english/pdf/RS_No58/No58_08VE_Ohr.pdf.

²⁵ European Commission, "Kosovo*: 2013 Progress Report."

²⁶ Interview with EULEX police official, 29 January 2014.

civilians disappeared or were killed.²⁷ To prevent impunity for war criminals, it is necessary to find and convict them. Public sentiment, however, recoils at investigations. There is very little possibility to investigate and indict former Serbian military and paramilitary forces which exercised crimes against humanity during and before 1999, and still many resist individual allegations against former Kosovo Liberation Army (KLA) members. UNMIK increased the difficulty of investigations by only investigating a few cases, most of which were Serbs.²⁸ The nine-year gap in evidence gathering thinned the number of cases that can be investigated and tried. Investigations are thus required to prevent impunity for war crimes, but will return little due to popular resistance and minimal evidence.

F) Territorial Control

Kosovo law is largely absent in the north of the country. Local Serbs that reside in three northern municipalities, resist integration into Kosovo's legal system. With the exception of KFOR, international forces have had little impact and the rule of law is largely nonexistent.²⁹ Uncooperative behavior by Kosovo Serbs in those three northern municipalities and the insinuation of Serbian institutions into the north kept UNMIK out, but UNMIK barely protested these actions.³⁰ UN reports recognize Serbian involvement in the north, but appear content to allow Serbian authority to proliferate.³¹ It is likely that UNMIK was wary of angering the Serbian government, though local resistance and the general lack of safety in the north were also factors.³² In any case, the UNMIK period resulted in the region separating from Prishtina and tying itself tightly to Belgrade.

These ties have not improved the rule of law in the north of Kosovo. While its reputation as a center of "lawlessness and conflict"³³ is sometimes overblown, it has no reliable rule of law institutions. The population distrusts the police; criminal courts practically do not exist;³⁴ and civil courts are ethnic battlegrounds. Organized crime has gone through an extended boom in the north as it is regarded as an unregulated zone where the population does not accept tariffs set by Prishtina and enjoys preferential treatment from Belgrade. Criminal enterprises thus act without fear of prosecution for tax evasion, trafficking or other criminal activity. Smuggling is rampant. Criminal gangs go to great lengths to intimidate the local population, especially in northern Mitrovica, where few dare to go outside at night or cooperate with Prishtina.³⁵ Kosovo Serbs in the north thus suffer from profound mistrust and insecurity, rejecting outside rule of law institutions while having little recourse in their own.

²⁷ United Nations Security Council, "Report of the Secretary-General" (12 July 1999).

²⁸ Amnesty International, *Kosovo: Time for EULEX to Prioritize War Crimes*, (London: Amnesty International Publications, 2012), available at <http://www.amnesty.org/en/library/asset/EUR70/004/2012/en/3090bbe1-6da2-43af-9415-ae06fa3a54a2/eur700042012en.pdf>.

²⁹ International Crisis Group, "North Kosovo: dual sovereignty in practice," (14 March 2011), Europe Report no. 211, available at: <http://www.crisisgroup.org/~media/Files/europe/balkans/kosovo/211%20North%20Kosovo%20---%20Dual%20Sovereignty%20in%20Practice.pdf>.

³⁰ United Nations Security Council, "Report of the Secretary-General on the United Nations Interim Administration in Kosovo," (29 June 2007), UN Doc S/2007/395, available at: <http://www.unmikonline.org/SGReports/S-2007-395.pdf>; International Crisis Group, "North Kosovo."

³¹ United Nations Security Council, "Report of the Secretary-General," (29 June 2007).

³² International Crisis Group, "North Kosovo."

³³ Charles Cadwell, "Serbia-Kosovo agree to normalize relations, now to 'normalize' society," MetroTrends Blog, the Urban Institute, available at <http://blog.metrotrends.org/2013/04/serbia-kosovo-agree-normalize-relations-normalize-society/>.

³⁴ Interview with EULEX lawyer, Mitrovica October 2013.

³⁵ International Crisis Group, "North Kosovo."

III. EULEX UNTIL NOW

The EU rule of law mission that deployed to Kosovo in December 2008 to help institute the rule of law has been vexed with little success and many blunders. The mission's origins encouraged confusion and mistrust. Many of the challenges described in Chapter I have gone unaddressed. Organizationally, conflicting priorities and low-qualified personnel undermined effectiveness while international and local partners found cooperating with EULEX extremely difficult. While EULEX's presence has also had positive aspects, it has earned much of the critique it received.

A) Origin, Functions and Structure

EULEX's authority comes from a nebulous and changing legal mandate. Originally, the EU was to send take over for the UN in administering Kosovo under a plan to resolve the status issue written by Martti Ahtisaari. The Ahtisaari Plan expected the EU to appoint an International Civilian Representative to supervise Kosovo's independence and send a European Security and Defense Policy (ESDP) mission to help institute the rule of law.³⁶ However, Serbia and Russia rejected the plan, forcing the EU to find an additional mandate. The EU approved Council Joint Action 2008/124/CFSP³⁷ establishing EULEX under UN Security Council Resolution 1244 as a compromise.³⁸ UNSC 1244 provides a mandate for an international civil presence to develop Kosovo's institutions and maintain the rule of law. The EU would take the place of UNMIK as the international civil presence under UNSC 1244. This temporarily allayed conflict with Kosovo welcoming EULEX under the Ahtisaari Plan³⁹ and Serbia accepting it under UNSC 1244.⁴⁰ When supervised independence ended in September 2012, the legal basis for EULEX changed to an international agreement between the EU and the Government of Kosovo,⁴¹ though Serbia still considers EULEX to function under UNSC 1244.⁴² The EU's internal divisions over Kosovo's status allow the conflicting interpretations to fester.

EULEX divides its activities in Kosovo into two categories: executive actions and strengthening actions. Executive actions ensure "cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced," by international prosecutors and judges as necessary.⁴³ EULEX police officers investigate serious crimes to bring them for indictment by EULEX prosecutors in the international-local hybrid Special Prosecutor Office of the Republic of Kosovo (SPRK) and in regional offices.⁴⁴ EULEX judges hear cases prosecuted by the SPRK⁴⁵ and cases defined in the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.⁴⁶ Two EULEX judges sit on the Kosovo Judicial Council regulating the conduct and practices of judges. Three more judges sit on the Kosovo Constitutional Court, but

³⁶http://www.unosek.org/docref/Comprehensive_proposal-english.pdf, Article 12 and 13.

³⁷ Available at http://www.eulex-kosovo.eu/en/info/docs/JointActionEULEX_EN.pdf.

³⁸ Hereafter referred to as UNSC 1244. Shpend Kursani, "A comprehensive analysis of EULEX: what next?" Kosovar Institute for Policy Research and Development, (January 2013), Policy Paper no. 1/13, p. 7.

³⁹ Declaration of Independence, Paragraph 5, available at: <http://www.assembly-kosova.org/?cid=2,128,1635>.

⁴⁰ United Nations Security Council, "6025th meeting," (26 November 2008), UN Doc S/PV.6025, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6025.

⁴¹ [http://gazetazyrtare.rks-gov.net/Documents/Ligji%20per%20ratifikimin%20e%20marreshes%20KS-BE-Eulex%20\(anglisht\).pdf](http://gazetazyrtare.rks-gov.net/Documents/Ligji%20per%20ratifikimin%20e%20marreshes%20KS-BE-Eulex%20(anglisht).pdf).

⁴² http://www.b92.net/eng/news/politics.php?yyyy=2013&mm=07&dd=26&nav_id=87087.

⁴³ Council Joint Action 2008/124/CFSP.

⁴⁴ United States Department of State, Cable 09PRISTINA148; Chapter I, Law on the Special Prosecution Office of the Republic of Kosovo (SPRK), available at: http://www.kuvendikosoves.org/common/docs/ligjet/2008_03-L052_en.pdf.

⁴⁵ See Chapters II and III of the Law on the SPRK for the exclusive and subsidiary competences of the SPRK.

⁴⁶ Articles 3, 4 and 5 Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, available at: http://www.assembly-kosova.org/common/docs/ligjet/2008_03-L053_en.pdf.

they are not part of EULEX so far.⁴⁷ EULEX customs officers administer Border Crossing Points 1 and 31 and lead serious criminal investigations along the border. Strengthening actions are monitoring, mentoring and advising (MMA) actions to bolster local capacity. In the police component, EULEX seeks to improve KPS's planning capabilities, bureaucratic efficiency and ability to carry out basic operations, while ensuring merit-based promotions and diversifying the KPS's toolbox to fight serious crimes.⁴⁸ EULEX officials participate in the Kosovo Judicial and Prosecutorial Councils as advisors to promote professional standards and maintain judicial independence. EULEX officials at the Ministry of Justice aid legal policy writing and international judicial cooperation. EULEX judges and prosecutors assigned to local courts try to improve efficiency, independence and adherence to European best practices.⁴⁹ EULEX also seeks to improve Kosovo Customs' internal communications and its cooperation with other rule-of-law institutions.⁵⁰

The EU first divided EULEX into three components by sector: police, justice and customs. Each component handled executive and strengthening functions. However, after the 2012 strategic review, the EU scrapped this structure and EULEX adopted a new one.⁵¹ EULEX was structured along the line of its different functions, with the mission and its three components separated into Executive and Strengthening divisions.⁵² The reorganization has been divisive. One official interviewed insisted the reorganization removed the problem of long lines of communication between EULEX police units and prosecutors that previously had to go up the EULEX police and prosecution component's hierarchies, but it remains unclear if the new organization caused the establishment of direct communication lines, or if the mission review shedding light on the problem affected the change. Another EULEX official opined that under the original mission structure many EULEX judges and prosecutors failed or resisted to perform their executive and strengthening functions. Others interviewed added that the separation of MMA activities assembled under the roof of the Strengthening division from the peer-to-peer, on-the-job training EULEX judges and prosecutors continue to create new problems of coordination.⁵³

B) Performance

As discussed above, Kosovo suffers from six major rule-of-law challenges: capacities, political influence, corruption, organized crime, war crimes, and territorial control. While this section addresses EULEX's performance against each challenge, two broad problems should be noted. First, EULEX does not set metrics for progress. Operations, investigations and trainings are measured for completion, not results.⁵⁴ EULEX thus adjusts to a framework set by Brussels and

⁴⁷ The lines between executive and strengthening tend to get blurry in the judiciary. It is awkward for judges to function in an advisory capacity without intimate knowledge of cases, which needs to be reserved for sitting judges. Therefore, while the two functions are technically separated, judges still perform both. Interview with a EULEX official, Prishtina January 2014.

⁴⁸ EULEX Kosovo, "Monitoring, mentoring and advising tracking mechanism, March 2012," (March 2012), available at <http://www.eulex-kosovo.eu/docs/tracking/MMA%20TM%20Website%202012%2003%20-%20Final.pdf>.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ Council Decision 2012/291/CFSP.

⁵² Not all parts of EULEX are part of a division as well as a component. The Special Police Department, which serves as an emergency crowd control force, is part of the police component, but not of either division. United States Department of State, Cable 09PRISTINA148, Wikileaks, available at: <http://www.cablegatesearch.net/cable.php?id=09PRISTINA148&q=eulex>; EULEX Kosovo, "What is EULEX?" EULEX Kosovo, available at: <http://www.eulex-kosovo.eu/en/info/whatisEulex.php>.

⁵³ Interviews with high-level EULEX officials, who choose to remain anonymous, Prishtina, January 2014.

⁵⁴ ECA, "European Assistance to Kosovo," p. 27.

member states, not changes in Kosovo.⁵⁵ Second, EULEX has no realistic end condition for leaving Kosovo.⁵⁶ Currently, the desired “End-State” is:

“Sustainable progress towards a transparent and accountable multi-ethnic justice system, police service and customs service, with clearly defined roles and free from any political interference, operating within a sound legal framework and in close coordination and cooperation with all relevant actors, in accordance with international standards and practices, and with the capacity to consistently deliver an effective service responsive to the needs of society, without international intervention or substitution. Kosovo institutions engaged in broader field of law conform to accepted European standards.”⁵⁷

This is an absurd standard on which to predicate EULEX’s departure. Several current EU member states do not meet it, as noted in the Commission’s 2014 report on corruption.⁵⁸ It will be many years until Kosovo reaches this standard, meaning EULEX must leave under different conditions and therefore has no tangible objectives. Success or failure is thus difficult to assess beyond describing absolute improvement or deterioration. The lack of measurements and realistic goals may have contributed to the minimal progress EULEX has made in fighting Kosovo’s rule of law problems.

1) Capacities

EULEX’s record in improving local capacity has been mixed. Local capacity in customs improved quickly; 2013 customs revenues surpassed all 2007 revenues in 35 weeks.⁵⁹ However, EULEX has not significantly improved the police or judiciary. KPS remains limited with improvement in basic policing, but not specialized tasks. EULEX failed to complete specialized MMA actions or confirm that KPS could use new techniques.⁶⁰ The MMA action “Team Approach—Criminal Investigations,” tried to improve cooperation between police and prosecutors, but was suspended indefinitely,⁶¹ despite the continued need for improvement. The MMA action “Intelligence-led Policing” was conducted without confirming Kosovo authorities could commit enough staff to participate,⁶² undermining the action, as KPS could not use the techniques.⁶³ Kosovo judges and prosecutors mostly cannot take serious cases or work through their existing caseload.⁶⁴ Kosovo prosecutors handled only a third of organized crime and corruption cases within the Special Prosecution Office between October 2012 and April 2013.⁶⁵ Judges struggle with a case backlog of over 235,000 cases to be adjudicated as of 2013.⁶⁶ Outstanding criminal

⁵⁵Interviews with German diplomats, December 2013.

⁵⁶ECA, “European assistance to Kosovo,” p. 27, 51. In reply to the report by the European Court of Auditors, the European External Action Service did little more than agree that an exit should occur.

⁵⁷ European External Action Service (EEAS), Crisis Management and Planning Directorate (CMPD), (30 January 2014), *Strategic Review of EULEX Kosovo Mission*, EEAS 00115/14, (Brussels, Belgium), p. 11.

⁵⁸European Commission, (3 February 2014) *Report from the Commission to the Council and the European Parliament: EU Anti-Corruption Report*, COM(2014) 38, (Brussels, Belgium), p. 15-16, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf.

⁵⁹ Kosovo Customs, “Revenues,” available at: <http://dogana.rks-gov.net/sq/Te-hyrat>; ECA, “European assistance to Kosovo,” p. 20.

⁶⁰ ECA, “European assistance to Kosovo,” p. 16.

⁶¹ECA, “European assistance to Kosovo,” p. 16; EULEX Kosovo, “Monitoring, mentoring and advising tracking mechanism.”

⁶² ECA, “European assistance to Kosovo,” p. 16.

⁶³ EULEX Kosovo, “Monitoring, mentoring and advising tracking mechanism.”

⁶⁴ ECA, “European assistance to Kosovo,” p. 19.

⁶⁵ European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, “Joint report to the European Parliament and the Council on Kosovo’s* progress in addressing issues set out in the Council Conclusions of December 2012 in view of a possible decision on the opening of negotiations on the Stabilization and Association Agreement,” (22 April 2013), JOIN(2013) 8, available at: http://ec.europa.eu/enlargement/pdf/key_documents/2013/ks_spring_report_2013_en.pdf.

⁶⁶European Commission, “Kosovo*: 2013 Progress Report.”

cases in basic prosecution climbed from over 18,000 to approximately 20,000 in the first half of 2013.⁶⁷ In spite of EULEX support, justice remains delayed in Kosovo.

2) Political Influence

EULEX has proven unable to free Kosovo institutions of political interference. Illicit influence has been somewhat deterred, as senior officials do not pressure rule of law officers in front of EULEX officials.⁶⁸ However, local institutions cannot resist political interference on their own. The Kosovo Government still leaves positions unfilled for political reasons. The SPRK, which handles corruption and organized crime cases, had eight local positions filled out of fifteen in 2013, though this has since improved to twelve.⁶⁹ EULEX enables local prosecutors and judges' avoiding serious cases, leading in high profile cases like the Medicus Clinic trial—a case against an alleged organ trafficking ring involving a former health minister.⁷⁰ The Kosovo Judicial and Prosecutorial Councils include EULEX members and evaluate performance and institute disciplinary sanctions—25 cases in 2012 and 2013—but there have been no dismissals. Compliance with ethical standards remains low.⁷¹

3) Corruption

EULEX has made little progress in corruption. Only 13.1 percent of individuals investigated for corruption in the first half of 2013 were indicted.⁷² Only two former ministers have been indicted for corruption⁷³ during EULEX's tenure and neither has yet been found guilty. The local population has become frustrated with the lack of high-level convictions in spite of widespread evidence.⁷⁴ EULEX blames this dissatisfaction on impatience with complex investigations and a definition of success that focuses on high-profile cases.⁷⁵ Such statements ignore that EULEX had been remarkably inefficient, spending far more time and money per case than Kosovo's already inefficient judicial sector.⁷⁶

4) Organized Crime

While EULEX has helped build the foundations to combat organized crime in Kosovo, implementation of the law remains dubious. A new witness protection law, an action plan targeting trafficking—in drugs, firearms and human beings—money laundering and smuggling, and dedicated departments across the police, the judiciary and customs to fight organized crime are a credit to EULEX and Kosovo's government. Implementation, however, has been problematic.⁷⁷ Rule of law institutions still cannot combat organized crime on a large scale. The

⁶⁷ Kosovo Prosecutorial Council, "Report: On the performance of Basic Prosecutions, Special Prosecution of the Republic of Kosovo, Appellate Prosecution and State Prosecutor, first half of 2013," available at: http://www.psh-ks.net/repository/docs/Comprehensive_Report_for_all_Basic_Prosecutions.pdf.

⁶⁸ Kursani, "A comprehensive analysis of EULEX."

⁶⁹ European Commission, "Kosovo*: 2013 Progress Report"; Interview with a EULEX Prosecutor, Prishtina January 2014. There are 13 members of the Special Prosecution Office, technically, but one is under investigation and thus not counted here.

⁷⁰ Interview with German diplomats, Berlin December 2013; Ilir Rrecaj. He was acquitted on the charge of abusing his position to aid the trafficking ring. BBC, "Medicus: five guilty in Kosovo human organ trade case," BBC, (29 April 2013) available at <http://www.bbc.co.uk/news/world-europe-22343589>

⁷¹ European Commission, "Kosovo*: 2013 Progress Report."

⁷² Kosovo Prosecutorial Council, "Report."

⁷³ Former transport minister Fatmir Limaj and former health minister Bujar Bukoshi.

⁷⁴ Group for Legal and Political Studies (GLPS), "Rock and rule: Dancing with EULEX," (2013), available at: <http://legalpoliticalstudies.org/download/Policy%20Note%2003%202013.pdf>, p. 11-12.

⁷⁵ ECA, "European assistance to Kosovo," p. 31; GLPS, "Rock and rule" p. 11-12.

⁷⁶ GLPS, "Rock and Rule," p. 15.

⁷⁷ European Commission, "Report from the Commission to the European Parliament and the Council, on progress by

new witness protection law was admirable in scope, but Kosovo's institutions have proven unable to implement it properly.⁷⁸ Dedicated departments across agencies have not improved cooperation, especially between police and prosecutors. Overworked prosecutors, believing investigations to be outside their purview, prefer filing away cases to interacting with police to build a prosecution. Political obstruction of investigations is common. Kosovo judges and prosecutors still hand organized crime cases to EULEX, which has few high-profile organized crime cases.⁷⁹ The SPRK filed only four indictments on organized crime in the first half of 2013.⁸⁰ The result is a good framework supporting poor practice fighting organized crime.

5) War Crimes

EULEX has had great zeal for investigating war crimes, working through open cases against high-level officials and opening new ones. EULEX pursued war crimes cases against former transport minister Fatmir Limaj, though it failed to convict him, and opened 51 new investigations, including in previously uninvestigated areas such as sexual crimes.⁸¹ EULEX also created the Special Investigative Task Force (SITF) to investigate organ trafficking within Kosovo and Albania.⁸² The EU has supported the SITF with budget and personnel increases as needed while cutting budgets elsewhere.⁸³

The number of war crimes that need resolution remains daunting and EULEX faces scathing criticism for its investigations. Of the 1,187 cases inherited from UNMIK, most remain pending. In June 2013, approximately 500 cases were closed, 100 were under investigation and a paltry 20 were brought to trial and/or adjudicated.⁸⁴ Additionally, few are satisfied with EULEX's actions. Kosovo Albanians protested indictments of the "Drenica Group," which included two former KLA commanders, for war crimes.⁸⁵ The low conviction rate has displeased Serbia, especially the failure to convict Fatmir Limaj.⁸⁶ Amnesty International accused EULEX of limiting war crimes cases by not investigating disappearances.⁸⁷ Some foreign observers question the SITF's dedication to resolving organ trafficking cases.⁸⁸ While EULEX dedicated itself to investigating war crimes, it still faces a heavy caseload and opposition in Kosovo and abroad.

Kosovo* in fulfilling the requirements of the visa liberalization roadmap," (8 February 2013), COM (2013) 66, p. 11-15, available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/internationalaffairs/general/docs/report_on_progress_on_kosovo_visa_liberalisation_en.pdf.

⁷⁸ ECA, "European assistance to Kosovo," p. 25; EEAS, CMPD, *Strategic Review of EULEX Mission*, Annex II, p. 3.

⁷⁹ GLPS, "Rock and Rule," p. 11-12,

⁸⁰ Kosovo Prosecutorial Council, "Report."

⁸¹ Bernd Borchardt, "EULEX and war crimes," *EULEX Kosovo*, available at <http://www.eulex-kosovo.eu/en/news/000427.php>.

⁸² Special Investigative Task Force, "About SITF," *Special Investigative Task Force*, available at: <http://www.sitf.eu/index.php/en/about-sitf>.

⁸³ European Scrutiny Committee, "Common Security and Defense Policy: EULEX Kosovo," Parliament of the United Kingdom, (3 June 2013), Third Report of Session 2013-2014, available at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-iii/8331.htm>.

⁸⁴ Borchardt, "EULEX and war crimes."

⁸⁵ Kosova Press, "Protest held against arrest of 'Drenica Group,'" *Kosova Press*, (18 November 2013), available at <http://www.kosovapress.com/en/nacional/-protest-held-against-arrest-of-drenica-group-6018/>.

⁸⁶ Tanjug, "Office: Limaj's acquittal more than unpleasant surprise," (18 September 2013), available at: <http://www.tanjug.rs/news/99748/office--ljimajs-acquittal-more-than-unpleasant-surprise.htm>.

⁸⁷ Amnesty International, *Kosovo: Time for EULEX to Prioritize War Crimes*. The current head of mission Bern Borchardt vehemently disputes this reading of EULEX's actions towards missing persons cases. Borchardt, "EULEX and war crimes."

⁸⁸ B92, "EULEX: Kosovo organ trade probe will be 'inevitably long,'" *B92 Online*, (24 January 2013), available at: http://www.b92.net/eng/news/crimes.php?yyyy=2013&mm=01&dd=24&nav_id=84317.

6) Territorial Control

EULEX's ambitions for the north have been multiples of its accomplishments. MMA projects meant for all of Kosovo hardly penetrated the north. Serbs in the region resist EULEX's deployment. The one sustained effort to increase EULEX's presence in the region, Task Force Mitrovica, could not sustain its presence and relocated south to deploy patrols in the region from safety.⁸⁹ Kosovo Serbs frequently prevent the movement of EULEX and Kosovo customs officers through the region and some have attacked EULEX patrols, inflicting casualties.⁹⁰ EULEX judges and prosecutors maintain a criminal court in north Mitrovica, but must retreat from it often due to security threats and try cases without local judges, in violation of Kosovo law. To their credit, by pursuing criminal trials, EULEX judges and prosecutors provide a service that the Serbian parallel structures do not, albeit only in select serious cases mostly involving ethnic Albanian defendants. Serbian officials in the parallel structures rarely try cases.⁹¹ In spite of the discrepancy, EULEX could not delegitimize the parallel judicial structures, though blame for this may rest with EULEX's political overseers intervening in sensitive cases.⁹² EULEX failed to ease freedom of movement in the north, bring Kosovo law to the region or improve security. A combination of local antipathy for EULEX and Serb preference for parallel structures made these tasks difficult and EULEX police, judges and prosecutors deserve credit for the semblance of the rule of law they could provide. However, the situation in the north still has, at best, not improved since EULEX deployed and EULEX has only a small foothold in the region.

C) How to Fail at the Rule of Law?

EULEX's first five years in Kosovo resulted in slight improvement in Kosovo Customs' capacity, an improved, but poorly implemented framework to fight organized crime, an admirable, but still slow effort to fight war crimes and a small foothold in the north. How could so little have been achieved? While many shortfalls led to this general lack of success, they fall into three categories: failures in organization; failures in interacting with other international actors; and failures in handling local legitimacy. These three areas impeded EULEX's progress and created many of the problems in implementing its mission.

1) Organizational Failures

EULEX suffers from basic organizational problems. Some of these problems were inevitable with the needs of the mission and its muddled mandate. Seconded personnel make up 64.2 percent of the mission as the EU could only contract so many on its own.⁹³ These personnel, provided by member states, created many problems. Member states struggled to fill posts and many personnel were chosen simply because they applied. Seconded personnel's contracts rarely extended past 12 months, forcing disproportionate resources to be spent on training.⁹⁴ Short contracts also attracted younger, less experienced personnel for positions that required experienced hands to train Kosovo officials. Seconded personnel also implemented their home

⁸⁹ ECA, "European assistance to Kosovo," p. 23-24.

⁹⁰ International Crisis Group, "North Kosovo"; BBC, "EU police officer killed in Kosovo," *BBC*, (19 September 2013), available at <http://www.bbc.co.uk/news/world-europe-24158153>.

⁹¹ Interviews with EULEX officials, October 2013 and January 2014.

⁹² See "Organizational Failures" under "How to Fail at the Rule of Law" for more on the issue of political interference. Interviews with EULEX officials working in the north, Kosovo January 2014.

⁹³ As of February 2014.

⁹⁴ *Ibid.* p. 31.

state's policy on Kosovo instead of EULEX's, leading to them choosing which law to apply based on whether their home states recognized Kosovo.⁹⁵

These inconsistencies went beyond seconded personnel. Since the EU could not clarify between the dueling mandates for its mission, EU-contracted personnel did not know whether to implement UNMIK law, old Yugoslav law or Kosovo law. EULEX prosecutors and judges issued conflicting interpretations. Early in the mission, EULEX's then top two prosecutors, Belgium's Theo Jacobs and France's Isabelle Arnal, disagreed over which law to apply and gave conflicting directions, creating mass confusion.⁹⁶ A German judge in the Kosovo Supreme Court Special Chamber created consternation on the court with his refusal to apply Kosovo law.⁹⁷ The doubts over applicable law undermined Kosovo's rule-of-law institutions and EULEX's reputation. Kosovo institutions resented the obfuscation of their independence and Serbian officials were furious with implementation of an independent Kosovo state.

Even with the muddled mandate, some problems were avoidable. Member states' unwieldy recruitment policies caused the mission to use too many police and too few judges and prosecutors. Most judges and prosecutors work individually, while most police and customs officers work in units. Building the police and customs components was thus simpler than building the judicial component, but member states treated them as the same, leaving the judicial component understaffed.⁹⁸ States were also more comfortable with sending police missions abroad than judicial missions. The German Ministry of the Interior, for example, had a long tradition of building police missions within the country's complex federal structure and could quickly build one; in comparison, the German Ministry of Justice's role in sending German lawyers to foreign judicial mission remains weak.⁹⁹ Low salaries distorted by nationality also hurt recruiting. The United Kingdom and Germany had difficulty recruiting judges and prosecutors due to low remuneration. They still earned more than members from states like Greece and Bulgaria, leading to awkward situations where assistants were paid more than superiors.¹⁰⁰ Better recruiting strategies and better pay could have created a more balanced mission with a clearer command structure.

Misspent resources were another avoidable problem. Legal roadblocks in Brussels prevent personnel from overlapping contracts, preventing handover and leaving positions empty up to three months and forcing experienced officials to train new ones instead of working on the mandate. A EULEX official in the Executive Division estimated 40 percent of productivity gets lost due to the lack of overlap.¹⁰¹ The 2012 strategic review and subsequent restructuring of the mission also drained resources. A lengthy decision-making process on restructuring created uncertainty and led qualified personnel to leave the mission. Once the restructuring started, most EULEX resources were dedicated to it, only for a new strategic review—the one currently under consideration—to start six months after completion. Essentially, a massive distraction from the

⁹⁵ GLPS, "Rock and rule," p. 15.

⁹⁶United States Department of State, Cable 09PRISTINA256, Wikileaks, available at: <http://www.cablegatesearch.net/cable.php?id=09PRISTINA256&q=eulex>.

⁹⁷ Interview with EULEX Official, February 2014.

⁹⁸ Interview with EULEX official, December 2013.

⁹⁹ In the framework of Germany's federal state structure the Interior Ministry coordinates the secondment of police officers for foreign missions that are provided by the federal states. The ministry disposes of a pool of police officers. Within the Federal Ministry of Justice there exists a coordination office for foreign judicial mission, that also to a certain extent coordinates between the federal states, but state justice ministries in the past have demonstrated to be much more reluctant when it comes to granting judges and prosecutors leave in order to participate in foreign mission. Also, judges and prosecutors are not seconded by the federal ministry, but by the Center for international Peace Operations (ZIF), a separate government institution. Interview with EULEX official, Prishtina January 2014, German officials, Berlin March 2014.

¹⁰⁰ Interview with EULEX official, Prishtina January 2014.

¹⁰¹ Interview with EULEX official, Prishtina January 2014.

mandate was delayed and then followed by a new distraction.¹⁰² Overlapping contracts and a more decisive review process could have saved productivity and put more focus on the mission.

The oversight that could have pointed out these failings is mostly ill informed or powerless. Political and Security Committee (PSC) officials directing EULEX's mission often have only sporadic knowledge of Kosovo. Independent oversight over EULEX is based in the European Parliament, where only tangentially affected MEPs ask questions.¹⁰³ Oversight mechanisms in Kosovo have little influence. The Joint Rule of Law Coordination Board (JRCB), where Kosovo and EULEX officials meet, serves as a discussion forum, likely a one-sided one due to EULEX's extensive demands.¹⁰⁴ EULEX's Human Rights Review Panel, which monitors EULEX's protection of human rights, has no authority over seconded personnel and only gives the Head of Mission advisory opinions.¹⁰⁵ The lack of informed, empowered oversight allows little self-reflection and may have precipitated the other failures of the organization.

However, the political meddling into EULEX's mission by Brussels and the member states may be the worst self-inflicted damage. EULEX personnel and observers complain that Brussels and member states tend to micromanage the mission's operations.¹⁰⁶ This is especially true in the north. A high-level EEAS official in Brussels was reported to call a EULEX judge to set Sami Lushtaku free to take office as the Skenderaj mayor in spite of war crimes indictment.¹⁰⁷ When Oliver Ivanovic, mayoral candidate in north Mitrovica, was arrested for war crimes, Western diplomats and EU officials in Kosovo met with his family.¹⁰⁸ These efforts seem to have been aimed at local favor and at protecting the Kosovo-Serbia dialogue, but undermined EULEX's mission. One high-level EULEX official interviewed insisted that political meddling has been contained under the current Head of Mission, so the problem may recede,¹⁰⁹ but so far Brussels and the member states have felt they have a free hand to meddle in EULEX.

EULEX's organizational structure thus creates a both over- and understaffed, partly under-qualified mission with no unifying position to direct its personnel. Poor recruiting and bad use of resources limit its effectiveness. It has no effective oversight and takes direction from Brussels and member states that use it for political objectives. Without the direction to set priorities, the personnel to build capacity, the accountability to meet objectives or the independence to fulfill a technical mission, EULEX has been handicapped in tackling Kosovo's rule-of-law issues.

2) Failure to Coordinate with Other International Actors

When EULEX took the lead in instituting the rule of law in Kosovo, it joined many international actors. While UNMIK handed over most duties to EULEX, China and Russia, among others, recognize its authority in Kosovo. The North Atlantic Treaty Organization (NATO) retains a peacekeeping role, with Kosovo Force (KFOR) deployed throughout the country. The Organization for Security and Cooperation in Europe (OSCE) monitors Kosovo's institutions, especially for elections. The US remains Kosovo's largest bilateral donor and a powerful political force.¹¹⁰

¹⁰² Interview with EULEX official, Prishtina January 2014.

¹⁰³ Kursani, "A comprehensive analysis of EULEX," p. 20.

¹⁰⁴ ECA, "European assistance to Kosovo," p. 29.

¹⁰⁵ Interview with EULEX official, December 2013.

¹⁰⁶ Interviews with EULEX officials, October 2013- January 2014.

¹⁰⁷ This information was corroborated in separate interviews with EULEX officials and European diplomats, Kosovo January 2014.

¹⁰⁸ Interview with EU official, Prishtina January 2014.

¹⁰⁹ Interview with high-level EULEX official, January 2014.

¹¹⁰ The previous US Ambassador to Kosovo Christopher Dell praised himself for having engineered the appointment of Kosovo President Afetete Jahjaga; interviews with Western diplomats, Prishtina 2012.

Considering the importance of these other actors in Kosovo, EULEX must coordinate with them to succeed.

Unfortunately, EULEX's interaction with international actors has been a case of getting the little things right, but the big things wrong. Cooperation with UNMIK and the OSCE has been exemplary. UNMIK serves as an important intermediary between non-recognizing states and EULEX to assist those states' citizens in Kosovo and keeps the UN Security Council informed on the mission.¹¹¹ The OSCE complements EULEX's sustained activity with one-off training workshops on the rule of law and democratic participation. In general, both sides have been quite pleased with cooperation.¹¹²

Compared to KFOR and the US, however, UNMIK and the OSCE play small roles and with these two forces EULEX has failed. NATO doubts EULEX can fulfill its mandate and complains that EULEX shifts tasks it should manage to KFOR. EULEX exacerbates this impression by leaving border security and counter-smuggling in the north to KFOR's security zones. While KFOR has a more established position in the north and is thus better able to regulate activity there, it did not focus on border security or smuggling reduction and the results were predictably meager.¹¹³ EULEX also passed crowd control duties to KFOR, unilaterally cutting its crowd control staff in half before the 2011 blockades, leaving KFOR to bring the region under control.¹¹⁴ While the EU acknowledges its dependence on KFOR, it does not seem to realize the adverse effects of its dependence on the relationship.¹¹⁵

The buck-passing to KFOR, with its more established position in the north, is more explicable than poor cooperation with the US. The US views the EU as the leader in Kosovo and has been an active supporter of EULEX, contributing seconded personnel.¹¹⁶ In spite of the common ground, cooperation is awful. American seconded personnel consider other EULEX personnel too passive and subject to political interference.¹¹⁷ American government agencies act unilaterally in the rule of law sector, leading to awkward conflicts with EU benchmarks. The Kosovo Assembly passes laws that violate European standards, such as the recent money laundering law, on the advice of the US Agency for International Development.¹¹⁸ The US prefers to work out disputes in the rule of law sector with the EU Office in Pristina¹¹⁹ instead of through EULEX.¹²⁰ The American contribution to EULEX has been a half-hearted attempt to legitimize a mission for which the US has little patience.

EULEX has fumbled its relationship with other international actors in Kosovo. It achieved harmonious cooperation with UNMIK and the OSCE, but failed with KFOR and the US. EULEX shirked duties off on KFOR, which had neither the capabilities nor the desire to take them. EULEX's passivity and poor performance encouraged American institutions to work independently and at cross-purposes with the EU, in spite of common interests. Kosovo law suffered from the US and EULEX bickering while the rule of law in the north remains tenuous after relying on a pacification mission to build rule of law institutions.

¹¹¹United Nations Security Council, "Report of the Secretary-General on the United Nations Interim Administration in Kosovo," (4 February 2013), UN Doc S/2013/72, available at: <http://www.unmikonline.org/SGReports/NI1321969.pdf>.

¹¹²Kurti, "EULEX: we did a good job."

¹¹³GLPS, "Rock and rule," p. 13.

¹¹⁴ECA, "European assistance to Kosovo," p. 30.

¹¹⁵EEAS, CMPD, *Strategic Review of EULEX Kosovo Mission*, Annex II, p. 8.

¹¹⁶Canada, Norway, Switzerland and Turkey also contribute seconded personnel from outside the EU. US Embassy in Pristina, GLPS Interview, 6 December 2013.

¹¹⁷United States Department of State, Cable 09PRISTINA148; [US Embassy in Pristina, GLPS Interview, 6 December 2013](#).

¹¹⁸Interview with a European rule of law expert, Prishtina January 2014

¹¹⁹Henceforth referred to simply as the "EU Office."

¹²⁰ECA, "European assistance to Kosovo," p. 30.

3) Squandering Local Legitimacy

While EULEX came into Kosovo with legitimacy, it frittered it away quickly. Kosovo initially welcomed EULEX to implement the Ahtisaari Plan.¹²¹ However, EULEX's status-neutral position, high-handed behavior and bumbling effort to reach out to the local population profoundly damaged its local legitimacy. The status-neutral mandate ignored the effect it would have on a local population hoping EULEX would strengthen their infant state.¹²² With no effective local oversight, EULEX functioned more independently of its counterparts, preferring to act on its own than with local officials. This created a sense that EULEX acts on its own accord, not for the good of Kosovo.¹²³ EULEX's public comments first consisted of complaints that it went unappreciated because the local population only paid attention to high profile cases. When it finally reached out in summer 2012, it used leaflets with the ill-advised title, "EULEX is doing nothing?" and it was not until late 2012 that EULEX realized the need for a permanent media campaign highlighting its achievements. Its reputation had fallen so far at that point that it had an approval rating of 22 percent.¹²⁴

By showing such low regard for local legitimacy, EULEX made its mission much more difficult. High-profile corruption cases should not form the base of EULEX's mission, but by giving them a low priority, EULEX failed to break the cycle of low expectations. The population saw corruption as inevitable, even with EULEX's presence. Combined with a status-neutral mandate appearing to truckle to Serbia, EULEX turned from a mission ameliorating Kosovo's rule-of-law problems to a bullying mission caring more about Serbia's opinion than Kosovo's. This gave Kosovo's politicians ample excuse to criticize EULEX.. Opposition to EULEX became politically viable, for example, as the Government deflected questions of malfeasance by attacking recordings from a EULEX investigation of ruling Democratic Party of Kosovo (PDK) members as "fabricated" and "blackmailing public officials."¹²⁵ EULEX cannot build the rule of law if it is politically toxic. The Government can reject EULEX-preferred judges with political cover. Low expectations on corruption may calcify. External observers will have no faith in war crimes convictions due to incentives for Kosovo politicians to issue pardons once EULEX leaves. Poor outreach and high-handed behavior have made it more difficult for EULEX to instill the rule of law in Kosovo.

IV. EULEX IN THE FUTURE

A) Setting the Stage - a German-British non-paper

In spring 2013, only six months after EULEX began restructuring based on the 2012 Strategic Review and a new two-year mandate, the EU began to prepare for reviewing the mission anew for the next mandate after June 2014. In February 2013 the new German Head of Mission, Bernd Borchardt, took office. Only one month later, in the midst of the Belgrade-Prishtina dialogue the EEAS's Crisis Management and Planning Directorate (CMPD) began work on a new Strategic Review of EULEX to be sent to EU member states in September.¹²⁶

¹²¹ Kosovo Declaration of Independence, Paragraph 5.

¹²² GLPS, "Rock and rule," p. 25.

¹²³ GLPS, "Rock and rule," p. 19.

¹²⁴ GLPS, "Rock and rule," p. 25.

¹²⁵ Fatmir Aliu, "EULEX tapes of Thaci cause furor in Kosovo," *Balkan Insight*, available at: <http://www.balkaninsight.com/en/article/eulex-tapped-kosovo-s-pm-hashim-thaci-leaked>.

¹²⁶ Interview with EULEX official, Prishtina January 2014.

During the summer of 2013 the two lead EU nations in the dialogue, the UK and Germany, presented a non-paper entitled “EULEX post-June 2014.” A diplomat from the British foreign office that had initiated the joint paper explained that the two governments “wanted to give the CMPD strategic impulses ahead of them finalizing the Strategic Review.” According to the diplomat, the paper sought to approach EULEX’s future from a wider perspective, linking its mission and instruments to other EU institutions and instruments for integration in order to “find the right balance” and to “return the debate to the job that needs to be done.” According to German diplomats, the paper was both a counter-measure to pressure from the Kosovo government to close EULEX and a proposal for an exit strategy on how to phase out EULEX.¹²⁷

The paper defines four principles for an “effective EU action to address rule of law concerns in Kosovo: make proper use of all tools available to the EU; ensure the Kosovo Government takes clear responsibility in addressing the root cause of the rule of law challenges; ensure EULEX is given a clear sense of purpose, tangible objectives and an exit plan; acknowledge the very different challenges we face in southern Kosovo and the north.” Consequently the paper proposes that, in the north, EULEX’s future mandate include an “enhanced presence, with a focus on executive policing, judiciary and MMA to complement and support newly integrated police and judicial structures” and a lead role in facilitating and monitoring the implementation of dialogue agreements. In the south, the paper argues for a drastically consolidated, reduced and altered mandate. EULEX’s current executive authority thus “should be returned to the Kosovo government” while only a “core policing and judiciary team should remain, with a focus on completing the most sensitive executive cases” such as war crimes, organized crime and corruption and property claims. At the same time EULEX MMA responsibilities “should be passed to the EU Office in Kosovo by 2016.”¹²⁸

A British diplomat explained the reduction of EULEX’s executive mandate in the south by referring to the end of Kosovo’s supervised independence and the desire to start to treat Kosovo like a normal candidate for EU, though he acknowledged sensitive cases such as war crimes would remain problematic. A German counterpart recognized that domestic institutions avoid sensitive cases, but insisted that “at some point you need to make the cut. Also, we got other instruments to follow up – MMA, EU-integration mechanisms.” Neither diplomat explained why the EU needed to make the cut in 2014 nor whether the EU’s other instruments could fill the role EULEX’s executive functions play.¹²⁹ Both diplomats and the non-paper itself stress changes in framework conditions of the EU’s performance in Kosovo that drove their thinking on the future of EULEX: the 19 April Agreement between Belgrade and Prishtina and the EU decision to open negotiations on a Stabilization and Association Agreement (SAA) with Kosovo.

B) Changes in Framework Conditions: Serbia-Kosovo Dialogue

The signing of the April Agreement will, without a doubt, impact EULEX’s next mandate. The agreement opened the perspective of removing Serbian state institutions and legislation from Kosovo territory and to integrate Serbs living in the North into the Kosovo state. The agreement and the process of implementation brought Serbia the beginning of accession talks with the EU in January 2014 and allowed Kosovo to start negotiations with the EU over an SAA. However, unlike at the moment when the UK and Germany drafted their non-paper, the dialogue’s aims are

¹²⁷Interviews with British and German diplomats, Berlin-London-Prishtina, December 2013, January 2014.

¹²⁸ British-German non-paper „EULEX post-June 2014“, London-Berlin June 2013.

¹²⁹ Interviews with German and British diplomats.

far from achieved and its success is more uncertain than at any point since the April Agreement.¹³⁰

Already in 2013 the implementation process, originally foreseen to end on 31 December 31 2013, had missed most deadlines. Local elections were only completed in February 2014. The Kosovo Assembly was late passing an amnesty law for Serbs, delaying the integration of Serb police in the north. An agreement on the judiciary had not been reached ahead of the December EU Council meeting that set a date to begin Serbia's accession negotiations. An Assembly of Serb Municipalities has not been convened and it still lacks a statute. Serbia failed to integrate the April agreement into its legislative system. While dialogue somewhat progressed in early 2014, implementation has since slowed down further. Early parliamentary elections on 16 March in Serbia prevented a deal on the judiciary in the north from being finalized. With parliamentary elections in Kosovo likely to be held in June and the High Representative of the EU Ashton completing her mandate in October, the implementation of the April agreement may stall in 2014.¹³¹

Implementation of the April agreement and some of its provision may also inflict or has already inflicted damage on Kosovo's democratization, state institutions and rule of law. The Belgrade government used a variety of administrative resources and pressure to ensure Kosovo Serbs' participation in the local elections, both north and south of the Ibar river. This seriously damaged the already limited political pluralism among Kosovo Serbs. Additionally, the April Agreement defined a previously non-existing ethnic Serb regional police command, but the Kosovo Ministry of the Interior appointed the interim commander before the legislation had been put in place to create the position. Finally, the Kosovo government tried to pack an amnesty law for Serbs who had previously lived outside the constitutional order of the Kosovo state in the north with a general amnesty proposal for the whole of Kosovo that had nothing to do with the north. While civil society and Constitutional Court's resistance ultimately led to changes in the law, its officials refrained from public criticism so as to not complicate the agreement implementation, damaging the rule of law culture.¹³²

Even if the implementation of the April Agreement will proceed and finish in 2014, with municipalities, police and judiciary fully integrated into the Kosovo state, there will still remain around 300 Serbian state institutions in Kosovo that function according to Serbian legislation. The framework for the accession negotiations of the EU with Serbia theoretically deals with those institutions, as it seeks to cut Kosovo from Serbian state institutions and legislation. However, even if it succeeds, this is a long-term process throughout which Serbian institutions and legislation will remain present in Kosovo. How an integrated judiciary and police will handle cases involving such institutions remains unaddressed.¹³³

C) Changes in Framework Conditions: Kosovo's EU Integration Unblocked

In the aftermath of the April Agreement, the EU partially overcame its internal division over Kosovo and decided to start SAA negotiations in October 2013. This unblocked Kosovo's EU-integration process and potentially enhanced its leverage for reforms in Kosovo, including in the

¹³⁰ For a more detailed account see: Weber/Bassuener "Not Yet a Done Deal: Kosovo and the Prishtina-Belgrade Agreement", DPC Policy Paper, Berlin-Sarajevo November 2013. Available at: <http://democratizationpolicy.org/pdf/briefs/DPC%20Kosovo%20Policy%20Paper%20November%202013.pdf>.

¹³¹ Interviews with EU and EU member state officials, Pristina-Brussels-Berlin-London, January-March 2014.

¹³² Weber/Bassuener, „Not Yet a Done Deal.“

¹³³ Interviews with EU officials, January-March 2014.

rule of law. The EU in Kosovo now has six tools and formats that partially or entirely deal with rule of law reforms—more than in any current or former candidate country.

First, in the SAA framework, the EU has set a series of short-term and mid-term reform objectives. The objectives range from the concrete, such as benchmarks for the judiciary, adoption of particular legislation, and the development of specific government strategies, to the more general. Within the SAA framework, the EU in 2010 initiated the SAA Process Dialogue (SAPD). This more technical dialogue between Brussels and Kosovo will be turned into SAA Sub-Committees once the Agreement is signed.¹³⁴ Second there is the Structured Dialogue on Judicial Reform (SD), an added dialogue format without a formal place within the EU-integration process. Originally invented in 2011 in the context of the EU's Bosnia policy,¹³⁵ but then introduced in other Balkan states, the SD serves as a pre-screening dialogue on judicial and home affairs issues contained in chapters 23 and 24 of the accession process. It functions as a high-level political dialogue.¹³⁶ Third, the Visa Liberalization Roadmap contains several conditions pertaining to the judiciary and the rule of law, especially in anti-corruption.¹³⁷ Fourth, the instrument of pre-accession assistance, or IPA, provides funding for countries on the EU-integration path to help them meet EU benchmarks, including in strengthening the judiciary and rule of law. The new IPA II program is being prepared and the Kosovo government must present a judicial reform strategy in April to form the basis for the IPA programming. The first projects are slated for implementation in 2016.

The last two formats directly relate to EULEX. The Legislative Review Mechanism (LRM) is a joint EU Office-EULEX body that screens new draft legislation, both for developing rule-of-law institutions and for compatibility with EU legislation.¹³⁸ Finally, the Joint Rule of Law Board (JRLB) oversees the Compact on Joint Rule of Law Objectives for the Period until June 2014. It obliges the Kosovo government to concrete improvements in the police, judiciary and customs service in order to transfer EULEX authority to domestic institutions. According to an EU official, the Compact was created “because [Justice Minister Hajrudin Kuci] wanted transition from EULEX.” The board includes the EUSR, the EULEX Head of Mission and the ministers of justice and interior.¹³⁹

While the number of instruments seems impressive, their content is less encouraging. EU officials are divided on the SAA's leverage with some seeing the SAA as a strong instrument to strengthen the rule of law, but others insisting its conditionality in the field of judiciary is very general, potentially limiting effectiveness.¹⁴⁰ Concerning the Structured Dialogue both its necessity and strategic orientation remain unclear. This opinion was shared by almost all of EU officials and diplomats as well as Kosovo government officials interviewed. One diplomat admitted he had “no idea what EU officials in Brussels and Prishtina are up to with the SD.”¹⁴¹ Visa liberalization conditionality in other Western Balkan countries has had limited effect on structural problems in the judiciary and rule of law, including fighting systemic corruption. IPA projects have even less impact on those problems, since, as several EULEX officials have pointed

¹³⁴ Group for Legal and Political Studies, “Readying Kosovo for SAA Negotiations”, Policy Analysis No. 02/2012; interviews with EU officials, Brussels January 2014.

¹³⁵ See Chapter IV

¹³⁶ Interviews with EU officials and European diplomats, Pristina-Brussels-Berlin-London 2013-14.

¹³⁷ European Commission, “Visa liberalization with Kosovo: Roadmap”, Brussels 2012, available at:

http://eeas.europa.eu/delegations/kosovo/documents/eu_travel/visa_liberalisation_with_kosovo_roadmap.pdf.

¹³⁸ Interviews with EU officials in Prishtina and Brussels, January 2014.

¹³⁹ EULEX, “September 2013 Compact Progress Report”, available at: <http://www.eulex-kosovo.eu/docs/Compact%20Report%20final%20ENG.pdf>; interviews with EU officials, January 2014.

¹⁴⁰ Interviews with EU officials, Brussels-Prishtina January 2014.

¹⁴¹ Interviews with EU officials and diplomats, January 2014.

out, “projects are commercial interest driven....project implementation organizations thus won’t confront Kosovo government officials on structural issue for the sake of ‘successful’ implementation of their project.”¹⁴² The number of formats is not matched by committed staff structure within the EU Office – in spite of complaints from the EU Auditors’ Office at only five people in the rule of law office dealing with rule of law issues. The rule of law staff has since only risen to seven. More generally, the EU’s experience in the Western Balkans has demonstrated that it only gains real leverage on solving structural problems in the rule of law during accession negotiations, not during the pre-candidacy phase. Additionally, while the five non-recognizing EU member states agreed to the start SAA negotiations with Kosovo, this support is not guaranteed during future steps.

D) The 2014 Strategic Review

The 2013 Strategic Review was completed and sent to EU member states on 29 January 2014. The authors of this study were unable to speak to the reviewers and thus gained no direct access to the methodology used or the list of EULEX personal interviewed. The Head of Mission was intensively engaged in the whole process and the reviewers. One high level mission official and an experienced lawyer insisted he that “they did not come to me and they never discussed any topics with me or any of the lawyers in the mission.” Such statements mirror complaints frequently heard during interviews that “Brussels doesn’t take the judiciary serious, doesn’t understand judicial matters.” CMPD also involved officials dealing with justice and home affairs in the EU Office in Kosovo and the Directorate General for Enlargement in Brussels. Drafts were presented and discussed with the Kosovo government late into the process.¹⁴³ An EU official directly involved explained the late publication as targeting “a time slot after local elections in Kosovo and before the start of the campaign for general elections, in order not to have that interfere into the decision-making process on the future mandate with Prishtina.”¹⁴⁴

The Strategic Review finally sent around is a 20 pages document that contains an additional couple of annexes – an “overview of progress achieved,” plus two position papers/letters from the Government of Kosovo. The document mostly follows the German-British non-paper and lays out the mandate and structure of the future mission in greater detail. The Strategic Review lists the same “new realities on the ground that make it necessary to recalibrate the EU Rule of Law presence” – the dialogue, progress in Kosovo’s and Serbia’s EU-integration process, “strengthened Kosovo local capacity” as well as “greater expectations on Kosovo side: the authorities became more assertive in their demand for transitioning EULEX mandate.” The document proposes a smaller mission with a new 2 year mandate. In the north the mission should have strong executive authority in justice and police and executive and MMA should be “brought under one roof.” In the south the mission should concentrate on central institutions in Prishtina and on MMA. MMA shall be transferred from the mission to the EU Office within a year. Executive functions shall be reduced to solving sensitive ongoing cases. MMA capacities are to remain within the Ministry of Justice, the Kosovo Judicial and Prosecutorial Councils. A reduced, “residual” MMA capacity will remain in Kosovo Customs headquarters, in Kosovo Police Directorate General and the Correctional Services. Concerning executive mandate, prosecutors will remain in SPRK, that will be headed by a Kosovo prosecutor only. Judges will work in panels

¹⁴² Interviews with EULEX officials and representatives of organizations-institutions implementing IPA funded projects in the field of judiciary, 2014.

¹⁴³ The Government of Kosovo even produced an unofficial Albanian translation of the draft document for internal communication, interview with journalistic source, Brussels January 2014.

¹⁴⁴ Interviews with various EULEX and EU officials, Prishtina-Brussels, January-February 2014.

with a majority of Kosovo judges, except for cases prosecuted by an international prosecutor. Judges will remain at the Special Chamber of the Supreme Court that deals with privatization matters, while the Civil Judges Mobile Unit will be dissolved. The two EULEX judge members in the KJC shall terminate their function. The three international judges at the Constitutional Court shall be integrated into the future mission. Prosecutors would take on new cases upon request from domestic prosecutors and local court presidents can request a EULEX-majority judges' panel. EULEX Assemblies of Judges and Prosecutors will be dissolved with international lawyers "embedded" into the Kosovo judicial system and hierarchy, albeit while retaining privileges and immunities. Also, a "limited criminal investigative and intelligence policing capacity" shall remain, as well as a strong role in witness protection. The Special Investigation Task Force dealing with the Dick Marty report on organ trafficking is left out of the review, while it is made clear that the executive function of EULEX will be retained for any court proceeding that may arise from the investigation.¹⁴⁵

E) Positions of the Government and of Parliamentary Parties in Kosovo

The Kosovo Government has first presented its official position on the future of EULEX in a strategy paper sent to the EU in July 2013.¹⁴⁶ The paper defines the aim of transition as "helping EULEX to transfer its executive powers to the Kosovo relevant institutions in a coordinated and sequencing manner in order to be able to end its mandate by June 2014." Consequently the paper lists transition proposals for all segments of EULEX in a way that ends both its executive and MMA role in 2014. An eight-page position paper from January 2014 comments on the Strategic Review and is largely in line with the CMPD proposal. It indicates the close communication between the EEAS and Prishtina in the drafting process of the Strategic Review. It stresses certain elements of the proposed new mission such as support of the April Agreement in the north, the concentration on MMA in the south and the integration of the executive judicial staff into Kosovo institutions. There is disagreement on a proposed 3 months rollover – a proposed extension of EULEX's current mandate needed to transition to the new mission, as this would demand an exchange of letters between the government and the EU and Assembly decision in addition those needed for the new mission. Also, the paper deviates from the Strategic Review in proposing a mandate of only 18 months for the new mission.¹⁴⁷ The government position vis-à-vis EULEX seems inconsistent and guided by short-term political interests. A German diplomat criticized Prishtina's push for closure of EULEX as Western "support à la carte approach – they want KFOR, but don't want EULEX. That's not how it functions." An EU official noted that "they want to be treated as any other potential candidate country. There is a sense in Kosovo that if you got a foreign mission, you must have a problem – they need to understand that that may not be the case, that the foreign mission might in fact help on the way forward on EU-integration reforms."¹⁴⁸

Opposition parties are equally flighty and opportunistic. Following the prosecution of former high-level KLA officials, almost all parties supported an Assembly resolution passed in July

¹⁴⁵ „Strategic Review of EULEX Kosovo Mission“, CMPD, Brussels, January 2014.

¹⁴⁶ Government of Kosovo, „Continued Strategy for the transition of EULEX competencies to Government of Kosovo Institutions“, Prishtina 2013.

¹⁴⁷ Government of Kosovo, „Position of the Government of the Republic of Kosovo regarding Strategic Review of EULEX Mission in Kosovo“, Prishtina January 2014.

¹⁴⁸ Interviews with EU diplomats and officials, 2014.

2013 that called for an end of EULEX.¹⁴⁹ They did not follow up on that demand. Some party officials have stressed the need for a continuation of the EU Rule of Law mission, but also used such statements to attack the ruling coalition's record on the rule of law.¹⁵⁰

F) Critique of the EULEX Strategic Review

The Strategic Review is problematic in a number of aspects, some of which have already provoked critique within the EU. It has been criticized as not being strategic, but rather submitting to Prishtina's pressure to close the EULEX mission. One European diplomat in Kosovo suggested, "we also have an interest in making our rule of law efforts sustainable – that should drive the EULEX-closure debate, but I don't see it."¹⁵¹ An EU official was "a bit uneasy with the whole thing – priorities are turned upside down, typical EU story....The question whether Kosovo institutions are ready is not the starting point of the Strategic Review – that inevitably leads you to manipulating with benchmarks for closure."¹⁵² The fact that the first StratReview draft proposed a completely different mission design with a much stronger executive, labeled by an EULEX official as a "law enforcement mission," but then was subsequently rejected in internal discussion within EU institutions, seems to confirm such assessments. An EEAS official involved in the drafting and redrafting process said, "We've been moving quite a lot towards Prishtina, Kuci," but insisted, "You can't impose cooperation."¹⁵³

A criticism raised by member states in the first discussion of the Strategic Review that took place on February 4 in the EU Council's PSC (Political and Security Committee) attacked the CMPD for engaging in whitewashing in their presentation of the state of judiciary and police in Kosovo.¹⁵⁴ The authors of the Review do write that, "The judiciary and the prosecution remain weak in Kosovo...investigation and prosecution of war crimes remains a complex and sensitive issue...the judiciary and the public prosecution continue to be exposed to political interference" in sensitive cases dealing with war organized crime and corruption, war crimes and privatization matters, and "Kosovo is far from having adequate capacity to deal with witness protection."

Nevertheless, there are still multiple blind spots in the analytical part of the document. For example, the passage on the SPRK gives a quantitative assessment of the performance of the institution, but does not discuss how local prosecutors handle sensitive cases. The review fails to mention that some high-level judges appointed by the KJC in 2013 received their appointments on a political basis and were only reversed due to the engagement of the KJC's two members from EULEX.¹⁵⁵ In relation to the Kosovo police the document uses very careful wording to express that "operational deficiencies in intelligence led-policing remain...for serious types of crime lack of KP's capacity or willingness to investigate has at times necessitated EULEX to use its executive powers."¹⁵⁶

The Strategic Review's attempt to limit executive functions and hand over competences to local officials also appears to overlook significant problems. While EULEX staff interviewed for this study may not be representative, it is indicative that almost all of them—including all EULEX

¹⁴⁹ Assembly of the Republic of Kosovo, Resolution Number 12, available at: http://www.kuvendikosoves.org/common/docs/Rezution_Nr_012.pdf.

¹⁵⁰ Various media sources, for example: Koha.net, "Kërkesa e PDK-së për largim të EULEX-it, vetëm për publik," *Koha.net*, (13 October 2013), available at: <http://www.koha.net/?page=1,13,162023>.

¹⁵¹ Interview with European diplomat, Prishtina January 2014.

¹⁵² Interview with EU official, Brussels January 2014.

¹⁵³ Interviews with EULEX and EEAS officials, January 2014.

¹⁵⁴ Interviews with journalistic sources, Brussels February 2014.

¹⁵⁵ Interview with EU official, Brussels January 2014.

¹⁵⁶ Strategic Review, Annex II: „ Overview of Progress Achieved”.

judges and prosecutors interviewed—found their local counterparts not ready to take on all executive functions. In addition, Kosovo media reported that 17 EULEX judges had signed a letter to the head of the Executive division warning that their domestic colleagues are not ready to handle politically sensitive cases.¹⁵⁷ One prosecutor stated, *“it is my opinion that the domestic judiciary, including prosecutors have not reached the necessary level of Rule of Law – we face political interference, pressure from the chief prosecutors, no respect for human rights...everyday.”* Another high-level EULEX lawyer said, *“They can’t initiate high profile cases and they can’t take them over as it is today. If we don’t initiate any new cases no high profile persons will ever be prosecuted again. The policy no new cases for EULEX – is a total win for the government of Kosovo. All the high guys can now feel safe.”* Additionally, the interdiction on new cases does not make sense for two more reasons: one, the prosecution of the existing number of “old” cases will not at all be finished within the proposed two-year mandate; two, there is no reason in principle a EULEX judge or prosecutor cannot hand over a case to his/her Kosovo colleague. A phase-out should be defined by benchmarks. EULEX judges and prosecutors should force their domestic colleagues to take over sensitive cases, they should monitor their performance and that performance should determine the date for transition.¹⁵⁸

Due to this criticism, the EEAS is working on a compromise for the future executive mandate that would shift from the original Strategic Review definition of judges and prosecutors taking on new cases only on demand from the Kosovo side based on the new mission’s assessment. This would require judges and prosecutors assemblies to remain or at least a chief EULEX judge and prosecutor to make such assessments.¹⁵⁹ This still appears to be more political compromise than strategy, punting the decision on taking new cases.

Member states also criticized the EEAS for negotiating the document’s content with the Kosovo government before EU governments could see the paper.¹⁶⁰ Indeed, in presenting the draft to Prishtina and giving them a chance to define their position in a paper that has also been leaked to the Kosovo media, the EEAS may have ensured that any difference between the final mission design and the Kosovo government paper will make negotiations with Prishtina substantially more difficult than if no pre-negotiations had taken place.

The Strategic Review also entails serious organizational problems that could negatively affect the new mission’s output. First, on the proposal to embed international judges and prosecutors into the Kosovo justice system, one EULEX prosecutor warned that *“the idea of embedding EULEX prosecutors into the Kosovo system is a problem. The Chief Prosecutor would be their boss, he is not bad, but still this would be too much power.”* A EULEX judges insisted *“this is crazy. I won’t sign such a contract. It’s a legally fraud construction, no EU member state could reasonably accept it.”*¹⁶¹ Previous experiences¹⁶² show embedding international lawyers in local legal systems does not work and creates a blurred legal construct. Second, EULEX officials reject the complete transfer of MMA to the EU Office. One EULEX official said separating the mentoring and monitoring function from the EULEX judges and prosecutors’ peer-to-peer training activities will *“make it organizationally difficult to cooperate,”* while another insisted, *“It makes absolutely no sense to move MMA to the EU Office.”* EU Office officials also admit they have no

¹⁵⁷ BIRN, „Kosovo judges can’t handle politically-sensitive cases“, February 14, 2014.

¹⁵⁸ Interviews with EULEX judges and prosecutors and other EULEX officials, December 2013-February 2014.

¹⁵⁹ Interview with EEAS official, Brussels March 2014.

¹⁶⁰ Interviews with journalistic sources, Brussels February 2014.

¹⁶¹ Interviews with EULEX judges and prosecutors, January 2014.

¹⁶² See Chapter IV

idea how to organizationally handle the takeover of over 100 personnel by an office that now has about a dozen international staff.¹⁶³

A final, serious insufficiency in the strategic planning is the lack of coordination between the planning for the new EULEX mission's role in the north of Kosovo and the negotiations over the judiciary issue, especially over the structure of the Mitrovica Basic Court. According to an EU official involved in the negotiations, the current negotiations between Belgrade and Prishtina over the shares of Serb and Albanian judges and prosecutors at the basic court is proceeding without considering EULEX judges' and prosecutors' role. An EEAS official insisted that this was intentional and the EU was "aiming at a sustainable solution for the Mitrovica court." According to the official, Serb judges will form a majority on the three-member judges' panels in all cases that relate to the four majority Serb municipalities north of the Ibar, while Albanians will form a majority in the three southern municipalities that belong to the basic court. EULEX judges will only be called to sit on the panels based on the planned compromise formula on new cases – where EULEX assesses the need to bring in international judges and prosecutors. Their mandate is planned to end after at most 18 months. And this inclusion of EULEX lawyers on new cases is not foreseen for the three Albanian municipalities. This proposal, if implemented, will doom the judiciary in the north to failure. This proposal seems to ignore that Serb judges and prosecutors did only work in a parallel judicial system – in an area dominated by an underground economy they almost completely refrained from criminal cases and also dealt only with a limited range of civil cases. However, so did Albanian judges and prosecutors in the area south of the Ibar. With no access to the Mitrovica court building located in the northern part of town and thus situated in auxiliary premises they so far used the lack of adequate buildings as a cover up to deal only with a very small number of criminal cases.. A trial and error approach that hands full competences immediately to Serbian and Albanian judges and prosecutors will ultimately fail.¹⁶⁴

G) The Ticking Clock and Other Complications

The decision-making process on the post-June 2014 mission has encountered a serious timing problem. The Strategic Review was to be published in September 2013 to allow an orderly transition to the new mission, but only was distributed in January 2014. Already, in December 2013, EU diplomats realized that a three to four-months rollover was necessary. When the Strategic Review met substantial resistance from member states, any hope of completing the internal decision-making process by the end of February 2014 was extinguished. To make the budgetary preparations for a new mission, the decision-making process must conclude in April. At the same time the Kosovo government was tasked to draft a sectoral strategy for the judiciary until April that has to include proposals for the IPA II planning. As demonstrated this IPA component is integrated into the proposal for the new EULEX mission. Yet such timing of the new IPA program makes it impossible to coordinate with the planning of the new mission. As the internal processes of the EU continue, the Kosovo parliamentary election campaign is accelerating. This development on the ground makes it unlikely the EU will succeed to get the two votes it needs—on the rollover and on the new mission—through the Kosovo Assembly. While EEAS officials still demonstrate confidence that they will ultimately succeed, other EU officials are convinced that no such decision can make it through the Kosovo parliament before the election. Should the EU succeed in finding a common position on a future mission and an agreement with the Kosovo government, but fail in the Assembly, there could be no rule of law mission in Kosovo.

¹⁶³ Interviews with EULEX, EU officials, January 2014.

¹⁶⁴ Interviews with EEAS officials, Brussels March 2014, EULEX officials, Kosovo 2013-14.

In addition, the completion of the SITF's work planned for summer 2014 and the possible establishment of an international ad hoc tribunal to try any high-level cases that emerge from SITF's findings will further complicate any extension of EULEX's mandate. The issue has provoked a heated debate in Kosovo media, due to proposals to establish a court functioning under the EULEX umbrella and within the Kosovo legal system, but would be located outside of Kosovo to protect witnesses. Such a court, even if the Kosovo government agreed to it, would need another vote of the Assembly to create its legal basis. Such a vote may also have to enter parliament before the upcoming elections, likely scheduled for June.¹⁶⁵

V. LESSONS FROM BOSNIA-HERZEGOVINA

Bosnia-Herzegovina can serve as a useful comparison for assessing EULEX's work and considering the transition from the EU mission to domestic institutions and actors in Kosovo. As in Kosovo, rebuilding the judiciary and re-establishing the rule of law constituted a cornerstone of the international community's post-war efforts to bring public order and safety and to establish a sustainably democratic and multiethnic society. As in Kosovo, the West identified the need to bring in international judges and prosecutors with an executive mandate for a certain time period to enable those goals. Judicial institutions created served as role models in the rest of the Western Balkans region and were later integrated as benchmarks in the EU's integration policy. Finally, the question of the transition of international judges and prosecutors' role provoked a similar controversy both within the international community and between internationals and local political elites.

As part of the Socialist Yugoslav system, Bosnia and Herzegovina's judiciary generally secured the rule of law. It functioned based on civil-law traditions passed down from its membership in the Austro-Hungarian Empire. It did so rather well, in spite of a one-party system functioning beyond the rule of law and a socialist constitutional framework. However, from the mid-1980s on, BiH's judiciary degraded dramatically. The erosion of legal culture and the rule of law began in the context of the crisis of the socialist economy and the socialist system as a whole. During the 1992-1995 war, rule of law was *de facto* suspended; the wartime political leadership perverted the judicial system. Large-scale war crimes, ethnic cleansing and mass looting were instruments of policy and created a culture of impunity. Many judges and prosecutors left the judiciary or were "ethnically cleansed," replaced by inexperienced, under-qualified or unqualified personnel. Interference by political elites, economic elites and organized crime reached previously unseen dimensions.

A) Post-War Judiciary Reforms

Addressing BiH's judicial mechanisms was integral to reestablishing public order and instilling democratic reform after the war. The judiciary in BiH after Dayton was burdened by both the legacy of wartime co-optation and institutional fragmentation. The Dayton state constitutionally atomized responsibility for rule of law. The country separated into two entities, the *Republika Srpska* (RS) and the Federation of BiH, each with supreme and constitutional courts, regional courts, municipal courts and courts in Brčko District. On the state level, there was only the Constitutional Court of BiH. There were 13 ministries of justice.

Reform of the judiciary was led by the highest civilian international authority in Bosnia, the High Representative, and implemented during the first half of the previous decade. After a

¹⁶⁵ Interviews with EU officials and diplomats, Brussels-Berlin-Prishtina December 2013-March 2014.

two-year period of monitoring and assessment of the judiciary by the UN-led Judicial System Assessment Program (JSAP), the High Representative established an Independent Judicial Commission (IJC) in 2000. The IJC coordinated and guided the subsequent judicial reform process that over the next four years re-framed the institutional and legal setting.

The High Judicial and Prosecutorial Council (HJPC) was established and unified into one body at the state level in 2004. The HJPC was vested with sole authority to appoint all judges and prosecutors in BiH at all levels. Members of the HJPC were selected by a wide range of judicial bodies, professional judicial associations and government institutions from various levels to insulate against political influence. Out of 15 members, 11 are judges and prosecutors elected by their peers. The HJPC gained the exclusive authority over disciplinary procedures, judicial administration, statistics and drafting judicial budgets, as well as a coordination role over training and judiciary reform.

Through the HJPC, two structural reforms were conducted. First, the HJPC restructured the court system based on rational, apolitical criteria, reducing the number of first-instance courts by 41 percent. This process re-established the multiethnic character of courts and prosecutor's offices throughout the country. Second, the HJPC re-appointed all judges and prosecutors, purging those who were unqualified or had problematic war records, reducing the number of judges by 28 percent. Eighty percent of acting court presidents were not reappointed to their previous positions.¹⁶⁶ Other measures were less sweeping, but no less vital. Judges and prosecutors received a substantial increase in salaries. Information and communication technology (ICT) was introduced in the whole of the judiciary, including an automatic case allocation system to protect against outside interference in courts.¹⁶⁷ The High Representative between 2000 and 2004 imposed laws that established the Court of BiH and the Prosecutor's Office of BiH. Though established at state level, the Court of BiH was not a supreme court, but a court with state-wide, first- and second-instance jurisdiction that was originally limited mainly to administrative disputes and electoral appeals. Further additions substantially extended the jurisdiction of the court and increased its size. Two special sections were added: one for war crimes and another one for organized crime, economic crime and corruption. The War Crimes Chamber picked up where the International Criminal Tribunal for the former Yugoslavia would leave off, as well as allow pursuit of cases that never reached The Hague. The Organized Crime and Corruption Chamber took on the endemic corruption and organized crime in the country. It has jurisprudence in cases where the "protected object" is BiH. Also, the court gained jurisdiction over cases that endanger the sovereignty, territorial integrity and political independence of Bosnia-Herzegovina.¹⁶⁸ In 2004 the Registry was established as an international institution that was authorized to manage and support the Prosecutor's Office as well as the two new sections of the Court of BiH, including the management of international donations that covered a large part of the institutions budget as well as to support international judges and prosecutors. Internationals made up a large share of judges and prosecutors at the beginning – the Prosecutor's Office started its work with foreign prosecutors only and gradually brought in local lawyers; at the Court of BiH internationals made up about a third of all judges in the first few years. Gradually locals took over positions of president of Court of BiH, Chief Prosecutor and the

¹⁶⁶ Sven Maria Urke, "Establishment of an independent and accountable judiciary in countries in transition: Bosnia and Herzegovina as a case study", in: Nils Asbjørn Engstad, Astrid Lærdal Frøseth, Bård Tønder, *Dommernes uavhengighet*, page 357.

¹⁶⁷ Urke, *ibid.*, p. 362-364.

¹⁶⁸ The Court of BiH, "The Court of BiH", Sarajevo 2007, available at: http://www.sudbih.gov.ba/files/docs/brosura/brosura_eng.pdf.

head of the Registry.¹⁶⁹ Internationals also served in other key judicial institutions, such as the HJPC and Constitutional Court, although in smaller numbers. In addition, new and greatly harmonized Criminal Codes and Criminal Procedure Codes were adopted at the state and entity levels.¹⁷⁰

B) Structural Problems

These judicial reforms created important institutional conditions for the independence of the judiciary and improvements in efficiency and financial sustainability, but many structural weaknesses and problems remained, while new problems arose. The reforms have created additional institutions, but they have not solved the problem of fragmentation. Apart from the Constitutional Court and the limited Court of BiH, there was no state-level tier of the judiciary, mainly due to resistance from the political elites in the RS against the establishment of a Supreme Court of BiH. The new criminal and criminal-procedure codes altered the legal tradition of Bosnia's criminal-justice system. They introduced a mix of continental European civil-law tradition with Anglo-Saxon common-law procedures. This fundamentally altered the role of judges, prosecutors, and defense lawyers, as well as of law enforcement agencies. Lack of proper preparation and training for this shift disoriented judicial and law enforcement officials and affected the functioning of the judiciary for many years.¹⁷¹ While the new system assigned a key role to prosecutors, no systematization of the prosecutors' work on individual cases developed. Internal control mechanisms and disciplinary sanctions remained underdeveloped. These factors created openings for interference from political elites and organized crime.¹⁷² Regulation of the professionalism and conduct of attorneys is in disarray.¹⁷³ Expert witnesses are often corrupt.¹⁷⁴ Verdicts in criminal court cases have gone unimplemented. Many techniques have been used to delay sentences including registering false addresses of residence and claiming health problems.¹⁷⁵ Finally, application of commercial law seems particularly problematic in BiH. The continuous inefficiency of commercial courts entrenches a culture of impunity in business life, including non-compliance with contractual obligations.¹⁷⁶

C) Failed transition to Local Ownership

In 2005, the international community shifted its overall policy from the resource-intensive post-war external state building towards local "ownership." It was meant to end all internationally held executive mandates and hand over responsibility for democratic and functional reforms to domestic political elites deemed mature enough to take on the task. EU integration was defined as the framework within which reform processes were expected to continue, with the international community taking a facilitating and guiding role. Yet "transition" did not yield the

¹⁶⁹ Ibid., interview with former international prosecutor, February 2014.

¹⁷⁰ For accounts on the judicial reform process see: chapter on "Reform of judiciary in BiH" in: Denis Hadžović, *The office of the High Representative and security sector reform in BiH*, Center for security studies BiH, Sarajevo February 2009, p.66ff.; David Pimentel, *Restructuring the courts: in search of basic principles for the judiciary of post-war BiH*, Florida Coastal School of Law, January 2008, available at: http://works.bepress.com/david_pimentel/.

¹⁷¹ Christopher P. DeNicola, "Criminal procedure reform in BiH: Between organic minimalism and extrinsic maximalism," 2010, available at: http://works.bepress.com/christopher_denicola/.

¹⁷² Interview with domestic expert on the BiH judiciary, June 2011.

¹⁷³ Interview with domestic expert on the BiH judiciary, June 2011.

¹⁷⁴ „Nameštena svjedočenja," Centar za istraživačko-novinarstvo (CIN), <http://www.cin.ba/Print/?cid=837,2,1>; Interview with domestic human rights activist, December 2010; "Suđenje Saviću pokazalo da RS nije pravndržava," *Nezavisne novine*, 04-27-2011.

¹⁷⁵ "Na logorovanje umjesto u zatvor," 03-16-2011, <http://www.sarajevo-x.com/bih/clanak/110316028>.

¹⁷⁶ Interview with B-H entrepreneur, May 2011; "Dug put od presude do oduzimanja", *Oslobodjenje*, 05-08-2011.

expected results. Rather, it saw the return of nationalist rhetoric and attacks on postwar reforms. In the RS, Milorad Dodik and his social democratic party started to assault the state and its central institutions. The judiciary, especially the newly created judicial institutions at the central state level, became one of the main targets of these attacks. The West struggled to counter these attacks, but as it lacked the political will to adjust its policy approach, it was left with policy tools that proved inadequate.

I) Phasing Out International Judges and Prosecutors

At the beginning of the transition, a conflict broke out over an end date for the work of international judges and prosecutors. A transition agreement signed in 2006 stated international lawyers would end their executive work in 2009. In addition, the international Registrar would be transferred into domestic institutions of the Court of BiH and the Prosecutor's Office of BiH. Under the agreement, international judges and prosecutors were to be formally embedded in BiH's judicial system.¹⁷⁷ Yet this integration into the local judiciary remained only "formal, legally, but de facto Western governments who sent staff did in practice prevent it and local institutions like the Registrar and the HJPC backed down on exerting their formal authority over internationals." For foreign governments that seconded judicial staff, this was an issue of sovereignty. In practice, it protected foreign judges and prosecutors from growing political pressure their local colleagues were exposed to and thus enabled them to continue to do their important work in highly sensitive areas of organized crime, corruption and war crimes.¹⁷⁸

In 2009, international actors attempted to convince BiH authorities to extend the contracts of international judges and prosecutors that were to end on 31 December that year, but without success. Political opposition, particularly on the organized crime and corruption front, was broad and multiethnic. It was led by Milorad Dodik. His attacks on the Court and Prosecutor's Office of BiH became personal in 2008, when the Prosecution launched an investigation into the construction of the RS government building, with Dodik as one of the suspects.¹⁷⁹ At a PIC Steering Board meeting, the international body overseeing the work of the Office of the High Representative (OHR), both the Court of BiH president – a Bosniak – and the Chief Prosecutor – a Serb – urged the West to extend the mandate of international judges and prosecutors for another three years, and warned of the possible collapse of the ownership process should they decide differently.¹⁸⁰ In the end the PIC blinked in the face of RS pressure. On December 14, 2009, the High Representative, unwilling to impose in the face of a divided PIC Steering Board, decided to extend the mandate of international judges and prosecutors employed at the Court of BiH and Prosecutor's Office of BiH – but only those dealing with the less politically sensitive issue of war crimes and only due to pressure from the UN war crimes tribunal (ICTY). The decision was presented by the High Representative as a contribution to the ongoing process of building local ownership in the state-level judiciary. The decision sent a devastating political message to officials working in the domestic judiciary and had damaging practical effects, especially on the Prosecutor's Office of BiH. The four international prosecutors at the

¹⁷⁷ "Agreement between the High Representative for BiH and Bosnia and Herzegovina on the registry for section I for war crimes and section II for organized crime, economic crime and corruption of the criminal and appellate division of the Court of BiH and for the special department for war crimes and the special department for organized crime, economic crime and corruption of the PO of BiH as well as on the creation of a transitional council", available at: http://www.registrarbih.gov.ba/files/docs/New_Registry_Agreement_-_eng.pdf.

¹⁷⁸ Interview with a former international prosecutor, February 2014.

¹⁷⁹ "Independence of the judiciary: undue pressure on BiH judicial institutions", OSCE Mission to BiH spot report, Sarajevo, December 2009.

¹⁸⁰ Kurt Bassuener/Bodo Weber, „Are we there yet? International impatience vs. a long-term strategy for a viable Bosnia," *DPC Policy Brief*, May 2011, p.7/8.

special department for organized crime and corruption had to hand over several hundred cases to their remaining six local colleagues in just over two weeks. As a consequence, several highly sensitive cases were lost. The PO subsequently dropped a number of corruption cases that involved high-level politicians, including the case against Milorad Dodik. A pattern evolved of prosecuting less sensitive cases of organized crime and petty corruption, avoiding high-level corruption cases.¹⁸¹

2) EU Integration Policy and Political Attacks on the Judiciary: the Structured Dialogue

Early in its integration policy, the EU included judicial reform in its conditionality-based policy. Thus, the establishment of state-level institutions was included in the benchmarks of the feasibility study for signing an SAA with Bosnia. When “transition to local ownership” provoked negative effects and EU integration yielded nothing, the EU lowered conditionality in the hope this would create momentum. Brussels dropped its demand for a state-level Supreme Court, though it was an integral part of the EU’s partnership document with Bosnia.

This did not stop RS politicians’ attacks against the state-level judiciary. In fact, they reached a new high in April 2011, when the RS National Assembly (RSNA), on Dodik’s initiative, passed a number of conclusions¹⁸² and scheduled a referendum in the RS on the High Representatives’ use of executive authority, particularly the establishment of the Court and the Prosecutor’s Office of BiH.¹⁸³ In spite of apparent unity in the PIC for High Representative Inzko to annul the RSNA’s conclusions and referendum plan, on May 13, Catherine Ashton, the EU’s foreign policy chief, agreed with Dodik to withdraw the RSNA referendum decision in exchange for the establishment of a new EU integration tool: high-level meetings in the framework of the EU’s Structured Dialogue on Judicial Reforms. The deal allowed Dodik to claim that the RSNA’s decisions were legal and legitimate, despite violating the Dayton framework. Furthermore, the launching of the Structured Dialogue gave recognition to his complaints against the BiH judiciary.¹⁸⁴

The Structured Dialogue would later be implemented in other Western Balkan countries in spite of its origins and structural deficiencies. Brussels has not explained how SD can overcome Banja Luka’s antipathy to state-level judicial institutions. The format is not rooted in the formal EU integration mechanisms and procedures, making non-compliance by BiH officials inconsequential to the EU integration process. The RS’s non-compliance with the Structured Dialogue proceedings reveals the deficiencies of this *ad hoc* EU format even more clearly. When EUSR Sørensen took office in September 2011, he inherited a conflict over a draft RS Law on Courts. The draft law subverted HJPC authority and competences, contradicted higher-instance HJPC law and undermined the independence of the judiciary. In its conclusions from the second SD meeting in November 2011, the Commission demanded that the RS adjust the draft law to fully satisfy the HJPC’s objections and recommendations. The RSNA still passed the law as it was, in almost complete defiance of those objections.¹⁸⁵

Despite this affront, the Commission on 30 January 2012 brokered a closed-door meeting between HJPC President Milorad Novković and then-RS Justice Minister Đerard Selman.

¹⁸¹ Interviews with international judicial personal, Sarajevo 2009-2010.

¹⁸² One conclusion questioned the authority of the Constitutional Court of BiH.

¹⁸³ Conclusion of the 4th special session of the RSNA, April 13, 2011, http://www.narodnaskupstinars.net/cir/zakljucci/zakljucak.php?id_zakljucka=299.

¹⁸⁴ Toby Vogel, “Ashton agrees to negotiations with Dodik,” *European Voice*, May 13, 2011.

¹⁸⁵ Bodo Weber, “It’s the EU’s turn now”, available at: <http://istinomjer.ba/13/01/2012/its-the-eus-turn-now/>.

The compromise deal did not comply with HJPC objections. With its stance, the Commission undermined the HJPC and judges' and prosecutors' associations from all over the country that had resisted Banja Luka's effort to weaken the HJPC's ability to guard the independence of the judiciary. The backroom deal, which was never publicly announced or explained, exposed Commission officials to manipulation by RS officials. The RS continued to resist implementation of even this compromise. A second backroom deal that was struck in December 2012 only further discredited the EC and the Dialogue and was never implemented by RS authorities.¹⁸⁶ The case of the RS Law on Courts emboldened the RS to continue its attacks on the judiciary through the Structured Dialogue. Other political elites have since joined attempts to roll back post-war reform. None of these conflicts¹⁸⁷ has been solved and the SD has achieved little positive.

A couple of lessons can be drawn from the international community's experience in Bosnia with phasing out its post-war executive role in promoting the rule of law and an independent judiciary. First, by ending the mandate of international judges and prosecutors too early the international community risks to damage painfully achieved results in the judiciary, especially if such a decision is driven by pressure from political elites on the ground. Second, embedding international judges and prosecutors into the domestic judicial institutions is not a good idea. At best it is not implemented in practice and judges and prosecutors maintain their valuable independence. Still it is a fraud legal construct that damages the idea of the rule of law. Finally, the EU's integration toolbox can only partly substitute the role of executive instruments. And they will only make an impact if there is a clear strategy and a joint EU policy driving their use. As none of those lessons were applied in Bosnia, the international community has contributed to a rules-free environment in which the reform and EU integration process is stalled, state institutions, including judicial institutions, are increasingly blocked and the judiciary is increasingly restricted in safeguarding the rule of law and in effectively fighting organized crime and corruption.

VI. CONCLUSIONS AND RECOMMENDATIONS

From the moment of its deployment, EULEX has suffered from a multitude of structural contradictions and constraints. Many of those derived from the EU's disunity over the independence of Kosovo and subsequent passivity in solving the frozen Kosovo-Serbia conflict. It was only in 2013 when those negative framework conditions began to be removed, ironically when the discussion of an exit strategy for EULEX accelerated. In this fluctuating reality, reviewing the mission's mandate was a challenging political endeavor.

The EU has a strategic interest in the proper functioning of the rule of law and of an independent, efficient and multiethnic judiciary in Kosovo, even more so due to the tight relationship between a functioning democratic Kosovo state and a sustainable solution for the existing status conflict. The new mission proposed in the Strategic Review does not approach its task from those European interests. Rather it tries to balance the various relevant variables, some of which are in flux. At the same time, the review is too optimistic on the impact or sustainability of gains recently achieved – namely the EU integration tools after the partial unblocking of Kosovo's integration process and the future of the Serbia-Kosovo dialogue.

The EU should not trade democratization for conflict resolution over EULEX. Such an approach could backfire on both democratization and conflict resolution. It should start from its

¹⁸⁶Discussions and interviews with EC officials, European diplomats and international judicial experts, Sarajevo 2011-14.

¹⁸⁷Over a new Law on Courts of BiH, a reform of the HJPC law and over a proposal to re-politicise appointments of prosecutors by transferring the authority from the HJPC to parliaments.

strategic interests linked with the rule of law mission, not with the Kosovo government's position on EULEX. The undeclared principle that "one can't impose cooperation" sounds reasonable at first glance, but the reality of democratization and conflict resolution policy in the Balkans has never been that simple. In the end, the EU did impose cooperation in the Brussels dialogue on Belgrade. However unpleasant it may be to Kosovo politicians, Kosovo is not a normal candidate country, though neither is Serbia. Since it may only gain full sovereignty with the support of the EU, Kosovo must yield on the rule of law.

Were the debate on the future design of the EULEX mission to continue on its current path, the EU and Kosovo risk losing hard-won improvements in the rule of law. This would negatively impact the Kosovo status conflict and the achievement of full state sovereignty as well as lead to setbacks in EU integration. Moreover, Brussels has at least partial responsibility for additional complications in the decision-making process on the future EULEX mission. The risk of losing the EU's Rule of Law mission in Kosovo is real and the EU can look at itself for running such a risk. A reset is necessary.

RECOMMENDATIONS

1. Timing

The EU should ask for a six-month extension of the current EULEX mandate to be passed by the current Kosovo Assembly as soon as possible so as to avoid EULEX becoming a local campaign issue. The new mission could be seriously prepared after the Kosovo elections and negotiated with the new Government and Assembly.

2. The new mission

The new two-year mission should be substantially smaller, but should maintain its executive function in sensitive cases, especially in the judiciary and police. Sensitive cases should be gradually handed over from EULEX to domestic judges, prosecutors and police officials and their international colleagues should force them to deal with those cases. EULEX should continue to take on new cases, but executive functions should almost exclusively be organized in mixed teams/panels. Clear benchmarks, based on domestic staff's performance shall define the speed of transition.

A. Executive functions

- Maintain EULEX judges in Appellate Court, Supreme Court and the Kosovo Judicial Council. Add EULEX judges to the planned Special Crimes Division at Basic Courts. Maintain EULEX prosecutors in the SPRK, including the EULEX co-Chief Prosecutor.
- International judges should be maintained on the Constitutional Court and brought into the EULEX system.
- EULEX judicial officials should not be integrated into Kosovo judicial recruitment system, but should exercise their function under the constitutional authority of Kosovo's institutions. For the sake of strategic planning and internal transparency the judges' and prosecutors' assemblies should also be maintained.
- EULEX judges should remain on the Kosovo Judicial Council until the following benchmarks are passed:
 - The KJC is reformed along Venice Commission recommendations, namely removing the right to appoint members from the Assembly.
 - Implementation of Norwegian Case Management Information System to codify rules for case allocation and create a system of automatic allocation. The law on

KJC should be amended in order to put the Council in charge of managing Information and Communication Technology.

- Reduce police executive functions outside the north to investigating organized crime, financial crimes, corruption and war crimes. Retain authority to open new cases, but focus on serious, high-level crimes.
- Reduce customs executive functions to administering Border Crossing Points 1 and 31. Remove all other executive functions for customs.

B. MMA functions

- MMA functions should only partially be handed over to the EU Office – IPA-project related activities should be entirely handed over to EU Office; mentoring and monitoring activities should remain stay with EULEX in order to secure coordination with peer-to peer MMA activities of executive staff.
- The current number of five monitors for all Kosovo judges and prosecutors should increase. Monitors should gain the legal right to communicate with prosecutors and look into files.
- MMA presence in the Ministry of Interior should be strengthened in Professional Standards Unit (PSU).
- Customs MMA should have a strong presence in Prishtina headquarters, but not at borders.

C. The North

- EULEX needs to have a strong executive and MMA presence in the north with judges, prosecutors and police in order to facilitate the implementation of the April Agreement and the integration of Serbian parallel structures into the Kosovo state to establish the rule of law.
- EULEX judges, prosecutors and investigative police units with an executive mandate should have a strong presence in the region's judicial and police institutions. They should work with their domestic counterparts in mixed teams/panels, especially in investigating and prosecuting criminal cases. They should also participate in civilian cases that are of an interethnic character.
- EULEX judges, prosecutors and police should take the lead role in highly sensitive cases of war crimes, organized crime and corruption. EULEX judges should form a majority on judges' panels dealing with such cases. EULEX judges, prosecutors and police should, from the beginning, concentrate on 'forcing' their local counterparts to take on sensitive cases. A gradual transition to domestic judges, prosecutors and police should be based on performance benchmarks. Peer-to-peer on-the-job mentoring and training should be combined with other MMA measures.
- Kosovo Serb judges and prosecutors in the region must be evaluated for competence.
- Albanian judges and prosecutors and local branches of the Mitrovica basic court located south of the Ibar should be treated under the same EULEX regime as proposed for the Serb majority territories north of the Ibar.

D. Special Investigation Task Force

As SITF will complete its report and may result in indictments as necessary, the international community should find an adequate solution for a possible mechanism within EULEX-Kosovo

structures to try SITF's investigations. Such a solution should deliver justice on any allegation raised, pay respect to the specific challenges of witness protection within Kosovo territory as well as avoid any potential damage on the integrity of the judicial system in Kosovo. This solution should be established within the existing court system of Kosovo, but jurisdictionally managed by EULEX. Such a mechanism should be exclusively controlled by EULEX judges and prosecutors, but the Kosovo Judicial Council should be involved under the EULEX mentoring function with the aim of increasing future capacities to try high-level war crimes cases.

3. The EU's wider institutions and toolbox

- The EU Office should substantially raise the number of its legal staff dealing with judicial issues. The creation of a rule of law department within the EUO/EUSR comparable to the one that exists at the EU Delegation in Bosnia should be considered.
- The EU should streamline and reduce the overall number of tools and forums dealing with rule of law issues, especially when it will have signed the SAA with Kosovo. In the spirit of an integrated exit strategy for EULEX, the Legislative Review Mechanism and the Joined Rule of Law Board should be integrated into the EU's integration toolbox and cease to exist as separate formats. Following the entry into office of the new European Commission in October 2014 the meaningfulness of the Structured Dialogue should be seriously reviewed.
- Future EU Progress Reports should strongly rely on the insight of EULEX's judicial monitoring team regarding assessment of the judiciary's performance. Accordingly, EULEX judges and prosecutors experience should build the basis for the assessment of the implementation and effects of ongoing and future judicial reforms.

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POLICY REPORTS

Policy Reports are lengthy papers which provide a tool/forum for the thorough and systematic analysis of important policy issues, designed to offer well informed scientific and policy-based solutions for significant public policy problems. In general, Policy Reports aim to present value-oriented arguments, propose specific solutions in public policy – whereby influencing the policy debate on a particular issue – through the use of evidence as a means to push forward the comprehensive and consistent arguments of our organization. In particular, they identify key policy issues through reliable methodology which helps explore the implications on the design/structure of a policy. Policy Reports are very analytical in nature; hence, they not only offer facts or provide a description of events but also evaluate policies to develop questions for analysis, to provide arguments in response to certain policy implications and to offer policy choices/solutions in a more comprehensive perspective. Policy Reports serve as a tool for influencing decision-making and calling to action the concerned groups/stakeholders.