Rules of Thumb for the Rule of Law:
EULEX and the Re-making of Kosovo's Juridical Field

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Table of Contents:

List of Figures and Tables………………………………………………iii

Abstract………………………………………………………………….... iv

Acknowledgments…………………………………………………… v

Abbreviations…………………………………………………………....vi

1. Introduction ………………………………………………… 1

1.1 IR Theory and the study of the EU as a global actor…………………………. 4
1.2 A brief anatomy of a CSDP Mission: What is EULEX? ……………………. 10
1.3 A Bourdieusian theory of power and juridical field. ………………………… 12
1.4 Methodology…………………………………………………………………17
1.5 Outline of the thesis …………………………………………………………19

2. Understanding EULEX: A vision of how to not have a vision ……... 21

2.1 The EU and the Western Balkans ……………………………………….... 23
2.2 Negotiating Kosovo's status ……………………………………………... 27
2.3 Ahtisaari Proposal and Kosovo's internationally supervised independence … 33
2.4 Reconciling EULEX with UNSCR 1244 …………………………………… 36
2.5 State-building within a status-neutral framework …………………………… 41

3. EULEX: Constituting and Transforming Kosovar Polity from within..45

3.1 The UNMIK legacy: Creating a polity worthy of ruling? ……………………51
3.2 Understanding EULEX's prerogatives at the legal level …………………… 56
3.3 Behind Monitoring Mentoring and Advising – MMA ………………………. 64
3.4 Executive and MMA powers within the Police Component …………………67

4. The rule of law: between power, authority and legitimacy ………….. 71

4.1 Rule of law vs. rule of law I: MP immunity ………………………………… 78
4.2 Rule of law vs. rule of law II: The North of Kosovo ……………………….. 88

5. Conclusion and the way ahead ……………………………………95

Bibliography ……………………………………………………………….. 101
Appendix ………………………………………………………………… 108

List of Figures and Tables

Table 3.1 Criminal and civil cases taken over between 2009 and 2010 ……………63

Abstract

This thesis examines the politics of international legal tutelage in post-independence Kosovo by investigating the dynamics of power interplay between EU's largest civilian mission to date – EULEX and Kosovar stakeholders. Informed by the "practice turn" in IR and borrowing from Bourdieu's sociology of juridical field, the central argument of this thesis posits that the relations between EULEX as an "expertise-rich" entity and Kosovar institutions as "expertise-deficient" as well as their interactions as partners in the monopoly of violence, have resulted in the emergence of a new legal field that has been grounded by the ontological glorification surrounding the notion of "rule of law." The EU's attempt to socialize the nascent Kosovar polity into international liberal norms and European best practices has resulted in daily institutional struggles that continuously define and re-negotiate the principle of the "rule of law." These struggles, in turn, have provided Kosovar institutions and political elite with a platform whereupon they are able to mobilize meaningful symbolic power from a palette of resources, which helps them legitimize their own claims about authority, local ownership and statehood.

Résumé

Ce mémoire examine la situation politique de la tutelle internationale au Kosovo post-indépendance via l'investigation des dynamiques de pouvoir entre la plus large mission de l'UE à date – EULEX – et la partie prenante Kosovar. Éclairé par le « practice turn » en RI et empruntant à la sociologie du champs juridique de Bourdieu, la thèse centrale de ce mémoire affirme que les relations entre EULEX – en temps qu'entité « riche en expertise » – et les institutions Kosovars – considérés « pauvres en expertise » -, ainsi que leur interactions en temps que partenaires dans l'exercice du monopole de la violence légitime, se sont traduites par l'émergence d'un nouveau champs légal. Ce dernier est largement supporté par la glorification ontologique de la notion d' « État de droit ». Les tentatives de l'UE de socialiser le naissant État Kosovar aux normes libérales internationales ainsi qu'aux pratiques Européennes a résulté en des luttes institutionnelles quotidiennes qui ne cessent de (re)définir et (re)négocier le principe d' «État de droit ». À leur tour, ces luttes on fournit aux institutions et à l'élite politique Kosovar une plateforme sur laquelle elles ont été capable de mobiliser significativement un pouvoir symbolique provenant d'une palette de ressources; ce qui les aide à légitimer leur propres revendications quant à l'autorité, la propriété locale et l'indépendance
étatique du Kosovo.

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Abbreviations

CFSP	Common Foreign and Security Policy
ECLO	European Commission Liaison Office
ESDP/CSDP	European Security and Defense Policy
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
EUPT	European Union Planning Team
EUSR	European Union Special Representative
ICO	International Civilian Office
ICR	International Civilian Representative
ISG	International Steering Group
KFOR	Kosovo Force
KJPC	Kosovo Judicial and Prosecutorial Council
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Cooperation in Europe
PISG	Provisional Institutions of Self Government
SPRK	Special Prosecutor of the Republic of Kosovo
SRSG	Special Representative of the Secretary-General
UNMIK	United Nations Mission in Kosovo

1. Introduction

On February 4th, 2008, two weeks before the Provisional Institutions of Self-Government in Kosovo (PISG) declared unilateral secession[1] from Serbia, the Council of European Union adopted the Joint Action 124 establishing the European Union Rule of Law Mission in Kosovo (hereinafter EULEX). This marked the inauguration of the EU's largest civilian mission to date operating under the auspices of the newly revamped EU Common Security and Defense Policy – CSDP. Intended to support the Kosovar institutions and authorities toward establishing the "rule of law" by assuming law enforcement responsibilities from the UN Mission in Kosovo (hereinafter UNMIK), EULEX's stay in Kosovo has been marked by a myriad of difficulties, not the least problematic of which has been the tarnished reputation of its predecessor.[2] Since its deployment in 2008, EULEX has been a subject of visible local unpopularity, most vividly captured by frequent protests led by the local population and political actors. In some cases, this discontent has not fallen short of direct confrontation with EULEX officers resulting in casualties as well as property damage.[3]

On the policy front, these conflicts have often been cherry-picked by pundits from different fronts who have mostly drawn antithetical conclusions: while some have criticized the alleged perennial interference of the international community in Kosovo, others have insisted that EULEX, by virtue of its mandate, should take a

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[1] Full text of *Kosovo Declaration of Independence* available at http://www.assembly-kosova.org/?cid=2,128,1635.

[2] For a detailed account of UNMIK governance in Kosovo, see Alexandra Gheciu, "International Norms, Power and the Politics of International Administration: The Kosovo Case," *Geopolitics* 10*,* no. 1(2005): 121-146. For a critical account, see Alexandros Yannis, 'The UN as Government in Kosovo' *Global Governance* 10, no.1 (2004): 67-81.

[3] In the largest protest organized by the *Vetëvendosje* (Self-determination) Movement in 2009, 28 EULEX vehicles were severely damaged while 21 *Vetëvendosje* protesters were arrested. *Vetëvendosje* is by far the most vehement critic of international rule and administration in Kosovo.

more rigorous stance. At a more theoretical level, studies into EULEX operations have yielded little beyond researchers' more immediate preoccupations, such as locating EULEX as a CSDP[4] mission in the context of a larger debate concentrating on the prospects of a common European security and foreign policy in the post-Lisbon Treaty era. In both cases, a focus on the face-value performance – success versus failure – of EULEX has become inescapable.

Important as they are, missing in these analyses is a willingness to unpack EULEX's impact on Kosovo's legal field. By looking more concretely at the way the Mission operates and interacts with the Kosovar authorities in practice, this thesis bypasses questions of quality of EULEX's efforts in measurable terms. Instead, it seeks to unveil the contextualized character of power relations between EULEX and Kosovar institutions by looking at how EULEX's mandate to establish the "rule of law" has structured these relations in the first place. In relegating questions of performance and effectiveness to other researchers, this thesis does not intend to minimize the challenges that have been encountered along the way.

Rather, it is argued that the greater bulk of these difficulties can be analyzed by shedding light on EULEX's unique position in Kosovo. By virtue of being EU's first integrated Security Sector Reform (SSR) mission *with* executive powers which comprises police, justice and customs components, EULEX sits at a nexus of a complex give-and-take between a triad of authority, legitimacy and sovereignty (as a function of Kosovo's battle for statehood recognition). In looking at EULEX's

[4] Since the formerly known as the European Security and Defense Policy –ESDP was re-baptized into Common Security and Defense Policy – CSDP with the advent of the Lisbon Treaty in 2009, throughout this thesis the two terms will be used interchangeably depending on the time period under examination.

peculiar mandate as a locus of power, I examine the dynamics and the implications of EU's efforts in reforming and redefining Kosovo's legal field.

To that end, I rely on a theoretical framework that hinges upon the contributions of the "practice turn" in international politics and Pierre Bourdieu's theory of practice. In particular, I draw on Bourdieu's sociology of juridical field, which offers a strong analytical purchase for understanding both the genesis of a newly emerging legal field in Kosovo almost exclusively revolving around the principle of the "rule of law," and the extent to which this field has become a power grid between the agents involved. While being part and parcel of a broader SSR initiative driven by international efforts in post-conflict Kosovo, this new field has provided for a platform whereupon the local institutions and the local political elite have been able to legitimate their claims about authority and wider local ownership in the monopoly on the legitimate use of violence.

The increasing trends of tension between international missions with supervisory roles and local stakeholders where such missions have been deployed compels a series of questions, not the least important of which are those that pertain to the autonomy and authority of the aforementioned bodies. First, how can students of international politics account for what seems to be an intense preoccupation on the part of such missions in general (in this case, supervisory missions like EULEX) with their own rules and the notion of rule-following? On a broader level, this issue also begs a more straightforward question that the IR as a field has all too often ignored: how are we to explain the underpinnings of what some authors have called a "yawning

gap"[5] between what international agencies are intended to do and what they actually do in practice? More to the point, how does an international civilian mission like EULEX fit in this puzzle?

Guided by these arguments, I argue that EULEX can be seen as a compelling example of a highly influential civilian mission that has had an undeniable impact on Kosovo's internationally driven state-building efforts through informing and redefining the very understanding of the "rule of law" in the post-conflict period. I suggest that by creating a space that contests and delineates subject matters of high importance – the understanding of the rule of law in particular – EULEX is transforming Kosovo juridical field as we speak. Crucially, its autonomy has been demonstrated largely on the extent to which EULEX has been able to continuously challenge, redefine and often undermine the authority of Kosovar institutions ever since its deployment in 2008. By extension, EULEX has often come to be viewed in negative light by the Kosovar counterparts, including the population, which initially had been very welcoming to the Mission initially.

1.1 IR Theory and the study of the EU as a global actor

Research on the EU's emerging role as a global actor has been unable to focus on a narrow set of explananda primarily because of the EU's complex nature as a political and institutional body. Notably, the analysis of the EU-sponsored missions abroad operating in the field of crisis management has been engulfed by a larger debate that has focused on the EU's ability to project a powerful image and lead meaningful and consistent policies in its external relations. It is thus no surprise that

[5] See Ingo Venzke, "International Bureaucracies from a Political Science Perspective – Agency, Authority and International Institutional Law," *German Law Journal* 210, no. 1 (2010): 67-98.

the greatest bulk of research from IR theorists with respect to the EU has revolved around the creation and/or the (in)effectiveness of the CFSP and CSDP.

Vast as the history behind these institutional formations may be, realist analysis for its part has focused mostly on looking at the rise of these bodies as either a function of power politics among the EU giants -- Germany, UK and France – or of structural constellations within the transatlantic community. Departing from a more pessimist outlook, both Waltz and Mearsheimer were profoundly dubious of a common European front in face of the fading bipolarity on the continent in the immediate post-Cold War period. While Mearsheimer's skepticism was mostly centered on his predictions of European countries vying for power as the opportunity for multipolarity arose[6], Waltz preferred to look at this issue via a lens of looming unipolarity. As it stood, the US would be sweeping under the NATO carpet any projects related to a common defense and security policy, and that was mostly due to European ineptness to substitute NATO's prowess.[7] Waltz's verdict remained blunt: "[a]s far ahead as the eye can see, Western Europe will remain an international-political cipher."[8]

Talking from a post-St Malo and Cologne Council perspective, other realists have more recently tried to accommodate the genesis of ESDP and its operations in their research, albeit still in terms of balancing. For Posen, although the ESDP was a weak attempt to balance US power, researchers should not underestimate the sheer willpower it took that lead up to its formation. The reasons for this, according to

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[6] John J. Mearsheimer, "Back to the Future: Instability in Europe After the Cold War", *International Security* 15, no.1 (1990): 5-56.

[7] Kenneth N. Waltz, "Structural Realism after the Cold War", *International Security* 25, no.1 (2000): 5-41.

[8] Kenneth N. Waltz, "The Balance of Power and NATO Expansion," Working Paper 5/66, (UC Berkley, Centre for German European Studies, 1998).

Posen, were twofold at the time: first, the Europeans no longer trusted the U.S to address problems of Europe's periphery; and second, many Europeans were not even sure they liked the way that U.S was addressing these problems in the first place.[9] Seth Jones, on the other hand, while according heavy importance to the Europeans' willingness to decrease their reliance on the US, also argued that some form of balancing occurred even among European giants themselves. For Jones, France and Britain in particular were cautious to institutionally bind Germany in attempt to balance its rising relative power as the U.S retreated from the continent.[10] Highlighting France and Britain's initiatives, in a similar vein, Art contends that it was these member states' willingness to increase their political influence within the transatlantic community what prompted them to launch the ESDP. [11]

On the liberal institutionalist front, the record –while mixed – still remains state-centric. Generally, the existence of the CFSP has been attributed to behavior that is guided by a rational-choice dictum, whereby member-states' most immediate concerns have to do with issues of overcoming collective action problems.[12]The contribution has taken a more EU-specific nuance and has been predominantly championed by Moravcsik's liberal inter-governmentalism which looks at the likelihood of the EU member states to further delegate power to a supranational entity in order to deal with co-operation and co-ordination problems. The Union's CFSP as

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[9] Barry Posen, 'European Union Security and Defense Policy: Response to Unipolarity', *Security Studies* 15, no.2 (2006): 150.

[10] Seth G. Jones, 'The Rise of European Defense', *Political Science Quarterly* 121, no.2 (2006): 241-267.

[11] Robert J. Art, "Europe Hedges Its Security Bets," in T.V Paul, James J. Wirtz, and Michel Fortmann, eds., *Balance of Power Revisited: Theory and Practice in the 21st Century.* (Stanford University Press, 2004).

[12] For a general overview, see Hasenclever, Andreas, Peter Mayer, and Volker Rittberger, *Theories of international regimes* (Cambridge: Cambridge University Press, 1997).

such, has been seen as a venue where member-states bargain strategically. Institutional choice-theorists like Wagner argue, for instance, that the CFSP will likely remain intergovernmental, "because the dominant features of its most common task, crisis management, brings about little demand for supranational institutions."[13] According to Wagner, since the effectiveness of crisis management depends on the voting-rules at the Council, the introduction of Qualified Majority Voting (QMV) makes the delegation of power to a supranational institution unnecessary.

To be sure, as Wagner himself points out, effectiveness in delivering crisis management policies, does not guarantee successful European crisis management, not the least so because the EU itself rarely uses QMV in matters of foreign policy. In fact, even if QMV has been introduced in crisis management, member states can still block voting motions for important and stated reasons of national policy. For the purpose of this thesis, this insight is essential because it explains to a great extent EULEX's neutrality toward Kosovo's sovereign status as a reflection of the five EU members that have not recognized Kosovo's statehood to this date.

Constructivism on the other hand, has long tied the role of the CFSP and CSDP and integration within the EU to concepts of norms, identity, strategic culture and socialization, writ large. Testing the waters on whether we can talk about a European strategic culture, Meyer has analyzed the extent to which national strategic cultures have converged in Europe since the end of the Cold War. Although he concludes that so far we can only speak of a narrow common strategic culture due to persisting incompatible norms and beliefs among member states on the use of force,

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[13] Wolfgang Wagner, "Why the EU's common foreign and security policy will remain intergovernmental: a rationalist institutional choice analysis of European crisis management policy", *Journal of European Public Policy* 10, no. 4 (2003): 585.

there is a growing attachment to the EU as an actor with a general preference for using soft power.[14]

The greatest bulk of constructivist contributions in examining the EU to date has been oriented toward the impact of socialization with a particular emphasis being put on investigating "conditions under which, and the mechanisms through which, institutions in Europe socialize states and state agents, leading them to internalize new roles or group-community norms."[15] For Checkel et al., mechanisms such as strategic calculation, role playing, normative suasion are key to understanding how institutions are connected to policy outcomes, with each of these mechanisms reflecting a different level of alternation that occurs between the logic of consequences and the logic of appropriateness. Following in the footsteps of Checkel et al, Tonra has tried to assist the opening of new venues in studying the CFSP by defining the latter in terms of a regime, thereby side-stepping altogether the debates on the unique or comparative aspects of it. Devising a cognitive approach that emphasizes the importance of social learning, Tonra argues that aside from being simply a regulative framework, rules within the CFSP regime are also constitutive of an epistemic community, which then can further embed policymaking within this regime. [16]

All in all, while useful for shedding light on a panoply of issues, cannons and dependent variables about the EU's emerging role as a global actor, most of the aforementioned research has moved little beyond issues of effectiveness and decision-making as they occur in Brussels. There has been hardly any attempt to shift the

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[14] Christoph O. Meyer, *The Quest for a European Strategic Culture: Changing Norms on Security and Defense in the European Union*, (London: Palgrave, 2006).

[15] Jeffrey T. Checkel, "International Institutions and Socialization in Europe: Introduction " International Organization 59, no.4 (2005): 802. See also others in the same issue.

[16] Ben Tonra, "Constructing the CFSP: The Utility of a Cognitive Approach," *Journal of Common Market Studies* 41, no.4 (2003): 731-756.

analysis toward the other end of the spectrum – i.e, the other side of equation of policy outcomes, and there has been little interest in investigating what exactly happens once the EU deploys a mission abroad. After all, as we speak, the EU flaunts 15 completed CSDP missions, while 13 of them are still ongoing or active. By mid-summer, the EU will have launched its 29th CSDP mission abroad.[17] Even if we are to concede that the EU remains a political dwarf, these numbers are substantial enough to beg questions that call for shifting some of the research beyond an analysis that is restricted to investigating the EU politics along a member-state versus Brussels binary.

There is much to be earned by accounting for what exactly these missions do and how they do what they do, not the least important of which are insights on the added value of the EU as a global actor. To quote Ginsberg: "Who better than outsiders absorb the EU's effects? A focus on external political effects of EFP [European foreign policy] activity broadly defined – rather than on the "successes" and "failures" of the CFSP -- avoids judgment calls and makes more concrete what we know of EU's effects internationally. One sees the trees in the forest."[18] Such, is the purpose of this thesis: it moves in and through EULEX -- one of the many CSDP missions — in practice, to understand the political impact that it has had for the "outsiders" for which it has been designed. By extension, it provides an analysis of how in turn these insights contribute to the understanding of the EU's role in its near abroad.

[17] EUCAP NESTOR, the most recent CSDP mission, is expected to be fully deployed by the end of the summer of 2012 in the Horn of Africa with an aim to support regional maritime capacity-building.
[18] Roy H. Ginsberg, *The European Union in International Politics: Baptism by Fire* (Oxford: Rowman & Littlefield, 2001): 5.

1.2 A brief anatomy of a CSDP Mission: What is EULEX?

While a proper and thorough investigation of EULEX is presented on the chapters to follow, this section provides a brief introduction to what EULEX is and what it does. Since in the next section I proceed with an outline of the conceptual and theoretical framework substantiating this thesis, a short sketching of the anatomy of the Mission[19] becomes all the more expedient.

As previously noted, EULEX was created in February 2008 at the behest of the EU Council with a "central aim to assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs areas."[20]Referred to as a civilian "technical mission", EULEX is the EU's first integrated mission – encompassing police, justice and customs components – a characteristic that makes EULEX truly unparalleled among previous and current CSDP missions. While the initial targeted capacity was 3200 people, of whom 1950 international and 1250 local, due to staffing and seconding issues, EULEX currently has a staff of some 2800, of whom roughly 1600 are international officers and 1200 are locals. Of the 1600, about 1400 are police officers, and the remaining include judges, prosecutors, and legal officers who are expected to assist the Kosovar judicial authorities and law enforcement agencies in their progress towards developing and strengthening a multi-ethnic justice and police system in line with the European best practices.[21] While the Mission's budget has been set at around €250 million a year, rough estimations have put its expenses at over €500 million in the period between 2009 and 2011. As a

[19] Throughout this thesis, the term "Mission" will often be used instead of EULEX in order to avoid an excessive usage of the acronym.

[20] EU Council, "Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo," *Official Journal of the European Union*, L 42/92, 16 February 2008.

[21] Ibid.

civilian mission, EULEX's primary responsibilities are oriented towards monitoring, mentoring and advising the Kosovar institutions – all along while retaining a number of executive powers. The existence of these executive powers is what further sets EULEX apart from the rest of CSDP missions. More importantly, it is the somehow equivocal nature of these powers that has become a source of contention between EULEX and the Kosovar stakeholders.

Initially, there were a number of controversies pertaining to EULEX's mandate,[22] amongst others the very fact that it was not until months after it had been dispatched that EULEX had succeeded in securing a broader international support, and especially that of Serbia and Russia at the UN Security Council. In fact, the latter, suspicious of the most of the EU members' intentions to recognize Kosovo independence, were instrumental in blocking any attempt to revise the UNSC Resolution 1244[23] which had effectively put Kosovo under the UN administration. The objective was straightforward: an EU-dispatched mission would challenge the status quo created by the UNSCR 1244, which essentially reaffirmed the preservation of the territorial integrity of Serbia. It was only after all parties (with the exception of the Kosovar government) had agreed that the EULEX would be operational under the provisions of UNSCR 1244 that the deployment of EULEX was allowed to accelerate. As part of the deal, EULEX was to remain operational under the framework of UNSCR 1244, albeit responsible to Brussels and, as such, it had to assume a status-

[22] On the legal controversies surrounding the deployment of EULEX, see Erika de Wet, "The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX," *The American Journal of International Law* 103, no.1 (2009): 83-96.

[23] The UNSCR 1244 reflects in entirety the agreement concluded by former-Yugoslav and NATO representatives – an agreement which ended the NATO military intervention of 1999 in the former Yugoslavia. The UNSCR 1244 effectively authorized a UN-led web of international institutions – amongst others the European Union. From 1999 until 2008, UNMIK assumed a broad set of powers of governance in Kosovo in order to oversee the development of provisional democratic self-governing institutions that would 'ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.'

neutral position toward Kosovo's recently declared independence. On an institutional and legal level, it is this latter development – namely, the status-neutrality of EULEX towards Kosovo statehood – that underlies the tension between EULEX and Kosovar institutions, whereby the self-perception of EULEX as an independent actor with a separate legal-rational standing and executive responsibilities is often seen as a direct encroachment upon Kosovar authorities.

1.3 A Bourdieusian theory of power and juridical field

As stated earlier, the analytical premise of this thesis rests upon the work of Pierre Bourdieu and his theory of practice – and primarily on his work on the sociology of juridical field. Before turning to the latter, I find it important to first engage with some of the key Bourdieusian concepts and aspects of his theory that embed the rest of my arguments.

To begin with, Bourdieu's conceptual arsenal is inherently based on a monist or anti-dualist premise.[24] In attempt to dissolve what he terms "dialectical relations" between agential and structuralist positions that have long perplexed social scientists, Bourdieu theory of practice stresses both the social construction of reality by agents, as well as the structural elements that constrain the processes involved in that social construction of reality.[25] Put differently, agency and structure are in a perennial mutually constitutive relationship. To that end, Bourdieu puts forth a theory that tries to transcend recurrent dichotomies in social science: i.e subjectivist vs. objectivist modes of theorizing, material vs. symbolic dimensions of power, interpretive vs.

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[24] See Loïc Wacquant, "Pierre Bourdieu," in *Key Sociological Thinkers*, ed. Rob Stones (New York: New York University Press, 1998): 215-229.

[25] Michael C. Williams, *Culture and Security: Symbolic Power and the Politics of International Security* (New York: Routledge, 2007): 24.

explanatory methods, micro vs. macro levels of analysis. In so doing, he offers a synthesized framework comprised of concepts such as field, habitus, capital and doxa wherein he is able to underline and shed light on the interdependent and relational aspects of each.

The notion of *field* in Bourdieusian theory refers to a relatively autonomous, yet structured domain or space, which has been socially instituted, which is historically contingent and within which specific sets of practices take place. [26] Examples of field would be, academia, economic field, religion, military, etc. The field is an arena of constant struggles by competent agents for 'stakes,' which can be thought of as field-specific resources of symbolic nature. In that sense, the field operates much like a game wherein agents adopt competitive strategies in order to gain stakes relevant to the field, i.e *symbolic capital*. It needs to be noted that while conduct is always strategic, it is not necessarily conscious. This is because the boundaries of the field, as well as its composition, are defined and redefined throughout the course of this struggle – they are themselves byproducts of attempts to establish and legitimate domination within the field.

Each field is governed by a given *habitus* – a set of dispositions, schemas of perception, thought and action which are partly brought from without the field by participating agents, and partly altered and adjusted in accordance with the new experiences on the field. A given habitus is inculcated in other individuals —mainly novices of the field—through ongoing grooming processes, whereby the authorities in charge of the pedagogic practice disseminate certain sets of historically contingent

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[26] I owe this rendering to Alan Warde, "Practice and Field: Revising Bourdieusian Concepts", CRIC Discussion Paper No. 65 (April 2004): 12, http://www.cric.ac.uk/cric/pdfs/dp65.pdf.

meanings, presenting them as objective truth.[27] The unconscious adoption of a given *habitus* by novices and the acquired tendency to think and act in accordance with the prescriptions of that habitus is what makes for a successful socialization. For this to happen, it is important that the socializing agency (i.e EULEX, in this case) be recognized and trusted as a legitimate subject in the social field (juridical field, or the field of "rule of law") by the apprentices (Kosovar institutions). When this parameter of trust and legitimacy comes under stress, the apprentices in the field can come to see the habitus as a "reflection of a particular political agenda, rather than the normal, common sense of concepts and dispositions."[28]

In his seminal work on the force of law, Bourdieu approaches the realm of jurisprudence, or as he terms it – 'juridical field', as a social universe with a particular logic of its own: a platform wherein agents are constantly under "competition for monopoly of the right to determine the law."[29] Although in principle the juridical field operates like any other field in Bourdeusian theory of practice, what makes this field exceptionally interesting is that nowhere does a specific hierarchy of power relations become more coagulated and treated as a self-evident truth. This is mostly due to law's and legal field's particularly institutionalized nature. As Bourdieu puts it:

> Law does no more than symbolically consecrate –by recording it in a form that renders it both eternal and universal –the structure of power relations among the groups and the classes that are produced and guaranteed practically by the functioning of mechanisms.[30]

In other words, the law inscribes the structure of power relations in such way that renders the structure lasting and durable.

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[27] Alexandra Gheciu, "International Norms", 135.

[28] Ibid., 141.

[29] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *Hastings Law Journal 38* (1986): 817.

[30] Pierre Bourdieu, *The Logic of Practice*, (Oxford: Blackwell, 1990): 132.

Within the juridical field, according to Bourdieu, "there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognized capacity to interpret a corpus of texts sanctifying a correct or legitimized vision of the social world."[31] Where confrontation seems implausible, apprentices or agents that are typically in an inferior/dominated position [they do not have the qualifications and the resources of the superior/dominant agents] have bought into the specific interpretation of the legal order. One can see this dynamic, for instance, in the extent to which people uncritically use taglines such as "it's the law" or "it's against the law" in a tacit demonstration of complicity, unconsciously avoiding an explicit questioning the said law's rationale. Therefore, what is rational or what is good becomes what is legal, thereby imputing some logic of practicality to the law itself.

Thus, confrontations in the juridical field are particularly important because they directly influence the congealing of specific political and social order depending on who among the agents gets to dominate the field. In other words, the ability of specific agents, which are recognized for their expertise in the field, to employ a certain interpretation of the law (and thus affect the enactment of the "rule of law" as a broader concept) locks in, consolidates and, by extension, furthers the authority and the legitimacy of a particular hierarchy. For instance, a specific interpretation of the law will create a precedent for other cases to be interpreted in a similar vein, thereby strengthening and revalidating the power of that precedent in an iterative manner. In this sense, as Bourdieu puts it, "[t]he juridical institution promotes an ontological glorification. It does so by transmuting regularity (that which is done regularly) into

[31] Bourdieu, "The Force of Law," 817.

rule (that which must be done), factual normalcy into legal normalcy [which is] sustained by a whole arsenal of institutions and constraints."[32]

As is the case with all other social fields in Bourdeusian theory, this struggle for control, i.e for authorized or legitimized interpretation of the texts of the legal corpus and practice, occurs in the realm of the symbolic, linguistic and hermeneutic.[33] As Bourdieu claims, "reading is one way of appropriating the symbolic which is potentially contained in the text. Thus, as with religious, philosophical, or literary texts, control of the legal text is the prize to be won in interpretive struggles."[34] Implicit in this struggle of monopolizing the interpretation of the law is "the tendency to universalize one's mode of thinking, broadly experienced and recognized as exemplary"[35]—which, according to Bourdieu, is also an effect of the ethno-centrism of dominant groups. In this process, the "universality of law" therefore becomes the holy grail of the legal praxis.

By looking at EULEX as an expertise-rich entity and Kosovar institutions as expertise-deficient (or expertise-recipient), I examine the power relations between these two agents in terms of Bourdieu's theory of juridical field. In particular I approach their power struggles from a lens of the two vying for symbolic capital – legitimacy and authority. I argue that these struggles have been instrumental in helping each party delineate and disentangle their own separate share of the monopoly on violence as they both competed to determine the Kosovar juridical field through offering differing interpretations of the "rule of law". Following Bourdieu, I consider

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[32] Ibid., 846.

[33] See, Richard Terdiman, translator's introduction to "The Force of Law: Toward a Sociology of the Juridicial Field," by Pierre Bourdieu, *Hastings Law Journal 38* (1986): 808.

[34] Bourdieu, "The Force of Law," 818.

[35] Ibid., 847.

this monopoly on violence as being not only physical (in Weberian terms), but also symbolic.[36] Despite sounding as a contradiction in terms, I have deliberately referred to these struggles as an attempt to recover and legitimate their separate share of monopoly on violence because, as I demonstrate, by virtue of having executive/exclusive powers in carrying out investigations, prosecutions and adjudications of certain crimes, EULEX is a partner with Kosovar institutions in exercising the legitimate use of force (be it physical or symbolic). Put differently, in Kosovo, the monopoly on the legitimate use of violence is actually shared between Kosovar authorities and EULEX. Such complex political infrastructure is a consequence of Kosovo's unfinished statehood or "supervised independence." In international community's jargon, the "supervised independence" refers to the formula upon which Kosovo status settlement and Kosovo's statehood has been based.

In referring to EULEX as expertise-rich and Kosovar institutions as expertise-deficient, I do not simply assume *a priori* their power differentials: there is a long history of institutionalization that has taken place that contextualizes the current architecture of power. Of great importance is the institutional design of EULEX itself and its position today, which embodies years of strong diplomatic struggles revolving around Kosovo's unresolved political status and contested statehood that has not faired well even after Kosovo's declaration of independence in February 2008.

1.4 Methodology

The nature of this project has compelled that I rely on a wide array of data primary and secondary, qualitative and interpretive. While in content this thesis

[36] Frédéric Mérand, *European Defense Policy* (New York: Oxford University Press, 2008): 6.

remains largely under the umbrella of political sociology, its wide scope also straddles the realms of public international law and European law. In order to remain true to these interdisciplinary foundations, a thorough review and analysis of a series of legal documents – from memos, to resolutions to joint actions and policy strategies – pertaining to the UN, EU and EULEX has come to be viewed as necessary. Similarly, I have put under scrutiny relevant data and documents that have been published by Kosovar authorities and judicial institutions. Where appropriate, I have drawn directly from parliamentary memos as well as documents and rulings issued by the relevant courts. Furthermore, press releases regarding specific events when tensions between Kosovar authorities and EULEX were seen as visibly high were also pertinent to this study.

More importantly perhaps, this project anticipated a field research in Kosovo that was complemented by 18 ethnographic interviews with key political figures among others, Members of Parliament, advisors of the Prime-minister, representatives from different ministries, EULEX legal officers and political advisors, political advisors from the International Civilian Office and other EU related agencies. In attempt to offer a more nuanced account, I have also interviewed civil-society members, political analysts, journalists and social media analysts as well as members of the Kosovar society. The interviews were semi-structured in order to allow for more flexible data collection and in order to penetrate the practical essence of the existing power relations as presented from each side of the spectrum.

Following my Bourdieu-inspired framework, I have mostly tried to capture the logics shaping each side's engagement (EULEX on one hand, Kosovar institutions and authorities on the other), albeit always by paying attention to their contextualized

nature. In so doing, throughout this thesis, I make an attempt to refer back to the historical aspects of each venue that I explore. Guided by a philosophy that tries to shed light on the positional aspects of each agent, my goal was to recover and capture insights from their work as the stories unfolded. In as far as EULEX officers are concerned, I have tried to understand the level of loyalty towards the Mission itself as well as discover how officers feel and how they normally react when presented with a scenario, which pits the Mission against the local stakeholders. Lastly, more detailed information about the methodology used is offered at the beginning of each chapter.

I have obtained informed consent from each interviewee in written. A list of interviewees is offered at the end, with some of them remaining anonymous as per their wishes. The interviews were conducted in compliance with the McGill Research Ethics Board.

1.5 Outline of the thesis

The rest of this thesis is structured as follows: In the first chapter, I provide with a thorough examination of post-1999 international presence in Kosovo in order to contextualize the creation of EULEX. In so doing, I argue that the political and diplomatic reality on the ground dictated that the mandate of the Mission be created having already embodied the difficult process of negotiations to settle the political status for Kosovo. Of particular importance was the extent to which the stakeholders that were heavily involved in Kosovo and some diplomats essentially dislocated Kosovo from an agenda of international interest all the while bringing it closer to Brussels.

The second chapter offers institutional insights into EULEX's mission as I unpack its mandate thoroughly including a detailed account of both MMA and executive powers not only as they have been established by the Law on Jurisdiction, but also in practice. In so doing, I try to show that following UNMIK's legacy; the Mission has been institutionally set up such that it would be privileged and able to determine the contours of the "rule of law." Having this institutional advantage allows EULEX to systematically structure the "juridical field" without necessarily asking for the consent of Kosovar authorities.

Lastly, in the third chapter, I examine two highly contentious episodes between EULEX and Kosovar authorities that reveal the intricacies of the power interplay. I argue that despite its relatively short stay in Kosovo, EULEX seems to have transformed the "juridical field" just about enough to start seeing Kosovar institutions as contenders in the game of establishing the "rule of law". In both episodes, Kosovar authorities were effectively able to deliver their own articulations of truth with respect to the "rule of law."

2. Understanding EULEX: A vision of how to not have a vision

In order to better examine EULEX's engagement in Kosovo – including the activities pertaining to its mission – this chapter will look at the backdrop against which the mission was conceived. Because of the highly entrenched network of international actors in Kosovo, locating the Mission vis-à-vis other EU agencies in Kosovo becomes all the more necessary. Toward the end of this chapter, I also try to unpack the institutional relations between these agencies in order to better and fully account for EULEX's separate, albeit contextualized, juridical and political impact on Kosovo, which would be fully dealt with in the chapters to follow. I argue that the establishment of EULEX and its mandate, rather than being shaped by *prima facie* state-centric power politics, has been crucially informed by almost a decade of diplomatic *give-and-take* -- negotiations and interaction, bargaining and exchange centered on the future political status of Kosovo. In that sense, the nature and scope of the transactions undertaken by the key actors involved speaks more closely to a system of still immature, but nonetheless existent, international "transgovernmental field" that involved not only state actors, but also non-state entities, which together went to pains to bring Kosovo closer to Europe diplomatically than it had ever been.

In approaching Kosovo as a *sui generis* case that deserved a *sui generis* solution, the logic of this field was paramount in displacing the locus of attempts to handle Kosovo's political status from an international platform – that of the UN and the transatlantic community —to a regional platform, that of the EU. Surely, this dislocation of Kosovo from an international agenda of an international interest to a European agenda of a European interest was also met with some resistance. This

resistance was mustered by not only the parties that would have otherwise been crucially affected by these transformations, i.e the local population in Kosovo and Serbia, but also by the EU's own institutional deficiencies. EULEX, as such, is essentially a product that remains strongly anchored on the nexus of this binary.

Secondly, in looking at how EULEX came to be crowned with a rather unique mandate, one can still talk of a dynamic that ultimately lends itself to a lack of a dominant strategic culture on the part of the EU. Ironically, it is also this lack of a convergent strategic culture that has primarily allowed for the creation of EULEX as an unparalleled CSDP mission – exposing a mandate that is in substance invested in a project of state-building in Kosovo, all the while remaining agnostic toward Kosovo's statehood. In practice, these contradictions are best epitomized by an unheard-of *modus operandi*, which has led to the exposition of EULEX as being more of a political project than a technical mission. On the other hand, this complex setup has also demonstrated that the EU is capable of moving beyond its institutional shortcomings meaningfully as it tries to establish itself as a global actor.

In sum, in this chapter I look at two different processes spanning over two distinct stages in the lead-up to the creation of EULEX. The first has to do with the EU's mechanics of bringing Kosovo closer to the EU – i.e, the 'Europeanization' of Kosovo as a political issue because of the perceived implications to the European stability; and, the second has to do with locating the mission within a dynamic that defines Kosovo as a *sui generis* case in international politics requiring a *sui generis* solution, for which a Mission like EULEX was best suited to deal with. Thus, in being the only operational CSDP mission with executive powers, EULEX largely embodies this logic of *sui generis.*

In terms of methodology, this chapter benefits primarily from a detailed, but by no means exhaustive, historical and contextual analysis of the post-conflict international diplomacy in Kosovo. A reading and an interpretation of relevant documents from the Cologne Council to the Comprehensive Proposal for the Kosovo Status Settlement (shortly known as the Ahtisaari Package) is key to exploring some of the abovementioned dynamics. Such undertaking rests on the assumption that the construction of post-war reality in Kosovo, of which EULEX is only a facet, largely appertains to the aforementioned diplomatic practice. This material provides the symbolic and discursive aspects of the diplomacy that has both constructed and constituted the reality on the ground.

2.1 The EU and the Western Balkans

While the EU has only recently found itself more earnestly engaged in providing security for its "near abroad", two decades ago such preoccupation was anything but a foregone conclusion. The early episodes of the Yugoslav crisis had rather strikingly demonstrated that the much-flaunted common European foreign and security policy was perhaps more of a myth than reality. In 1991, as Yugoslavia was showing its first signs of collapse, the EU mediator and Luxembourg's Foreign Minister – Jacques Poos, boasted that "the hour of Europe has dawned," thereupon alluding pre-emptively to the EU's readiness to act in unison in face of a regional calamity. Short of materializing, statements such as those of Jacques Poos' were symptomatic of a European Union, which subject to its internal divisions remained a political dwarf. For many foreign policy analysts, it was as if the Balkans crisis' sole purpose was to expose the need for a more concerted action toward the creation of a

common EU foreign policy, which until then had remained largely a hostage of the divergent policies of its member-states.

Indeed, while the Bosnian crisis proved to be European diplomacy's "baptism by fire",[37] it was the Kosovo crisis of 1999 the one responsible for midwifing the European Security and Defense Policy.[38] Rather ironically, the need for the ESDP received its first attempts of institutionalization in June 1999 at the Cologne Council, during the peak of NATO' air campaign on former Yugoslavia.[39] The declaration of the Cologne Council – itself a milestone for the Union's Security and Defense Policy– emphasized the Union's willingness to be re-positioned in the driver's seat in all future projects with an objective of consolidating regional stability. It was at the Cologne Council that the Council of the EU officially pledged its commitment to be the leader in the future reconstruction efforts in Kosovo upon the termination of hostilities. In the Presidency Conclusions, the Council noted:

> The European Council reiterates the European Union's commitment to take a leading role in the reconstruction efforts in Kosovo, and calls on other donors to participate generously in the reconstruction effort. To this end, a clear and effective transitional administration of the province will need to be established in the framework of the political solution. This administration, which could be headed by the European Union, will need to have the authority and capacity to act as a counterpart to the international community, enabling an effective reconstruction and rehabilitation process. [40]

Adopted after NATO ended its air campaign on Yugoslavia, the UN Security Council Resolution 1244 of June 1999 established the framework for the international civil and

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[37] See Roy H. Ginsberg, *The European Union in International Politics, 2001*.

[38] See Wolfgang Koeth, "State Building Without a State: the EU's Dilemma in Defining Its Relations with Kosovo," *European Foreign Affairs Review* 15 (2010): 227-247.

[39] Coincidentally, on June 3rd of 1999, Milošević had formally accepted the terms of an international peace that would end the hostilities.

[40] Council of the European Union, *Conclusions of the Presidency: Cologne European Council, 3 and 4 June 1999'*, Bulletin of the European Union, no.6, Art V, point 65.

security presence in Kosovo[41]. In a matter of weeks, Kosovo was effectively put under the administration of United Nations Interim Mission in Kosovo – UNMIK, a mission vested with full civil and political authority and sole responsibility for the governance of Kosovo. Officially a UN protectorate, Kosovo was to be administered by an institutional architecture whose activities were branched into four different pillars covering essentially all of the components crucial to any form of liberal democratic governance.[42]

By committing to becoming an active and key stakeholder in the interim civilian administration in Kosovo, the EU evinced readiness to extend its presence in post-conflict Western Balkans. It did so by assuming single-handedly all of the operations of one of the four pillars of UNMIK in line with the spirit of the Cologne Council. Dubbed as the "EU Pillar" -- the pillar of economic reconstruction and development – sought to primarily deal with macroeconomic reforms. In general terms, those included but were not limited to issues of privatization and regulatory regimes, financial assistance and the reorganization of trade, currency and banking

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[41] To this day, interpretations of UNSC Resolution 1244 have been likened to the Gordian Knot of Kosovo's sovereign status. Two very different discourses have surfaced on the matter since 1999; the first, suggesting that the resolution 1244 is "status determined" and the second arguing that it is "status open." The first line of reasoning is mainly used by Serbia and its supporters to suggest that UNSCR 1244 guarantees the territorial integrity of Serbia; while the second is that adopted by the Kosovar Albanians and sympathizers of Kosovo independence who have interpreted Res. 1244 to suggest that it does not place limitations on the final status settlement. In July 2010, the ICJ advisory opinion on the conformity of Kosovo's unilateral declaration of independence with international law, ruled that while "[..,]resolution 1244 (1999) clearly establishes a regime; it cannot be understood as putting in place a permanent institutional framework in the territory of Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status without prejudging the outcome of the negotiated process." Today, exacting the nature of this regime remains a point of much contention between the parties concerned.

[42] UNMIK's activities at the time were organized around four pillars: Pillar I -- Police and Justice, under the supervision of UNHCR; Pillar II -- Civil Administration, run by the UN Department of Peacekeeping Operations; Pillar III -- Democratization and Institution-building, under the leadership of the OSCE; and Pillar IV -- Reconstruction and Economic Development, administered by the EU.

matters. Even though, the Union's role was initially centered on proctoring Kosovo's transition to a market economy, the Pillar soon benefited by an expansion of other EU programs such as that of the European Agency for Reconstruction (EAR) and a segment of EU Monitoring Mission (EUMM), which together represented the EU's face in Kosovo.[43]

Yet, while the EU ensured that its operations were configured within a general framework of the international presence in Kosovo, it also sought to establish a rather distinct image that was substantially detached from the latter. For instance, although the 'EU Pillar' derived its legitimacy from the UN and SC Res. 1244, its operations were entirely sponsored by the European Commission. Put differently, while the chain-of-command of the Pillar was in New York, the Pillar itself was funded by the EU. The heavy role of Brussels was noticeable even at the employee level. According to some reports, most EU Pillar employees seemed invested in carefully highlighting their association with the EU, not simply in order to boost their credentials, but also to -- at least in theory – move away and protect the Union's reputation from the unpopular image that UNMIK had come to espouse. So much so that some scholars have noted that the employees associated with the pillar would always identify themselves as working for the EU, rather than the UN. [44]

The adoption of the European Security Strategy in 2003 entitled "A Secure Europe in a Better World" would be the most indicative step of the EU plans to engulf the Balkans in its future integrationist program by highlighting the latter's European future. In so doing, the EU would make the Balkans a testing ground of the

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[43] Koeth, "State Building Without a State," 2010: 229.

[44] Koeth notes that Pillar IV used the website <www.euinkosovo.org> and the domain eumik.org while the staff regularly introduced themselves as working for the EU.

viability of the Union's nascent common foreign and security policy. The strategy explicitly suggested that "the credibility of the [EU] foreign policy" depended on the consolidation of the achievements [in the Balkans].[45] This consolidation would have to depend on the EU's wide array of civilian tools at its disposal. The following paragraph is worth quoting at length:

> The quality of international society depends on the quality of the governments that are its foundation. The best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order.[46]

Whether the above suggests an imminent securitization of Balkans as a necessary step for the Union's ability to project a common foreign policy on the region, remains contentious and beyond the scope of this thesis. However, suffice it to say that by many accounts the EU's engagement at this point did suggest that the EU was progressively showing signs of wanting to be on the driver's seat in leading post-conflict reconstruction efforts.

2.2 Negotiating Kosovo's status

Between 17 and 19 of March of 2004 a wave of riots and acts of civil disobedience swept through Kosovo with severe consequences for the already tense inter-ethnic relations in the province. The so-called March Riots[47] – the most violent ethnic clashes yet between Kosovo Albanians and Kosovo Serbs ever since 1999–

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[45] European Council, *European Security Strategy: A Secure Europe in a Better World*, (Brussels, 2003).

[46] Ibid.

[47] According to a report published by the ICG on the issue, "the rampage [had] left nineteen dead, nineteen dead, nearly 900 injured, over 700 Serb, Ashkali and Roma homes, up to ten public buildings and 30 Serbian churches and two monasteries damaged or destroyed, and roughly 4,500 people displaced." See International Crisis Group, "Collapse in Kosovo", ICG Europe Report No. 155, 22 April 2004.

proved to be another critical juncture, which would bring the EU further to the forefront of all future political transactions in and about Kosovo. While the exact causes of the ensuing inter-ethnic violence are even today still debated, the general sentiment on the ground was that the lingering limbo status of Kosovo and the delays on initiating the diplomatic process for a political settlement had generated an explosive mix that could no longer be ignored. Central to this debate was the idea that the March Riots, highly destabilizing and painful as they were, occurred mostly as a reaction to the international community's approach to Kosovo and, in particular, to UNMIK's endorsement and implementation of the highly contentious "standards before status"[48] policy.

The latter was a series of benchmarks that were devised by the UN and that aimed to commit the Kosovar political elite to the notion of good governance with a primary focus on developing and sustaining a multi-ethnic society. According to the logic of "standards before status", which was designed by the Special Representative of the Secretary-General (SRSG) for Kosovo – Michael Steiner and adopted by the Contact Group in November 2003, the provisional government in Kosovo had to warrant undeniable progress on the eight different statutory areas in order to have the Kosovo political status reviewed by mid-2005 by the international community. These areas included: representation (functioning democratic institutions); tolerance (freedom of movement, property rights); peaceful conflict resolution (rule of law, dialogue with Serbia, and transformation of Kosovo Protection Corps) and economic issues.

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[48] *See* Anne-Marie Gardner, "Beyond Standards Before Status: Democratic Governance and Non-State Actors," *Review of International Studies* 34, no. 3 (2008): 531-552 for a detailed account of "standards before status" strategy in Kosovo and Nagorno-Karabakh.

Making status negotiations contingent on realized progress on these eight standards generated much resentment among Kosovars and in particular among the Albanian majority. Not only was the "standards before status" viewed by the local actors as an overly ambitious program of liberal-democratic norms which would perhaps take years to be fully implemented, but it was also considered by many as rather disconnected from the reality on the ground. In fact, many were wary of SRSG Steiner's doing away with his predecessors' "Agenda for Coexistence" which was more geared toward creating a civic contract that would seek to rebuild trust and communication among the different ethnicities at the grassroots level.[49]

Arguing that "standards before status" was essentially opting for an institutionalization of multi-ethnicity often by means that amounted to political bribery, some analysts looked upon it as counterproductive.[50] For instance, with respect to the tolerance and inclusion of the minorities (in particular the Serb community), the onus of progress was primarily placed on the efforts that were being made by Kosovar authorities. In so doing, the Kosovar government was strongly urged to advance the implementation of reforms for the protection of minority rights. Several campaigns ensued to this effect: for one, the Office of the Prime Minister pushed for the adoption of key legislature that created reserved quotas of participation for minorities, and especially for Kosovo Serbs. It advanced an affirmative action program for the civil service and it launched an outreach program for the recruitment of the minority community members. Even though with mixed results, the outcomes were seen as tangible. Yet, other politicians, while supportive of the general idea,

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[49] International Crisis Group, "Kosovo's Ethnic Dilemma: The Need for a Civic Contract," ICG Europe Report No. 143, 28 May 2003.

[50] Ibid., 18-20.

cautioned against bestowing further exclusive rights to the minorities by arguing that that process was hampering the integration process and creating further divisions within the society. To paraphrase a member of the Assembly, what was wanted was a society of equal citizens, not favoritism.[51]

On the other end of the spectrum, this process of inclusion and enfranchisement was also contingent on the level of consent and collaboration from the minorities. Granted that the Kosovo Serbs had continuously expressed dissatisfaction with the status quo post-1999, for Kosovar authorities they remained largely uncooperative. On several institutional layers and occasions, Kosovo Serbs had categorically refused (with this still being a persistent issue) to accept a status of minority in Kosovo. For one, they regarded and still regard Kosovar Albanians as an actual minority within a majority Serb state. This position has remained unwavering ever since 1999: Kosovo Serbs believe their government to be in Belgrade and, as such, they remain reluctant to integrate in Kosovar institutions, considering the latter as illegal. To this day efforts to incorporate Kosovo Serbs and abolish what Kosovo authorities deem as parallel structures that have been running since 1999 have been met with resistance.

All in all, parties from both sides remained deeply distrustful of each other's intentions and blamed one another for not making satisfactory effort toward inter-ethnic coexistence. According to some surveys, as many as 45.6 percent of the Kosovo Serb respondents at the time considered the Albanian efforts toward integration as insufficient, while 35 percent of Albanians said that Serbs lacked the willingness to integrate. In face of such disparities in opinion as well as lack of a comprehensive

[51] Ibid., 13.

mechanisms to tackle them, the rigor of the "Standards before Status" and its strict implementation timeframe were viewed with much skepticism and considered as only furthering the securitization of ethnic relations in Kosovo.

The difficulties associated with the implementation of the "standards before status" policy were seen by the Kosovar political elite in Prishtina as contributing to the congealing of an unsustainable status quo that took a turn for the worst during the March Riots. In as far as UNMIK's insistence on the "standards before status" was arresting the prospects of a political settlement that would pierce the cordon of isolation that Kosovo citizens had experienced since 1999, the blame was mainly put on the UN. A USIP report analyzing the causes of March Riots, amongst others, concluded that "the ingredients of the violent explosion [were] all too evident: political extremism, hopeless youth, and slow movement on the status question proved a powerful combination."[52] According to the report, instead of dooming its own presence, the UN needed to move toward a more constructive approach; one that shifted from a policy of "standards before status" to one of "standards with status."

While the Kosovar political elite and the Kosovar cause for independence would suffer greatly the consequences of the March Riots, the episode itself provided for a new impetus on the status negotiation of Kosovo. This also set the stage for a greater engagement by the EU, which began with the UN SG Kofi Annan's appointment of the Norwegian diplomat Kai Eide to undertake a comprehensive review of the situation on the ground. The report produced by Eide had an overall objective of evaluating the progress made on the standards and of assessing whether the conditions were ripe for the political process to begin. The report's verdict was

[52] Daniel Serwer,"Kosovo: Status with Standards," *United States Institute of Peace*, April, 2004.

that while the progress on the standards had been uneven, "the overall assessment [had] led to the conclusions that the time has come to commence [the status negotiation] process."[53]

Eide's report remains crucial in that it ultimately laid the foundation for setting in motion another process in the Kosovo conundrum – that of status negotiations. In as far as the EU was concerned, Eide's report was the first of its kind to hint to EUs commitment to step up its presence in Kosovo. In line with the prevalent rhetoric of regional security at the time, it supported the idea that since Kosovo was located in Europe, the Union "should […] play an enhanced role in the standards process, prepare for a longer-term engagement and provide visible evidence of Europe's commitment to Kosovo." [54]

It advised that the Union should be expected to take on a more prominent role, in particular in the areas "of police and justice, where a continued presence would be required, albeit smaller and more specialized; to monitoring and supporting the standards process, which will gradually be merged with the established EU processes; and to a focused capacity building effort."[55] Lastly, the report advocated an institutional setup with a high representative, akin to that of post-Dayton Bosnia, firmly tied to the EU contributions which would even envisage a "Bonn Powers" arrangement -- essentially an arrangement that would bestow upon the high representative executive powers in areas related to inter-ethnic disputes.[56]All of these

[53] U.N. Security Council, *Letter dated 7 October 2005 from the Secretary-General addressed to the President of the Security Council* (S/2005/635), 7 October 2005.

[54] Ibid., Supp. No., 80.

[55] Ibid., Supp. No., 80.

[56] The so-called "Bonn Powers" are exclusive and substantial powers granted to the Office of High Representative in Bosnia & Herzegovina – the international authority overseeing the civilian implementation of the Dayton Accords of 1995 that ended the war in Bosnia. The

suggestions laid out the foundations for an increased involvement on the part of the EU in the future status-determined Kosovo: by default, these suggestions were to also significantly determine the nature of the EU's largest yet CSDP mission to date – EULEX. Crucial to this process, was the incorporation and the further elaboration of the abovementioned provisions on the Ahtisaari Package – the UN Special Envoy's Comprehensive Proposal for the Kosovo Status Settlement, which I now turn to.

2.3 Ahtisaari Proposal and Kosovo's Internationally Supervised Independence

The Eide Report created the much-yearned space for the opening of a new chapter in Kosovo –one that would finally herald a series of Pristina-Belgrade talks tailored towards negotiating a political settlement for Kosovo's future status. In so doing, the report also challenged the EU to be on the driver's seat of all future plans that the international community had for Kosovo. The so-called status talks that ensued were mediated by the appointed UN Special Envoy to Kosovo, Martti Ahtisaari, a former Finnish president and respected diplomat with plenty of expertise in the Balkans. His aides included two high-ranking officials from the EU Council and the Commission. In line with the spirit of Eide's recommendations, these diplomats played a crucial role in dissecting Kosovo from an exclusively UN and NATO agenda and turning it into a predominantly European issue.

"Bonn Powers" were granted to all incumbents of OHR and include the OHR's ability to, amongst others, a) adopt binding decisions when local parties seem unable or unwilling to act and b) remove from office public officials that are deemed to be uncooperative or that engage in obstructionist practices that could jeopardize the implementation of the Dayton Accords. The "Bonn Powers" have generated much criticism for being arbitrary and undemocratic. See later for how some of those powers would be delivered to the International Civilian Office in Kosovo, and EULEX.

Needless to say, with the exception of progress in some technical matters (decentralization and guarantees for the protection of Serbian Orthodox Church heritage), the yearlong negotiations brought little compromise between the parties with the key issue – that of whether Kosovo was to remain part of Serbia or become an independent country – still exposing the irreconcilable positions. In March 2007, after continuous attempts to bring the parties closer to an agreement failed, the Special UN Envoy Ahtisaari submitted to the Security Council his Comprehensive Proposal for the Status Settlement. Accompanying the Proposal was also Ahtisaari's official letter addressed to the Secretary General listing his own recommendations.

In essence, the Proposal carried all of the blueprints of the Eide Report and remained closely attuned to the rationale of "standards with status". First and foremost, it provided a lengthy set of provisions necessary for the establishment of a multi-ethnic society, with a primary focus on ensuring the protection of the rights, identity and culture of Kosovo's non-Albanian communities, including the establishment of a framework for their active participation in public life. As Ahtisaari himself noted, about two-thirds of the document was catering to the needs of Kosovo Serbs and other non-Albanian communities.[57] Secondly, the Proposal sketched out the architecture for an interim international supervision of the Settlement – with the EU, at this point, being the key actor in all spheres, and most importantly in helping the development of the rule of law sector in Kosovo through an anticipated CSDP mission which was to be deployed immediately.

[57] UN Office of the Special Envoy to Kosovo, "Statement by Special Envoy Martti Ahtisaari during his joint press conference with NATO Secretary General Jaap de Hoop Scheffer in Brussels," UNOSEK Press Briefings, 16 February 2008.

It needs to be noted that despite the title alluding to a status settlement, the Ahtisaari Proposal elaborated and was explicit on all its provisions except for the status itself. Interestingly, in its 58 pages and 12 additional annexes, there is no exact reference to an internationally recognized sovereignty formula. While the Proposal addresses the nature and other aspects of public powers, with some of the functions typically assumed only by the states[58] -- i.e the right to negotiate and conclude international agreements and the right to seek membership in international organizations -- no mention other than that of Kosovo as an existing "society" is made with respect to the institutional and legal arrangement of the Kosovar polity. In fact, when the draft-proposal was circulated to the parties, all of them were left to interpret it based on the content. While for Prishtina the prospect of independence had never been any closer, for Belgrade, the Proposal was even in its initial stages unacceptable.

Along with the Comprehensive Proposal, however, the UN Envoy also submitted a separate document detailing his own recommendations on the exact nature of the political settlement. It is in these recommendations, and not on the Proposal itself, that the formula of "internationally supervised independence" was proposed for the first time. In fact, when the Kosovo Provisional Institutions of Self-Government declared independence eleven months after the Proposal was presented to the parties and the Security Council, the act of declaration was based on the recommendations and not the Proposal per se.

The need to deliberately separate the two documents reveals the contentious politics that had overshadowed the negotiations process between Belgrade and Pristina. It appeared that the only way to get the Proposal through the Security

[58] Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence* (Oxford: Oxford University Press, 2009): 212-217.

Council was for it to be acceptable in substance without mentioning the "I-word", i.e independence. After all, consensus on the Proposal at the Security Council level would also mean the passing of a new Resolution to replace Res. 1244, which had become an epitome of the status quo since 1999. The general feeling of hope in the EU and the US that the Security Council would endorse the Ahtisaari Package to replace the UNSCR 1244 proved immature when it became clear that Russia was determined to veto any sort of proposal that amounted to statehood for Kosovo. Between February and July 2007, the sponsored Resolution of the US, UK and some other members of the UN Security Council, was rewritten four times in attempt to get Russia's blessing. The Resolution was only formally withdrawn when it became clear that Russia indeed would veto any proposal that was not acceptable to Belgrade.

2.4 Reconciling EULEX with UNSCR 1244

To be sure, talks over a future ESDP mission to be deployed in Kosovo had been already launched during the initial stages of the Ahtisaari mediated talks, even though the full scope of such mission's engagement and jurisdiction was only outlined on the final version of the Proposal. Already in 2006, the Council of the EU had preemptively deployed a forty-member European Union Planning Team (EUPT), responsible for making the proper arrangements for the future ESDP Mission. Even though the looming threat of a Russian veto at the Security Council (and the resulting discomfort among some of the EU members that the mission would end up unable to secure a SC Resolution) would threaten to render much of these preparations obsolete, the skeletal frame of EULEX was largely put in place by the EUPT. In fact, the Annex

of Ahtisaari's Proposal related to the future EULEX benefited exclusively by the input of EUPT staff.

Against this backdrop of insecurity and confusion, on 4 February 2008, only a few days before Kosovo declared independence, the Council adopted the Joint Action 124 establishing the European Union Rule of Law Mission in Kosovo -- EULEX Kosovo, with an aim to assist and support Kosovo authorities in the area of the rule of law, specifically in the areas of police, judiciary and customs. As stipulated in its mission statement:

> EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices.[59]

In fulfilling its mandate, EULEX would "monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law, including a customs service, whilst retaining certain executive responsibilities."[60] More importantly, in keeping with the "Bonn Powers" rationale, EULEX would have the authority to reverse and annul altogether, as necessary, decisions taken by Kosovar authorities, in order to ensure the maintenance and promotion of the rule of law, public order and security. It would have the primary responsibility of ensuring that "cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated,

[59] EU Council, "Council Joint Action 2008/124/CFSP," Art.2.
[60] EU Council, "Council Joint Action 2008/124/CFSP," Art.2, lit. a.

prosecuted, adjudicated and enforced, according to the applicable law"[61] as well as the primary responsibility of deciding who precisely – local authorities or EULEX staff -- would be in charge of adjudicating any case related to criminal and civil offences.

While some EU officials initially remained hopeful that EULEX would ultimately secure the international support and the approval of Russia, this optimism proved premature. Not only was the legality of the Mission challenged at the Security Council by Russia on the basis that its mandate was affirming the Ahtisaari Proposal's call for Kosovo independence, but EULEX's legitimacy was also questioned within the EU itself by the five members opposed to Kosovo's independence. On the ground, EULEX was also facing opposition by the refusal of the Serb-controlled territories to recognize its authority. This also entailed that notwithstanding the exact nature of its engagement, EULEX had to work through UNMIK if it wanted to extend its operations.[62]

It became clear that the only way to get EULEX deployed and make it fully operational was for the mission to be reconciled with the UNSCR 1244. Four months after its creation, the UN Secretary General proposed that the activities of EULEX remain under the overall authority of the UN Special Representative, pursuant to UNSCR 1244. What this essentially amounted to was an apparatus in which UNMIK would be reconfigured in order to allow for EULEX to take primary responsibility in all areas related to the rule of law. By extension, like UNMIK, EULEX would have to maintain a status-neutral stance in all its transactions with Kosovar authorities. Put differently, EULEX's influence within the Kosovar juridical field, which I explore

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[61] EU Council, "Council Joint Action 2008/124/CFSP," Art.2, lit. d., The language of the Mission Statement approved on the Council Joint Action remains almost entirely identical as that laid out on the Ahtisaari Proposal.

[62] See Erika de Wet, "The Governance of Kosovo," 2009: 84-86.

more in detail in the following chapters, would be very much determined by the Mission's diplomatic and political agnosticism vis-à-vis the legitimacy of Kosovar authorities.

This tension can be best understood in the context of its mandate. Despite the fact that EULEX holds itself to be a technical mission, both the roots and the implications of the Mission's neutrality toward Kosovo's statehood and sovereignty are largely political. Two issues emerge as rather salient from the onset: first, the reference to the "European best practices" to be respected by local institutions and second, the extension of EULEX's authority and jurisdiction over the so-called sensitive crimes. While alluding to the "European best practices" as a self-evident truth and existing practice within the EU might suggest of a European way of doing things, there has been little elaboration over what these practices are, allowing EULEX to determine the contours of its operations by using legal formalism as a pretext.

As an extension of this attempt to depoliticize the issue by alluding to legal formalism, EULEX seems to have inadvertently opened another Pandora's Box – that of what laws exactly are applicable in adjudicating each case in Kosovo, and moreover, how exactly does the choice of the applicable law challenge EULEX's status neutrality toward Kosovo's statehood. For instance, even though each EULEX official (judge, prosecutor or police) is given full discretion over the choice of applicable law, one of the biggest dilemmas has been the question of whether or not to apply the laws passed by post-independence Kosovo institutions, i.e the Assembly of Kosovo. Having noted this tension, a former EULEX judge commented on the nature of its implications at the practical level:

> The choice is given to every single judge which legal norms to apply. In strict legal terms, this is the correct solution. The problem however, is that even if

> the mission has a "neutral status" regarding the independence of Kosovo, by choosing to apply one or the other legal provisions, EULEX judges are *de facto* put in a position to implicitly or not recognize Kosovo's new institutions. If a EULEX judge decides to apply legislation voted by the Kosovo parliament, that implicitly means the judge recognizes the legitimacy of the legal order originated by Kosovo's declaration of independence. […]The question has arisen several times, and Brussels is very well aware of the problem. A clear solution, however, can be given only by political means. [63]

In fact, Kosovo's somewhat patched jurisdiction, as I note in the next chapter, leaves little clue about what laws are to be applied under what circumstances. Between, former Yugoslav jurisdiction, laws adopted during UNMIK times and the new Kosovo laws, most law-enforcing agents –be they judges, prosecutors or police officers –are often undecided as to under what law they are carrying investigations, prosecutions and adjudications. As noted by a EULEX legal officer in frustration

> As legal practitioners, we are allowed to choose the source of jurisdiction for each case, yet choosing between three jurisdictions creates a somewhat schizophrenic effect, not to mention when we apply Kosovo Assembly laws. I don't know if that bodes well with our claims that we are status-neutral.[64]

The second issue involves the very areas of the rule of law that the future Mission would have authority over. As noted above, EULEX's "executive powers" are tied to the adjudication of cases of war crimes, terrorism, organize crime, corruption, inter-ethnic crimes, financial/economic crimes, and other serious crimes. What this translates into is that due to the sensitive circumstances in establishing the rule of law and due to the pending danger of inter-ethnic tensions, EULEX is to retain executive responsibility in adjudicating the abovementioned cases. Thus, as EULEX retains some exclusivity over the determination of what constitutes a sensitive crime and who gets to adjudicate it, there is also an element of securitizing the field of "rule of law" by

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[63] Francesco Martino, "EULEX, the delicate balance of justice" *Osservatorio Balcani e Caucaso,* 15 July, 2011.

[64] EULEX Acting Special Assistant to the Head of Justice, Interview with the Author, Prishtina, Kosovo, 17 January 2012.

means of defining it. Lastly, EULEX is also supposed to receive political guidance in adjudicating crimes that require direct executive powers from the EU Special Representative (EUSR) – a post which, until recently, had been double-hatted with the International Civilian Representative (ICR), also known as the "supervised independence watchdog".[65]

2.5 State-building within a status-neutral framework

Parallel with the Joint Action establishing EULEX, the Council also adopted another Joint Action establishing the EU Special Representative for Kosovo (hereinafter EUSR) -- an EU agency that would promote the overall EU political coordination in Kosovo by playing a "leading role in strengthening stability in the region and implementing a settlement defining Kosovo's future status, with the aim of a stable, viable, peaceful, democratic and multi-ethnic Kosovo."[66]

The institutional links between EULEX and the EUSR have been, until recently, very complex. According to the Joint Action creating the EUSR, the Head of EULEX would be receiving local political guidance from the EUSR, "including on the political aspects of issues relating to executive responsibilities."[67] Guided by the Ahtisaari Proposal, however, the Joint Action also commanded the double-hatting of the EUSR and the ICR. [68] In practice, this meant that the powers and mandates of

[65] See below for the double-hatting of the EUSR and ICR

[66] EU Council, "Council Joint Action 2008/123/CFSP of 4 February 2008 appointing a European Special Representative in Kosovo", *Official Journal of the European Union*, L 42/88, 16 February 2008.

[67] EU Council, "Council Joint Action 2008/123/CFSP", Art. 12, lit.2

[68] The Office of the International Civilian Representative carries a critical role in the implementation of the Ahtisaari Proposal. This institution is vested with the final authority in Kosovo to interpret the civilian aspects of the settlement. Under his capacity, the ICR is able to take corrective measures, when necessary, to "remedy […] any actions taken by the Kosovo

both the EUSR and the ICR were to be vested in the same legal person. While the EUSR as a representative of the 27 EU member states would remain agnostic toward Kosovo's independence, the ICR as a chaperone of the Ahtisaari Proposal and as the ultimate authority supervising Kosovo's independence affirmed in principle Kosovo's independence. This created a scenario where the incumbent of both positions – the Dutch diplomat Pieter Feith – was expected to remain status-neutral in his mandate as the EUSR and as political advisor to EULEX all along serving as the head of the ICO—an office that would supervise and promote Kosovo's independence.

While very little has been said about the exact rationale of this arrangement, particularly considering that the two institutions would later remain divergent in their positions toward Kosovo's statehood, the setup draws parallels from a practice that has become prevalent within the EU itself and specifically among the EU operations in Western Balkans. Kosovo's case, for its part, has been modeled after the double-hatting of the EUSR and OHR in Bosnia & Herzegovina. In most cases, it has been argued that such arrangement would help the EU consolidate its image as a stabilizing factor in both post-conflict constituencies by creating closer coordination schemes among the different EU agencies operating on the ground. In order to better understand the implications of this arrangement for EULEX a look at the Office of the International Civilian Representative (ICR) is necessary.

As mentioned above, due to the impending threat of the Russian veto, the Ahtisaari Proposal was never passed through the Security Council. Following

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authorities [deemed] to be a breach of [the] Settlement." These corrective measures include full discretion in annulling laws or decisions adopted by Kosovo authorities that fail to comply with, or are contrary to, the spirit of the Settlement. The ICR also reserves the right of sanctioning or removing from office any public official, as necessary, to ensure the full respect for the Settlement and the Implementation.

Kosovo's unilateral declaration of Kosovo, however, a "coalition of the willing" of countries that recognized Kosovo statehood was nonetheless created. Having supported the Ahtisaari Proposal, in its ranks the coalition prides most of the EU members and some other countries that have extended full recognition to Kosovo as an independent state. It is this group of states – also known as the International Steering Group – that the seat of the International Civilian Representative (as envisioned by the Ahtisaari Proposal) draws its mandate from.

The EUSR, on the other hand, falls under the command of the High Representative of the EU's CFSP. The EUSR represents the consensual politics of the CFSP, including the interests of the EU members that have refused to recognize Kosovo's independence, remains overtly status-neutral, and recognizes the UNSCR 1244 to be *de facto* and *de jure* the framework of all its operations.

Under the configuration of double-hatting, however, where the authorities and powers of the EUSR and ICR were vested in the same person (the Dutch diplomat, Peter Feith), this institutional setup remained highly incongruous, eventually leading in their final decoupling in 2011. To put this on simpler terms: on the one hand, there was the pro-independence ICR –Peter Feith (heading an office of 250 members) who drew his legitimacy from the Ahtisaari Proposal and from the Kosovo Constitution. On the other hand, there was the status-neutral EUSR – Peter Feith, whose legitimacy was drawn from a status-neutral stance pursuant to UNSCR 1244. Some researchers have noted that serving in both capacities simultaneously, there were occasions when

Feith had to explicitly make clear in what capacity he was speaking: in some extreme cases he was noted to stop the meeting and state explicitly that he was switching hats.[69]

Most notably, in 2010, double-hatting caused many diplomatic headaches for the office of EUSR and EULEX together, when a document called "Strategy for the North" drafted by Peter Feith in his capacity as ICR in collaboration with the Government of Kosovo was leaked to the media. The Strategy sought to remove the so-called Serb administered "parallel structures" in northern Kosovo, a policy that was not done in consultation with the five members of the EU that have not recognized Kosovo statehood yet. To further complicate the matters, it was also revealed that EULEX was fully aware of the existence of such strategy and it had even been consulted over its draft.

In sum, judging from these anomalies alone, it becomes rather clear that the current state of affairs does not allow us to talk about a common EU strategic culture without falling into the trap of analyzing the impacts of such culture in terms of the mechanisms employed. One could still, however, talk of a diplomatic "transgovernmental field" that has tried to dislocate Kosovo from an arena of international interest to a platform of European security. That said, the Mission's status-neutral stance has indeed placed constraints in terms of what EULEX can do and how it does what it does.

[69] Maria Derks and Megan Price, "The EU and Rule of Law Reform in Kosovo," Conflict Research Unit, *Netherlands Institute for International Relations* (November, 2010): 14.

3. EULEX: Constituting and Transforming Kosovar Polity from within

Having examined the creation of EULEX in light of somewhat stark and often impenetrable diplomacy grid, in this chapter I unpack EULEX's mandate both in its legal form and practice. As previously argued, the complex political backdrop – both international and regional –against which EULEX has been established has considerably determined the nature of its deployment beyond what its initial and face value mandate propounded. By extension, these somewhat strenuous beginnings of EULEX have also altered the public perception of its mandate. The record remains mixed: for some EULEX is vested with powers that run against the principle of local ownership as adopted by EU's crisis management strategy; while for others, EULEX despite being vested with executive powers, has done very little in providing for the rule of law. In any event, a proper analysis of how the mission operates is in order.

The fact that EULEX operates under the umbrella of UNSCR 1244 (which still considers Kosovo to be a UN protectorate) and, by extension, under the continuing discord on Kosovo statehood even among EU member states,[70]was paramount in protracting its deployment while rendering the take-over of UNMIK responsibilities difficult. The operational logic for EULEX as a CSDP mission has, after all, been pitched at a level that mirrors a diplomatic compromise between what the Ahtisaari Proposal[71] initially intended EULEX to be and the equally powerful diplomatic voices that sought to keep Kosovo under UNSCR 1244. Thus, it is no surprise that the necessity to mold the mission into an arrangement that could

[70] Cyprus, Greece, Slovakia, Spain and Romania still decry Kosovo's independence.

[71] As argued in the previous chapter, EULEX's initial design and scope of activities was largely defined on the Ahtisaari Proposal.

represent the interests of various international and local actors involved has led some to identify EULEX as "shoulderi[ing] an extensive commitment that reaches beyond the formal confines of its mandate."[72]

While the blueprints of the future ESDP Mission in Kosovo were already laid out on the Eide Report and on the Ahtisaari Proposal, as I demonstrate below, the EU Joint Action that inaugurated EULEX left the nature and the scope of its mandate significantly unspecified. Indeed, the Mission's operations in practice seem to owe much more to a program that is subject to frequent adjustments in order to allow for the accommodation of the political dynamism on the ground, rather than to a unified strategy. Crucially, these adjustments are substantially informed and corroborated by the daily interaction between different EU, international and domestic actors. By extension, the daily operations of EULEX have come to take the shape of on-the-go, piecemeal implementation and reformulation of the main responsibilities, which often fall short of meeting the expectations of the local stakeholders. In fact, when undergoing criticism, whether aired by locals or the occasional outsider, Mission insiders have repeatedly cited this sort of "capability–expectations gap" – to borrow Christopher Hill's term –as the core source of all its ills. As noted by a senior EULEX political advisor:

> It is increasingly becoming difficult to convince the people here that we are mainly a technical mission, and [as such], we are involved in implementing the technical aspects of the rule of law. The truth is, we are locked within a political stalemate that we cannot solve. We do not have the choice of remedying the restricted implementation of our mandate. As a mission, thus, we constantly find ourselves between a rock and a hard place."[73]

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72 Martina Spernbauer, "EULEX Kosovo – Mandate, Structure and Implementation: Essential Clarifications for and unprecedented EU Mission," *CLEER Working Paper 2010/5*, 33.

73 EULEX Senior Political Advisor, Interview with the Author, Prishtina, Kosovo, 19 January 2012.

Yet, a closer scrutiny of the Mission reveals that highly important as these political conditions may have been, not everything about EULEX's political impact is extraneous. EULEX's bifurcate mission mandates it to carry out the following tasks: on one hand, it is expected to monitor, mentor and advise (shortly known as the MMA functions) the relevant Kosovar judicial authorities and law enforcement agencies in their progress towards sustainability and accountability; on the other hand, EULEX is to retain executive tasks, primarily in the judicial processes. As a CSDP mission with the central aim to assist and support Kosovo authorities in the area of rule of law, EULEX usually takes refuge in the fact that it is technical or technical support mission (see above). What sets the mission apart from other CSDP missions however, is precisely this allocation of executive or corrective powers: they are extended as far as reversing or annulling operational decisions taken by the competent Kosovo authorities when the reversal and the annulment proves necessary not only for the maintenance of the rule of law, but also for that of public order and security. Notably, EULEX's executive powers in the justice sector are usually understood in terms of EULEX staff's exclusive responsibility to investigate, prosecute or adjudicate the so-called "sensitive crimes" with or without the help of Kosovo authorities.

This envisaged necessity by its creators to entrust the Mission with executive powers transcends the putatively technical mission discourse, and speaks more closely to the need to cater to the political exigencies on the ground. Because the very *raison d'etre* of the Mission was one which aims to transform Kosovo's judicial system (and by extension, the Kosovar polity itself) conform the provisions of Ahtisaari's Proposal, to speak of EULEX as being simply technical in nature is to single-handedly dismiss that the rationale that underlies the retention of these executive powers is anything but

rooted in the complex political dynamism in Kosovo. A testimony to this prerogative is EULEX's retention of exclusive investigative, prosecutorial and adjudicating authority over such cases that in international community's Kosovo-specific jargon usually go by the adjective of "sensitive." These offenses are exclusively defined as belonging to the realm of inter-ethnic crimes, war crimes, criminal or high-level corruption disputes, the handling of which requires a judiciary that does not fall prey to political whims – a quality which Kosovo judiciary is thought to not have developed yet.

The negligence of law and of legal analysis in the study of international politics has been critically noted by both legal theorists and political scientists alike. In her work highlighting the constitutive relationship between laws and sovereignty in Europe, Marlene Wind argues that legal discourse is an "important mechanism through which constitutive norms are produced and reproduced and which over time may provide legitimacy for new types of political organization." Citing legal theorist Christian Joerges, Wind argues that political scientists have traditionally "relied upon an instrumentalist view of the legal system which fails to acknowledge the law's normative logic and discursive power." Law and legal doctrine, Wind argues, "are first and foremost social and thereby inherently political phenomena which contribute to disciplining society and to the construction of our ordinary conceptions of right and wrong, normality and deviation."[74]

In a similar vein, Christian Reus-Smit has considered that the adoption of theoretical frameworks that sit at the nexus between international politics and

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[74] Marlene Wind, "Sovereignty, anarchy and law in Europe: When legal norms turn into political facts," in *International Relations Theory and the Politics of Integration: Power, Security and Community,* eds., Morten Kelstrup and Michael C. Williams (London: Routledge, 2000), 124.

international law is not simply inevitable, but also highly desirable for constructivist scholars. Because "international politics takes place within a framework of rules and norms, and states and other actors define and redefine these understandings through their discursive practices […], international law is central to this framework."[75] Like politics, Reus-Smit argues, "constructivists see [international law] as a 'broad social phenomenon deeply embedded in the practices, beliefs and traditions of societies and shaped by interaction among societies.' "[76]

In keeping up with my Bourdieu-inspired framework, below I provide an analysis that seeks to elucidate both the extent to which law is a social act and the extent to which once institutionalized it tends to promote an ontological glorification. Following Bourdieu, by trying to capture the politics behind the institutionalization of law, I try to move beyond the dichotomy in legal theory that usually characterizes the law as belonging to either the formal or the instrumental realm. In that sense, the approach to the legal theory as adopted throughout this thesis is one which is strictly sociological.

As I demonstrate below, the ability to not only define the contours of the juridical field, but to also take sole responsibility, when necessary, in implementing the law, creates a scenario in which EULEX, in effect, manages its own chapter of the monopoly on the legitimate use of force which parallels the one run by Kosovar institutions. Because, the rationale is not simply to support, but also to directly set to rights the presumed shortcomings of the Kosovar counterparts, EULEX is given a central judiciary role. This need to impart executive powers to the Mission, while

[75] Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge, UK: Cambridge University Press, 2004), 3.

[76] Quoted in Reus-Smit, 3.

flowing from a liberal-democratic idea of instilling a culture of rule of law, order and security in Kosovo, exposes a complex power interplay between Kosovar institutions and EULEX. It is upon this nexus of power dynamic that the Kosovar juridical field, as well as the understanding of rule of law, is informed with direct implications for the Kosovar polity.

Methodologically, this chapter benefits firstly from a survey of the state of affairs in the justice sector in pre-EULEX times in order to contextually situate the following analysis of legal documents that were key in defining the contours of EULEX's operational capabilities. These documents are then complemented by examples from the ground as well as interviews with key stakeholders. Taken as a whole, this wide range of documentation represents the empirical data that reflects the nature of transformation permeating the Kosovar juridical field, and by extension the Kosovar polity. I begin by tracing the legal institutional roots of EULEX; to this end, I look at the Ahtisaari Proposal as the charter that carries the blueprint underlying EULEX's own legal basis – EU Council Joint Action 124. I then engage a legal reading of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, which further defines the parameters of EULEX operations on a legal level. To demonstrate how these operations are structured in practice, I then turn to the Official Guidelines that the EULEX judges and prosecutors use in implementing both their executive responsibilities as well as the so-called MMA (mentoring, monitoring and advising) and complement them with documentation from the ground.

3.1 The UNMIK legacy: Creating a polity worthy of ruling?

Since 1999 when UNMIK took over the administration of Kosovo under UNSCR 1244, the law enforcement sector in Kosovo has primarily been kept in the hands of the international community. As noted by Spernbauer,[77] while many other tasks and governing responsibilities were piece-meal transferred to the Provisional Institutions of Self-Government,[78]the international community invested in Kosovo remained largely skeptical vis-à-vis Kosovars' readiness to take over the sectors of police and justice.[79] Even in those areas where local institutions were slowly 'enfranchised' by UNMIK's transfer of responsibilities, the transfer itself was made contingent on the successful socialization of the locals into accepting and institutionalizing liberal-democratic norms as the bedrock of the new Kosovar society.[80] In other words, whether local authorities in Kosovo had matured institutionally enough in order to be deemed as capable of ruling was largely made contingent on how far they had pledged to uphold the liberal democratic models.

This meant that liberal-democratic norms and concepts such as the rule of law, human rights with a special emphasis on tolerance and multi-ethnicity and democracy had to become, in Gheciu's words, "the 'common sense' foundation of [the Kosovar] society."[81] Ironically, this end goal of instilling the concept of self-discipline[82] in local

[77] Spernbauer, "EULEX Kosovo", 10.

[78] With the promulgation of the Constitutional Framework that established the Provisional Institutions of Self-Government (PISG) in 2001, a new window that would allow for the transfer of some administrative powers to the local institutions was opened.

[79] In fact, UNMIK remained the sole authority that administered the law enforcement sector until in 2008 when a reconfiguration of the international presence was worked out by the UN Secretary General and the Security Council in order to allow EULEX to deploy throughout Kosovo.

[80] Gheciu, "International Norms," 121-146.

[81] Ibid, 128.

institutions to construct a democratic, multi-ethnic polity was built on a palpable tension: there was "on one hand, the international mission's official commitment to promote democracy in Kosovo, and, on the other hand, the fear that giving Kosovars more power would simply lead to a perpetuation of the cycle of violence."[83]

Because the nature of the conflict was ethnic and because the Kosovar society even in post-conflict times remained deeply divided along ethnic lines, the international community's post-conflict reconstruction of Kosovar polity was one that primarily championed the establishment and the functioning of a multi-ethnic society. To that end, other operations in the field of institution-building and capacity-building, were approached in such way as to comprehensively tackle the lingering inter-ethnic tension and in return create a multi-ethnic constituency. Virtually all of the four Pillars of UNMIK remained true, in principle and practice, to the idea of multi-ethnic society (re)construction, with the OSCE taking the lead in this dimension by adopting comprehensive projects ranging from tolerance-building training programs (both at institutional and individual level), to supervising elections to monitoring and promoting human rights.

Despite relentless efforts and resources invested in promoting a vision of a multi-ethnic society, Kosovar yearnings for wider local ownership in the realm of "rule of law" were viewed with a grain of salt by the international community. The aspirations for a secure and democratically ruled society were carefully weighed against the pending danger of Kosovars reverting to inter-ethnic violence. Although, the locals' willingness to "transcend the anti-liberal, violent modes of thought and action

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[82] See Michael C. Williams, `The Discipline of the Democratic Peace: Kant, Liberalism, and the Social Construction of Security Communities', *European Journal of International Relations* 7, no. 4 (2001): 525-53.

[83] Gheciu, "International Norms," 128.

and to evolve into self-disciplined liberal subjects"[84] was commended, the actual ability to do so was repeatedly questioned. For many international stakeholders, the March Riots were a case in point and a testimony that the province had yet to overcome the tendency to easily elapse into inter-ethnic conflict.

In fact, from 2000 onwards the international control of the justice sector instead of shrinking in scope saw significant augmentation. While initially UNMIK had only appointed a minority of international judges and prosecutors to sit on panels with a majority of Kosovar judges, by December 2001 UNMIK adopted a resolution allowing the changing of panel compositions in favor of a majority of international judges. The so-called "Regulation 64" would feature a mechanism of "hybrid panels" wherein judge panels would be composed of at least two international judges collocated with one local judge to adjudicate cases that were deemed as "necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice."[85] To facilitate this mechanism, UNMIK introduced a novel institutional body responsible for the appointment and removal of judges and prosecutors. The so-called Kosovo Judicial and Prosecutorial Council had an international voting majority: as such, KJPC was paramount in establishing an international judiciary that could overrule its Kosovar counterparts in war crimes and other politically sensitive cases. Similarly, the KJPC, strengthened Pillar I of UNMIK, which in turn made the hardline approach of maintaining law and order its priority. At the legislative level, KJPC made

[84] Ibid, 128.

[85] UNMIK, "Regulation No. 2000/64 on the Assignment of International Judges/Prosecutors and/or Change of Venue," 15 December 2000, sections 1.1 and 1.2.

use of exclusive legislative competence reserved only for the Special Representative of the Secretary-General (SRSG).[86]

Even four years after UNMIK had promulgated the Constitutional Framework – a crucial step toward integrating the locals in governing the province – the international community cautiously warned that the local counterparts were not sufficiently prepared to take over responsibilities in the field of law enforcement. While UNMIK was pivotal in establishing the Provisional Institutions of Self-Government, including the inauguration of the Office of Prime Minister along with ten other ministries, it decided against the creation of a Ministry of Justice until a resolution of the Kosovo status would take place. Many diplomats remained wary of the risks involved in granting the locals ownership of this sector with some constantly underscoring the importance of maintaining it under international scrutiny. This position was also seconded by the Special Envoy of the UN Secretary General – Kai Eide on his evaluative report of 2005:

> The Kosovo police and judiciary are fragile institutions. Further transfer of competences in these areas should be considered with great caution. In a deeply divided society, which is still recovering from post-conflict trauma, the establishment of ministries of justice and the interior could lead to the impression that they have fallen under the control of one political party or one ethnic group. The transfer of competences in such sensitive areas cannot work without a firm oversight, intervention and sanctioning policy. In the light of the limitations of the police and judicial systems, there will be a need for a continued presence of international police with executive powers in sensitive areas. [87]

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[86] For a groundbreaking account of UNMIK's legacy on the justice sector in Kosovo based on 150 interviews conducted with national and international stakeholders, see Leopold von Carlowitz, "Local Ownership in Practice: Justice System Reform in Kosovo and Liberia," DCAF Occasional Paper No. 23 (Geneva Center for the Democratic Control of Armed Forces, Geneva, March 2011).

[87] Kai Eide, "A Special Review of the Situation in Kosovo," annexed to the *Letter dated 7 October 2005 from the United Nations Secretary-General to the United Nations Security Council*, UN Doc. S/2005/635, 3.

According to the report, all 'sensitive cases' – that is, cases related to war crimes, organized crime and corruption as well as difficult inter-ethnic cases – were best to be handled by the international community present in Kosovo. The report also warned against the ongoing reduction in the number of international judges and prosecutors: in Eide's eyes the process was premature and as such needed to be urgently reconsidered.[88]

The Ahtisaari Proposal was the first attempt toward addressing and accommodating Eide's concerns at an institutional level in the anticipated post-UNMIK era. As envisaged by the Proposal, the future ESDP mission would be granted authority over ensuring that "cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, […] prosecuted [and] adjudicated, including, where appropriate, by international judges sitting independently or on panels with Kosovo judges."[89] The proposal further stipulated that international judges within the ESDP mission, would "enjoy full independence in the discharge of their judicial duties"[90] and that, *inter alia*, they would have "authority to assume other responsibilities independently or with the competent Kosovo authorities to ensure the promotion of the rule of law, public order and security."[91]

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[88] Ibid, Art. 40.

[89] UN Secretary-General, "Comprehensive Proposal for the Kosovo Status Settlement" annexed to *Letter dated 26 March 2007 from the United Nations Secretary-General to the President of the Security Council*, UN Doc. S/2007/168: Art. 2, Sec. 3a.

[90] UN Doc. S/2007/168, Art. 2, Sec. 3c.

[91] UN Doc. S/2007/168, Art. 2, Sec. 3e.

3.2 Understanding EULEX's prerogatives at the legal level

The Council Joint Action that established EULEX encapsulated, almost in entirety, the provisions of Ahtisaari Proposal. The mission's mandate was thus established to be one that would assist Kosovo institutions, judicial authorities and law enforcement agencies in their progress toward sustainability and accountability. Remaining true to multi-ethnic capacity-building efforts, EULEX would be key in developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and custom service by ensuring that these institutions were free from political interference all the while adhering to internationally recognized standards and European best practices. In order to fulfill this mandate, EULEX was to "monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law […], whilst retaining certain executive responsibilities."[92]

To be sure, the exact nature of the so-called MMA functions – (mentoring, monitoring and advising) enunciated on the EU Joint Action remains ambiguous. And, even more importantly, aside from stating that EULEX is to retain "certain executive responsibilities," the Joint Action falls short of attaching a precise definition to the scope of executive powers also. In its most generous rendering, the Joint Action only stipulates that EULEX is to be vested with a responsibility of "ensur[ing] the promotion of the rule of law, public order and security, including as necessary, in consultation with the relevant international civilian authorities in Kosovo through reversing or annulling, operational decisions taken by the competent Kosovo authorities."[93] Similarly, the question of whom the onus of investigation, prosecution and adjudication falls upon -- local versus international law enforcement officials–

[92] Council Joint Action 2008/124/CFSP, Art. 3, lit. b.
[93] Council Joint Action 2008/124/CFSP, Art. 3, lit. c

remains substantially vague. It is merely conceded that "serious crimes, such as war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes are to be properly investigated, prosecuted and adjudicated *where appropriate*, by international investigators, prosecutors and judges, jointly with Kosovo counterparts *or* independently."[94] (Emphasis added)

A simple textual reading of the Joint Action provisions, thus, provides little help in understanding what EULEX's prerogatives exactly are. In this quest, two issues emerge as rather noteworthy: the first has to do with determining what exactly these executive responsibilities entail and, by extension, what ticks the EULEX into invoking them; the second has to do with determining the authority –local versus international—that decides on the jurisdiction as well as case allocation, investigation, prosecution and adjudication of the above-mentioned crimes.

In the first instance, the scope of EULEX executive powers including, as necessary, "the reversal or the annulment of operational decisions taken by Kosovar authorities", seems flexible enough and only to be decided in the event that the rule of law, order and security are threatened. It would follow that the lack of a third party that can determine when and whether the circumstances on the ground constitute a threat to the rule of law, order and security leaves the decision of invoking such powers to EULEX. Additionally, in order to ensure the maintenance and promotion of the rule of law, EULEX is also said to "assume other responsibilities, independently or in support of the competent Kosovo authorities […]."[95]Again, the lack of elaboration on what these other responsibilities are leaves, at the very best, substantial ground for variegated interpretations. This vast flexibility on the Joint Action seems

[94] Council Joint Action 2008/124/CFSP, Art. 3, lid. d.
[95] Council Joint Action 2008/124/CFSP, Art. 3, lit. h.

noticeable also at practical level in the multitude ways that these powers are understood. According to a former EUPT[96] staff member, the above provision is to be interpreted as follows: possible additional executive tasks are encapsulated in the notion of "independently" whereas non-executive tasks of monitoring, mentoring and advising, are covered by "in support of the competent Kosovo authorities".[97]

Secondly, the Joint Action is *de facto* silent on the issue of determining the relevant authorities involved in the processes of adjudication. The actual division of labor (local versus international) is hardly defined, blurring further the lines between, assistance-related responsibilities such as MMA-s and executive powers. In other words, despite the fact that this Joint Action is considered by EULEX staff itself to be EULEX's legal basis, trying to grasp the full scope of EULEX's mandate and operational capabilities—including relevant responsibilities be they MMA or executive related –through a mere reading of the Joint Action is not the most fruitful enterprise.[98]

The very first attempt to comprehensively address the provisions of case selection, allocation and adjudication was only made after the creation of EULEX, when the Assembly of Kosovo committed to pass en masse the so-called Ahtisaari Laws,[99] also adopted the Law on the Jurisdiction, Case Selection and Case Allocation

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[96] Recall that EUPT was the agency in charge of planning the ground for EULEX before the latter was deployed.

[97] Quoted in Spernbauer, "EULEX Kosovo", 16.

[98] This contrasts with some of the Mission's employees. For instance, when asked if she thought that there was some ambiguity surrounding the exact scope of the mission in terms of its responsibilities, a Senior Political Officer for EULEX responded: "It's all laid out on the Joint Action 124."

[99] Between February 2008 and December 2008, the Assembly of Kosovo passed 49 laws required by the Ahtisaari Proposal. The approval of these laws was mainly done through an accelerated procedure. Because the general public had no access to the draft-laws, these so-called 'Ahtisaari laws' received a lot of criticism by the civil society, in general, and even by MPs who were not able to exercise their role as deputies in neither their amendment nor their

of EULEX Judges and Prosecutors in Kosovo.[100] It is the Law on Jurisdiction that institutionally congeals the basis of labor division between EULEX and Kosovo institutions and authorities in Kosovo's juridical field. Based on this law, EULEX judges and prosecutors are given primary/exclusive and secondary/subsidiary competences over a range of criminal and civil offences in Kosovo. For instance, EULEX retains primary/exclusive competence and jurisdiction over any case investigated by the Special Prosecutor Office of Republic of Kosovo. The SPRK is a prosecutorial office created by the government of Kosovo at the request of the international community and features a mixed staff of 11 international and 10 local prosecutors. Headed by a EULEX prosecutor, the SPRK is exclusively responsible for processing criminal offences, which concern, *inter alia*, cases of terrorism, genocide and crimes against humanity, war crimes, inter-ethnic cases, organized crime, financial crimes and other serious crimes. In addition, SPRK is also the only organ to investigate and prosecute crimes that have been referred to the Kosovar authorities by international tribunals such as the International Criminal Tribunal for the Former Yugoslavia – ICTY.

On the civil offences front, EULEX retains primary competences and jurisdiction on public property and property related claims. To give a few examples: EULEX judges and prosecutors retain exclusive jurisdiction in processing cases within the Special Chamber of the Supreme Court of Kosovo that concern issues related to Kosovo Trust Agency (KTA) -- the state agency that manages the privatization of

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modification. See GAP Institute ,"Rule 61*: Ahtisaari Laws – Consequences and lessons derived from the approval of laws through an accelerated procedure," GAP Policy Brief, (December, 2010).

[100] The Assembly of the Republic of Kosovo, "Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo" No. 03/L-053, *Official Gazette of the Republic of Kosova*, Prishtine, 13 March 2008.

state-owned companies. Further, EULEX reserves exclusive competence on cases falling within the jurisdiction of any court of Kosovo concerning appeals against decisions of the Kosovo Property Claims Commission.

In line with both the provisions endorsed by the Ahtisaari Proposal as well as the rationale of the mission to ensure politically independent and equitable adjudication of the cases, the Law on Jurisdiction also dictates the creation of the "hybrid panels." In both criminal and civil proceedings where EULEX judges have primary/exclusive jurisdiction, this institutional arrangement entails that the judge panels be composed of three judges, of whom at least two are EULEX judges and of whom one EULEX judge is always a presiding judge. The President of the Assembly of the EULEX Judges[101] has full authority to derogate, "for grounded reasons", from mixed panels and change the composition of the panels to a panel with a majority or a total composition of Kosovo judges. However, in the event that the local judges are unable or unwilling to exercise jurisdiction due to, for instance, political interference, the President of the Assembly of EULEX judges can also allocate a case to a panel composed fully of EULEX judges. In practice, war crimes and interethnic crimes – be they in the immediate post-war period or those related to March Riots -- are mostly dealt with by the latter. Banking on UNMIK's legacy, this trend reflects a conviction among the international community that still views the Kosovar judiciary in a skeptical light, profoundly questioning their ability to carry out a fair trial in adjudicating inter-ethnic crimes.

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[101] President of the Assembly of EULEX Judges is defined as a judge, belonging to the EULEX Kosovo, who has been selected and appointed by the competent authority to work in Kosovo in this specific position.

The Law on Jurisdiction, thus, does not simply establish a framework of jurisdiction and competence for the EULEX judges and prosecutors, but in so doing it also inscribes a particular logic of quotas (primary/exclusive vs. secondary/subsidiary) in the Kosovar justice system by creating a hierarchy of the judiciary from within. To the extent that EULEX judges are given full discretion in determining the nature of the cases, in allocating them as well as in determining the composition of the panels, EULEX in effect, has the upper hand at both the prosecutorial as well as the adjudicative level. A testimony to this is also the rate of flexibility at which EULEX's primary competences are allowed to take precedence over any local involvement. It would follow that on the basis of the above legislation, EULEX judges and prosecutors are not simply an integral part of the Kosovo judicial and prosecutorial system, but most importantly they are well positioned to inform and shape this system from within. Surely, this master-position of EULEX in the juridical field flows from the general perception that EULEX is the expertise-rich entity in the rule of law sector.

In quotidian proceedings, the lines between primary/exclusive (executive) and secondary/subsidiary (MMA) are often blurred by the so-called process of "case take-over." This means that in the event that there is reasonable ground to believe that a case will be suffering a miscarriage of justice if left to Kosovo judiciary, the President of the Assembly of EULEX Judges can request a case transfer from a local judge to a EULEX judge, even in those cases where the law explicitly determines that the EULEX judge is only to serve in his/her capacity as MMA. In other words, while a case under primary competence falls automatically and non-negotiably under the jurisdiction of EULEX judges, the latter can request to bring under their primary

competence cases that are normally under their secondary competence. The motives for case take over are broadly defined under two categories: first, as mentioned above, there is grounded reason to believe that proper administration of justice is thwarted and second, there is suspicion that the case relates to an ethnic-motivated crime.[102]

Yet, the reverse does not hold true: there is currently no third party within the Judiciary that could determine if a EULEX Judge or EULEX Prosecutor has failed to uphold proper jurisdiction or has somehow been implicated in a miscarriage of justice. To partly compensate for this deficiency, the EU has instead created an agency called Human Rights Review Panel "with a mandate to review alleged human rights violations by EULEX Kosovo in the conduct of its executive mandate."[103] Although esteemed as an independent, external accountability body which prides itself to be performing its functions "with impartiality and integrity", the recourse offered by Human Rights Review Panel is limited to non-binding recommendations which are submitted to the EULEX Head of Mission for remedial action.

During 2010 alone, of the 53 take-over hearings on criminal cases that took place in front of the President of the Assembly of EULEX Judges, 43 of them were approved. The following is a table comparing the number of criminal and civil cases that have been taken over by EULEX judges between 2009 and 2010.

[102] EULEX Kosovo, *Annual Report on the Judicial Activities of EULEX Judges 2010*, Prishtina, 2010.

[103] See, *Human Rights Review Panel*, available at http://www.hrrp.eu/index.php.

Courts	Pristina District Court		Mitrovica District Court		Peja District Court		Prizren District Court		Gjilan District Court		Supreme Court of Kosovo	
Years	'09	'10	'09	'10	'09	'10	'09	'10	'09	'10	'09	'10
Criminal cases taken over	14	3	19	25	8	11	4	6	1	0	3	2
Civil cases taken over	6	22	0	0	21	6	0	4	3	2	0	0

Table 3.1: Criminal and civil cases taken over between 2009 and 2010

Source: EULEX, *Annual Report on Judicial Activities of EULEX Judges 2010*

As indicated on the table, the number of criminal case taken over is still substantially high and has not decreased on average. In the case of Pristina District Court where a sharp decline in the number of criminal cases taken over is noted, this decline has been attributed to: a) a felt increase in cases falling automatically under the primary/exclusive competence of EULEX judges and b) an expansion of monitoring activities (which I discuss below), which has eliminated the need for a case take-over altogether.[104] While Kosovar counterparts have, under the Law on Jurisdiction, little say in the procedures involved in the case take-over, not all of them view this process favorably. When asked if case take-overs had created tension between EULEX staff and their Kosovar counterparts, a senior legal officer working for the Ministry of Justice lamented:

> We are well aware of our deficiencies – we have little to no experience in certain areas that are key to carrying out a proper investigation; for instance, in the field of forensic medicine. As a capacity-building Mission, which is here to support us, EULEX is supposed to provide us with training in this area, which we know ourselves to be lagging substantially behind. However, because the Department on Forensic Medicine is mostly involved in shedding light over war crimes, most of which are of inter-ethnic nature, EULEX has often asked

[104] EULEX Kosovo, *Annual Report on the Judicial Activities of EULEX Judges 2010,* 17.

> that local officers who were initially part of the investigative team be "discharged" of their duties. At the end, instead of getting training and expertise, all we get is expense bills that we as a Ministry are required to cover.[105]

3.3 Behind Monitoring Mentoring and Advising – MMA

Even those responsibilities that fall under secondary/subsidiary responsibilities, thus under the so-called monitoring, mentoring and advising duties (MMA) -- remain deeply tied to the primary/exclusive (executive) responsibilities. According to the guidelines distributed to EULEX judges and prosecutors that instruct the parties on the how to perform the MMA functions in practice, the MMA functions turn out to be largely a preliminary step that could eventually lead to the invoking of the executive powers.

Monitoring, for instance, is to be understood as "professional observation and assessment of the judicial system to identify weaknesses in the administration of justice and the application of the rule of law and contradictions to European standards and best practices."[106] In the event that a EULEX judge observes misconduct by his local counterpart(s) during his/her monitoring, then the transgression is duly reported first to the EULEX line manager and then to the relevant disciplinary and prosecutorial authorities. If recurrent transgressions and violations of European standards are observed, and further, if these violations prove to be an impediment toward the administration of justice and the rule of law, EULEX judges in charge of monitoring are to proceed with the *mentoring*.

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[105] Legal Advisor to the Minister of Justice, Interview with the author, Prishtina, January 17, 2012,.

[106] See EULEX Kosovo, 'Guidelines on Monitoring, Mentoring and Advising (MMA) of EULEX judges,' Prishtina, 23 September 2010.

Mentoring as an activity is perhaps the one function out of the three MMA responsibilities that captures most vividly the socializing effects of the Kosovo judicial and prosecutorial authorities into what EULEX calls "best European practices". As a fundamentally educational and training project, it is generally centered around techniques such as coaching, counseling, creating networks, offering experiences and opinions on adjudication by providing relevant legal sources or doctrinal essays and most importantly international jurisprudence. In that sense, mentoring is intended and tailored to teach the local counterparts, by "showing [them] how to deal with a specific task [by] sharing the "know how" or by encouraging."[107]

While listed as being primarily a type of informal support, "based on mutual trust and professional respect, through the exchange of experiences, information, opinions and best practices,"[108] it is hard to conceive of it as being anything else but a "part and parcel of EULEX judges' executive function."[109] This is primarily because mentoring, informal as it may be, is conducted throughout judicial deliberations -- through the very exercise of judicial and prosecutorial functions. Thus, even though mentoring activities are based on a relationship of equality – in good faith and between colleagues -- they still foresee a more prudent involvement in the investigation, prosecution and adjudication of "sensitive crimes" through co-locating EULEX judges and prosecutors with their local counterparts (see hybrid panels above).

In fact, keeping this involvement at informal level, "with the less possible exposure" and "without appearing intrusive or supervisory, but rather in an interactive

[107] Ibid, 5
[108] Ibid, 4.
[109] Spernbauer, "EULEX Kosovo", 27.

manner"[110] becomes difficult, once mentoring is transformed into *advising*. That is, if the previous steps of mentoring and monitoring fail to bring adequate remedy, i.e fail to eliminate violations and structural dysfunctions, then the last step to be undertaken by EULEX is that of advising. Unlike monitoring and mentoring, which are of informal nature and are conducted in direct individual interaction with judges and prosecutors, advising can lead to the issuance of a formal and official position to a relevant institution. It usually takes the shape of guidelines and recommendations outlining the "necessary insights to intervene in [that] specific area of the justice system that needs general and structural improvement."[111] In other words, of all the MMA functions, advising is the only one with tacit, albeit effective, institutional implications. This is primarily so because in the event that these formal positions fail to be honored, EULEX judges are able to, in the very last instance, use their executive or 'corrective' measures. In that way, the MMA functions are not very different in principle from the executive powers – if anything at all, they seem to complement them.

In practice, the principle of co-location of EULEX staff in the execution of their MMA functions is not limited to law enforcement mechanisms only. Notably, EULEX has also positioned staff members in the Ministry of Justice to advise on the adopted legislation. Currently, there are members of EULEX that are collocated both with the office of the Minister of Justice and with the legislative drafting unit. As such, not only are EULEX staff members co-drafters of relevant legislation in the area of the "rule of law" before this legislation is submitted to the Assembly of Kosovo, but they are also reviewers as well as advisors on other strategic policy documents

[110] EULEX Kosovo, "Guidelines on Monitoring, Mentoring and Advising", 5-6.
[111] Ibid, 8.

produced by the Ministry of Justice.[112] As noted by a EULEX officer: "because we have a mechanism whereby we can monitor the drafting of the laws, we are also in position to advocate for what we would like to see be preserved in some instances of jurisdiction, and we usually get it."[113] Most recently, EULEX's staff at the Ministry of Justice has been instrumental in helping the local counterparts draft the new Criminal Code, which is to replace UNMIK's Provisional Criminal Code of Kosovo adopted in 2004. Asked, what this new Code looks like and what other European practices incorporates, an interviewee tried to sum it up: "It's a bit of everything, really. They [EULEX] have brought in articles from all over, but as a legal expert I can tell you it looks good and it's likely the best we've had."[114]

3.4 Executive and MMA powers within the Police Component

While the executive powers and MMA powers also apply to the Police Component of EULEX, they are not as intertwined as in the Justice Component. In fact, one could talk of a much more distinct and sharp separation between these two sets of functions in the Police Component. As is the case with the Justice Component, the MMA functions of the Police Component still embody the principle of colocation. Thus functions conducted by EULEX subunits such as the Police Strengthening Department (PSD) are tailored toward supporting, training and coaching the Kosovo Police – KP. These are usually managed with training sessions in order to provide KP

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[112] Spernbauer, 29.

[113] EULEX Senior Political Advisor, Interview with the Author, Prishtina, Kosovo, 19 January 2012.

[114] Legal Advisor to the Minister of Justice, phone interview with the author, April 15, 2012.

with strategy, to monitor their performance, and to improve the managerial skills in their daily duties of "rule of law" enforcement.

The executive powers of the Police Component on the other hand are generally undertaken by the Police Executive Department (PED), which works primarily in so-called sensitive cases, i.e financial crimes, organized crimes, war crimes, terrorism and corruption. While the collaboration in Justice Component between EULEX and the local counterparts is a lot more nuanced, the PED has its own command structure whereby cases are handed over directly to the Special Prosecutorial Office. The same principle of case take-over applies: not only is the PED allowed to investigate crimes independently from the Kosovo Police (KP), but it can also claim exclusivity by acquiring the files being investigated by the KP. In practice, this means that during the initial stages, two different units can investigate the same case simultaneously with often some tension emerging from the asymmetrical use of resources, capacity and authority.

Last, but not least, EULEX features four anti-riot units all of which endowed with executive responsibilities. Notably, the relationship between the KP and EULEX's four anti-riot units has been a strenuous one. Even though the latter are said to be on stand-by and only second in line to respond in case of a stability-threatening riot (with the KP being the first and KFOR being the third), they have often been accused of not coordinating sufficiently enough with the KP. After yet another round of rekindled clashes between Kosovo Serbs and Kosovo Albanians in the ethnically-divided town of Mitrovica culminated in the death of a Kosovar Albanian, a protest denouncing the violence was announced via the social media. In a widely televised incident, the Head of the KP in the Mitrovica region confronted the EULEX

commander after the latter decided to tank-block the infamous Mitrovica bridge in anticipation of riots due to the protest. To better capture the moment, I transcribe the dialogue between the two:

> *Head of KP*: Sir, what is the problem? Is there anything that we are not aware of?
> *EULEX Commander*: We have an order to stand on the bridge.
> *Head of KP*: Which bridge?
> *EULEX Commander*: This bridge. We want to avoid the demonstration troubles. We have information that by 3pm there will be a demonstration here.
> *Head of KP*: That is a lie. Who gave you this information? For every action you need to coordinate with us. You understand that this is frustrating. People do not understand what is going on here.[115]

Based on the above provisions and investigation, it is safe to say that, even if indirectly, EULEX is heavily involved in both capacity- and institution-building. What ceases to make EULEX simply a technical mission, is that the idea of local ownership, which EULEX along with the other international counterparts seem to be promoting in principle, remains somewhat hollow. In his capacity as a EUSR, Pieter Feith denied the allegations that the EU's role in Kosovo would be akin to that of UNMIK administration – a mission invested in capacity and institution-building, with firmly anchored executive powers. He noted "We are assuming different responsibilities than the UN from whom we are taking over. Therefore the transfer is not from the UN to the EU, it's from the UN to the Kosovo government. They will have the ownership and the responsibility."[116]

It is true that the EU has indeed a much more distinct role than the UN – for one, Kosovo is not a protectorate of the EU and is not under the administration of the

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[115] "Why did EULEX "occupy" the bridge?," *Koha Ditore* (Distributed by Koha.net, April 11, 2012), http://koha.net/?page=1,13,95106.

[116] Pieter Feith, "EU in Kosovo: EULEX Mission" (Distributed by EUSecurityandDefense, April 16, 2008) <http://www.youtube.com/watch?v=47GtGBA-b3k&feature=relmfu>

EU. However, what makes EULEX a lot more than simply an assisting mission, or in the EU jargon – a technical mission -- is precisely this ability to penetrate and transform the Kosovar polity from within, by profoundly shaping its law enforcement sector through its peculiar mandate. This is not to say that the power of EULEX is intrusive -- in fact, most EULEX staff workers will try to demonstrate that the point is not to intervene. However, in allowing plenty of space for intervention, EULEX's power becomes primarily one that is tacitly constitutive, and thus transformative, even if it remains concealed and shielded by the enumeration of operational tasks of the mission.

To conclude, a EULEX staff member's comments about the role of the MMAs versus the executive powers, are worth quoting at length:

> There are many ways to use the executive capacities and one of them is to *make use of* them in a witty manner. The truth is that you catch more flies with honey than with manure. Besides, I think that the emphasis on MMA proves to be less offensive in delivery and this is particularly valuable to our masters in Brussels. After all, we are an institution born with no legs and one arm perpetually tied behind our back.[117]

[117] EULEX Reporting Officer, Interview with the author, Prishtina, 12 January 2012.

4. The rule of law: between power, authority and legitimacy

In this chapter, I examine two different yet somehow interconnected episodes that expose EULEX's impact in reforming the Kosovar juridical field and the ensuing reaction from the Kosovar political elite. By providing an analysis of the tensions that emanated from these two occasions, I unearth a complex interplay between power and the principle of "rule of law" against which EULEX has thus far defined its role in Kosovo. These two episodes provide a concrete platform from which one can observe in detail two analytically engaging processes at play: first, the socialization of Kosovar institutions into EULEX's praxis or "way of doing things" as an instance of EULEX's pedagogical program of sanctioning support for the "rule of law"; and second, the extent to which Kosovar authorities, upon a growingly shared understanding of the "rule of law," are able to articulate competitive truths to legitimize their own standing and carve their own niche of authority as legitimate contenders in the Kosovar juridical field.

In order to validate these claims, I look at how EULEX's mandate on providing support for the judiciary has not only been crucial in embedding the institutional and social construction of a polity primarily based on a rhetoric which hinges upon the respect for the "rule of law", but has also shaped the dispositions and the interests of the Kosovar political elite. Notably, I demonstrate how EULEX's advocacy for the rule of law is being invoked by Kosovar politicians on a similar scale and format in order to justify their own articulations of truth all the while delimiting those espoused by EULEX. Having bought into EULEX's "way of doing things," the locals are provided with a framework wherein they are able to better mobilize or

resuscitate their own share of symbolic capital -- authority and legitimacy. It is through this symbolic capital that Kosovar counterparts are able to legitimize their own practices and actions, even if the outcomes are intended to vindicate their own claims while refuting those that are typically propounded by EULEX. In so doing, the local counterparts establish themselves as legitimate players on a platform where EULEX is set to have an advantage, or even mastery – the juridical field.

The first occasion, which attracted much publicity in 2011, concerns EULEX's attempt to get a Constitutional Court ruling via the Assembly of Kosovo on the issue of MP immunity. For EULEX, this was deemed as a necessary step in order proceed with executing its exclusive responsibilities in the investigation of high-level corruption and war crimes that implicated members of the Kosovar political elite at the ministerial level as well as sitting deputies at the Assembly of Kosovo. This move by EULEX, in turn, generated much debate and tension when the Speaker of the Assembly aided by a few deputies refused to bring the issue up to vote in an Assembly session on the basis that EULEX's request was itself unconstitutional.

The second episode deals with the difficulties encountered in establishing the rule of law in the predominantly Serb-populated north of Kosovo. Despite retaining executive powers in this region, EULEX has been unable to extend its operations to the North, due to Kosovo Serbs' consistent refusal to accept Kosovar institutions and the Ahtisaari Plan. The North of Kosovo has remained outside Prishtina's control for the past 13 years: it administers its own parallel structures – institutions that challenge Prishtina-based authorities. The inability to engulf the North under Kosovar sovereignty has for years now outraged the Kosovar political elite, who look upon EULEX's reluctance to use the executive powers to tackle the burgeoning organized

crime in this areas as politically motivated. As a result, the intensity of criticism toward EULEX for essentially allowing the North to remain unruly, disorderly and troubled due to the perceived risk of instability has increased dramatically.

Before I proceed further, a few caveats are in order. Because I explicitly deal with the interactions between the Kosovar political elite and EULEX and expose an interplay of power at the judiciary with ramifications on both the legislative and the executive, it may be tempting to conclude that EULEX's full-scale domination over the field of rule of law in Kosovo is implicitly assumed. To make such a statement, one would have to submit that EULEX as an entity is central in Kosovo's governance. While I have argued in the previous chapters that EULEX, by virtue of its mandate and the ability to resort to its executive powers, shares the monopoly on the legitimate use of violence in Kosovo alongside Kosovar authorities, attributing full governance would be advancing an unwarranted premise.

Secondly, I do not venture on examining the face value motives behind the Kosovar political elite as they engage in actions that legitimize their own share of authority and legitimacy. The reason for this is that I do not, on a post-hoc basis, challenge the extent to which these motives may or may not have been strategic. Looking back, one may well argue that certain actions were intended to safeguard or further individual self-interest and other definable goals, notwithstanding whether these strategies were consciously undertaken or not. To be sure, agents may or may not have the luxury to look into their options, ponder their limitations and arrive to utility-maximizing conclusions. Even by rationalist accounts, looking at variations in optimality may be a good gauge of that.

The point of departure for my inquiry however is a different one: I examine the extent to which agents' actions are anchored in an emerging framework of shared understanding around a particular field of practice – i.e the "rule of law" –and how this field offers a distinct palette of resources that actors can draw from and mobilize. By implication, I posit that if we are to delineate what is reasonable/rational from a pattern of social interactions -- and by extension, from the world of practice – we are doomed to place a heavy limitation upon any analytical framework especially with respect to understanding the more implicit mechanisms of power, i.e those mechanisms which are not necessarily materialistic nor articulated in material terms.

In its current institutional arrangement, be it at a formal or practical level, EULEX remains a major actor in shaping the Kosovar juridical field. Its prerogatives, which reflect the institutionalized source of authority and which following Bourdieusian theory I refer to as "symbolic capital," encompass the very ability to determine what exactly is implied by the "rule of law," how one establishes it, on what basis a case is prosecuted and adjudicated and, last but not least, who prosecutes and adjudicates a case (e.g a Kosovar judge or a EULEX judge). In that sense, EULEX's power in defining the Kosovar judicial field is paramount. As Barnett and Adler have put it "the ability to create the underlying rules of the game, to define what constitutes acceptable play and be able to get other actors to commit to these rules because they are now part of their self-understandings is perhaps the most subtle and effective form of power"[118]

EULEX's "symbolic capital" is profoundly anchored in EULEX's recognized position, both internally and externally, as a watchdog of Kosovo's "rule of law" and a

[118] Quoted in Vincent Pouliot, *International Security in Practice: The Politics of NATO-Russia Diplomacy* (New York: Cambridge University Press, 2010): 45.

reformer of its juridical field. For one, this authority has been granted to EULEX not only by the international community, but also by the Kosovar political elite.[119] This allows EULEX as a CSDP mission to assert itself as a chaperone of the European values. Further, in as far as EULEX proctors the establishment of the "rule of law" in Kosovo according to European best practices, and can intervene when other practices are seen as derogatory, then the scope of authority which EULEX is endowed with can upset the conventional understanding of state sovereignty, (however limited in scope Kosovar statehood may be). The ability to invoke the principle of "rule of law" and interpret it often comes to clash with an interpretation endorsed by local counterparts who have come to view themselves as contenders in this game, fighting around the same principle, albeit intending different outcomes.

In the previous chapter, I have submitted that EULEX's engagement in Kosovo is essentially pedagogic in nature:[120]it is based on an understanding that EULEX is present in Kosovo to support local institutions toward the establishment of the "rule of law." As an agency engaged in the security sector reform, EULEX has a purposeful mission: to improve and transform the legal field be it by mentoring, monitoring and advising or by directly engaging in exclusive/executive powers. In so doing, it inevitably plays an impressive role in the construction of a particular understanding of the "rule of law", attaching meaning and values that for the recipients must become the "commonsensical foundation" of the domain for which EULEX is there in the first place. Daily interactions and training activities ensure the success of such pedagogic premise: the commonsensical foundation comes to be

[119] As a part of adopting the Ahtisaari Package, the domestic institutions had to formally invite the international presence, including that of EULEX.

[120] See Gheciu, 2005a.

shared by other agents (e.g Kosovar institutions, judiciary) for whom this pedagogical practice is designed. Moreover, within such mentor–apprentice relationship, not only is the creation of a world of shared meanings inevitable, but also so is the creation of a power hierarchy. As argued by Pouliot, "the archetype of a power relation in and through practice is apprenticeship."[121] Trust in EULEX as an agency to help the local counterparts in and through practice establish the rule of law according to European best practices is a confirmation of EULEX's master position in relation to Kosovar position as a pupil.

Notably, when operating under such a highly entrenched framework of socialization, agents are often led to take for granted the symbolic boundaries between what is acceptable – i.e reasonable/appropriate — and what is not.[122] In other words, the reasonable/rational or normative/appropriate are defined in terms of the practical i.e in relation to the "commonsensical" and vice-versa. Thus, the "rational thing to do" and the "good thing to do" are by default "the practical thing to do." Put differently, through iterated action, agents are imbued with a practical sense – with a logic of practicality that is neither instrumental nor rule-driven. In fact, as noted by Pouliot, "it is thanks to this practical sense that agents feel whether a given social context calls for instrumental rationality, norm compliance or communicative action."[123] In that sense what is implied by strategy in Bourdieusian terms, is precisely "what the given social context calls for" having taken into account both the position and the dispositions of the agent.

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[121] Vincent Pouliot, *International Security,* 47.
[122] Ibid., 131
[123] Ibid., 36.

In any case, the strategy of agents in the juridical field is one that is guided by struggles to monopolize the very reading of the law and its interpretation. Universalizing the law through institutionalization is the price to be earned at the end of this struggle because a successful institutionalization ensures the congealing of power relations which then favors the agent that triumphed in the battle to secure a reading. According to Bourdieu, this is precisely how the "universality of law" becomes the holy grail of a legal praxis. Moreover, the ability of an expert to systematize and rationalize the juridical decisions or the ability to appeal to the rules for grounding and justifying those decisions is also an ability to invoke the *seal of universality*. This seal of universality is the "quintessential carrier of symbolic effectiveness" leading further to the *practical universalization*, that is to the generalization in practice of a mode of action and expression previously restricted to a social space.

It follows that the process of universalization of law is by no means a foregone conclusion. On the contrary, the law, as a quintessential form of legitimized discourse, which has been propagated by a resourceful agent "can exercise specific power only to the extent that it attains recognition, that is, to the extent that the element of arbitrariness at the heart of its functioning remains unrecognized." To that end, Bourdieu contends, "the tacit grant of *faith* in the juridical order must be ceaselessly reproduced."[124] One way to do this would be for the agents that are involved in formalizing and systematizing the law to co-opt people, partners, contenders (or recipients) into the value of law by creating the impression of neutrality and autonomy.

124 Bourideu, "The Force of Law", 844.

In that sense, establishing the "rule of law", presupposes the coming together of a sense of commitment to common values and to common understanding of the working mechanism of a specific domain and how that domain should be governed. The process of co-opting people or recipients (in this case of socializees, or the Kosovar institutions) into EULEX's "way of doing things," is closed to what Gheciu calls 'habitus diffusion.' Habitus diffusion is only successful in as far as socializers (EULEX) – those that are formalizing and systematizing the law are perceived as legitimate experts in the field. In the event that this legitimacy is questioned, due to inexplicable compartment by socializers, which may be arbitrary to the prescriptions of the habitus that they disseminated in the first place, the socalizees will see this behavior as having been inspired by some other political agenda rather than normal, common sense set of concepts and dispositions.

As I will demonstrate below, EULEX's decision to ask for a Constitutional Court ruling on the MP Immunity has been done cautiously in order to underline the fact that even though EULEX is the guardian of the rule of law, this should not exempt it from exploring juridical channels to arrive to the outcomes intended. This belief in establishing a culture that believes in the universality of the law is necessary to maintain legitimacy around the rule of law. On the other hand, Kosovar counterparts, in both cases below, have challenged this by confronting EULEX with its own tendency to evade this universality.

4.1 Rule of law vs. rule of law I: MP immunity

The MP Immunity has been one of the most talked about issues in post-independence Kosovo with EULEX having a subtle, yet effective, influence in

prompting a Constitutional Court ruling that would clarify its legal scope. The long episode began in April 2010 when EULEX, independently and unaided by Kosovar counterparts, launched an investigative raid on the Ministry of Transport and Telecommunication on the grounded suspicion of high-level corruption, noted irregularities in several procurement proceedings and tenders related to the construction of the roads in Kosovo between 2007-2009. Among the most controversial charges in this two-year probe was one related to the 700km highway project in Kosovo. The investigation primarily targeted the then-Minister of Transportation and Telecommunication, Fatmir Limaj, who aside from being a former KLA commander and a war friend of Prime Minister Hashim Thaci, was also serving as a Deputy Head of Thaci's party—PDK. Accordingly, Limaj and several members of the Ministry's personnel, whose private premises were also searched, were suspected of soliciting bribes, money laundering, organized crime and fraud in office and the suspected embezzlement of 80 million euros, of which EULEX was claiming to have evidence of at least 2 million.[125]

This action sparked a crisis between EULEX and the government, with most government officials, primarily from the ruling PDK party accusing EULEX of staging a spectacle and resorting to "unnecessarily sensational strategies"[126] with the Minister himself calling EULEX's actions as "political lynching."[127] The affair turned into a fully-fledged public dispute, for the most part shedding light on the difficult relationship between the local institutions and EULEX. The prime minister, for his part, publicly questioned whether the International Civilian Representative, Pieter

[125] Muhamet Brajshori, "Kosovo: Doubts Raised About High Profile Corruption Case," *Eurasia Review,* 29 April 2012.

[126] Prime Minister's Chief of Staff, Interview with the Author, Prishtina, 9 January, 2012.

[127] "EULEX Fights Kosovo Corruption," *SETimes*, 21 May 2010.

Feith, -- who at the time was also serving as the EU Special Representative and thus responsible for politically advising EULEX -- had the right to interfere in the judicial system.[128] According to the PM, the raids on the Ministry were sending out a message that "Kosovar institutions were at war with the international institutions." [129]

To these statements, the Chief EULEX Prosecutor at the time, the Dutch Johannes van Vreesvijk, who was in charge of the investigation and who had earned himself a public reputation for vowing to go after "the big fish"[130] responded by calling PM's assertions as unfortunate and "dangerous for a prime-minister," adding that the PM "cannot know better than a judge when to apply the law." Disdainful of the PM's remarks, the EULEX Prosecutor added "we [EULEX] are not pleased with [Prime Minister's] remarks, because [the PM] forgets one thing: that he is member of the executive branch. The parliament is the legislative. We are here for the judiciary."[131]Finally, in a lavishly quoted sentence by the media, he warned, "all those who are linked with organized crime and corruption should start sweating."[132]

While the corruption case was still under investigation, the tensions between the Kosovar political elite and EULEX hit a new low when almost a year later, Limaj came under a fresh series of investigations, this time under the suspicion of war

[128] See Chapter 2 for a more detailed analysis of the double-hatting of the ICO and EUSR.
[129] Balkan Insight, "EULEX: Limaj Could Face a Long Jail Term," *Balkan Insight News Report*, 7 May 2010.
[130] "Catching big fish" is one of the most commonly used terms in the new lingo of Kosovar judiciary. It was coined by EULEX officials as a metaphor to indicate the prosecution of high-ranking politicians believed to be involved in crime.
[131] In fact, such statements that tend to establish the judiciary in Kosovo as ultimately a responsibility of EULEX have been reproduced in several occasions.
[132] These bold remarks made by van Vreesvijk shortly earned him a reputation for being a guardian of the rule of law, prompting some Kosovar citizens to even rename the main pedestrian boulevard in Prishtina after him. In an interview with a high official at the EULEX, van Vreesvijk's remarks were considered as untimely and lacking strategy, because if anything, "they helped raise expectations among the local population," which were then not met.

crimes[133] committed against Kosovo Serbs and Kosovo Albanians in an alleged makeshift KLA detention camp during the war. While EULEX issued an arrest warrant on Limaj, no actual arrest followed due to Limaj's immunity as a deputy of the Assembly of Kosovo. In its communiqué to the press, EULEX informed the public that the Prosecutor had been in contact with Limaj to discuss the situation due to the latter's position as an MP, and therefore his entitlement to MP immunity, and that it would continue to do so until further clarification on the immunity issue.

Because of the already existing tension, EULEX also ensured to call upon the government of Kosovo to show maximum care to not instigate new polemics that could label the case as political. Among others, it cautioned the Government of Kosovo to refrain from politicizing the issue by pointing out that "EULEX would like to make it clear that the judicial process should be absolutely free from political interference." In so doing, it added that since the Government of Kosovo had consistently expressed its desire to improve the rule of law in Kosovo by making it a priority, EULEX would keep calling upon the Government to respect those basic principles.[134]

While the negotiations took place behind closed doors, four months later it was revealed that Limaj had not been arrested pending a clarification on the issue of immunity. In a televised interview, the Deputy Head of EULEX urged the former minister to waive his own immunity from prosecution and face trial. Confiding to a journalist, the Deputy Head admitted EULEX's inability to proceed with the matter:

[133] It needs to be noted that Limaj, had already been previously tried at the ICTY for war crimes committed against Albanians and Serbs who were suspected of having collaborated with Serbia during the Kosovo war of 1998-1999. He was acquitted after a 2-year long trial and returned to Kosovo.

[134] EULEX Kosovo, "EULEX Statement on War Crimes Arrests," 17 March 2010.

"We don't know if we can arrest him while he is performing his duty as an MP […] One way would have been for Limaj to resign. We asked him to do it, but he said 'No.'"[135] To this statement, Limaj's defense lawyer responded with harsh criticism by arguing that the direct targeting of his client was shaping to be more of a political saga than a judicial act, passing the buck of politicization back to EULEX. Calling EULEX Deputy Head's remarks as inappropriate, the defense lawyer added:

> It is not usual for someone who claims to not interfere in the work of judiciary to make such statements because, ultimately, he is the Deputy Chief of EULEX, which in fact is a political position, and he is not a judge, nor is he a prosecutor or a police officer […] He can say "we have a right to arrest all those who breach the law" but, why would he mention Fatmir Limaj by name and surname?[136]

It was soon revealed that EULEX had already initiated an institutional battle to get a Constitutional Court ruling instead. A letter by EULEX was mailed to the Speaker of the Assembly of Kosovo – Jakup Krasniqi, requesting that he demands from the Assembly passing of a resolution that would in turn ask the Government to refer the question of deputy immunity to the Constitutional Court for clarification. The row deepened further as the Speaker of the Assembly (also a member of PDK ruling party, and a war ally of both Fatmir Limaj and the PM Thaci) refused to proceed with EULEX's request on the basis that the request was not only unconstitutional, but it was also not based on the law nor on the rules of procedure of the Assembly.[137]

Reading off the Constitution, the Speaker of the Assembly suggested that addressing the MP immunity was not the duty of the Assembly. Citing relevant articles on the Constitution, the Speaker argued that channeling this request through Assembly

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[135] Balkan Insight, "EULEX Urges Limaj to Face War Crimes Trial," *Balkan Insight News Report*, 15 July 2011.

[136] "EULEX To Question Limaj," *Koha Ditore*, 17 July 2011.

[137] "Krasniqi Sends Letter to EULEX Regarding Immunity," *Bota Sot,* 12 July 2011.

vote and resolution was unnecessary because both the Government and the President of the Republic could in theory refer a case to the Constitutional Court directly, without getting the Assembly involved.[138] While pointing out that the issue of immunity was very clear and limited[139] the Speaker, however, suggested that should EULEX insist that this clarification must go through the Assembly, it would have to do so by following the relevant laws that regulate these matters. The procedurally correct way would be thus to submit a request to the State Prosecutor who could then submit the request to the Assembly.[140]

The Speaker's refusal launched a series of attacks from the international community present in Kosovo, the strongest of all being from the U.S Ambassador, Christopher Dell. The Ambassador criticized the Speaker on the basis that the latter was deliberately trying to frame the EULEX request on the issue MP immunity as some sort of an attempt to blemish the legacy of the KLA:

> I'm very disappointed that the Speaker today rejected the EULEX letter and sent it back to them saying that it has no standing and he hid behind a number of basically farcical, ridiculous legal arguments that are an attempt to avoid his responsibilities. I think that the Speaker, backed by certain other individuals, have done immense damage to Kosovo. The United States worked hard with EULEX to craft an outcome that made this not about an individual, not about

[138] According to Article 113 of the Constitution of Kosovo, the authorized parties that are allowed to refer a case to the Constitutional Court for questions on compatibility include: the Assembly of Kosovo, the Government and the President of the Republic.

[139] According to Article 75, Sec. 1 and 2 of the Constitution of Kosovo: Deputies of the Assembly are immune from prosecution, civil lawsuit and dismissal for actions or decisions that are within the scope of their responsibilities as deputies of the Assembly. This immunity, however, does not prevent their criminal prosecutions for actions taken outside of their responsibilities as deputies. Further, a deputy cannot be arrested while performing his duties as a deputy, without the consent of the majority of Assembly.

[140] The Law on Rights and the Responsibilities of the Deputies, commands that the request for dismissing the immunity of the deputy be done only by the Attorney General of Kosovo; or, in the case when a private indictment is raised against the deputy according to the Criminal Procedure Code of Kosovo, the request can be submitted by the court that is investigating the case. Once the Prosecutor makes a request to the Assembly, then the Assembly decides on an individual level with the majority of deputies' votes needed for such request to pass.

> war crimes, not about the supposed values of the KLA, and on this let me just say about these supposed KLA values. I never thought that the KLA fought, I never thought the U.S. or NATO backed the KLA because the KLA was fighting to protect war criminals from justice. I thought that the KLA was fighting to prevent war criminals from carrying out their plans against the good of, the people of Kosovo. So, when I say that this position that the Speaker has put out there is a distortion, that is what I mean, a complete distortion of the legacy of what the KLA struggled for in the name of the people of Kosovo. [141]

He further warned that these attempts were in effect challenging the international community and especially the latter's support for post-independence "rule of law" in Kosovo. According to the Ambassador, the Speaker's actions were setting Kosovo "on a collision course with the international community."[142] Reminding that the prosecution of war crimes and bringing individuals to justice for such crimes was a question of fundamental values for the United States and Europe, he added, "Speaker Krasniqi has chosen to defy the international community; to defy Kosovo's best friends in the name of protecting one or two friends of his. This causes me to question whether […] he's any longer suitable to remain in the position he holds." [143]

Responding to these accusations, the Speaker of Assembly pointed out that as a public official, elected by the people of Kosovo, he "has pledged to uphold the Constitution and the laws of the country", reminding the Ambassador that in a "democratic country, nobody is entitled to remove a public official from office" with the exception of the people that have elected him in the first place. Summoned in Brussels to discuss the issue with the relevant EU agencies, in a televised interview, the President of Assembly responded:

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[141] "Ambassador Dell Interview with VOA – Albanian Stringer in Kosovo, July 12, 2011," transcript, *Embassy of the United States in Prishtina*, 13 July 2011.

[142] Ibid.

[143] Ibid.

> I am preparing a response in letter that is more legal than political. The reason why I am in Brussels today is precisely to meet and discuss the issue with some members of the EU Parliament, since as we know, EULEX is an agency of the European Union. I have brought EULEX's letter of request on this issue that was submitted to the Assembly of Kosovo and to myself in my capacity as the President of the Assembly. I have also brought the draft letter of the response [that the Assembly has prepared], which contains the legal opinion of Assembly experts in collaboration with international experts… Therefore, I am convinced that Mr. Ambassador has spoken prematurely… I believe that within the past few years in Kosovo, thanks to the help of United States, that of the European Union and the international community, in general, we have learned how to respect the Constitutional order, we have learned how to respect democracy, how to build on it and how to advance it so that at the end nobody is above the law. [144]

Following the second rejection letter from the President of the Assembly, EULEX assessed that it would follow with so-called "alternative routes" whereby the Mission would target parliamentary caucuses at the Assembly. Many MPs, government officials and legal specialists expressed their bewilderment, with some even assessing that these actions indicated that EULEX had either very little understanding of the Assembly procedural rules and the Constitution itself, or that it was deliberately trying to politicize the issue. A law professor from the University of Prishtina, offering his verdict on the issue hinted that this case was suffering from political interference:

> I do not understand why EULEX has chosen to follow this path and I do not understand why it insists getting the Constitutional Court involved in this matter, when the Prosecutor in charge of the case can demand the revoking of the immunity [of a deputy who is suspected of having conducted crimes outside the scope of his/her responsibilities as deputies of Assembly] … In this situation, both the EULEX Prosecutor that is in charge of the case, or the State Prosecutor, has a right to request from the Assembly to revoke the immunity of a deputy […][145]

[144] President of the Assembly Jakup Krasniqi, Televised Interview with *Voice of America*, 13 July 2011.

[145] Quoted in "The Constitution is Clear on Immunity," *Bota Sot*, 18 July 2011.

A similar opinion was also shared by the Head of the Constitutional Amendments Commission, a much-admired law professor, who had also served as one of the leading local drafters of the Constitution in 2008:

> The procedure is exceptionally clear. The process [of revoking the immunity of a deputy] is to be initiated by the Kosovo State Prosecutor and it develops within the Assembly of Kosovo: there is a Committee within the Assembly, which deals exclusively with the scope of deputy mandate and immunity and which will process such request [by the Prosecutor] within 30 days. Pending the assessment of this Committee, the issue is then transferred to the Assembly, which discusses the matter in a plenary meeting followed by appropriate voting procedure. A case is referred to the Constitutional Court for interpretation only if an Assembly Committee is unclear on the exact meaning of the relevant laws and articles. [146]

For the most part, EULEX justified its insistence on a Constitutional Court ruling on the basis that it was a matter of legal principle, and not one that aimed to target people individually. In an interview, the Deputy Head of EULEX confided: "[our] intention was not to make a public drama – [our] intention is purely to clarify this issue for the benefit, not just of this particular case, but for future cases."[147] The decision to initiate the debate within the Assembly and not directly within the Government was seen as a means to harness more legitimacy around the understanding of the immunity itself: thus, if MPs voted for a Resolution that would demand from the Government to refer the case to the Constitutional Court, the burden of the legitimacy of such act would fall primarily on the Assembly as the legislative body of the country.

Finally, a Constitutional interpretation would sanction an attempt to resolve the issue once and for all. By doing away with any possible ambiguity systematically, it would grant, what Bourdieu calls, the *seal of universality*, which would not only

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[146] Ibid.

[147] "Ambassador Christopher Dell and EULEX Deputy Head Andrew Sparkes Interview with Jeta Xharra –"Jeta ne Kosove" – BIRN" transcript, *Embassy of the United States in Prishtina*, 14 July 2011.

demonstrate a particular agent's upper hand on an issue, but in so doing it would also lock in a new configuration of power relations. On the other hand, as the President of the Assembly, deputies and other local officials found themselves defending what they held as "respect of the law, Assembly procedures and Constitution," they offered a competitive understanding and interpretation of the "rule of law." By engaging symbolic resources drawn from the international habitus into which they had been socialized, i.e by demonstrating that they are well capable of playing a game of legal warfare, they offered their own competitive articulation of truth.

Weeks into the public debate, the International Civilian Representative Pieter Feith suggested that the alternative was indeed – as the President of the Assembly had initially indicated – to get the government to refer the case to the Constitutional Court directly, without getting the Assembly involved: "I think we should move to Plan B. In my opinion, the Government is entitled to ask for the opinion of the Constitutional Court on the removal of immunity. This does not have to go through the Assembly."[148]Shortly after ICR's message, the PM announced that the Government had decided in effect to give an end to the ongoing debates by directly referring the case to the Constitutional Court citing that the referral of relevant matters to the Constitutional Court was a Constitutional right of the Government. In addition, the PM made a request that the question on the clarification and the interpretation of the scope of immunity be extended to a verdict on the immunity of the President of the Republic, of the Prime Minister, and all high-level members of the Government.

Following the request by the Prime Minister, the Constitutional Court processed the case and delivered a ruling two months later. Among others, it noted that "deputies

[148] ICR Pieter Feith, Interview with *Klan Kosova*, 14 July 2011.

[were] not immune from criminal prosecution for actions taken or decisions made outside the scope of their responsibilities." It further added that "this [was] applicable both with regard to prosecution for criminal acts allegedly committed prior to the beginning of their mandate and during the course of their mandate as deputies." More importantly, perhaps, it ruled that the relevant institutions responsible with the prosecution of the case had the right to indict and arrest any deputy under investigation *without* the permission of the Assembly [149](emphasis added), thereby offering a clarification, which would theoretically vindicate EULEX's efforts in this regard.[150]

4.2 Rule of law vs. rule of law II: The North of Kosovo

Ironically, as the row over immunity was more or less over by the time the Kosovar Government referred the issue to the Constitutional Court, EULEX and the Government found each other entering another chronicle of heightened tension. On the same day that the Government decided to formally ask the Constitutional Court for a ruling on the MP immunity, it also decided on effectively placing an embargo on the Serb goods entering Kosovo as a measure of reciprocity for the three-year long blockade that Serbia had placed on Kosovar goods entering or passing through Serbia. The embargo itself was instituted throughout customs checkpoints bordering Serbia, with the exception of the so-called Northern gates, which had been left under the administration of the international community since 1999 due to this region's difficult

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[149] Constitutional Court of the Republic of Kosovo, Case No: K098/11, "Ruling on the Immunity of the Deputies of the Assembly of the Republic of Kosovo, of the President of the Republic of Kosovo and the Members of the Government of the Republic of Kosovo," 20 September 2011.

[150] Hours after the Constitutional Court made public its decision EULEX placed Mr. Limaj under house arrest.

relationship with Prishtina authorities. Since EULEX's deployment in 2008, the North has been under the supervision of EULEX, with the agency assuming executive powers in the justice, police and customs areas.

The North of Kosovo remains an epitome of the ongoing territorial and political fracas between Kosovo and Serbia. With a strong and predominantly rural Serb majority, amounting to 65.000 people, the North has uniformly rejected the authority Kosovo institutions and has continuously refused integration with the constituents south of the Ibar river.[151] Since the end of 1999 Kosovo War, the North has remained, *de facto*, under a dual sovereignty: on one hand, under the barely functional northern Kosovar institutions that are vehemently rejected and repeatedly attacked and on the other hand by the so-called parallel institutions that remain under Serbia's control.

While Prishtina has sought for years to rid this region from operating the parallel institutions and integrate it in order to gain control over the border with Serbia, Belgrade has equally as strongly pushed in the opposite direction. It has widely been suggested that Serbia, in fact, deems the North as the last standing bastion to compensate for losing the rest of the former province. This bone of contention has proven particularly grave since the 2010 ICJ ruling on the legality of Kosovo's independence, which held Kosovo declaration of unilateral independence to not be illegal. Since then, Belgrade spends about €200 million annually in sustaining the

[151] To date, the northern city of Mitrovica, which was considered to be a beacon of multi-ethnicity in former Yugoslavia, is a city most stringently divided along ethnic lines. The Serb-populated North of the town is divided from the Albanian-populated south by the natural frontier of the Ibar river.

population in the North[152], and along with it – a status quo which Prishtina sees as harboring disintegration and instability not only within Kosovo borders but also in the region.

Nowhere has the North conundrum proved more problematic than in the area of rule of law and customs. While Kosovo judicial and police authorities do not retain any popularity and are heavily disregarded, the Serb police are barred by the UNSC 1244 to enter — what is administratively known as — Kosovo territory. Because Prishtina has been unable to impose customs, a new thriving inter-ethnic criminal elite that primes on smuggling has caused much concern for Kosovar authorities To date, the Northern Kosovo suffers from a reputation as a "gangster paradise" and is even regarded by some as "one large duty free zone."[153].

By allowing the North to remain *de facto* outside of Kosovo's jurisdiction, the Kosovar political elite has for years felt that the international community, which is in charge of order and security in this region, is being complicit to the flourishing of organized crime – and to the labeling of Kosovo as a country ruled by organized crime networks. On the economic front, it has also been estimated that without solid customs units observing the border in the north, Kosovo has been losing annually between €30 and €40 million in revenues at the Northern gates. For Kosovar authorities, the decision to impose an embargo on Serb goods thus not only entailed that Kosovo would be taking over the customs checkpoints in the North, but that it would also cease an opportunity to reinstitute its authority in this part and reaffirm what it sees as its territorial integrity.

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[152] International Crisis Group, "North Kosovo: Dual Sovereignty in Practice," ICG Europe Report No. 211, 14 March 2011: 4.

[153] Ibid., 15.

To Prishtina's dismay, five days after the imposition of the embargo was announced, the Northern gates still remained open. It was shortly made clear that EULEX had no intention to implement the embargo citing security concerns. In response to EULEX's refusal, the Kosovar PM ordered the deployment of the Kosovar Special Police Units – ROSU to install Kosovar police-led customs checkpoints in these border crossings. The operation caused much distress in the Serb-dominated municipalities who shortly after erected barricades thereby blocking all access into the North. After a confrontation between the ROSU and the residents in these areas, a Kosovar Albanian police officer for the ROSU was shot dead, while the newly installed customs facilities were torched down and bulldozed. The day after, in an extraordinary press statement to honor the killed officer and condone the burning of the checkpoints, Prime Minister Thaci called the decision to deploy the ROSU as "as not an easy one, but just and as such necessary" adding that as a Prime Minister he had a "moral, constitutional and legal duty to make such hard decisions." [154]

By many accounts, the operation was poorly organized and uncoordinated with the international community. Yet, while EULEX launched a series of accusations against Kosovar authorities for failing to inform the Mission about their intentions, most of the Kosovar political elite turned the argument against EULEX. In their judgment, it was EULEX's failure to control the northern border with Serbia that was thwarting Kosovo's sovereignty, imperiling further the prospects for the "rule of law" in the country and in the region. In essence, the rhetoric of the "rule of law" which EULEX stood for and helped inculcate the Kosovar authorities with, was now being invoked by the latter to assert themselves as contenders in the game.

[154] Assembly of Kosovo, *Prime Minister's Address to the Deputies of the Assembly of Kosovo*, 26 July 2012.

Commenting on the relationship between EULEX and Kosovo Government during this time, a high official at the Ministry of Economy and Finance confided:

> [we] had a very specific relationship with them [EULEX]. Due to their executive powers in this region [the North], we asked them to control the border checkpoints thoroughly. Their activities, however, were limited to registering the goods. We were very patient initially until this started causing many headaches that were both economically and politically costly.[155]

Many felt that by telling Prishtina to focus on the south, to be patient and leave the North to them, international community had for years helped creating a status quo that was no longer sustainable. To quote an advisor of the PM "had we known that the EU would not deliver, we would have taken steps since February 2008 to deal with the North [because] this is [like] Syria in Lebanon."[156]

For the Kosovar political elite, the decision to send ROSU to the North was also a move toward challenging a status quo, which it felt was catering to the interests of those that were against the establishment of the "rule of law." Some felt that in as far as EULEX remained status-neutral, the Mission's aspirations were more geared towards maintaining a status quo, which in practice was against the spirit of the "rule of law." To quote a government official:

> By trying to depoliticize the issue at stake – which is essentially very political – EULEX ended up championing a status quo which was in essence going against its own mantra of supporting the "rule of law." For us [the Government] this status quo anchored in stagnation is not optional since, unlike EULEX which is appointed, we are elected. Our ability to govern this country depends on how much progress we make and not on maintaining things as they are.[157]

155 Advisor to the Minister of Economy and Finance, Author's Interview, Prishtina, 5 January 2011.

156 Quoted in International Crisis Group, "Kosovo and Serbia: A Little Good Will Could Go a Long Way," ICG Europe Report No: 215, 2 February 2012: 4.

157 Advisor to the Minister of Economy and Finance, Author's Interview, Prishtina, 5 January 2011.

In a meeting with the Head of EULEX, the Prime Minister warned that the future partnership with EULEX would have to depend on a notion of extending the "rule of law" throughout Kosovo and not only on specific parts. Sending the ROSU to the North might have been a symbolic act which however in principle seems to have emancipated the Government of Kosovo by allowing it to establish itself as a legitimate contender for the guardianship of the "rule of law."

Curiously, only two years before the 2011 July operation, a ROSU access to the North of Kosovo was seen as unthinkable. As noted earlier, one of EULEX's executive powers was to "reverse or annul operational decisions taken by the competent Kosovo authorities, as necessary to ensure […] public order and security." In fact, in August 2009, when Prime Minister Thaci ordered a Special Police Unit to provide security for Kosovar Albanians in Northern Mitrovica who were rebuilding their homes (in what, prior to 1999, used to be an ethnically mixed neighborhood), EULEX was able to block the access by positioning its own Special Units on all of the three Mitrovica bridges on the Ibar River – which divide the North from the rest of Kosovo. The confrontation between the ROSU and the EULEX special units was avoided only by a last minute intervention from the U.S Ambassador who convinced the Prime Minister to withdraw his unit.[158]

It is clear that a lot has changed since then. Before July 2011, EULEX had persistently rejected Government's requests to provide security for Kosovo officers by escorting them northward. Since the July operation, however, the policy in Brussels seems to have changed dramatically. Starting in Septmeber 2011, The EU foreign

[158] International Crisis Group, "Kosovo and Serbia: A Little Good Will Could Go a Long Way," ICG Europe Report No: 215, 2 February 2012, 4.; See also, U.S Pristina Embassy Cable, 28 August 2009 by Wikileaks.

policy chief, Catherine Ashton, ordered EULEX to helicopter Kosovo police and customs officers to the North on a daily basis. A reportage on the German TV channel Deutrsche Welle discovered that EULEX spends €4,000 per day in helicoptering officials to the northern gates, located 100 km away from Prishtina. From September 2011 to January 2012 alone, helicoptering the Kosovar officials has cost EULEX an estimated €400,000 while the Mission's budget so far has been over €400 million.

In sum, this chapter has shown that one way to see how EULEX has been embedding the juridical field in Kosovo is through looking at the extent to which Kosovar institutions have learned to use the rules of the game promoted by EULEX. As EULEX and Kosovar institutions come to slowly share a common habitus, Kosovar counterparts are more capable of offering their own articulation of truth even if that means countering the practice of EULEX. By challenging EULEX's "selective application of law," Kosovar authorities have not only been able to identify the gaps in EULEX's rhetoric, but they have done so in a way that has increased their symbolic power – authority and legitimacy. While in the first instance, EULEX has had its way in getting a constitutional ruling, it was only done so after the Speaker of the Assembly and a few delegates were able to effectively and institutionally challenge EULEX's procedural ways at approaching the issue at stake. In the second instance, the Kosovar Government was able to change the decade-long status quo in the north. It did so by strategically challenging the perceived 'selective application of law' and it effectively established its claims of sovereignty and legitimacy for the North.

5. Conclusion and the way ahead

In 2008, as the EU was preparing the full deployment of its largest ESDP/CSDP mission yet in Kosovo, Pieter Feith – the EU-groomed diplomat – speaking in his capacity as EUSR, confidently promoted the EU's prospects as a driving force behind Kosovo's efforts to establish the rule of law in a trying post-conflict environment:

> If Europe can't do it, then I don't know who could. I think we still have a particular attraction to the people in the Balkans and we have all the instruments that are appropriate for a situation like in Kosovo.[159]

Claims like the above have been repeatedly challenged by many political figures in Kosovo. At the forefront is the Head of Lëvizja Vetëvendosje (Movement of Self-determination) – Albin Kurti, whose now third most popular party in the Assembly of Kosovo has long voiced opposition to international community's operations in Kosovo. For Kurti, whose popularity surged when EULEX predecessor UNMIK kept him "detained on remand"[160] for months in 2007 urging even Amnesty International to call for a fairer trial, EULEX claims of increasing local ownership in Kosovo have been a fairy tale that not even children believe anymore.[161] Referring to EULEX as "UNMIK in all but name" in an op-ed, Kurti warned that EULEX was causing more damage than helping:

> A decade after the war and a year and a half since the declaration of independence, rather than stable progress we have stability *as* progress.

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[159] Pieter Feith, "EU in Kosovo: EULEX Mission," (Distributed by EUSecurityandDefense, April 16, 2008).

[160] In a *Vetëvendosje* led protest in February 2007 against the Ahtisaari Proposal, UN Romanian police officers fired upon the protesters with prohibited versions of rubber bullets that contained iron core, thereby killing two unarmed protesters and injuring some 80. Kurti was arrested on the same day and 'detained on remand' for months. One of the first charges was that as a leader of the Protest he bore responsibility for the deaths of the two protesters.

[161] Albin Kurti, "Causing damage in Kosovo," *EU Observer*, 2 September, 2009.

> EULEX defines itself as a "crisis management operation," as if the crisis is here to stay and merely has to be managed. "(Re)solution," the traditional vocabulary of international missions, has been replaced by "management." Crisis management means prevention of an explosion of crisis, not elimination of the crisis or its causes. In this way, we are constantly kept on the brink of an explosion. Rather than a post-conflict mission, where the priorities are development and justice, EULEX is a pre-conflict mission operating with a doctrine of regional stability and internal security. Its paradigm of stability subdues people's rights and negates justice. […] Eulex' "rule of law" mandate is in fact a license to become "rulers of the law." [162]

While the Government in Kosovo has been cautious enough to stress the value of the partnership, in many instances this has proven more difficult than anticipated. When EULEX refused to carry out an order by the Kosovo Minister of Interior to end the usurpation of the District Courts in the North by Serb-run "parallel institutions," and to collect vehicle license plates that were issued in Belgrade, the Minister lamented:

> My order was valid. We know that there has been an illegal distribution of Belgrade license plates and they need to be confiscated wherever we have access. As for EULEX, well, we cannot really expect anything from them at this point. God save us from EULEX![163]

Supporting his fellow Minister's views, the Minister of Justice added: "it's not so much about what EULEX does; it is about what it does not do"[164] – a statement which has become a hallmark of most government officials in Kosovo when dealing with EULEX.

All in all, remarks like the above have been profusely recycled by local stakeholders and highly chased after by journalists and political commentators. Certainly, Kosovo's unique case somehow seems to have added additional charm to them. At an academic level, judging from deliverables – i.e successes versus failures—

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[162] Ibid.
[163] "Rexhepi: God save us from EULEX," *Portali Indeksonline*, 27 April, 2011.
[164] Ibid.

has been the preferred route in gauging the claims behind the EU's global role. While important, this has often come at the expense of seeking explanations and insights of political processes and implications for the other side of the equation – namely, the side of the beneficiaries or recipients of EU's missions abroad. Following on the footsteps of a few others, in this thesis I have attempted to reverse this trend by putting under scrutiny the EU's single largest mission to date –EULEX Kosovo. In so doing, I have brought to the fore an examination that, while not necessarily entirely exhaustive, has sought to elucidate the way EULEX operates and interacts with the local authorities in practice.

Borrowing insights from the Bourdieu-inspired "practice turn" in IR, and in particular, Bourdieu's work on the sociology of the juridical field, I have approached the newly emerging legal field in Kosovo via the many visible struggles between EULEX and Kosovar authorities as they try to determine the order of things, by advancing their own interpretations of the "rule of law." I have looked at Kosovo institutions and political elite in terms of socializees (expertise-deficient) in the game of establishing the "rule of law" where EULEX as a socializer (expertise-rich) has had an upper hand. Although, they are both partners in the monopoly on violence, EULEX is seen as privileged institutionally, both because of its expertise-rich position and the executive powers that allow it to determine and interpret the "rule of law." Importantly, it has been argued that in attempt to establish themselves as legitimate contenders in the game, Kosovar counterparts have often enacted their own competitive articulations of truth, which stem from the ongoing socialization into liberal international norms -- a process that had already begun with the establishment of the international presence in Kosovo in 1999.

While I have tried to insulate the subjects so as to better capture the interplay in their power relations, the contextualization of the topic at hand was not simply necessary, but also highly desirable if not only due to the nature of investigation. To that end, in the first chapter, I have provided with a thorough examination of post-1999 international presence in Kosovo. An undertaking of that sort has also helped in identifying EULEX as a mission that upon creation had little choice but to sit at a nexus of a complex interplay between a triad of concepts: sovereignty (a function of Kosovo's contested statehood), authority and legitimacy.

The second chapter offers institutional insights into EULEX's mission as I unpack the mandate thoroughly both at a formal-legal level and in practice, including issues pertaining to its MMA and executive powers. The chapter's aim is to demonstrate that the Mission has been from the very beginning set up such that it would be able to determine the contours, the understanding and the interpretation of the "rule of law." Being endowed with an institutional advantage has allowed EULEX to systematically structure the "juridical field" without necessarily asking explicitly the consent of the Kosovar authorities. In turn, the ontological glorification of the concept of the "rule of law" has largely been the driving force behind the politics of state-building in Kosovo, all the while animating the legal field itself.

Lastly, in the third chapter, by thoroughly examining two episodes of heightened tension where the power interplay between EULEX and Kosovo institutions was evidently patent, I have demonstrated that EULEX— notwithstanding its short stay in Kosovo – has embedded the Kosovar juridical field profoundly. In both situations, that of the MP immunity and the customs conundrum in the North, Kosovar authorities were effectively able to deliver their own articulations of truth on the "rule of law,"

which were visibly anchored on the similar rhetoric and practice that they have been socialized into. Ultimately, while they might have not internalized the face-value understanding of the "rule of law," Kosovar institutions and the political elite seem to have, at the very least, learned how to play the rules of the game.

In keeping up with the somewhat unconventional premise of this thesis, which, as indicated from the onset, has been to move beyond an analysis centered on the deliverables, this last section seeks to circumvent speculations on policy recommendations. Instead, it focuses on an open invitation for future research. That said, the aforementioned objective is in no way exempt from recurrent questions such as "so what?" that we as students of international politics are pressed hard to think about at every step and stage of research.

The short answer to this question is another well-known puzzle: a discipline-wide preoccupation with the systemic level and nation-states has raised more questions than it has provided with answers. To put this in the context of the current thesis, while in the last two decades Kosovo has abundantly appeared in almost every other book and article with a focus on the transatlantic community, hardly any of this academic output has investigated Kosovo as a topic on its own. For one, Kosovo's mercurially changing status –from a province to a UN protectorate, from internationally supervised independence to a contested statehood—does not sit well with the idea of sovereignty and nation-state as traditionally recognized. By the same token, speaking of Kosovo institutions and political elite and the power that they emanate as domestically driven in face of a continuous involvement by the international community, is plainly amiss. Thus, toying with inquiries that are specifically centered on the micro-level is not simply desirable –it is necessary, lest any

analytical purchase that we are to subscribe to will suffer greatly from straightforward negations of reality. Since Kosovo's status has once again changed into one of *sui generis* in a fashion that challenges the orthodox definitions of statehood, authority and legitimacy, perhaps the IR as a discipline will have much to gain by shifting some of the research to the outliers.

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Appendix -- List of Interviewees
*Indicates that the name of the interviewee has been altered in order to protect interviewee privacy

Albin Kurti
Head of the Vetëvendosje Movement

Agon Hamza
Independent Researcher

Andreas Berg
Reporting Officer – EULEX

Christian Palme
Spokesperson and Head of Press and Public Affairs, International Civilian Office – ICO

Bekim Collaku
Senior Advisor to the Prime Minister, Office of the Prime Minister

Bernard Nikaj
Senior Political Advisor and Head of Cabinet, Ministry of Trade and Industry of the Republic of Kosovo

Besfort Rrecaj
Senior Political Advisor, Ministry of European Integration of the Republic of Kosovo

Fiona Kelmendi,
Researcher, Science Po Paris

Fisnik Rexhepi
Senior Political Advisor, Ministry of Interior of the Republic of Kosovo

Jessica Smith*
Acting Special Assistant to the Head of Justice – EULEX

Krenar Gashi
Executive Director, Institute for Development Policy – INDEP

Krenar Shala
Associate Researcher, Institute for Advanced Studies – GAP

Kreshnik Hoxha,
Contributor, Balkan Insight

Michael Marsden

Head of the Customs Component, EULEX

Monica Sullivan*
Senior Officer Political Affairs – EULEX

Robert Wilton
Head of Policy and Political Affairs, International Civilian Office – ICO.

Venera Hajrullahu
Executive Director, Kosovo Civil Society Foundation

Vesa Gashi*
Senior Legal Advisor, Ministry of Justice of the Republic of Kosovo