

# **United or Divided We Stand? Perspectives on the EU's Challenges**

**Brussels, 9-10 May 2016**

Conference papers are works-in-progress - they should not be cited without the author's permission. The views and opinions expressed in this paper are those of the author(s).

**[www.uaces.org](http://www.uaces.org)**

**Abstract**

Under the umbrella of the Common Foreign and Security Policy, the EU has launched several civilian missions and military operations with the objective of preserving stability and promoting democratic rule of law beyond its borders. Through an inductive approach, the paper presents the role of EULEX Kosovo- the EU's largest civilian rule of law mission- as a case which tests the European Union's structural strengths and weaknesses in promoting rule of law and democratic consolidation in weak states. Despite almost a decade of the EULEX presence in Kosovo, the country lags behind in democratization levels, it is one of the main origin countries of asylum seekers from the Western Balkans in the EU and its Schengen visa liberalization process is far from being successful due to technical and political factors. The case of Kosovo demonstrates that a missing post-conflict political settlement, combined to a 'dual' mandate of the EU, endanger domestic institutional and behavioural change. The latter contributes to the creation of the conditions for delayed reform implementation particularly in rule of law related areas, raising concerns about contemporary humanitarian crisis response and management and the future of the Union's transformative power.

*Keywords: Common Foreign and Security Policy, EULEX Kosovo, rule of law, weak states, democratization*

**1. The EU as a *sui generis* international rule of law promoter**

This paper is concerned with the controversial consequences of external rule of law promotion under the circumstances of a politically contested statehood, such as the case of Kosovo. Trapped between international state recognition and externally sponsored state-building, Kosovo indicates a representative example of a state-in-the-making, which directly challenges the dynamics of international rule of law promotion ventures such as the ones led by the EU<sup>1</sup>. Kosovo has since 2008 been home to the EU's largest and most expensive international civilian rule of law mission, EULEX, which is currently exercising its fourth renewed mandate in the country. As current waves of crisis unfold, they pose more complex challenges to Europe's relatively recent foreign policy institutional arrangements which appear to have received little input from member states as opposed to other areas such as development assistance or trade. The Lisbon Treaty equipped the EU with an administration functioning exclusively in the foreign and security policy domain, the European External Action Service (hereinafter, EEAS). It also invigorated the High Representative for Common Foreign and Security Policy (hereinafter, CFSP) with a double hatted mandate of vice president of the Commission and the chair of the EU Foreign Affairs Council. However, practical consequences of such an institutional architecture transformation are soon to be challenged by ever changing crises of post-conflict fragile states in the near post-Yugoslav area and Europe's eastern neighborhood.

Generally speaking, recent decades have shown a proliferation in internationally-led humanitarian interventions and the establishment of transitional interim administrations, such as the cases of Bosnia and Herzegovina, and Kosovo. This provides an ample source for post-conflict rule of law promotional features (Chandler, 2006), and the establishment of types of 'neo-trusteeship' arrangements which comprise peacekeeping missions such as in Timor-Leste, broad coalitions like in the case of Afghanistan, or military intervention ventures such as in Iraq. These types of external interventions have often been described as instances of imposed democratization or internal transformation (Whitehead 2004, Ikenberry and Kupchan 1990). Currently, the EU represents itself as a fully-fledged international diplomatic actor with the vision of mediating and intervening globally on behalf of the Union's values in foreign affairs. In particular, by attempting to enhance the coherence and cohesion of its external actions, it seeks to raise its profile as a crisis management actor by deploying several civilian and military missions beyond its borders. It upholds the idea that the EU is an active and capable actor that would make an impact on a global scale. It has been notably stated in the European Security Strategy that Europe should be ready to share in the responsibility for global security through a more active, capable and coherent external action (European Security Strategy, 2003).

This implies the usage of an integrated set of mechanisms for crisis management and conflict prevention through diplomatic, political, military, civilian and development instruments on the one hand and on the other, a fine-tuned coordination between the EU's external action institutions and Justice and Home Affairs policies. Its current stage of development is commonly considered as

---

<sup>1</sup> There is an ongoing debate among scholars with interest in the Western Balkans around the topic of statehood in Kosovo. For the 'minimalist state' approach see: Bieber F., 2013, Building Impossible States? State-Building Strategies and EU Membership in the Western Balkans, Europe and Asia Studies, Vol. 63, Issue 10 (forthcoming in : Bieber F.,(ed.) EU Conditionality in the Western Balkans, London and New York: Routledge. For the unfinished state debate see: Ernst A. (2011) Fuzzy Governance: State Building in Kosovo since 1999 as interaction between international and local actors, in: Democracy and Security, Vol. 7, pp. 123-139

a manifestation of these long debated ideas of making the EU a more capable actor both within and beyond its borders. The latter ambition has led the EU to initiate a great range of tasks in state-building beyond its borders. In the case of Kosovo, it has been observed that the disputes over its status recognition among members of the EU has obfuscated, and in many occasions hindered, the implementation of rule of law reforms. Yet, the missing consensus among EU member states has also had a significant impact on the legitimacy of the EU as a rule of law promoter domestically in the country<sup>2</sup>.

Except from the democratization scholarship which has inquired on the dynamics of external rule of law promotion, attempts were made at analyzing the thriving international competences of the EU as a foreign policy actor. This body of literature is concerned with the coherence of the EU's policies in the foreign affairs and security policy realm, focusing on the conceptions of the EU as a foreign policy actor (Hill, 1990, Smith 1990, Sjustedt 1977). Many efforts have been made in this regard in order to conceptualize the EU's international role and a potpourri of definitions describing it as a 'civilian power' (Whitman, 1998), 'superpower' (Moravcsik, 2010), 'soft power' (Nye, 2004), 'l'Europe puissance' (Lefebvre, 2004) and even 'smart power'<sup>3</sup>, have been coined. These contributions, therefore offer an extensive overview of the EU's actorness projection on the global scene, focusing on definitional and value-based arguments, pivoted around the global strive for rule of law promotion. However, this essay is more interested in shedding light on the EU CFSP substance, its legal instruments, field operative resources and eventual impact on the general system of the rule of law in the recipient country.

Notwithstanding, the evolution of the EU CFSP has undergone a process of incremental change undermined by political and institutional adaptations and innovations and it is not new to Europe. From a structural point of view, many scholars have argued that the so called 'Lisbon architecture', i.e. the set of institutional arrangements, is rather revolutionary, as for the first time, a non-state actor has created its *sui generis* foreign service, composed by a plurality of networks combining the Brussels-based administration and the external delegations abroad. By strengthening the coherence of its external action, the European Union currently seeks to raise its profile as a global player in the world. Currently, the EU acts as an international actor while disposing a complexity of crisis management and civilian mission instruments which include diplomatic mediation tools (declarations, high profile meetings, conflict mediation), humanitarian assistance, military and civilian operations etc.<sup>4</sup> In the last decade, the EU has taken over civil policing and military operations such as in former Yugoslavia (Bosnia and Herzegovina EUPM and EUFOR Althea, in FYROM the Concordia and EUPOL missions) and conducted its first autonomous operations outside its borders, dispatching troops in RD Congo, Sudan, Chad, Somalia, Guinea Bissau, etc. One can argue that the 'crisis management' doctrine is an encompassing one, which includes both civilian operational aspects (rule of law promotion, civilian administration, border assistance, allocation of EU Special Representatives) like in the cases of Iraq (EUJUST LEX), Kosovo (EULEX), Georgia (EUJUST Themis) and military operational tools like in the case of Congo, Bosnia and Herzegovina, Sudan, Somalia etc.

Indeed, given the complex international challenges that the EU currently faces, one can note that there has been an increased need for expanding its scope and action across policy arenas and geographic zones, far beyond the Union's borders<sup>5</sup>. The EU Common Foreign and Security Policy (hereafter, CFSP) agenda often includes a combination of 'traditional' community policies such as development and trade and relatively 'new' policy areas, often falling under Justice and Home Affairs Policy.<sup>6</sup> The treaty reform process was initially launched in the Laeken Convention which included the 'introduction of robust conflict prevention and crisis management capabilities in the EU foreign policy toolbox, in order to cope with a leading role in the new world order'. Along with this, as it was stated in the Laeken Convention: 'within its borders the Union had to bring its institutions closer to its citizens by increasing their transparency, accountability and democratic security (The Laeken Declaration, 2001)<sup>7</sup>.

---

2 Cyprus, Greece, Romania, Slovakia and Spain have not recognized Kosovo's independence.

3 Speech of Benita Ferrero-Waldner, Commissioner for External Relations and European Neighborhood Policy, 'GlobalEurope: what next for the EU Foreign Policy?', European Policy Centre, Brussels, 11 July 2008, available at: [http://europa.eu/rapid/press-release\\_SPEECH-08-387\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-08-387_en.htm)

4 As of May 30, 2012, the Commission had confirmed over 144,8 million euro in humanitarian aid and civil protection in Libya, making the EU, in a comparative perspective, the biggest aid donor after the US. For further reading: US Department of State, US Government Humanitarian Assistance in response to the Libyan Crisis, Fact Sheet, June 2011, available at: <http://www.state.gov/r/pa/prs/ps/2011/06/165315.htm>

5 There is general consensus among scholars, that with the end of the Cold War era, internal and external security aspects are even more linked as they were before. Indeed, Europe envisages a range of threats to its security such as terrorism, proliferation of weapons of mass destruction, regional conflicts, state failure (Somalia, Afghanistan, Liberia, former Yugoslavia), organized crime (cross-border trafficking of drugs, women, illegal migrants, etc)

6 As stated in the Treaty, "the Union shall define the pursue of its common policies and actions and shall work for a high degree of cooperation in all fields of international relations in order to safeguard its values, fundamental interests, security, independence and integrity, consolidate and support democracy, the rule of law, human rights and the principles of international law.", available at: <http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01001001.htm>

7 At the 2001 Laeken European Council Convention for the Future of Europe, amongst all, a long-standing quest for coherence and consistency in the EU Foreign Policy was significantly advanced. For further reading consult: *The Laeken Declaration*, SN 273/01, 15 December 2001, Laeken, Belgium, available at: [http://ec.europa.eu/governance/impact/background/docs/laeken\\_concl\\_en.pdf](http://ec.europa.eu/governance/impact/background/docs/laeken_concl_en.pdf)

Arguably, the EU has not elaborated a comprehensive concept on the visions of the union vis-à-vis foreign policy and furthermore, its added value. Despite not having a proper 'foreign policy doctrine' the EU has nevertheless opted for the stability paradigm in its near borders, whereas decision as whether to launch military operations (such as in the case of Libya at the time of the NATO led intervention in 2011 or the CAR mission deployed only in the capital Bangui) or get involved in conflict mediation (encouraging efforts in South Sudan and to lesser degrees in Iraq and Syria) have often taken place in an unplanned and an ad-hoc basis. There are several reasons to believe so, among others, the differences between the strategic visions of EU member states over foreign and security policy and the varying degrees of complexity in the changing global affairs (Vimont, 2015). Therefore, the EU's external action has continuously been backed by the Commission which through its expertise and influence has contributed to the promotion of an international image for the EU as a soft power, through mechanisms of standards and conditionality in contrast to conventional *realpolitik*. The paper will explore this relation in the following sections through the case of the visa liberalization process in the Western Balkans, as a tangible and powerful tool of Europeanization and policy change that the EU possesses at present vis-à-vis the region.

## 2. Rule of law promotion in weak states: why Kosovo?

Rule of law, both as a notion and as a practice for democracy promotion, is given central importance. This essay aims at identifying and assessing the impact of the internal-external dynamic of democratization, with focus on the EU democratic rule of law promotion as applied to the case study of Kosovo. It is therefore necessary to shed light on the premise on which the rule of law is to be analyzed, and its effectiveness as applied to the specific case study of Kosovo. From a methodological perspective, the rule of law is deemed a necessary tool for studying transitional or hybrid regimes (O'Donnell 2005, Kleinfield 2006, Kopstein 2006). Authors suggest that theoretically, the rule of law has to be considered a precondition for the analysis of democratic change (Morlino and Palombella, 2010). Several studies have attempted to explain the link between quality of democracy and the rule of law as a fundamental dimension (Diamond and Morlino, 2005). The present essay starts with the assumption that the usage of the term 'rule of law' does not need to be exhausted by its initial emergence as a *prima inter pares* dimension of the quality of democracy (O'Donnell 1998), but rather attempts shall be made to extend it to the level of its 'instrumental usage' as a pattern for external attempts at post conflict democratization. But, where does this 'infatuation' with the rule of law come from?

The 'allure' of the rule of law has attracted a wide range of interpretations and a variety of cross-disciplinary definitions. For the purposes of the selected case study, this paper approaches it from an instrumental perspective, i.e. the rule of law as an instrumental pattern for external influence upon domestic democratization of rule throughout the modality of law. The promotional dimension of democratization raises questions over the consistency of the approach by sponsoring polities regarding the implementation of rule of law in the 'receiving' countries. In this aspect, the persistence of rule of law in the European Union's Common Foreign and Security Policy rhetoric may indicate a plausible platform for its self-identification as a *sui generis* normative power (Manners 2002, Bull 2002). However, in both the academic and policy communities the above link is seldom asserted but hardly explained. Therefore, there is a need to investigate and draw together causal links between the role of international agents and democratization, alongside their impact upon democratic domestic change.

Prior to and after the unilateral declaration of independence, Kosovo has been extensively assisted by the international community and particularly the European Union. Key argument to this paper is that the multi-level contested statehood, i.e., at a regional level from Serbia, internally from the Kosovo Serb community and at a broader international level, is currently hampering the implementation of rule of law, promoted by the EU rule of law mission in Kosovo, EULEX. On the other hand, structural and coordination aspects of the EU's external action such as staffing of the mission, strategic leadership, and a relative tendency of ineffectiveness of aid assistance in fighting areas such as corruption, organized crime and the investigation of sensitive war crime cases etc., contribute to the general feeble response of the EU civilian mission to deliver rule of law measures in Kosovo. Despite of the fact that Kosovo, is by far, the largest per capita recipient of EU financial aid in the world and home of the largest civilian crisis management mission ever launched by the EU, it still suffers from an almost proverbial reputation of a lawlessness country dipped in corruption and organized crime. According to Freedom House 'Nations in Transit' democracy score methodology, Kosovo is ranked as a 'semi consolidated authoritarian regime', i.e. a country where there is limited respect for democratic institutions and practices<sup>8</sup>.

---

8 According to Freedom House Nations in Transit methodology, the countries which get a democratization score [5.00-5.99] are listed as semi-consolidated authoritarian regimes. Typically this score matches with failures in meeting the minimum standards of electoral democracy and self-governing. Indeed, electoral fraud and low voter turnouts have indicated setbacks in terms of democratization. However, steps are being made at a formal level of rule adoption with regard to local government and decentralization reforms and the establishment of a modern court system which is expected to improve judicial independence

The case of Kosovo has posed direct challenges to the implementation of the EU's external action given its intricate statehood situation and the lingering rule of law situation on the ground. Linz and Stepan's study on democratic transition and consolidation has notably highlighted the importance of *stateness* as the key variable in assessing the impact of rule of law reforms. It is generally argued that the initial condition for a democracy to exist, is its foundation on the statehood, and the sovereignty of the state is a key determinant in a non-secure democracy (Linz and Stepan, 1996, p.19). Drawing from such reflection, the implementation of the executive mandate of EULEX has been constantly hindered by the political agenda over Kosovo's statehood. Furthermore, Kosovo's citizens have constituted the major number of asylum seekers originating from the region with numbers ranging to approximately 108,000 over a population of 1.8 million, increasing the need for enhanced rule of law intervention. The literature generally provides the following tools for the assessment of the effectiveness of rule of law implementation: (i) administrative and institutional capacity to formulate, implement and enforce law, (ii) the independence of the judiciary and political interference, (iii) the fight against corruption, illegality, and abuse of power and (iv) an effective civilian control of police.

Under former Yugoslavia, Kosovo (together with Vojvodina), was recognized as an autonomous province within the Federal Republic of Serbia, one of the other six constituent republics of the former Yugoslav federation. Because of the rights set forth by the Constitution of 1974, Kosovo was able to create its autonomous institutions, including its own University campus in the Albanian language. The Yugoslav secession wars, severe economic breakdown of the former self-management system and the increasing human rights violations under the nationalist government of Milosevic, led to the complete breakdown of the rule of law, with a deteriorating security situation which sounded the alarm of a humanitarian crisis. This led to the North Atlantic Treaty Organization (NATO) launching a large scale military intervention over Serbia, the first of its kind in NATO's history. The legality of NATO's intervention has been prone to a large controversy and debate over humanitarian intervention, as a case of violation of state territorial integrity (Human Rights Watch, 2000). Nevertheless, with the withdrawal of both Kosovo military and paramilitary forces (Kosovo Liberation Army, KLA) as well as Serbian troops, UN international security and civil presences were deployed (KFOR) together with the adoption, in June 1999, of Security Council Resolution 1244/99 (UNSCR 1244). This installed in Kosovo the *ad hoc* Interim Administration Mission (UNMIK) with a mandate to create a political framework for the establishment of new institutions of self-government, and provide conditions for Kosovo's final status. UNSCR 1244, still in vigor, identifies Kosovo as part of the Federal Republic of Yugoslavia of which Serbia is known to be the successor state (United Nations Security Council, 1999). It is on the umbrella of the same resolution that EULEX, the EU's Rule of Law mission in Kosovo, currently operates with the clear statement of being a '*status neutral*' mission.

After a long period of negotiations, the UN Special Envoy, Martti Ahtisaari, drafted a proposal for Kosovo's status settlement through the formula of supervised independence (United Nations Security Council, 2007). This proposal was not endorsed by the UN Security Council following the veto of Russia and China. However, two fundamental aspects of the draft proposal were implemented *post hoc*. First, the EU Council of Ministers established EULEX, which besides the 'status neutral' terming, is based upon the general agreement of member states that the EU shall provide substantial assistance and funding with the aim of preserving stability not only in Kosovo, but in the wider region of the Western Balkans (Council of the European Union, 2008). This group of states supporting Kosovo's independence (the International Steering Group) would establish the International Civilian Office (ICO) according to the model of the High Representative in Bosnia Herzegovina, a body with the highest civilian political authority to monitor the implementation of the Ahtisaari Proposal, i.e. Kosovo's independence. The head of the ICO held executive correctional powers over the entire institutional setting of Kosovo, such as the annulment of laws adopted by the Kosovo authorities and the appointment or removal of high public officials. This supervised independence was lifted in September 2012, while the mandate for EULEX to carry out its executive functions has been extended until June 2014 (Council of the European Union, 2012).

Kosovo declared unilateral independence from Serbia in February 2008, a decision which was followed by rejection from Serbia and many countries which do not recognize its international status. According to the office of the President of the Republic of Kosovo, as of June 2015, 111 out of 193 UN member states have recognized Kosovo's independence. The EU is currently directly engaged at a political level through high-profile meetings in Brussels in facilitating a direct dialogue between Pristina and Belgrade, where the disputed issue of the northern municipality of Mitrovica remains a highly salient point on the agenda. According to the 2011 census data, an estimated 5% of Kosovo's 1.7 million people are ethnic Serbs, mostly living north of the river Ibar in the Mitrovica area. The volatile north remains a hotspot for EULEX activity and the fatuous status quo is acknowledged by all stakeholders involved in the process of negotiations (Grigoriev, et al., 2012). There is the anemic unsubstantial authority of Pristina,

which does not extend beyond the north of the River Ibar, leaving space for the existence of double institutions and an area for EULEX to implement rule of law reforms.

### 3. The EU in Kosovo: an agent of rule of law promotion?

In contrast to other Western Balkan countries, EU prospects and the process of democratization are, *per se*, jeopardized by a lack of consensus over the issue of Kosovo's unilateral declaration of independence. Notwithstanding, EULEX has adopted a 'status neutral' position, focusing on the technical aspect of reforming and building Kosovo's independent institutions. EULEX is considered, by far, the flagship of the EU's CFSP and indeed the most complex and admittedly resource-intensive civilian mission. With a budget of more than €270 million, and approximately 2600 international and local staff, EULEX is the largest and the most ambitious CFSP civilian mission, and currently has taken the lead in assisting domestic democratic development in Kosovo, especially in the three key areas of rule of law, namely: the judiciary, customs, and the police. Through a mechanism of mentoring, monitoring and advising (MMA), the mission is conceived as a joint effort in assisting Kosovo's new institutions, and law enforcement agencies based upon the European standards of rule of law (Council Joint Action 2008/124/CFSP). The underlying rationale of EULEX's mission in Kosovo is to promote the rule of law and the construction of strong, self-sustaining state institutions as prior conditions to a functional democracy. The MMA activities, despite being one of the main pillars of EULEX's activity in Kosovo and a significant part of it, have encountered much skepticism and often outward criticism. Evidence collected from field interviews suggests that since its last renewed mandate, EULEX has been allocating more resources in the executive pillar. Reasons have to be discussed, even though interviewees generally agree that the Dick Marty report and the Court of Auditors report have had a significant influence.<sup>9</sup>

Along with the aim of promoting local ownership through the MMA mechanism, EULEX experts hold executive correctional powers in broader rule of law fields, in particular concerning the investigation and prosecution of sensitive crimes, including war crimes and other high profile corruption cases (Council Joint Action 2008, Art.3). The legal provisions stipulated in the Ahtisaari Plan<sup>10</sup>, as well as in the Constitution of Kosovo, recognize the presence of EULEX including an ample range of executive correctional powers, i.e. international prosecutors, judges, police, and border management corps have the competence to conduct investigation, prosecution and adjudicate cases of war crimes, organized crime, and corruption, along with property and privatization cases<sup>11</sup>. These executive functions have often been subject to local criticism which questions the issue of accountability of EULEX staff vis-à-vis the local population. The question pertains to claims over judicial misconduct for instance. The only mechanism which is expected to exercise the role of oversight is the Human Rights Review Panel (hereafter, HRRP). Despite several cases of alleged misconduct (especially in the witness protection system during the investigation of sensitive war crime cases), the HRRP has no judicially binding powers, thus serving only as a watchdog of human rights violations. According to its mandate, the Review Panel can issue recommendations for the Head of the Mission who might (or might not) take measures accordingly<sup>12</sup>. This accountability vagueness has engendered major contention locally, especially from grassroots civil society movements, which disapprove the conduct of EULEX rule of law tasks and eventually not recognize them. The latter have contributed to the creation of a colliding situation between international and domestic civil society actors. Instead of a 'rule of law' mission, EULEX is perceived as a 'law ruling' mission vis-à-vis the local society.

In addition, the European Commission has launched several capacity building projects in the rule of law area, while Kosovo continues to vastly benefit from the Instrument for Pre-Accession Assistance (IPA) and the Instrument for Stability (IFS) projects. In the 2007-2011 period, Kosovo received approximately € 421.9 million in projects oriented towards key rule of law strategic areas such as the judiciary, anti-corruption, money laundering, drugs, organized crime and police<sup>13</sup>. The European Court of Auditors reports that the EU budget has funded € 1.2 billion in Kosovo during the 2007-2011 period, the biggest EU financial assistance per capita in the whole world (European Court of Auditors, 2012). However, the Court of Auditors report has been extremely discussed as it gives remarkable evidence on the ineffectiveness of EU assistance in the field of rule of law in Kosovo, especially with regard to the management of projects, the coordination between EU, other donors and the Kosovo institutions and the clarity of objectives to be met.

---

9 Interviews with EULEX officials, Pristina January- March 2013

10 Formally, the Comprehensive Proposal for the Kosovo Status Settlement

11 The mission is expected to ensure that cases of war crimes, terrorism, organized crime, corruption, are properly investigated, prosecuted, judged and decisions efficiently implemented. It is described in Article 2.3 points a,b,c of Joint Action 2008/124/CFSP that the investigation may be conducted by international investigators, prosecutors or judges, acting with or independently from the Kosovo prosecutors and judges and these provisions will apply

12 As for February 2013, the HRRP received a total of 67 claims where 58 cases out of the total were subjected against the Executive Division of EULEX

13 The European Union's IPA Program for the Western Balkans, Thematic Evaluation of Rule of Law, Judicial Reform, and Fight Against Corruption and Organized Crime in the Western Balkans, Lot 3, Final Main Report, February 2013

Apart from the enactment of the EULEX MMA Mechanism for the promotion of rule of law, conditionality and EU-Kosovo policy dialogue tools are expected to fuel domestic democratic progress. The European External Action Service (EEAS) and the Commission hold only one technical level annual meeting with Kosovo, under the framework of the Stabilization and Association Process (SAP) in which the visa liberalization 'Roadmap' reform can be considered thus far as one of the few conditionality mechanisms acting as an incentive for promoting the implementation of rule of law. At a political level, the Commission proposed a 'Structured Dialogue on the Rule of Law' with Kosovo, which will add to the agenda two annual meetings focused on key rule of law domains, such as the judiciary, organized crime, and corruption (Commission, 2012). However, due to the peculiarity of Kosovo's contested statehood, the incentive of future accession, as it stands for the rest of the Western Balkans, may be jeopardized by the inner dynamics of CFSP institutions and their lack of cohesiveness in reaching a common position towards Kosovo's status. Critics of the EU's foreign policy architecture tend to define the above as Europe's missed chance to 'speak with one voice' (Howorth 2010, Risse, 2012)

#### **4. Assessing the European rule of law promotion as a pattern of external state-building in Kosovo**

Whilst the local elite has considered independence and the international recognition of its status as a key strategic goal, Kosovo faces notably tougher challenges, such as its almost proverbial reputation as a lawless country struggling between poverty and organized crime. With particular stress on organized crime, given the international nature of its networks, the fight against organized crime and the strengthening of the rule of law in Kosovo is vital to the EU's internal security. The turmoil of years of conflict and missing order have created a hazardous vacuum of rule of law, which is assumed to have been exploited by organized crime networks. The European Board of Auditors and the EU Office for Criminal Intelligence (EUOCI) note that despite the financial assistance of donors, the situation regarding organized crime in Kosovo has not substantially changed since the arrival of the international community in the early summer of 1999 (EUOCI, 2010). International auditors claim that the investigation of serious crime is ineffective due to limited experience and political interference (European Court of Auditors, 2012).

Alongside this issue, the impunity of war crimes remains a chronic human rights concern in Kosovo, where EULEX has the main responsibility for investigating and prosecuting these cases (Amnesty International, 2012). EULEX's staffing design allows for many international prosecutors and judges to be present in Kosovo and especially in the cases where high-profile political figures are involved, the power of EULEX experts in indicting human rights abuses is expected to be a key factor in dismantling the impunity culture (Ibid. p.21). However, when EULEX became operative, it inherited what it called the 'challenge to fix a failed UN system' with a backlog of 1,187 non investigated war crime cases (Amnesty International 2012, p.16). The 'Marty Report' states that "EULEX [...] inherited a sensitive situation particularly in the sphere of combating serious crime: incomplete records, lost documents, uncollected witness testimony [...] little or no detailed investigation has been carried out in respect of war crimes committed against Serbians and Albanian Kosovars[...] it is very much to be hoped that political considerations will not impede [EULEX] to this commitment" (Council of Europe 2010). International observers note that the number of EULEX staff dedicated to the investigation and prosecution of war crimes is inadequate with relation to the number of cases, causing trial delays under the conditions of insufficient international judges, prosecutors and police. According to field interviews conducted with several EULEX judges and officials, there is sufficient evidence to argue that the mission 's effectiveness is undermined by a human resource bottleneck. Especially in courts, the heterogeneity of legal cultures represented by international judges appears to frustrate the effective adaptation to functional demands in succeeding with the trial of sensitive cases. Often the confidentiality of the judges' mixed panel deliberation is put in question due to the presence of externally contracted interpreters<sup>14</sup>. Additionally, it appears difficult to fill many vacancies in a timely fashion due to reasons related to long procedures between the contributing states and the EEAS or the lack of a readily deployable standby contingent of experts. These factors often hinder the proper adjudication of sensitive cases contributing to a general belief that the EU rule of law promotion in Kosovo is not delivering its expected outcomes.

It is assumed that the EU rule of law promotion may be obstructed from clientelistic networks and political corruption, not totally unknown phenomena in the Western Balkans<sup>15</sup>. A major factor which arises here is the impact of Kosovo's independence non-recognition by five EU member states, which prevents for instance the European Law Enforcement Agency (Europol) from making strategic agreements with Kosovo Police and EULEX, given that the CFSP design, *ipso facto*, gives EULEX no legal personality (European Commission, 2011). These shortcomings hinder traceability, and the investigation aimed at preventing and combating

---

14 Interview with EULEX judge, Pristina, April 2013

15 According to Transparency International CPI, on a scale of [0:10] where 0 indicates a country which is perceived as highly corrupt and 10 where corruption is missing completely (applying to the public sector with indicators such as enforcement of anti-corruption laws, conflict of interest, access to information, etc.). Kosovo's corruption indicator for 2011 is listed at rank 2.9 which typically indicates countries with a perceived rampant corruption.

organized crime<sup>16</sup>. Recent public poll surveys highlight that in public perceptions towards Kosovo; Albanians mostly demonstrate a decreasing level of satisfaction regarding the performance of the Kosovo Security Force, whilst the lowest satisfaction recorded according to the UNDP Public Pulse survey, is with EULEX Police (UNDP, 2012).

Corruption is a persistent concern in general Kosovan public opinion, even though authorities have agreed upon the establishment of a particularly complex anti-corruption institutional architecture<sup>17</sup>. Namely, the Anti-Corruption Agency and the Anti-Corruption Council have been formally set up as independent bodies with funding provided from the Kosovan budget with a mission to investigate and combat cases of corruption. Analysis suggests that apart from having overlapping responsibilities, these bodies have relatively weak power, and have achieved little so far. Given the explicit dissonance between perceptions of high levels of government corruption, and the formal establishment of these bodies, one can conclude that Kosovo remains prone to widespread corruption<sup>18</sup>. EULEX has investigated several corruption cases, which only provided disputable results. The case of former governor of Kosovo's Central Bank who was accused of corruption and money laundering by EULEX, has paved the way for criticism surrounding the issue of interference and political bargaining. After several rulings by international EULEX prosecutors and judges confirming the detention of the Central Bank governor, his trial case was dismissed on the basis of insufficient evidence. Implications in the level of credibility and social legitimization of EULEX in Kosovo have been observed.

With regards to the judiciary, the structural reforms undertaken in recent years through extensive EU funded projects have provided the Kosovan judiciary with a genuine opportunity to maintain its independence by means of its institutional outlook<sup>19</sup>. However, a problem of function over structure appears to undermine the promotion of rule of law within the judicial dimension. Given the peculiarity of a post-conflict transition process, the judicial system in Kosovo has been under the acute pressure of critical factors such as the poor infrastructure of courts, the cultural political legacy of strong executive influences, clientelistic networks, misconduct and corruption, not to mention the perplexingly high backlog of war crimes, and a legacy of highly complex disputes over property and ownership combined with organized crime allegations. The Organization for Security and Cooperation in Europe has given evidence over cases of judicial misconduct due to the unwillingness of judges to render judgments on the basis of law due to an anticipatory tendency to obey to external influences (OSCE, 2012). Despite the presence of international judges and prosecutors, along with international experts working in tandem with local counterparts, the independence of the judiciary is yet another factor which perturbs the effective promotion of the rule of law in Kosovo.

The EU was the main actor who sponsored the political dialogue between Kosovo and Serbia in which the item at the top of the agenda was the disputed municipalities north of river Ibar. Given this condition, the implementation of reform is obstructed by the anemic extension of the central government's power to the region where the rule of law is almost nonexistent. The lack of control over the north by Kosovan authorities has a direct impact on the functioning of the judicial system and a proper police force. Whilst the Council of the European Union has described the region as one with the reputation of being 'a safe haven for organized crime' (Council of the European Union, 2011, p.29); the OSCE study has previously reported the non-functioning justice system, cases of continuing human rights violations and difficult working conditions in some judicial offices, impacting the proper delivery of justice. According to field observations, in the Mitrovica region, parallel courts apply the Serbian law and almost none of the local judges and prosecutors has been able to exercise their duties in the north, since the unilateral declaration of independence. Eventual blockades of the main connecting roads have led to restricted mobility for local and international EULEX judges<sup>20</sup>. These factors might have the potential of developing into larger-scale tensions unless concrete measures are taken to fully implement the agreement and on the other hand, establish a clear conditionality strategy for future accession.

---

16 Critics have been addressed with regard to the information sharing between EULEX Police and the Kosovo counterparts. The Dick Marty report, in an interesting footnote, notes that there is a notable lack of confidence of Kosovo authorities vis-a-vis the EULEX criminal investigations through restricted and often limited access to criminal databases.

17

Gallup International in the Balkan Monitor Survey brings evidence that roughly 97% of respondents in Kosovo perceive the government as highly corrupted in 2012. When citizens were asked whom of the actors do they trust the most in the fight against corruption, 18% of the respondents had mentioned international organizations in 2011. For more detailed survey data see: Gallup Balkan Monitor :Insights and Perceptions, Voices of the Balkans, available at: <http://www.balkan-monitor.eu/index.php/dashboard> [last accessed: 12 November 2012]

18 The head of the Anti-Corruption Taskforce in Kosovo, Nazmi Mustafi, appointed by the Prime Minister Hashim Thaci, has himself been arrested with corruption and abuse of office charges by the EULEX. Article available at: <http://www.balkaninsight.com/en/article/kosovo-s-anti-corruption-chief-arrested-for-corruption> [last accessed on 19 September 2012] . As for November 2012 EULEX has confirmed the indictment against former head of the Anti-Corruption Task Force

19 The justice system reform in Kosovo has been funded through the Instrument for Pre-Accession Assistance (IPA) Projects and the Instrument for Stability Projects. Namely the Legal Education System Reform (3 600 000 euro), Re-appointment of Judges and Prosecutors (5 000 000 euro), Support to Anti-Corruption Institutions in Kosovo (997 260 euro) . For detailed information see: European Court of Auditors, European Union Assistance to Kosovo related to the Rule of Law, Annex II

20 Given the latest Program Report issued in July 2012, the EULEX has been making significant efforts in continuing its rule of law mission in the North of Kosovo, dislocating staff in the area. In order to establish a larger presence in the disputed area, it has also set up a special Task Force which gathers experts from the EULEX Police, Kosovo Police and the EU Office for Criminal Intelligence in order to develop criminal investigations. See: EULEX Program Report: Rule of Law Beyond Headlines, available at: [http://www.eulex-kosovo.eu/docs/Accountability/2012/EULEX\\_Programme\\_Report\\_2012-LowQuality.pdf](http://www.eulex-kosovo.eu/docs/Accountability/2012/EULEX_Programme_Report_2012-LowQuality.pdf)

## 5. Free movement as a tool of Europeanization: the Western Balkans visa liberalization regatta and Kosovo as an outlier

The seven Western Balkans countries, except from Croatia which is an EU member state, Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Kosovo and Serbia were included in dialogues over visa liberalization with the European Commission. Pursuant to the Council Regulation which stipulates a 'black list' of third country nationals who shall be in possession of visas when crossing the external borders of the EU, a variety of criteria were included<sup>21</sup>. Generally speaking, they all relate to illegal immigration and the threat that migratory flows from such countries might pose to the Union's security, therefore establishing a general understanding that the security within the EU borders, shall be 'protected' by the insecure flows beyond them.

It is beyond doubt that the Schengen visa application except from being extremely time-consuming and trying is costly for citizens living in the region. These requirements and what is often the case, limitations, have often created feelings of rejection and isolation, especially among young people who statistically speaking, are dominant in the region. The EC established a praxis of monitoring the implementation of the criteria stipulated under the regulation, through the so called visa liberalization roadmaps, whereby the governments of respective countries submit regular reports on the progress achieved on almost fifty conditions ranging from border management, asylum procedures, biometric passports to international police cooperation. These documents contain a series of specific benchmarks that the country aspiring a visa-free regime with the Schengen area shall meet and which fall within the core body of the EU law, i.e. justice and home affairs.

Specifically, the visa roadmap benchmarks were divided into four blocks, namely the: illegal immigration, document security, public order and security and external relations and fundamental rights. The European Commission has generally sent several field missions of experts streamlined through the Technical Assistance and Information Exchange instrument (TAIEX) or other peer-missions with experts from single EU member states to report on the compliance with the benchmarks. Such an assessment is presented in the Council within the preparatory bodies of the COREPER, and specifically in the case of the Western Balkans in the COWEB, which is responsible for EU relations with the Western Balkans.

Serbia was the first country to receive its roadmap in mid 2008 and after the peer missions of EC and EU Member states experts' assessment, visa requirements were lifted for Serbia, Macedonia and Montenegro in 2009, following Albania and Bosnia and Herzegovina. Thus, Kosovo remained the only country in the region on the EU 'black list' and those holding the Kosovo passport could only travel freely to the bordering countries (Albania, Montenegro and Macedonia), Turkey and Haiti, influencing in the creation of a vision as the 'world's most isolated country' (European Stability Initiative, 2009). The Commission launched the visa liberalization dialogue with Kosovo in early 2012 and it consequently handed over to the local authorities the roadmap of measures to be undertaken in order to succeed in lifting the Schengen visa regime for Kosovo citizens. Among others, Kosovo authorities including the Ministry of Interior, have worked in the past 4 years in improving the readmission and reintegration procedures for Kosovo citizens attempting asylum application in EU member states<sup>22</sup>, document security through an improved civil status registration system and border and migration management<sup>23</sup>.

However, the Commission's roadmap contained to a larger degree a numerous number of measures and benchmarks which directly fall within the scope and mandate of the EULEX mission in Kosovo, namely those related to public order and security such as preventing and combating organized crime, corruption and terrorism, law enforcement, data protection and judicial cooperation in criminal matters (European Commission, 2015). On the one hand, this evidence can be analyzed as showcasing the shortcomings of the EULEX mission on the ground as it sheds light on the highly complex task of promoting and implementing rule of law in Kosovo. The Commission released the third and final report, thereby establishing a set of eight recommendations to be met as a condition upon lifting the visa regime for Kosovo citizens. It has ever since monitored the process, alongside with an ad hoc peer mission of member states experts that could observe the progress made on the Commission's recommendations. The process is now due to a COWEB discussion over the findings and possible future steps.

The case for the visa liberalization for Kosovo is a representative one for a series of reasons. Firstly, it demonstrates that a clear and tangible result, such as the free movement of citizens, is a powerful driver for domestic policy change. However, the perils of such a tool being used for a political purpose, uncover the roots of a problem that has been discussed in the recent years in the scholarship over externally promoted rule of law, that is, the application of double standards by the EU, despite its relevant presence in the small country. This case also demonstrates that despite the strong leverage exercised by the Commission, the member states, yet, need a common vision about the EU's role in international state-building and its vested interests, beyond national ones (in the case of Kosovo, countries such as Spain, Cyprus and Slovakia actively object the country's visa free regime) as a *sine qua non* for an effective external action.

---

<sup>21</sup> Council Regulation (EC), 2001, No. 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, Official Journal of the European Communities

<sup>22</sup> A specific Reintegration Fund has been established in 2015 with a fund of Eur 3.2 million allocated from the state budget including a case management system which facilitates the access of returnees to reintegration services.

<sup>23</sup> This has been a highly contested benchmark as a clause on the ratification of the border delineation agreement with Montenegro as a pre condition for granting visa-free status to Kosovo citizens which was imposed upon Kosovo.

## 6. Conclusion

Kosovo inherited a complex set of problems related to the rule of law, the weakly managed and reckless UNMIK Administration of more than a decade, entrenched with the clamor of advice and discordant international agendas-, which all play a role in the flaccid rule of law in Kosovo. Evidence suggests that the EU's capacity in promoting rule of law in Kosovo is still precarious and vulnerable to political interference which increasingly calls for a coherent and integrated approach from the EU side. The EU's international stature is increasingly growing and so are expectations, for a coherent 'single voice' on important external issues. Through the assessment of the case of Kosovo, the paper attempted to give an account on the shortcomings of the EU rule of law promotion doctrine abroad. At a political level, the abiding controversy of EU Member States over the status of Kosovo and the brokering process of dialogue mediation between Pristina and Belgrade often erode many aspects of the implementation of rule of law reforms in the country.

Rather than opting for a firm systematic model of engagement that would blend the statehood dimension (the question of independence) to the deployment of a civilian mission providing administrative assistance and expertise in key rule of law domains (judiciary, police, customs), the European Union took the decision of demarcating the two. The poor results in succeeding with rule of law reforms in Kosovo as it was attempted to be illustrated through the visa liberalization process, and the evident presence of political interference in the process, indicate that there is space for re-defining the role of the EU in the country. This case, taken as isolated, indicates that the model of democracy promotion under the conditions of a contested statehood rather than being effective, creates a type of status quo ante order domestically, hindering the democratization process.

Triggered by the developments in the CFSP architecture after the entry into force of the Lisbon Treaty, the paper critically presented the case of EULEX as an institutional manifestation of the long debated idea of introducing robust conflict management and rule of law promotion capabilities in the EU foreign policy toolbox. With the aim of challenging such an idea through the evidence of a contemporary case study such as Kosovo, the essay attempted to argue that the feeble response of the EU civilian mission to promote rule of law indicates the extent of how complex and demanding it is for Europe as an international actor to forge a coherent foreign and security policy and to respond in concert to the goals it has set forth. From an analytical point of view, the Lisbon Treaty represents a necessary benchmark for explanatory analysis of the CFSP but not a sufficient one. It has to a great extent solidified convergence from an institutional point of view while edging the coordination of the offices of representation aided by the High Representative which formally brings together the Commission and the Council. From this perspective, one can argue that the EU is equipped with the necessary institutional assets for developing an effective and coherent foreign policy, but the assessment of its real capabilities has to be done through the analysis of case studies.

Finally, it is the case for the democratization scholarship, to reflect on how the concept of democratization through rule of law promotion applies in different contexts. The rise of the rule of law as a new *nostrum* in external democratization ventures shall set the scene for deeper understanding of the applicability of the term in practice. Not only shall it serve as a long-term source for the self-identification of an international actor's rationale of intervening in state-building and democratization processes, but also provide a platform of concrete measures depending on constantly changing political settings.

## References:

Allen D., Smith M., 1990, *Western Europe's presence in the contemporary international arena*, Review of International Studies, No.16, PP.19-37

Amnesty International, 2012, Kosovo: Time for EULEX to Prioritize War Crimes, Campaign for International Justice

Bieber F., (ed.), (forthcoming) *EU Conditionally in the Western Balkans*, London and New York: Routledge

Chandler, 2006, *Empire in denial: the politics of state-building*, London; Ann Arbor : Pluto press

Commission, 2012, Conclusions of the Structured Dialogue on the Rule of Law with Kosovo, Brussels, 30 May, available at: [http://ec.europa.eu/commission\\_2010-](http://ec.europa.eu/commission_2010-)

Council of Europe, 2010, Inhuman treatment of people and illicit trafficking in human organs in Kosovo, Committee on Legal Affairs and Human Rights Report, AS/Jur (2010) 46, 12 December 2010, Rapporteur: Dick Marty, Alliance of liberals and Democrats in Europe, Switzerland

Council of the European Union, 2008, Conclusions on the External Relations Press Release, Council meeting no.2851, Brussels, 18 February

Council of the European Union, 2012, Decision 2012/291/CFSP on the amendment and extension of Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 5 June 2012

Council of the European Union, Regional Report on Western Balkans, 20 June, 11791/11 EUOCI, 2010, Strategic Threat Assessment - Organized Crime in Kosovo, November

Diamond, L., Morlino, L., 2005, *Assessing the Quality of Democracy*, Baltimore MD: Johns Hopkins University Press

Dimitrova, A., Pridham, G., 2004, *International Actors and Democracy Promotion in Central and Eastern Europe: the Integration Model and its Limits*, Democratization, Volume 11, Number 5, December 2004, pp. 91-112(22)

Ernst, A., (2011), *Fuzzy Governance: State- Building in Kosovo since 1999 as Interaction between International and Local Actors*, in: Democracy and Security, 7:123-139

European Commission, 2011, Strengthening ties between CSDP and FSJ actors: proposals for a way ahead , Joint Staff Working Paper, High Representative of the Union for Foreign Affairs and Security Policy, Brussels 5 May

European Commission, 2015, COM (2015) final, Report from the Commission to the European Parliament and the Council: Third report on progress by Kosovo\* in fulfilling the requirements of the visa liberalization roadmap, Brussels, February 18

Fearon, J.,D.,Laitin, D., 2004, *Neotrusteeship and the Problem of Weak States*, International Security, Vol. 28 no. 4, page(s) 5-43

Grigoriev, A., Malazogu, L., Gashi, D. (2012), *From Creative Ambiguity to a Constructive Process: How to Approach Northern Kosovo*, Project on Ethnic Relations and Democracy for Development Report, Pristina

Hill C. (1990), *European foreign policy: power bloc, civilian model- or flop?*, in: Rummel R., (ed.), The Evolution of an International Actor: Western Europe's New Assertiveness, Westview Press, pp. 3155

Howorth J., 2011, *The EU as a Global Actor: Grand Strategy for a Global Grand Bargain*, in: Journal of Common Market Studies, 48:3, pp. 455-474

Howorth, J., 2010, *The EU as a Global Actor: Grand Strategy for a Global Grand Bargain?*, Journal of Common Market Studies, Vol.48, No.3, pp. 455-474

Human Rights Watch, 2000, Civilian Deaths in the NATO Air Campaign, Vol.12, No.1, February

Ikenberry, G.,J.,Kupchan, A.C., 1990, *Socialization and Hegemonic Power*, International Organization,Vol.44, No.3, pp. 283-315

Lefebvre M., 2004, '*L'Europe, puissance par la defense?*', in: Defense Nationale, Etudes Politiques, Strategiques, Militaires, Economiques, Scientifiques, 60:5, pp. 42-55

Levitsky,S., Way,L., 2005, *International Linkage and Democratization*, Journal of Democracy, Vol.16,

Linz, J., Stepan., A. (1996) *Problems of Democratic Transition and Consolidation*, Baltimore: John Hopkins University Press

Linz,J., Stepan,A., 1996, *Problems of democratic transition and consolidation*. Baltimore: Johns Hopkins University Press

Magen, A., Morlino, L., 2009, *International Actors, Democratization and the Rule of Law: Anchoring Democracy?*,UACES contemporary European studies series, New York London: Routledge

McFaul,M., 2005, *Transitions from Postcommunism*, Journal of Democracy, Vol. 16, No.3, pp.5-19

Morlino, L., Palombella, G., (eds.) 2010, *Rule of Law and Democracy: Inquiries into Internal and External Issues*, Leiden; Boston :Brill Nr.3,pp.20-34

Nye J., 2004, *Soft power: The means to success in World Politics*, New York: Public Affairs

OSCE, 2012, Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions, January 2012

Pevehouse J.C., 2005, *Democracy from Above. Regional Organizations and Democratization*, Cambridge, Cambridge University Press

Risse T., 2012, *Identity Matters: Exploring the Ambivalence of EU Foreign Policy*, Working Paper in: Dahrendorf Symposia Series (2012-09)

Sjostedt G., 1977, *The external role of the European Community*, Saxon House

UNDP Public Pulse Report No.4

United Nations Security Council, 1999, Resolution 1244, S/RES/1244 (1999), 10 June

United Nations Security Council, 2007, Comprehensive Proposal for the Kosovo Status Settlement, S/2007/168/Add.1, 26 March 2007

Vimont, P., 2015, The path to an upgraded EU Foreign Policy, Carnegie Europe Policy Outlook, June 30

Wessels W., Franziska B., (2008), *The Institutional Architecture of CFSP after the Lisbon Treaty-Constitutional Breakthrough or Challenges Ahead?*, Research Paper No.10, Challenge Papers available at: CEPS <http://ceps.eu/book/institutional-architecture-cfsp-after-lisbon-treaty-constitutional-breakthrough-or-challenges-a>

Whitehead, L., 1996, *The International Dimensions of Democratization: Europe and the Americas*, Oxford University Press

Whitman R.G., 1998, *From Civilian Power to Superpower? The international identity of the European Union*, Houndmills et.al