

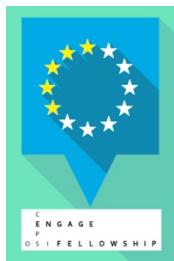
Ten years after EULEX

Key principles for future EU flagship initiatives on the rule of law

Naim Rashiti

No. 2019-07, May 2019

CEPS Papers in Liberty and Security in Europe offer the views and critical reflections of CEPS researchers and external collaborators on key policy discussions surrounding the construction of the EU's Area of Freedom, Security and Justice. The series encompasses policy-oriented and interdisciplinary academic studies and comment on the implications of Justice and Home Affairs policies within Europe and elsewhere in the world.



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Abstract

With its “credible enlargement perspective for and enhanced EU enlargement with the Western Balkans”, the EU plans to launch several new flagship initiatives for the six aspiring countries. The key initiative envisaged is “to strengthen rule of law” through more detailed assessment of the rule of law and reform implementation by including case-based peer reviews, trial monitoring of serious corruption cases and organised crime, developing indicators for reform implementation and deploying advisory missions.

The EU has begun some planning but detailed action plans are yet to come. New programmes and initiatives should be new in content and form. In the case of Kosovo, things are more complex; the clarity of the new plan and drawing the line between the past and future is key for any success of the upcoming initiatives. With EULEX still on the ground, after 10 years of deployment, plagued by low trust and an image of failure, the rule of law has little improved in Kosovo. The EU should carefully consider the conditions upon which new initiatives are established.

Equally, local authorities need to be fully in the driving seat. Reluctant to do so until now, the government has recently initiated a Functional Review of the Rule of Law Sector and Justice 2020. Their agendas have not progressed much in the absence of political will, and undefined roles and agendas remain between the local authorities and EU.

Any new initiatives should be launched based on certain principles that ensure they have full local ownership, are driven by local demand, are based on in-depth evaluation and verification, build upon broad consultations and inclusion, have a clearly defined role and scope, have realistic expectations and contribute to streamlining the reform agendas.

Executive summary

The EU Rule of Law Mission in Kosovo (EULEX), deployed in late 2008, should not only phase out but also go home; the mission has achieved limited success and its reputation has become questionable. Complex relations and incompatible agendas and interests between the local authorities and EULEX have failed to improve the rule of law in Kosovo. With EULEX set to depart, Kosovo institutions need to take the leading role. Citizens want to keep their government accountable.

The European Commission's "credible enlargement perspective for and enhanced EU enlargement with the Western Balkans" envisages launching several flagship initiatives, the key one being on the rule of law.¹ The initiatives to strengthen the rule of law help to assess reform implementation, including through developing impact indicators, trial monitoring, case-based peer-review missions and new advisory missions. EULEX has undertaken many of these activities in addition to its executive power. Yet, Kosovo's rule of law and judiciary remain weak, plagued by incompetence, corruption and political interference, with very little public trust.

With dozens of projects and initiatives in place through the EU, member states, the US and other donors, new flagship initiatives should not be a duplication of EULEX or Instrument for Pre-Accession Assistance projects. Important lessons should be drawn and all projects should be driven by local demand. With the goal to achieve 'societal transformation' in the area of the rule of law, the new initiatives have to be launched on the basis of a comprehensive assessment and certain principles that would ensure a feasible impact:

- No role for EULEX or its structures should be envisaged in assessing, planning or implementing other initiatives.
- An independent expert evaluation and verification mission should fairly evaluate the state of the rule of law and needs for improvement.
- New projects need to be demand-driven and ensure full local ownership.
- To increase the chance of success any new initiative should earn much broader local support, with in-depth consultations with civil society and citizens' groups.
- Advisory or support missions within the country need to have a clearly defined role and scope.
- New projects and agendas should contribute to streamlining reform processes.
- Framing the expectations of any new initiative within the country and communicating with the wider public is key for success and earning public trust.

¹ For more, see the full document at https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf.

1. Introduction

Ten years after the establishment of the EU's Rule of Law Mission (EULEX) in Kosovo in 2008, the European Council approved EULEX's fifth and likely final mandate. Also in 2018, the European Commission unveiled plans for a new rule of law flagship initiative in its enlargement strategy for the Western Balkans.² With EULEX being phased out and the Commission's flagship initiative still undefined, Kosovo's rule of law institutions are entering a period of transition and uncertain relations with the international community.

EULEX achieved some progress in policing, customs and strengthening Kosovo's legal framework. Yet, very few, including EULEX personnel and EU officials, would hail the mission as a success. Kosovo citizens had welcomed EULEX at the outset, hoping that it would catch the 'big fish', combat high-level corruption and organised crime, strengthen judicial independence, and bring Kosovo closer to the EU. Ten years later, however, EULEX has a poor track record in all areas of its work. Some internationally pushed reforms have brought Kosovo's justice system closer in line with EU standards on paper but have had limited practical effect.

The Kosovo Ministry of Justice has recently launched two large initiatives, the Functional Review of the Rule of Law Sector and Justice 2020, with the goal to support and coordinate rule of law and judicial assessment and reform. Still, rule of law institutions must move beyond ribbon-cutting to demonstrate effectiveness and capacity to meet both local objectives and EU requirements, improve inter-agency coordination and assume full local ownership for reform. Kosovo's rule of law institutions and the EU should adopt a post-EULEX strategy, which takes into consideration past experiences, lessons learned, mistakes in shaping a locally-owned rule of law landscape, and how the rule of law can be supported by the international community moving forward.

Rule of law and judicial reforms are driven by two complementary objectives, a state-building agenda and EU membership. First, as a new country, Kosovo has to move faster in establishing the rule of law, a cornerstone of any democratic state. Second, aiming to join the EU, Kosovo has committed to a number of EU integration processes requiring reforms to the rule of law, including the Stabilisation and Association Process (SAP), European Reform Agenda (ERA) and visa-liberalisation criteria.

The box-ticking approach that has accompanied Kosovo's ERA and EULEX's desire for a successful legacy has often undermined the normative goal of developing independent and effective rule of law and judicial institutions in the country. Yet moving forward, particularly in light of the internal rule of law challenges faced by a number of EU member states, the EU will require prospective members to fulfil additional, measurable benchmarks and to demonstrate

²The rule of law flagship initiatives will expand existing and alternative assistance tools and introduce new support mechanisms, including rule of law advisory missions and case-based peer-review missions as well as trial monitoring and the development of detailed action plans and indicators.

genuine ‘societal transformation’ in the area of the rule of law.³ Domestic rule of law institutions have to move beyond superficial, ad hoc reforms to focus on developing a comprehensive approach that supports ‘cultural transformation of the judiciary’ and independent justice sector institutions that can implement fundamental reforms in line with European standards.

This policy brief evaluates the state of the rule of law under EULEX’s mandate, draws lessons and identifies a number of preconditions for improving the rule of law and judicial development in Kosovo under the EU’s planned rule of law flagship initiative and support mechanisms. As EULEX prepares to fully dismantle, Kosovo’s government and rule of law institutions must take action now to steer rule of law and judicial reform, while collaborating early on with EU institutions to determine the implementation plan for the rule of law flagship initiatives.

2. A short overview of EULEX

In late 2008, EULEX deployed as a monitoring, mentoring and advising (MMA) mission with additional judicial and security-related executive functions,⁴ which allowed EULEX police and prosecutors to independently investigate and prosecute cases and granted EULEX judges final

³ European Commission (2018). “A credible enlargement perspective for and enhanced EU engagement with the Western Balkans.” Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2018) 65 final, 6 February; see Hoxhaj, Andi (2018). “The New EU Rule of Law Initiative for the Western Balkans.” *Conference Papers: Rule of Law in the Western Balkans: Exploring the New EU Enlargement Strategy and Necessary Steps Ahead*. April 2018. Aspen Institute Germany; see also Elbasani, Arolda (2018). “International Promotion of Rule of Law: Facing Connections between Patronage, Crime, and Judiciary Corruption.” *Conference Papers: Rule of Law in the Western Balkans: Exploring the New EU Enlargement Strategy and Necessary Steps Ahead*. Aspen Institute Germany, April.

⁴ See Council of the European Union (2008). Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, 4 February. In line with the **MMA pillar** of EULEX’s mandate, the mission assumed the following tasks: (i) helping to eliminate political interference; (ii) ensuring proper investigation, prosecution, adjudication, and enforcement of serious crimes; (iii) enhancing coordination throughout the judicial process, particularly with regard to organised crime; (iv) supporting the fight against financial crime and corruption; and (v) contributing to the implementation of the Kosovo Anti-Corruption Strategy and Anti-Corruption Action Plan (2008 Council Joint Action). EULEX’s **executive functions** were concentrated on the judiciary, particularly with regard to investigating and prosecuting ‘serious crimes’ including war crimes, terrorism, organised crime and corruption, interethnic crimes, and financial crimes. While EULEX also played an MMA role in this regard, international investigators, prosecutors and judges served in executive roles, working “jointly with Kosovo investigators, prosecutors, and judges or independently” to address serious crimes, and also assumed the authority to create “cooperation and coordination structures between police and prosecution authorities”. In line with Kosovo’s Law No. 03/L-053 on jurisdiction, case selection and case allocation of EULEX Judges and Prosecutors in Kosovo, EULEX judges formed the majority (two-thirds) on court panels. EULEX also had some security-related executive responsibilities, with the authority to “ensure the maintenance and promotion of rule of law, public order, and security ... as necessary ... through reversing or annulling operations decisions taken by the competent Kosovo authorities”. EULEX was also authorised to “assume other responsibilities, independently or in support of the competent Kosovo authorities” in the name of ‘rule of law, public order, and security’.

authority over cases under their purview.⁵ Initially comprised of over 3,000 police officers, judges, prosecutors and administrative personnel and with an initial 16-month budget of €205 million, EULEX was the largest civilian mission ever launched under the European security and defence policy.⁶ Its mandate was extended in 2010 and again in 2012, by which time the EU had committed €614 million for EULEX operations.⁷ In 2012, the mission was downsized (losing around a quarter of its personnel) and slightly restructured, with the ‘Executive Division’ managing the executive responsibilities and ‘Strengthening Division’ overseeing EULEX’s MMA functions.⁸ The exchange of letters between Kosovo President Atifete Jahjaga and EU High Representative Catherine Ashton paved the way for the renewal of the EULEX mandate in 2014, which limited the mission’s executive functions (local judges would subsequently form the majority on court panels and EULEX would not take on new cases with the exception of those pertaining to the north of Kosovo) and tasked EULEX with assisting the implementation of EU-facilitated dialogue between Pristina and Belgrade.⁹

In June 2018, EULEX’s mandate was renewed for the fifth and likely final time.¹⁰ Many hope EULEX will depart soon. The mission has lost executive powers in all but two key areas.¹¹ It currently employs only around 500 staff, has withdrawn its executive judges and prosecutors (with remaining judges no longer opening new cases besides those affecting Serb-majority areas in the north),¹² has handed over the vast majority (around 800) of its case files to local institutions, and has already begun phasing out its MMA support in anticipation of a complete

⁵ EULEX Webpage: “Short history of EULEX.” Available at <http://www.eulex-kosovo.eu/?page=2,44,197>; see also Mahr, Ewa (2018). “Local contestation against the European Union Rule of Law Mission in Kosovo.” *Contemporary Security Policy*, 39:1, pp. 71-94.

⁶ Around 2,000 personnel were international, seconded by EU member states as well as Turkey, Switzerland, Norway, Canada and the United States.

⁷ European Court of Auditors (2012). *European Union Assistant to Kosovo Related to the Rule of Law*. Special Report No. 18.

⁸ EULEX Webpage: “Short history of EULEX.” Available at <http://www.eulex-kosovo.eu/?page=2,44,197>.

⁹ Ibid.

¹⁰ Council of the European Union (2018). “EULEX Kosovo: new role for the EU rule of law mission.” Press Release 322/18, 8 June. The nine EULEX tasks highlighted in the 2008 Council Joint Action were not explicitly changed until June 2018, when the Council decided to formally refocus the mission’s mandate. The current mandate has an associated budget of €169.8 million, with nearly €84 million for EULEX operations in Kosovo and €86 million for the specialist chambers and the specialist prosecutor’s office.

¹¹ EULEX maintains executive powers only in the areas of witness protection, support for the specialist chambers and prosecutor’s office, and as a second security responder. EULEX’s scope of work is now limited to two key pillars – monitoring and operations – in line with the following three objectives: (i) monitoring selected cases and trials; (ii) monitoring, mentoring and advising the Kosovo correctional service; and (iii) providing operational support for the implementation of EU-facilitated dialogue agreements.¹¹

¹² Bertelsmann Stiftung (2018). *BTI 2018 Country Report – Kosovo*.

withdrawal in June 2020.¹³ Over the next 18 months, local rule of law institutions will assume responsibility for all transferred investigations, prosecutions and trials.¹⁴

EULEX did produce and inspire a number of tangible achievements over the course of a decade.¹⁵ However, few (including EULEX personnel) would consider EULEX's legacy to be one of success.¹⁶ EULEX facilitated the implementation of the EU-facilitated integrated border management (IBM) agreement and the establishment and staffing of interim IBM common crossing points and permanent crossing points (ongoing).¹⁷ EULEX claims to have supported Kosovo Customs in adopting new reforms and anti-corruption measures and provided MMA support in the areas of compliance, enforcement and revenue collection.¹⁸ Moving forward, EULEX will limit its MMA support to 'dialogue-related matters', particularly IBM implementation, "until such time that these responsibilities are transferred to an alternative EU mechanism, possibly the EUSR" (EU Special Representative).¹⁹

Positive developments can be attributed to EULEX in the areas of riot control, community and intelligence-based policing.²⁰ While mismanagement continues to inhibit the work of the Police Inspectorate of Kosovo, and maintaining adequate and representative staffing and equipment remains a challenge for Kosovo Police, EULEX no longer provides advisory support to the Kosovo Police.²¹ Even though EULEX claims to have boosted notable improvements in

¹³ EULEX (2018). *Compact Progress Report: Assessing Progress between July 2017 – June 2018*; see also Cama, Aida (2018). "EU ends Kosovo rule of law mission amid criticism over results." *DW.com*, 4 February.

¹⁴ Council of the European Union (2018). "EULEX Kosovo: new role for the EU rule of law mission." Press Release 322/18, 8 June.

¹⁵ EULEX legislation experts have contributed to drafting, amending or commenting on 96% of the laws proposed by the Ministry of Justice since 2008 and provided legislative assistance to Kosovo authorities on over 150 laws. EULEX judges have delivered over 600 verdicts. Special Chamber judges adjudicated over 10,000 property cases. EULEX was involved in more than 40,000 court cases and investigated and/or issued indictments in over 400 war crimes cases. EULEX facilitated cooperation between Interpol/Europol and Kosovo authorities, leading to 100 arrests. Alongside the EU, EULEX helped to establish a reliable civil registry of over 12,000 books. EULEX has also returned 506 victims to their families since 2008, although over 1,600 persons remain missing. *Euractiv* and *AFP* (2018). "Criticism as Kosovo justice mission EULEX closes judicial operations." 11 June; see also EULEX Press Office (2018). "EULEX on National Day of Mission Persons – Kosovo People Need Closure to the Painful Loss of their Loved Ones." 27 April; and also Hopkins, Valerie (2017). "EU courts trouble with Kosovo scandal." *Politico*, 17 November.

¹⁶ It is hard to interview a local, international or EU official who can positively assess EULEX achievements. Stories of consistent failures are numerous.

¹⁷ EULEX (2018). *Compact Progress Report: Assessing Progress between July 2017 – June 2018*, p. 35: on the Kosovo side, the construction of two of three planned permanent CCPS "advanced despite some technical difficulties", while political problems relating to the relocation of power cables has stalled progress on the third.

¹⁸ EULEX Press Office (2016). "Kosovo Customs marks substantial development towards EU recognized standards." 11 August.

¹⁹ EULEX (2018). *Compact Progress Report: Assessing Progress between July 2017 – June 2018*, p. 18.

²⁰ Zupančič, Rok, Nina Pejič, Blaž Grilj, and Annemarie Peen Rodt (2018). "The European Union Rule of Law Mission in Kosovo: An Effective Conflict Prevention and Peace-Building Mission?" *Journal of Balkan and Near Eastern Studies*, 20:6, p. 607.

²¹ EULEX (2018). *Compact Progress Report: Assessing Progress between July 2017 – June 2018*.

the area of customs and policing, citizens perceive customs to be the most corrupt institution and increasingly corrupt.²² Perceptions of corruption within the Kosovo Police have also increased (from 15% in October 2017 to 26% in April 2018), although this figure for the perception of corruption is still among the lowest compared with other institutions.²³

The progress made in the areas of customs and policing were not mirrored in the justice sector, courts, prosecution or overall performance of the judiciary. Yet, EULEX's executive functions did provide for some tangible outputs. The Special Prosecution Office was involved in around 1,350 cases, EULEX solved nearly 43,000 property cases via the Property Claims Commission, and EULEX judges delivered over 600 verdicts.²⁴ At the same time, EULEX's MMA functions yielded disappointing results. Its key judicial objectives were to support increased effectiveness, sustainability, multiethnicity, accountability and independence of the judiciary, and compliance with EU best practices. EULEX did support the integration of Kosovo Serb judges and prosecutors into the judicial system in 2017, but only after Pristina and Belgrade agreed to it.²⁵ Nevertheless, the sustainability, effectiveness, accountability and independence of justice sector institutions leave much to be desired.

EULEX could not counteract political interference in the judiciary, which will remain a key challenge moving forward, and sufficient measures for witness protection have not been put into place.²⁶ Capacity and efficiency remain low. Little attention was paid to court administration, which remains "slow and inefficient".²⁷ Staffing the mission with competent judges and experienced personnel was also a challenge – it was "difficult to ensure more and better judges, since EU member states have proved reluctant or at least faced challenges to second a sufficient number of experienced judges in a timely manner. Short-term deployments of one year or less usually appeal to younger and less experienced staff."²⁸ This in turn limited the impact of EULEX's MMA and capacity-building functions. While the mission's support for sustainable reform of the justice sector and judiciary was 'apparent', EULEX "has been less successful in this field, and rule of law is relatively far from fully functioning in Kosovo".²⁹

²² Among the respondents, 39% considered customs to be corrupt in April 2018, while 25% had perceived corruption in customs institutions in October 2017.

²³ UNDP Kosovo (2018). "Public Pulse XIV." Pristina, June.

²⁴ Zupančič, Rok, Nina Pejič, Blaž Grilj and Annemarie Peen Rodt (2018). "The European Union Rule of Law Mission in Kosovo: An Effective Conflict Prevention and Peace-Building Mission?" *Journal of Balkan and Near Eastern Studies*, 20:6, pp. 599-617.

²⁵ European Commission (2018). "Kosovo* 2018 Report." Commission Staff Working Document, SWD (2018) 156 final, 17 April.

²⁶ Bertelsmann Stiftung (2018). *BTI 2018 Country Report – Kosovo*.

²⁷ Ibid.

²⁸ Zupančič, Rok, Nina Pejič, Blaž Grilj and Annemarie Peen Rodt (2018). "The European Union Rule of Law Mission in Kosovo: An Effective Conflict Prevention and Peace-Building Mission?" *Journal of Balkan and Near Eastern Studies*, 20:6, p. 604.

²⁹ Ibid., p. 608.

According to Bertelsmann Stiftung's 2018 Transformation Index Report (BTI), the "outcome of EULEX anti-corruption endeavors has ... been meager; high-ranking corruption cases in particular were not even investigated, which creates an impression of impunity".³⁰ A former international civilian office director attributed this in part to reluctance to challenge the political stability.³¹ Political considerations influenced EULEX's choice of cases, time of action and tact, and the mission has been accused of being "too involved with local politics and not forthcoming enough in prosecuting local political elites".³² In instances where EULEX did choose to pursue high-profile cases, political interference and the inability to collect sufficient evidence and witness testimonies (as well as an underdeveloped criminal code) made it extremely difficult to prosecute.³³ EULEX did arrest a number of high-ranking officials on charges of corruption and organised crime, but often failed to deliver convictions in these significant high-profile cases.³⁴

In 2018, EULEX Head of Mission Alexandra Papadopoulou defended shortcomings in this area, arguing that EULEX's primary focus was to "help build rule of law" while "arrests were secondary".³⁵ Still, EULEX's initial framing and early promises to catch 'big fish' reflect poor management of local expectations.³⁶ While EULEX's "effectiveness is based on the attainment of its goals ... the local actors' understanding of what those goals are might not be the same as that of the EU".³⁷ Ultimately, EULEX's perceived inability to prosecute big fish and to combat organised crime and corruption in line with local expectations strengthened perceptions of the mission's ineffectiveness, weakened EULEX's credibility and "ruined the mission's reputation to the extent that it was broadly, domestically and internationally, seen as a failure".³⁸ It is worth noting that leadership matters. New EULEX chief Papadopoulou, with her approach, communication and consistency, has helped improve the image. To many locals and internationals, EUSR Nataliya Apostolova and the EULEX chief are the "right people

³⁰ Bertelsmann Stiftung (2018). *BTI 2018 Country Report – Kosovo*, p. 34.

³¹ Capussela, Andrea (2011). "Eulex in Kosovo: a shining symbol of incompetence." *The Guardian*, 9 April.

³² Zupančič, Rok, Nina Pejič, Blaž Grilj and Annemarie Peen Rodt (2018). "The European Union Rule of Law Mission in Kosovo: An Effective Conflict Prevention and Peace-Building Mission?" *Journal of Balkan and Near Eastern Studies*, 20:6, p. 608; see also Elbasani (2018).

³³ Papadopoulou cited in Bytyci, Fatos (2018). "EU justice mission leaves Kosovo, accused of failing its mandate." *Reuters*, 14 June.

³⁴ *Ibid.*; see also Kalaja, Besa (2012). "The War against Corruption through Media Spectacles." *Preperotr*, 4 October.

³⁵ Bytyci, Fatos (2018). "EU justice mission leaves Kosovo, accused of failing its mandate." *Reuters*, 14 June.

³⁶ Mahr, Ewa (2018). "Local contestation against the European Union Rule of Law Mission in Kosovo." *Contemporary Security Policy*, 39:1, pp. 71-94.

³⁷ *Ibid.*, p. 76.

³⁸ *Ibid.*, p. 87; see also Bytyci, Fatos (2018). "EU justice mission leaves Kosovo, accused of failing its mandate." *Reuters*, 14 June.

at the wrong time”, arguing that had Papadopoulou been deployed early on in the mission, EULEX would have performed much better.³⁹

Lastly, EULEX itself has faced its fair share of scandal, and corruption within EULEX became a controversial issue in the period after 2012.⁴⁰ While dismissed by an investigation team commissioned by the European External Action Service, allegations that high-level EULEX officials accepted bribes and the subsequent dismissal of a EULEX prosecutor and whistleblower “reinforced a strong impression ... that EULEX has become part of the problem rather than the solution”.⁴¹ EULEX again attracted unwanted headlines in late 2017, when Chief Judge Malcolm Simmons resigned amidst “a barrage of claims and counter-claims”.⁴² In addition to these allegations, human resources shortcomings and structural challenges fed a domestic narrative in which EULEX, “instead of Europeanizing Kosovo”, had itself been “Balkanized”.⁴³

The short-term, remunerative contracts held by EULEX personnel (often a year or sometimes half a year) and consistent turnover also limited EULEX’s effectiveness, as they did not accommodate the longer-term nature of prosecutorial and judicial work, limited opportunities for knowledge transfer and trust building, and thus “reinforced” its “lack of competence”.⁴⁴ For example, three different EULEX prosecutors have constitutively worked on a murder case, each restarting the case, which was only concluded after six years of trial.⁴⁵ The EU rule of law mission failed to obtain trust and help local ownership take root. According to a member of the Kosovo Supreme Court, a EULEX judge disallowed his professional associate to assist him on a case, claiming that the associate was paid to help solely the international judge.⁴⁶ EULEX also demonstrated a “political preference for not upsetting the status quo”.⁴⁷ Whether deriving from the personal/professional interests of EULEX personnel or from a tendency by decision-makers in Brussels to “overemphasize stability”, EULEX’s

³⁹ Interviews with government officials, NGOs and diplomats Pristina, September–November 2019.

⁴⁰ Mahr, Ewa (2018). “Local contestation against the European Union Rule of Law Mission in Kosovo.” *Contemporary Security Policy*, 39:1, pp. 71-94.

⁴¹ Borger, Julian (2014). “EU’s biggest foreign mission in turmoil over corruption row.” *The Guardian*, 5 November; see also Borger, Julian (2014). “Maria Bamieh: ‘I learned to adapt and survive’.” *The Guardian*, 5 November.

⁴² Hopkins, Valerie (2017). “EU courts trouble with Kosovo scandal.” *Politico*, 17 November. Simmons reported pressure to convict Fatmir Limaj in order to prevent him from taking part in the 2017 elections in Kosovo. He also highlighted cases of internal corruption and discord within EULEX, claiming that a fellow judge hacked his private email, that EULEX was vulnerable to political interference, that one full-time EULEX judge rarely operated within Kosovo and another held a second full-time job.

⁴³ Agron Bajrami quoted in Hopkins, Valerie (2017). “EU courts trouble with Kosovo scandal.” *Politico*, 17 November.

⁴⁴ Mahr, Ewa (2018). “Local contestation against the European Union Rule of Law Mission in Kosovo.” *Contemporary Security Policy*, 39:1, p. 86.

⁴⁵ Ibid.

⁴⁶ Balkans Policy Research Group (2018). Interview with a Supreme Court judge. Pristina, Kosovo, June.

⁴⁷ *Euractiv* and *AFP* (2018). “Criticism as Kosovo justice mission EULEX closes judicial operations.” 11 June.

demonstrated lack of willingness to rock the boat limited its ability to enact justice and substantial judicial reform.⁴⁸

EULEX operations in the north “triggered ... strong and occasionally violent contestation”.⁴⁹ The local court in North Mitrovica refused to cooperate with EULEX when it deployed in 2008, and 2011 protests and barricades (in response to the deployment of Kosovo Customs to the crossing points in the north) made movement throughout the north nearly impossible.⁵⁰ EULEX has failed to investigate and prosecute the killing of its members in north Kosovo in 2013. Following the Pristina–Belgrade Agreement of April 2013, EULEX has made some progress in the north, building a Kosovo Police Regional Command North, integrating Serb forces into the Kosovo Police as well as Civil Protection staff into Kosovo structures, and presiding over 100 criminal cases in the Mitrovica Basic Court.⁵¹

3. A decade of rule of law and judicial reforms

The rule of law in Kosovo has seen some improvements in recent years. The Kosovo Judicial Council and Kosovo Prosecutorial Council, the oversight bodies responsible for ensuring the independence and functioning of the judiciary,⁵² have overseen an increase in the case clearance rate and number of solved cases respectively, and the Kosovo Judicial Council is currently in the process of implementing a case management information system in courts and prosecution offices.⁵³ The 2018 *Compact Progress Report* highlighted increased performance and capacity among the Kosovo Police, Kosovo Judicial and Prosecutorial Councils, and the Civil Registration Agency in particular.⁵⁴

However, the rule of law and judiciary remain weak with major shortcomings in the areas of judicial functioning and the fight against organised crime and corruption.⁵⁵ The judiciary continues to struggle with political interference, poor efficiency, accountability,

⁴⁸ Zupančič, Rok, Nina Pejič, Blaž Grilj and Annemarie Peen Rodt (2018). “The European Union Rule of Law Mission in Kosovo: An Effective Conflict Prevention and Peace-Building Mission?” *Journal of Balkan and Near Eastern Studies*, 20:6, pp. 599-617.

⁴⁹ Mahr, Ewa (2018). “Local contestation against the European Union Rule of Law Mission in Kosovo.” *Contemporary Security Policy*, 39:1, p. 84.

⁵⁰ *Ibid.*, pp. 71-94.

⁵¹ Prelec, Marko and Naim Rashiti (2015). “Serb Integration in Kosovo after the Brussels Agreement.” Balkans Policy Research Group, 19 March.

⁵² The Kosovo Judicial Council and Kosovo Prosecutorial Council are responsible for evaluating and overseeing the work of judges and prosecutors, respectively, for establishing standards for recruitment, proposing candidates for appointment and managing promotions, transfers, dismissals and disciplinary proceedings.

⁵³ EULEX (2018). “Joint Rule of Law Coordination Board Compact Progress Report in a Nutshell July 2017 – June 2018”; see also EULEX Press Office (2018). “Final Meeting of the Joint Rule of Law Coordination Board.” 21 November.

⁵⁴ EULEX (2018). *Compact Progress Report: Assessing Progress between July 2017 – June 2018*.

⁵⁵ European Commission (2018). “Kosovo* 2018 Report.” 17 April.

professionalism and public perception.⁵⁶ In 2016, Kosovo citizens perceived the courts as the most corrupt national institution and in 2018 as the second-most corrupt behind Kosovo Customs.⁵⁷ Prosecutors hesitate to take on high-profile cases, and high-level political interference discourages judges from acting independently in sensitive cases.⁵⁸ The Kosovo Judicial and Prosecutorial Councils have failed to improve standards for protecting the judiciary from political interference.⁵⁹

The training, education and skills of both prosecutors and judges are inadequate in most cases. In February 2017, the Kosovo Judicial Institute was replaced by the Academy of Justice, responsible for the initial and continuous training of judges, prosecutors and their staff in line with criteria prepared in cooperation with the Kosovo Judicial and Prosecutorial Councils.⁶⁰ While the Kosovo Judicial and Prosecutorial Councils are required to conduct performance evaluations for prosecutors and judges every three years, performance assessments have met with long delays, and those have been largely superficial.⁶¹

A key challenge for the justice system is the backlog of cases.⁶² A high number of incoming cases, the new Law on Minor Offences (which took effect in January 2017), the lack of financing for and familiarity with dispute resolution tools and mediation have all contributed to the lack of progress in clearing court backlogs.⁶³ As part of the reduction strategy, the Kosovo Judicial Council is responsible for recruiting associates to assist judges in resolving cases efficiently, but it lacks a budget to make use of, according to the Kosovo Democratic

⁵⁶ Ibid.

⁵⁷ UNDP Kosovo (2016). “Public Pulse XI.” May, and UNDP Kosovo (2018). “Public Pulse XIV”. The percentage of Public Pulse respondents who perceived large-scale corruption in courts more than doubled from 2016 to 2018. June; see also Schulte-Cloos and Elshani (2016), p. 10: “Nine out of ten individuals (89.97%) evaluate that people with political influence are less likely to face legal consequences whereas only less than one out of ten (9.57%) believe that they are not.”

⁵⁸ EULEX (2014). Letter from EULEX Judges to the Head of Executive Division, Mats Mattsson, 22 January; see also UNDP and United Nations Office on Drugs and Crime (2014). “Judicial Integrity in Kosovo – Assessment Report”; and also Bertelsmann Stiftung (2018). *BTI 2018 Country Report – Kosovo*.

⁵⁹ European Commission (2018). “Kosovo* 2018 Report.” 17 April. In 2018, the EU recommended that the Kosovo Judicial and Prosecutorial Councils “establish a mechanism to react more efficiently and actively in cases of alleged political interference in the judiciary”.

⁶⁰ European Commission (2018). “Kosovo* 2018 Report.” 17 April.

⁶¹ Ibid.

⁶² Ibid. See Bertelsmann Stiftung (2018). *BTI 2018 Country Report – Kosovo*. While the number of impending cases reduced from 466,255 in 2013 to 440,627 by the beginning of 2016, court backlogs remain a key challenge. See also USAID (2015). “Kosovo Courts Reduce Backlog of Cases”. USAID calculations estimated that there were 56,300 major criminal, civil and serious crime cases in Kosovo’s 7 basic courts and their 20 corresponding branch courts in July 2014.

⁶³ European Commission (2018). “Kosovo* 2018 Report.” 17 April. Alternative dispute resolution and mediation systems could help reduce the backlog of cases and number of incoming cases; however, the public is largely unaware of these mechanisms, and three of seven regional mediation centres have closed due to lack of funding.

Institute.⁶⁴ Other factors include shortcomings in criminal legislation,⁶⁵ the absence of a centralised criminal records registry,⁶⁶ the low commitment of judges to sanction those causing delays, lengthy postponements of hearings (officials hardly show up in court), a high rate of cases sent to the basic courts for retrial, a demonstrated “preference for detention over other restrictive measures”, and the understaffing of courts and prosecution offices.⁶⁷

Satisfaction with the judiciary is low. In April 2018, a Public Pulse Poll conducted by the UN Development Programme (UNDP) and US Agency for International Development (USAID) reported that only 31.2% of respondents were satisfied with the courts and 29.9% were satisfied with the prosecutor’s office, the lowest level for any central executive or legislative institution in Kosovo.⁶⁸

The European Commission finds the composition and appointment procedures of the Kosovo Judicial and Prosecutorial Councils to be in line with European standards on paper, but these management bodies have failed to prompt substantial improvement, uphold internal regulations or enact the legal provisions needed to measure and ensure the accountability and efficiency of the judicial and prosecutorial systems.⁶⁹ Additionally, the EU finds that the Kosovo Judicial Council does not have the capacity to create the conditions for implementing the legislation.⁷⁰

In 2010, 76% of the Kosovo population believed that the EU integration process would help Kosovo fight corruption.⁷¹ Yet, nearly a decade later, citizens consider corruption to be the second-most paramount issue Kosovo is facing, behind unemployment.⁷² Against the high hopes that EULEX would dismantle criminal networks and prosecute high-level corrupt officials and elites, corruption and organised crime are still pervasive at all levels of government and a culture of impunity prevails. The 2018 EU country report for Kosovo cited some progress in the areas of final convictions for high-level corruption and organised crime cases and of preliminary confiscation of assets (although not with regard to final confiscation), but progress has been slow and largely superficial.⁷³

⁶⁴ Center for International Legal Cooperation (CILC), FOL Movement, and Kosova Democratic Institute (KDI)/Transparency International (2017). “Kosovo Justice Sector Integrity Scan.” December.

⁶⁵ European Commission (2018). “Kosovo* 2018 Report.” 17 April; the EU recommends that many provisions of the Criminal Procedure Code be simplified. See also Bertelsmann Stiftung (2018). *BTI 2018 Country Report – Kosovo*.

⁶⁶ Bertelsmann Stiftung (2018). *BTI 2018 Country Report – Kosovo*.

⁶⁷ European Commission (2018). “Kosovo* 2018 Report.” 17 April.

⁶⁸ UNDP Kosovo (2018). “Public Pulse XIV.” Pristina, June.

⁶⁹ European Commission (2018). “Kosovo* 2018 Report.” 17 April.

⁷⁰ Ibid.

⁷¹ UBO Consulting 2012 in Mahr, Ewa (2018). “Local contestation against the European Union Rule of Law Mission in Kosovo.” *Contemporary Security Policy*, 39:1, pp. 71-94.

⁷² UNDP Kosovo (2018). “Public Pulse XIV.” Pristina, June.

⁷³ European Commission (2018). “Kosovo* 2018 Report.” 17 April.

In 2015, a multidisciplinary team comprised of representatives from local rule of law institutions and tasked with coordinating efforts against high-level corruption and organised crime was established. This team led 42 investigations, resulting in 31 indictments but only 7 convictions.⁷⁴ Similarly, preliminary confiscation of assets has increased but final asset confiscation remains low, at only around 17% of those assets initially frozen and seized.⁷⁵ The EU is urging Kosovo to make substantial effort throughout 2019 with regard to final convictions and confiscation of assets in organised crime and money laundering cases.⁷⁶

Elites continue to evade prosecution and conviction. The judiciary has demonstrated little willingness to prosecute high-level cases of organised crime and corruption.⁷⁷ When prosecutions do occur, they are undermined by political interference and low capacity for managing high-level corruption cases. Kosovo urgently needs to focus on increasing the number of prosecutors investigating and prosecuting high-level corruption cases and increasing capacity in the areas of financial investigations, asset confiscation and witness protection.⁷⁸

Anti-corruption institutions are poorly coordinated, and have complex and overlapping mandates.⁷⁹ Bertelsmann Stiftung's BTI report of 2018 states that "the fact that a variety of institutions (e.g. the office of the state prosecutor, the anti-corruption task force, the office of the auditor general and also EULEX) are involved in fighting corruption has only resulted in spending without a coherent strategy".⁸⁰ Furthermore, anti-corruption efforts rarely go "beyond political statements".⁸¹ Assembly oversight over anti-corruption agencies has been impaired by "ongoing clashes between political parties", suggesting that the political party landscape inhibits anti-corruption efforts not only because of backroom deals and party cronyism but also because inter-party dynamics prevent proper oversight.⁸² Moreover, the report suggests that anti-corruption institutions in Kosovo have befallen a fate similar to that of other public institutions in Kosovo and the Western Balkans – one of fragmentation and 'agencification'.⁸³

⁷⁴ Ibid.

⁷⁵ During the reporting period for the EU's 2018 country report.

⁷⁶ Ibid.

⁷⁷ Group for Legal and Political Studies (2018). "Nations in Transit 2018 – Kosovo Report." Freedom House.

⁷⁸ European Commission (2018). "Kosovo* 2018 Report." 17 April.

⁷⁹ Freedom House (2018). Freedom in the World 2018 – Kosovo Profile.

⁸⁰ Bertelsmann Stiftung (2018). *BTI 2018 Country Report – Kosovo*, p. 34.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Mendelski, Martin (2018). "Good Governance Promotion in the Western Balkans: An Empirical Analysis of the De-politicization and Fragmentation of the State." *Conference Papers: Rule of Law in the Western Balkans: Exploring the New EU Enlargement Strategy and Necessary Steps Ahead*. Aspen Institute Germany, April. Mendelski argues that externally-driven good governance reform and efforts to de-politicise public institutions have resulted in fragmentation and 'agencification'. Indeed, in Kosovo, the number of semi-autonomous agencies has grown by over 400% since 1999.

Kosovo improved in the Transparency International Corruption Perception Index, from place number 33 in 2016 to 39 in 2017.⁸⁴ While this score may reflect slight developments in the fight against organised crime and corruption, public perception of corruption is increasing. According to the UNDP's annual Public Pulse survey, the proportion of respondents perceiving large-scale corruption in a variety of national and international institutions increased from 2017 to 2018 for every institution in question.⁸⁵

3.1 Many ongoing rule of law initiatives, scattered among locals and internationals

The Kosovo authorities had launched several initiatives with the aim of improving coordination and performance on the rule of law. Yet, the results remain highly questionable and are challenged by wider distrust.

In November 2016, the Ministry of Justice launched the **Functional Review of the Rule of Law Sector**, a ministry-led process seeking to advance the rule of law in line with EU standards.⁸⁶ The ministry committed to conducting a comprehensive assessment of the rule of law in Kosovo, which can inform the development of a comprehensive strategy for the rule of law that will help “harmonize the principles, legislation and institutions responsible in this sector”.⁸⁷ Streamlining rule of law processes should be a high priority for the government, given the ad hoc, decentralised nature of reforms and initiatives in recent years. Unfortunately, the functional review process was delayed for numerous reasons driven by repeated government crises and a lack of political will. It was relaunched in March 2018 with alternative plans for the composition of the steering committee.⁸⁸ The first comprehensive report will come out sometime in 2019 and aims to identify fundamental gaps within the rule of law sector and wide-ranging interventions and reforms to be implemented over a number of years.⁸⁹

⁸⁴ Transparency International (2016). “Fighting Corruption in the EU Accession Countries in the Western Balkans and Turkey.” 10 November; see also *Euractiv* and *AFP* (2018). “Criticism as Kosovo justice mission EULEX closes judicial operations.” 11 June.

⁸⁵ UNDP Kosovo (2018). “Public Pulse XIV.” Pristina, June. Perceptions of the prevalence of large-scale corruption in rule of law and key governing institutions in Kosovo are as follows: courts (38.6%, up from 24.9% in October 2017 but substantially lower than the rates reported during 2010–2016 excluding April 2011), Customs (39.1%, up from 22.7% in October 2017), central administration/government (34.7%), Privatization Agency of Kosovo (34.5%), EULEX Police (29.9%, up from 20.9% in October 2017), Tax Administration of Kosovo (28.9%) and Kosovo Police (25.7%, up from 14.9% in October 2017).

⁸⁶ Matias, Barbara and Francisco Jose Garcia Martinez (2018). “The Functional Review of the Kosovar Justice system: an overview of the process so far.” Group for Legal and Political Studies.

⁸⁷ *GazettaExpress* (2018). “Kosovo Launches Functional Review of the Rule of Law Sector.” 9 March.

⁸⁸ Matias, Barbara and Francisco Jose Garcia Martinez (2018). “The Functional Review of the Kosovar Justice system: an overview of the process so far.” Group for Legal and Political Studies; see also *GazettaExpress* (2018). “Kosovo Launches Functional Review of the Rule of Law Sector.” 9 March.

⁸⁹ Balkans Policy Research Group (2018). Interview with Kosovo Government Official. Pristina, Kosovo, 20 December.

While working on the Functional Review, the same ministry launched a new agenda, **Justice 2020**, which focuses primarily on the judicial and prosecutorial system, and will serve as a coordinating mechanism and complement the Functional Review Process “by establishing opportunities for discussing major topics that require in-depth research and more detailed discussions within the working groups”.⁹⁰ The Justice 2020 initiative, headed by the minister of justice in cooperation with the chairs of the Judicial and Prosecutorial Councils, is presented as a significant step for the independent functioning of Kosovo’s rule of law institutions and gives some hope that local ownership of the rule of law and judicial reform processes will grow and mature as EULEX takes a step back.⁹¹ Although supported financially by the US, UK and EU, Justice 2020 was “established proactively at the initiative of Kosovo authorities” and drafted independently by Kosovo institutions.⁹² There is nonetheless very little on paper and the agenda is not publicly available. The agenda is expected to set short-term priorities, particularly those that can enhance judicial efficiency, in line with the results deriving from the Functional Review.⁹³

As it stands, Kosovo still “lacks a comprehensive strategy for justice sector reforms and a proper mechanism for inter-institutional coordination”.⁹⁴ The Functional Review process and Justice 2020 could fill some of these gaps. These two initiatives demonstrate the Ministry of Justice’s intention to focus on improving coordination and streamlining rule of law reform in the coming years and could serve as foundational platforms to increase local ownership of the rule of law in Kosovo’s post-EULEX landscape. However, there are two problems: there is not full political will to back reforms and the Ministry of Justice should be wary of launching sweeping initiatives or new programmes quickly out of the gate. Initiatives, which further decentralise rather than coordinate existing institutions and processes, could increase opportunities for mismanagement rather than streamline rule of law and judicial reform.

In the case of Kosovo, the international community and donors exclusively have driven reforms and legislative agendas until now. Recent local initiatives mark the beginning but the government has neither the will nor the capacity to drive the reform agenda alone. The role of the EU and other donors is deeply rooted in the Kosovo system and much of the progress made comes from their contributions. But from the citizens’ point of view they also share the blame for things that did not go well.

⁹⁰ Minister of Justice Tahiri quoted in EULEX Press Office (2018). “Final Meeting of the Joint Rule of Law Coordination Board.” 21 November.

⁹¹ EULEX Head of Mission Alexandra Papadopoulou quoted in EULEX Press Office (2018). “EULEX at the launch of Justice 2020.” 26 September.

⁹² Papadopoulou quoted in *ibid*.

⁹³ Balkans Policy Research Group (2018). Personal Interview. Pristina, Kosovo, 5 December.

⁹⁴ European Commission (2018). “Kosovo* 2018 Report.” 17 April, p. 14.

3.2 EU and international support for the rule of law in Kosovo

Insufficient interinstitutional coordination is not unique to local institutions, as the 2018 country report for Kosovo also cited lack of coordination among donors resulting in “inefficiencies, incoherence and duplication of efforts”.⁹⁵ In addition to the EU, which currently funds around 20 rule of law-related projects, are other donors funding such projects in Kosovo, as discussed below.

The **UNDP** focuses on three areas: (i) strategic planning, policy development and coordination in the area of rule of law; (ii) the institutional capacity of judicial institutions and career development of legal actors; and (iii) access to justice and justice service delivery.⁹⁶ The rule of law activities of the **Organization for Security and Co-operation in Europe** focus on supporting the independence, impartiality and accountability of the justice system, monitoring and reporting on the judiciary and prosecution, the administration of justice in interethnic cases and cases impacting women and marginalised communities, and reviewing and supporting institutions to both develop and implement legislation.⁹⁷

USAID projects support judicial independence, the implementation of laws, oversight, management and professional skills (primarily within the Kosovo Judicial Council, Kosovo Judicial Academy, and courts) and efforts to combat pervasive corruption, as well as commercial law, property rights and alternative dispute resolution mechanisms.⁹⁸ Specific projects include ‘Justice Matters’, a three-year activity to improve access to justice, and the ‘Justice System Strengthening Program’. **ICITAP**, the US Department of Justice’s International Criminal Investigative Training Assistance Program, leads coordination for police development and currently assists the Ministry of Internal Affairs and Kosovo Police particularly in the areas of border management and immigration, IT support for criminal investigations, police and prosecutorial management of organised and financial crimes.⁹⁹

Norway committed to fully funding the development of a case management information system in courts and prosecution offices, and has been a key supporter of using alternative dispute resolution methods and of the CSSP (Berlin Center for Integrative Mediation) project for Kosovo since 2012.¹⁰⁰

⁹⁵ Ibid.

⁹⁶ UNDP Kosovo Project Website: “Support to strengthening the rule of law in Kosovo.” Available at http://www.ks.undp.org/content/kosovo/en/home/operations/projects/democratic_governance/support-to-strengthening-the-rule-of-law-in-kosovo.html.

⁹⁷ Ibid.

⁹⁸ USAID (2018). Webpage: “Rule of Law and Governance.” Last updated February. Available at <https://www.usaid.gov/kosovo/democracy-and-governance>.

⁹⁹ The United States Department of Justice. Webpage: “International Criminal Investigations Program (ICITAP): Europe and Eurasia.” Available at <https://www.justice.gov/criminal-icitap/europe-and-eurasia>.

¹⁰⁰ The Norwegian Ministry of Foreign Affairs (2017). “Statement by the Royal Norwegian Ambassador, Mr. Per Strand Sjaastad.” Support for Strengthening the Rule of Law in Kosovo – Information campaign on Mediation, March.

Other projects come from the Netherlands government, Millennium Challenge Cooperation, GIZ, etc.

EU operations in Kosovo are diverse and far-reaching. EU institutions in Brussels and those operating within the country (the EUSR and EULEX) have developed and implemented a variety of mechanisms, instruments, funding schemes, processes and action plans to support Kosovo's development and democratisation in line with European norms and to aid Kosovo on its path towards European integration. The European Reform Agenda, Stabilisation and Association Process, and EU enlargement perspective for the Western Balkans all demand substantial reforms in the area of rule of law as preconditions for further EU integration and accession.

The **SAP**, the EU's framework for relations with Western Balkan countries and the EU's enlargement perspective for the region, is a key pillar of the EU agenda in Kosovo. Kosovo has engaged in the SAP since 2010, and a Stabilisation and Association Agreement (SAA) between Kosovo and the EU entered into force in April 2016 with support for the efforts of Kosovo to strengthen democracy and the rule of law as one of four key aims of association.¹⁰¹ Kosovo's **ERA** was adopted in 2016 and set short-term priorities through the end of 2017 in line with SAA-related requirements, with one of three key focus areas being good governance and rule of law.¹⁰² While the timeline for the ERA one has expired, a key requirement that is still needed in the "legislative domain is the swift adoption of the provisions concerning the suspension and removal of public officials respectively indicted and convicted for corruption".¹⁰³ Although an ERA II is expected, plans have not yet been formally announced.

As EULEX is phased out and its monitoring, mentoring and advising support withdrawn from a number of institutions,¹⁰⁴ the Instrument for Pre-Accession Assistance (IPA) II will take on additional importance as a key mechanism for rule of law promotion and judicial reform in Kosovo. More specifically, "alternative assistance tools" (including IPA funds and projects) will be used to fill the "institutional gaps and structural weaknesses" that remain.¹⁰⁵

¹⁰¹ Council of the European Union (2015). Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the One Part, and Kosovo*, of the Other Part, 2 October. Article 83 of the SAA (Reinforcement of institutions and rule of law) highlights the following key aims: strengthening the independence, impartiality, accountability and efficiency of the judiciary; developing "adequate structures" for the police, prosecutors, judges, and all judicial and law enforcement bodies to "adequately prepare them for cooperation in civil, commercial and criminal matters"; and, "to enable them to effectively prevent, investigate, prosecute and adjudicate organized crime, corruption, and terrorism".

¹⁰² Balkans Policy Research Group (2017). "European Reform Agenda: Progress Report on Good Governance and Rule of Law." 26 October.

¹⁰³ EUSR Nataliya Apostolova in EULEX Press Office (2018). "Final Meeting of the Joint Rule of Law Coordination Board." 21 November.

¹⁰⁴ Including the Kosovo Police, the Kosovo Judicial Council, the Kosovo Prosecutorial Council, and the Civil Registration Agency.

¹⁰⁵ EULEX (2018). *Compact Progress Report: Assessing Progress between July 2017 – June 2018*, p. 2.

The government of Kosovo implemented the 95 priority actions identified through the dialogue on visa liberalisation. The visa dialogue itself was a high priority for the government and its constituents and has been closely linked with rule of law reform, specifically the fight against organised crime and corruption. In July 2018, the European Commission announced that Kosovo had met the required benchmarks; the European Parliament and Council must still approve the proposal on visa liberalisation for Kosovo.¹⁰⁶

The **EUSR's Rule of Law and Legal Section** collaborates with EULEX on a number of initiatives, including capacity building of local institutions, judicial cooperation between local and international institutions, and implementation of the Legislation Review Mechanism. The latter provides the government and Assembly of Kosovo with advice on EU *acquis* standards relevant to the government's legislative programme and benchmarks outlined in EU alignment processes including the SAP, visa liberalisation and EU-facilitated dialogue with Serbia.¹⁰⁷

The European Commission released its most recent Communication on a **credible enlargement perspective for and enhanced EU enlargement with the Western Balkans** in February 2018. The Commission highlights that all Western Balkan states need to take immediate action to ensure the independence and efficiency of judicial systems, to implement frameworks for preventing corruption, to counter money laundering and organised crime,¹⁰⁸ as well as to further invest in processes of transitional justice.¹⁰⁹ In the 2018 enlargement strategy, the EU introduced six new flagship initiatives, the first being the initiative to strengthen the rule of law. With the newly-announced **rule of law flagship initiative**, the EU will expand upon existing tools (including detailed action plans), enhance its assessment of reform implementation through new impact indicators, trial monitoring and case-based peer-review missions, and introduce new rule of law advisory missions.¹¹⁰

One element of the enlargement strategy is not regionally applicable – that relating to Kosovo–Serbia relations. While reaffirming the European perspective of all states in the Western Balkans, the EU has issued a thinly veiled reference to Kosovo's status-related

¹⁰⁶ European Commission, Migration and Home Affairs. Webpage: "Visa Liberalisation: Commission confirms Kosovo fulfils all required benchmarks." Available at https://ec.europa.eu/home-affairs/news/visa-liberalisation-commission-confirms-kosovo-fulfils-all-required-benchmarks_en.

¹⁰⁷ European Union Office in Kosovo. Webpage: "Kosovo* and the EU." Available at https://eeas.europa.eu/delegations/kosovo/1387/kosovo-and-eu_en.

¹⁰⁸ Via dismantling criminal networks and their economic bases, using financial investigations and tools (precautionary asset-freezing, a reversed burden of proof for specific types of assets, and more stringent disclosure requirements for businesses, among others). See European Commission (2018). "Enlargement Perspective." February.

¹⁰⁹ For Kosovo, this includes the handling of war crimes cases and full cooperation with the Kosovo Specialist Chambers. See European Commission (2018). "A credible enlargement perspective for and enhanced EU engagement with the Western Balkans." Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2018) 65 final, 6 February.

¹¹⁰ Ibid.

challenges, noting Kosovo’s opportunity to advance on its European path only “once objective circumstances allow”.¹¹¹ A comprehensive, legally-binding normalisation agreement between Serbia and Kosovo must be concluded in order for either to advance on their respective European paths (and must be “irreversibl[y] implement[ed]” before accession negotiations with Serbia can be closed).¹¹²

4. Looking forward

In the 2018 credible enlargement perspective for the Western Balkans, the EU committed to support the transformation of Western Balkan states through six new flagship initiatives, the most important being the initiative to strengthen the rule of law. With EULEX winding down, plans for the EU’s new flagship rule of law initiative and advisory mission in Kosovo will take on increasing significance. EU rule of law engagement in the Western Balkans, in terms of the shape, role, precise aims and level of support planned, has only been very broadly defined. As outlined in the enlargement strategy, the European Commission plans to expand upon existing tools (including **detailed action plans**), enhance its **assessment of reform implementation through new impact indicators**, and provide support via **trial monitoring, case-based peer-review missions** and **new advisory missions**.¹¹³ The EU has also committed to continuing support for the work of the International Criminal Tribunals and the Kosovo Specialist Chambers.¹¹⁴

The final declaration of the 2018 EU–Western Balkans Summit included the ‘Sofia Priority Agenda’, which offers minor additional insights.¹¹⁵ While also envisaging the introduction of trial monitoring (in the field of serious corruption and organised crime), advisory missions “with increased support from Member States and the EU”, and systematic, case-based peer-review missions focused on monitoring reforms, it has highlighted the EU’s intention to “enhance support for judicial reform and efforts to fight corruption and organised crime including capacity building for corruption prevention” and support for better measurement of results in justice reform.¹¹⁶

The EU will increasingly and solely rely on the IPA as the primary framework through which programmatic and financial support is provided to Western Balkan states in line with the enlargement strategy – “in order to ensure adequate funding to support this [enlargement]

¹¹¹ Ibid., p. 2.

¹¹² Ibid., p. 2.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Developed by the EU and member states, in consultation with Western Balkan partners, at the EU–Western Balkans Summit in May 2018.

¹¹⁶ Council of the European Union (2018). “Sofia Declaration.” EU–Western Balkans Summit, Sofia, 17 May 2018.

strategy and a seamless transition to membership, the Commission proposes to gradually increase funding under the [IPA]”.¹¹⁷

There are over 20 ongoing EU-funded projects supporting fundamental rights and the rule of law in Kosovo. However, a major justice package will likely be unveiled in 2019. A multi-year, comprehensive programme to support the rule of law in Kosovo is currently in the planning stages. This programme, which may be modelled loosely upon the EURALIUS project implemented in Albania,¹¹⁸ will be largely funded through the IPA and will focus on defragmenting rule of law development support and facilitating cohesive sectorial rule of law reform in Kosovo. The funding and implementation of this programme is expected to be primarily channelled through the Ministry of Justice and, to a lesser extent, through the Kosovo Prosecutorial and Judicial Councils, as well as the Justice Academy. The programme is expected to concentrate broadly on three key areas: (i) sectorial management and monitoring, (ii) capacity building and implementation of legal frameworks, and (iii) access to justice. Moving forward, the EU also foresees increased focus on twinning actions as well as increased cooperation with USAID and member state donors in an effort to minimise overlap and to better coordinate the division of labour and programming among international donors in Kosovo.

4.1 Rule of law flagship initiatives: A need for fresh and concrete actions

The European Commission has to yet release specific plans and agendas for the rule of law flagship initiatives in terms of their structure, size or scope. Preliminary discussions reveal some of the challenges. The government of Kosovo is not showing any commitment yet and there is a difference of view between the local authorities and EU representatives. This threatens the good intentions of the initiatives. An EU official warned that because of a lack of will on the EU side to offer more to Kosovo and on the government side to genuinely implement reforms, the new flagship initiatives could end up being a repackaging of the ongoing projects under a different title.¹¹⁹

Ideally, the EU should deploy a ‘PRIEBE’ mission to Kosovo, whose task should be to comprehensively evaluate the functioning and performance of the rule of law.¹²⁰ The PRIEBE mission was named after Reinhard Priebe, a German expert and former EU official, who chaired the Senior Experts’ Group on systemic rule of law issues in the Former Yugoslav

¹¹⁷ European Commission (2018). “A credible enlargement perspective for and enhanced EU engagement with the Western Balkans.” 6 February, p. 18.

¹¹⁸ For more, see <https://euralius.eu/en/>.

¹¹⁹ Interview with EU officials, January 2019, Pristina.

¹²⁰ European Commission (2015). “The former Yugoslav Republic of Macedonia: Recommendations of Senior Experts’ Group on systemic Rule of Law issues relating to the communications interception revealed in Spring 2015.” Brussels, 8 June.

Republic of Macedonia.¹²¹ An EU official warned that the “EU can launch such a review mission only if it has to offer something in return ... I am afraid it has nothing to offer.”¹²²

In spite of the painful realities, the EU should seize the opportunity of the *credible enlargement strategy for the Western Balkans* to launch a much more robust rule of law agenda for Kosovo (and the Western Balkans). At the same time, Kosovo’s authorities should seek concrete actions and plans that will comprehensively address the deficiencies of the rule of law. Citizens who have lost faith in both their government and the EU want a different plan that makes change real and brings tangible benefits to the people.

To achieve this, certain principles need to be set from the outset before any new flagship initiative takes shape:

1. *EULEX should go home.* Any new action and initiative should not take into account any role for the mission or the personnel.
2. *Launch an independent verification & evaluation mission.* Before any new initiative, the EU needs to launch a PRIEBE-like mission to Kosovo to independently and fairly evaluate the state of the rule of law, the achievements of EULEX and ongoing projects. The experts will identify gaps and the actions to be taken, which need to be presented in simple, actionable language. The report should become a manual for reforms and serve as a baseline for any new initiative to be launched.
3. *Ensure projects are demand-driven with full local ownership.* Any new initiative should be of a demand-driven form with the Kosovo authorities and in close consultation with civil society and other stakeholders. Likewise, all reform agendas need to have the local authorities in the driving seat. Citizens want local authorities to be accountable.
4. *Provide for inclusive planning based on a fact-finding mission, consultations and inclusion.* The government is prone to designing plans and projects on its own. So too are the EU institutions. Both like to do their planning alone. The credibility of both is heavily undermined and public trust that the government or the EU will do any better work on the rule of law is very low. To increase the chance of success, the new initiatives should earn much broader support, with the goal to increase support for reforms from the bottom up.
5. *Any mission support within the country needs to have a well-defined list of tasks, scope and size,* which aims to implement priorities but does not challenge local ownership. With EULEX’s tarnished image, any new mission must absolutely differentiate itself from a EULEX-type mission or some of the twinning projects that have also been weak.

¹²¹ Erwan Fouéré (2016). “Europe Must Be Ready to Punish Macedonia’s Leaders.” *Balkan Insight*, 22 April. All Western Balkan countries need “Pribe Reports” to measure state capture – see the full report at <http://www.bezbednost.org/>.

¹²² Interview with an EU official, October 2018, Brussels.

6. *Streamline reform processes.* The assessment report and the new initiatives should help to streamline reform processes and increase the performance of rule of law institutions. While supporting the reform agenda, peer-to-peer review and a sectorial approach with semi-permanent projects and personnel in the country should engage in the sectorial areas with clear tasks. Those missions need to regularly report to the wider public.
7. *Temper expectations.* Framing expectations will be key to any new EU rule of law initiative or mission in Kosovo. Local perceptions of EULEX's ineffectiveness derived in part from unrealistic expectations, which EULEX did little to temper. The EU and local authorities should commit to achieving targeted, realistic benchmarks, and the responsibilities of EU personnel and local authorities should be clearly delineated. As demonstrated via EULEX, unkept promises are harshly judged in the court of public opinion, which can affect the perceived authority of mission personnel and the overall effectiveness of development support for the rule of law and judicial reform.

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The ENGAGE II Fellowship Programme is coordinated by CEPS with support by the Open Society Initiative for Europe (OSIFE). This one-year programme aims to involve academic, civil society and think tank actors from Central and Eastern Europe, the Western Balkans and Eastern Partnership countries in EU policy debates. It entails training, study visits, public events and the publication of policy papers. It culminates in the active participation of the selected fellows at the annual CEPS Ideas Lab.

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- Judit Bayer, Professor of Media Law and International Law at the Budapest Business School
- Simonida Kacarska, Director and co-founder of the European Policy Institute, Skopje
- Naim Rashiti, Executive Director and Senior Balkan Analyst, Balkans Policy Research Group, Pristina
- Maria Repko, Deputy Director at the Centre for Economic Strategy, Kiev
- Berat Thaqi, Policy Analyst at the GAP Institute, Pristina





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- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach
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Programme Structure

In-house Research Programmes

Economic and Finance
Regulation
Rights
Europe in the World
Energy and Climate Change
Institutions

Independent Research Institutes managed by CEPS

European Capital Markets Institute (ECMI)
European Credit Research Institute (ECRI)
Energy Climate House (ECH)

Research Networks organised by CEPS

European Network of Economic Policy Research Institutes (ENEPRI)
European Policy Institutes Network (EPIN)