

Limits of the “institutionalisation before liberalisation” approach:

EULEX Kosovo measuring its impact and fighting side-effects as an example

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The international community has become increasingly involved in large-scale crisis management operations. Commitment to more comprehensive and longer-lasting state-building has been considered a major tool for managing regional security risks. Despite the ambitious and well-meaning goals, however, the shortcomings of these missions have been questioned widely. The lack of local ownership and the by-passing of democratic decision making processes have been identified as major flaws of the current international state-building operations. Kosovo is an interesting case as the small area hosts a number of crisis management missions and actors, whose mandates are sometimes overlapping: the UN civil administration (UNMIK) still operates, the OSCE mission is part of it, the EU has deployed a Rule of Law mission EULEX as well as an EU Special Representative (EUSR); the EUSR also wears a “double-hat” as he serves as the Head of the International Civilian Office (ICO). Although shrinking, the NATO peacekeeping operation KFOR is still in place. All international actors strive to map their achievements, but what is left outside these mechanisms of measuring effectiveness? A special focus will be given to the EULEX Kosovo Rule of Law mission, its mechanisms of measuring progress in achieving the objectives on one hand and its efforts in fighting against a number of side-effects on the other.

1 Introduction

Commitment to comprehensive and long-lasting state-building is considered a major tool for managing regional security risks, and thus, an investment towards sustainable peace and development. Despite the ambitious and well-meaning goals, however, many new forms of state-building practices have constituted highly invasive forms of external regulation.¹ Liberal peacebuilding is a concept born from the pro-liberalisation rhetoric of the early 1990s, “when democratisation and marketisation were portrayed as almost magical formulas for peace in war-torn states.”² Today liberalism is a broad paradigm; it hosts a number of alternative approaches to peacebuilding from promoting rapid political and economic liberalisation of the conflict societies to more prudent approaches of international regulation and surveillance. The shortcomings of liberal peacebuilding have been discussed widely and issues like inadequate attention to domestic institutional conditions, insufficient appreciation of the tensions and contradictions between the various international actors involved, limited knowledge of distinctive local conditions and insufficient “local ownership” over the strategic direction and daily activities have all been subject to academic criticism. The most extreme critics have presented peacebuilding missions just as a new form of western colonialism.³ Still, this criticism has not offered any serious alternative models and it has given comparatively little attention to what has been achieved and what would have happened without these missions.

In fact, there is a wide gap between the critical academic research focusing on the moral flaws of the recent crisis management and state-building missions and the more policy oriented research that produces technical lessons learned reports of the implementation of such missions.⁴ Critical debate on state-building missions often merely rejects the outside invasion rather than contributes to a strategic and

conceptual understanding of missions. The lessons learned exercises, on the other hand, have been hindered by the dominating discourse of the necessity of interfering in the internal administrations of post-conflict or fragile states in the name of “sustainable development”, “administrative reform” and “rule of law.”

A less policy oriented and more theoretical analysis on the impact of civilian crisis management can try to bridge these two fields of study. It is important to understand *how* the international community measures its achievements and its overall impact. The definition of mission goals is also a way to define its exit strategy: when will the mission be “accomplished”? The lessons learned exercises, that all international crisis management missions conduct today, are important tools to identify the problems in achieving the planned objectives. However, it is also important to note what is left outside these mechanisms of measurement (benchmarking and lessons learned); what are the silences of crisis management and (closely linked) state-building discourse on the goals, deliverables and final achievements of the international interference.

The concept of impact implies causality, in this case between state-building operation and its effects. A number of analyses have been made to determine the effectiveness of different operations based on how well these operations have achieved their stated goals. Evaluation of effectiveness demands clear and measurable objectives and operational goals.⁵ Progress on the activities and achievements can be followed through different benchmarks and related road maps towards these goals. However, impact of state-building activities is not merely limited to these stated goals and road maps described in mission mandates and concepts of operations. On the contrary, it is a larger concept implying also undesired or surprising outcomes directly or indirectly caused by these activities. Impact is thus considered as a consequence of an outcome⁶ – as something broader and lasting. This kind of impact is rarely measured or evaluated by the established mechanisms of the state-building operations.

1 Chandler 2006, 1.

2 Paris 2010, 338.

3 Ibid., 347–348.

4 This has been pointed out by Marko Lehti (Tampere Peace Research Institute) in a workshop on exit strategies of the international missions organized at the University of Pristina in Kosovo on 2 September 2010.

5 Meharg 2009, 60 & 66.

6 Ibid., 70.

Often the responsibility of the state-building operations is denied when it comes to these undesired side-effects or the long-term consequences of the policies that have been implemented as a result of international intervention. This critical perspective is based on David Chandler's conceptualisations of the international community's rejection of political responsibility when it comes to the impact of the state-building policies. What happens, for example, when capacity building is seen as a more important goal of these missions than promoting liberal democracy? Chandler in his book, *Empire in Denial*, criticises the way the international community conducts its state-building missions denying and evading accountability for the long-term consequences.⁷

This article proceeds in three parts. The first chapter examines the case of Kosovo, where a number of crisis management missions overlap. The second chapter analyses the existing mechanisms to measure the achievements of EULEX activities – the benchmarking activities under the “programmatic approach”. The third chapter focuses on the impact that cannot be measured; notably it focuses on the undesired impact of the multitude of civilian crisis management missions on the society including non-accountability of both the local and international authorities. In the conclusions I will contemplate the exit strategies of the crisis management missions in Kosovo.

7 Chandler 2006, 1.

2 Kosovo – a testing ground of civilian crisis management operations

Today state-building is seen as part of the natural continuum (as are peacebuilding and crisis management) in an effort to rid the world of weak states, which are considered as a security threat to the West in the form of organised crime that is harboured in these “outlaw societies”. Francis Fukuyama has written that “state-building is one of the most important issues for the world community because weak or failed states are the source of many of the world’s more serious problems, from poverty to AIDS to drugs to terrorism”.⁸

The case of Kosovo is highly revealing when thinking about the shift of the international peace building policies in the post-Cold War era. During the Cold War, the dominant discourse had been based on the rivalry between the two world visions. The rupture of the 1990s gave place for a more human centred discourse, focusing on the “needs” of the others, on international “responsibility to protect”, on “empowering” the weak groups and on emphasising “local ownership”.⁹ The role of the United Nations changed “from a narrow diplomatic task of preventing war to the interventionist state-building task of constructing peace.”¹⁰ There seemed to be an “ethical turn” in international thinking.¹¹

The 1990s in Kosovo were characterised by flagrant human rights violations committed by the highly repressive political regime of Slobodan Milosevic, who removed the autonomy of the province in 1989. Despite the fact that Albanians represented over 90% of the province’s population they were quickly fired from all public functions. In the early 1990s this situation did not raise important international media coverage. Kosovo was not included in the Dayton peace negotiations and the situation was considered by many European leaders as an internal issue of Serbia.

In the mid-1990s a Kosovo Liberation Army was formed and started guerrilla attacks against the Serbian police and military forces. This triggered revenge attacks on the Albanian civilian population. These events were strongly condemned by the international community, but the political pressure

on Milosevic did not result in a resolution and the situation in Kosovo only escalated in 1998. After the Rambouillet negotiations failed in February 1999, NATO launched an air campaign to halt any further attacks on the civilian population. The Serbian military and paramilitary forces responded by forcing a large part of the Albanian population to leave their homes and the country. Thousands were killed. The houses left behind by the refugees were robbed and torched.

The NATO bombings triggered a critical theoretical debate about the right of intervention, especially without a UN Security Council mandate. The Kosovo War marked an important milestone in the change of the international discourse. The concept of responsibility to protect – the right to intervene – gained support.¹²

After the war, Kosovo became a UN protectorate under the UN Security Council Resolution (UNSCR) 1244 with the NATO led peacekeeping force KFOR responsible for security and stability. The UNSCR 1244 left the future status question open and the UN interim administration without a clear exit strategy.

The UN administration organised municipal and later parliamentary elections, but the main decisions were adopted or at least approved by the Special Representative of the UN Secretary General (SRSG). In 2003, UNMIK introduced the standards before the status – a functionalist policy line supported by, for example, Roland Paris in his book *At War’s End*, in which he calls for institutionalisation before liberalisation in a post-conflict situation. Paris argues that it is important to focus on rule of law and strong institutions before giving post-conflict societies the right of self-governance. He also notes that democracy is fine for developed stable states but that it is destabilising for states which are failing or are in transition from war to peace.¹³ This stance “suggests that states and citizens can be capacity-built and empowered by correct practices of external regulation”¹⁴ before actual liberalisation takes place and self-government is established.

8 Fukuyama 2004, xvii.

9 Chandler 2006, 75–77.

10 UN 2004 “More Secure World” report.

11 Chandler 2006, 61.

12 ICISS 2001 “Responsibility to Protect” report.

13 Paris 2004.

14 Chandler 2006, 56.

In March 2004, Kosovo burst into flames after the death of a group of Kosovo Albanian children; rumours of Serbs being involved in their drowning spread like fire in the society and thousands of people rushed into the streets and burned hundreds of Serbian churches in furore. The violence lasted only for a weekend, but it left the international community perplexed. The peacebuilding process had started so well, a number of UNMIK listed standards had already been achieved and Kosovo institutions were being formed and trained. Why this sudden burst of violence? Norwegian diplomat, Kai Eide, when asked by the Secretary General of the UN to write a report about the issue, stressed that the main reason behind the violence was the frustration of the Kosovo people. The "standards before the status" -policy was seen as not providing a future status perspective. Kai Eide recommended negotiations commence as soon as possible.

The UN Secretary General, Kofi Annan, nominated Martti Ahtisaari as his Special Envoy to start negotiations between Pristina and Belgrade. It quickly became clear that there were no grounds for a negotiated solution: Belgrade would never want to give up Kosovo and for Pristina, the only possible outcome of the negotiations would be independence. The Independent International Commission on Kosovo had already recommended conditional independence in 2001. The Ahtisaari led bottom-up negotiations during 2006 focused accordingly on issues that would be monitored by the international community – financial questions, cultural heritage sites, minority rights and so on – rather than the final status itself. The comprehensive status proposal that was made public in the spring of 2007 outlined the mechanisms of surveillance: the International Civilian Office (ICO) and the European Union Rule of Law Mission would be deployed in Kosovo.¹⁵ In the attached letter to the proposal, Ahtisaari recommended a supervised independence for Kosovo.¹⁶

The status proposal did not get the unanimous support of the international community and was never endorsed by a new Security Council Resolution. However, in the independence declaration on 17 February 2008 the "leaders of Kosovo" committed themselves to implementing the Ahtisaari plan. The Kosovo authorities agreed to the establishment of the ICO to monitor the implementation of the Ahtisaari plan and invited the EU's civilian crisis management mission to Kosovo; a mission which had already been created by a Joint Action of the 27 member states on 4 February.¹⁷

This interventionist approach is based on an assumption that the "political sphere is (...) part of the problem, not where solutions are to be found."¹⁸ The external state-building efforts are presented as technical solutions for these problems. In the Kosovo case, the Ahtisaari package proposes solutions such as the creation of new municipalities to promote minority (or to be politically correct "community") rights in Kosovo. The establishment of a Rule of Law mission shows that problems

are seen "in moral rather than in political terms" – thus crimes need to be judged rather than viewed as political conflicts to be mediated. Indeed, many problems are considered as capacity problems and rule of law problems. Less attention is given to local political debates. Due to the fact that not all EU member states have recognised Kosovo's independence, but have accepted the deployment of the EU Rule of Law Mission, EULEX, in Kosovo, EULEX has declared itself as a "status neutral" and "technical" mission. Political questions do not belong to its mandate.

15 UNOSEK 2007.

16 Ahtisaari 2007.

17 Council Joint Action 2008/124/CFSP.

18 Chandler 2006, 61.

3 Progress in achieving objectives

David Chandler, in his book *Empire in Denial*, criticises the way the international community conducts its current state-building missions. He states that they are “highly invasive forms of external regulation”¹⁹ that are placed into the target countries, but at the same time the international community deny and evade the accountability and the responsibility that this regulatory power wields.²⁰ Chandler approaches state-building especially from the point of view of capacity building and notes how a large amount of the world’s development aid is in fact channelled into state capacity building²¹. In the case of the European Union’s relations with the Western Balkan states, this capacity building is closely linked with a process of “member state-building”. This kind of approach is seen as necessary since “these states are deemed to have ‘capacity problems’ which are held to prevent them from adequately dealing with the complex problems arising in the economic, social and political management of their societies.” “They” have the problem but this situation can directly affect us if it is not addressed by the international community. Chandler sees the interventionist policies of the “West” as highly self-interested and security oriented. He calls for more empirical research on the actual impact of external capacity building projects and governance reforms linked with international support. The dominant state-building discourse is based on a very technical understanding of the goals of international intervention. Chandler observes, how interestingly “depoliticized” the nature of all these discussions on state capacity building is.²² As the solutions proposed for these capacity problems are technical, it means the progress in implementing these solutions can also be measured.

In the case of EULEX Kosovo, the 27 EU member states made a collective decision on February 4, 2008 to deploy an ESDP/CSDP (European Security and Defence Policy/ Common Security and Defence Policy) mission to Kosovo to:

(...) assist the Kosovo authorities, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability. It will further develop and strengthen an independent and multi-ethnic justice system and a 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.²³

As the ESDP/CSDP mission is not considered as “capacity building,” which is in the hands of the European Commission, the member states added that the mission, “in full co-operation with the European Commission Assistance Programmes, will implement its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities.”²⁴ The executive powers were conserved for inter-ethnic crime, war crimes, terrorism, corruption, organised crime and financial crimes – crimes where local judges and prosecutors might be reluctant or unable to act due to a too harsh political pressure or security threats. The idea was to stress local ownership after 10 years of UNMIK administration; the local authorities would be “in the driving seat” as the Head of Mission (HoM), Yves de Kermabon has repeated many times. EULEX Kosovo was to operate in the overall framework of the EU Joint Action and UNSCR 1244, following an invitation from the Kosovo authorities.

As mandated, the EULEX mission will assist and strengthen the “transparent and accountable multiethnic justice system, police service and customs service” and “make sure that the rule of law institutions are free from political interference.”²⁵ The monitoring, mentoring and advising mandate was accompanied by the “Programmatic Approach” delivered by the EU Planning Team (EUP) which had been preparing the mission in Kosovo since 2006. EULEX was to *monitor* and improve the administrative system through its observations, to *mentor* and assist the local counterparts in acquiring new

19 Ibid., 5.

20 Ibid., 1.

21 Ibid., 3

22 Ibid., 5.

23 Council Joint Action 2008/124/CFSP, article 2.

24 Ibid.

25 Ibid.

skills and knowledge, and to *advise* and provide professional counselling. The achievements attained by these MMA activities were to be closely tracked.

EULEX was deployed in Kosovo in 2008. It was, however, not able to implement its mandate immediately. As there was no possibility to get a new Security Council Resolution accepted, UNMIK remained in Kosovo, contrary to the preliminary plans. UNMIK held an overlapping mandate in the field of rule of law with EULEX, having international judges and prosecutors active in Kosovo. It was only in November 2008 that the Security Council supported the Secretary General's plan for the reconfiguration of UNMIK and deployment of EULEX under the old UNSC Resolution 1244. This enabled the transition of the duties in the field of rule of law, including a number of judicial cases. EULEX declared "initial operation capability" on December 8, 2008 and "full operational capability" on April 4, 2009. The EU tried to make it clear from the beginning that it was not there to replace UNMIK and that Kosovo would now be "responsible" for managing its own affairs. EULEX would be there to support the Kosovo authorities in creating a sustainable and accountable rule of law system. Thus, since the beginning EULEX was presented as "a technical specialized mission in the field of Rule of Law."²⁶

Despite these declarations, the National Committee on American Foreign Policy called for a reform of EULEX in May 2010, demanding that the European Parliament "hold hearings reviewing EULEX's performance, and adopt benchmarks and deadlines for specific tasks and milestones."²⁷ This has also been an issue raised by some Kosovo think-tanks calling for greater accountability and assessment of EULEX activities.

However, this criticism seems out-dated, or at least ill-informed, as this has been taken into account in preparing the EU Rule of Law Mission in Kosovo. The EU has acknowledged that to ensure operational accountability it needs a system to assess the impact of the mission work on the ground. This "Programmatic Approach" was designed by the EUPT. All EULEX personnel co-located with their local counterparts to monitor, mentor and advice them, are asked specific questions every month about developments in their specialist fields. The Programme Office compiles these answers and regularly produces public reports on the progress of Kosovo's Rule of Law institutions. "These results will then be measured against the strategic objectives agreed by EU member states", states the official document on EULEX Accountability.²⁸ This is a mechanism to statistically measure EULEX achievements, as progress of the local Rule of Law institutions is considered to be an achievement of the EULEX MMA Action. HoM de Kermabon underlines the local ownership aspect of the process, as the EULEX staff provides assistance in and actively monitors the process of implementation, "which [is] the sole

responsibility of professionals in Kosovo's police, judiciary and customs."²⁹ Even though EULEX is present, the responsibility of the results is thus cast onto the local counterparts.

The most recent EULEX Programme Report 2010 titled, "Building sustainable change together", outlines the achievements of the past year but also highlights remaining weaknesses of the rule of law institutions in Kosovo. The previous EULEX Programme Report published in July 2009 had prepared detailed plans to address areas of weakness in Kosovo police, judiciary and customs based on an assessment carried out between December 2008 and June 2009. This assessment had resulted in the preparation of a number of recommendations, which were later "translated into MMA Actions" by the relevant Kosovo institutions which are assisted by EULEX. By tracking the implementation of these MMA Actions, EULEX aims to measure its progress in a transparent way.³⁰ A catalogue of these MMA Actions (that cannot be called projects as this term belongs to the EU Commission Assistance jargon) can be found on the EULEX internet pages, where the progress of each Action can also be followed.

Officially stated this "system is at the same time the exit strategy for EULEX: Once the strategic objectives have been fulfilled EULEX will leave Kosovo and the full responsibility for Rule of Law in the hands of the local institutions."³¹ Currently, EULEX still keeps limited executive functions, but will move towards a simple monitoring role in the years to come when the Kosovo institutions are assessed as ready to handle, for example, investigating and conducting trials of war crimes or high level corruption cases in a sustainable and accountable manner without political interference.

26 See EULEX website: www.eulex-kosovo.eu

27 Phillips 2010, 11.

28 "EULEX Accountability" document 2010.

29 de Kermabon in EULEX Programme Report 2010, 5.

30 EULEX Programme Report 2010, 6.

31 Ibid.

4 Imposed policies and techniques of evasion

In the case of Kosovo, we have seen the functionalist tendency to promote "institutionalization before liberalization"³². Even though elections were organised under the UN administration, UNMIK saw that standards should be implemented before the negotiations on the future status could start. Now EULEX will move gradually more to a monitoring role as the local institutions get stronger. In its extreme, this policy is based on a thought that institutional capacity building (police, judiciary, civil administration) should be in place before full self-government, which is liberalisation. Thus functional capacity of state institutions is understood in technical and administrative terms rather than being representative of the political will of the population and so understood in policy making terms.³³

This new state-building approach puts in question the old understanding of sovereignty as self-government and political autonomy. The international community rarely takes direct forms of rule (as in Kosovo with the UN administration that resembled the old trusteeship system), but rather introduces more subtle forms of control and regulation. Some commentators have thus introduced new concepts such as "neo-trusteeship", "guided sovereignty", "shared sovereignty"³⁴ and "shared governance"³⁵. These concepts were put forth many times as possible future status solutions for Kosovo, for example by the Independent International Commission on Kosovo (conditional independence)³⁶, the International Commission on the Balkans³⁷ and finally adapted by Special Envoy Ahtisaari in his proposal of "supervised independence"³⁸.

In fact, the new state-building policies of the international community have appeared as a response to the 1990s humanitarian interventions. They have necessitated a redefinition of sovereignty "as state capacity rather than as political independence, recasting intervention as strengthening sovereignty rather than undermining it." The humanitarian

interventions, including those in Kosovo, were based on a new definition of "sovereignty as responsibility".³⁹ If the state failed to protect its own citizens (as in the case of Kosovo with the Albanian minority) or, even worse, engaged in ethnic cleansing of a part of its population, the international community had the right, and in fact the need, to intervene. The state, acting irresponsibly, lost some of its sovereignty. Ahtisaari has defended the independence of Kosovo by stating that because of the suppressive policies of the Milosevic regime, Serbia "lost its sovereignty over Kosovo."⁴⁰ This logic has then led to the reinterpretation of state-sovereignty as being about the state capacity to provide services and protection to its citizens, leading to the interpretation of the state-building agenda being focused on capacity building.

This kind of an approach removes the importance from the political sphere and guides the thinking towards technical administrative solutions to overcome the problem of weak or failed states. The status negotiations between Pristina and Belgrade were directed towards technical issues such as the protection of cultural heritage and economic issues (for example, sharing of the international debt burden). The implementation of the Ahtisaari plan on how to deal with these issues is now supervised by the International Civilian Representative, not the sovereignty of the state itself.

When it comes to EU policies in the Western Balkans, the Stabilisation and Association Process (SAP) is a mechanism that strengthens the countries' ownership of their own reform policies in a very regulatory framework. This removes the EU's responsibility when it comes to the actual outcome of the reforms: it is solely the countries responsibility to succeed. Chandler's "empire in denial" – in this case the EU – does not occupy the region in a traditional way and thus denies its accountability and responsibility when it comes to the actual impact of its policies put forward in the region, as the ownership is in the hands of the local authorities.⁴¹ However, EU introduces highly invasive forms of regulation.

32 Paris 2004.

33 Chandler 2006, 6.

34 Ibid.

35 Fawn & Richmond 2009.

36 Independent International Commission on Kosovo 2001.

37 International Commission on the Balkans 2005.

38 Ahtisaari 2007, 2.

39 Chandler 2006, 26.

40 Ahtisaari 2007.

41 Chandler 2006, 8.

The EU action in the Western Balkans is based on the rhetoric of technocratic and administrative concerns and European assistance in capacity building and empowering it's neighbours rather than in dominating. However, the European Partnerships that serve as individually tailored road map documents for each country on their reform road towards the EU are "partnerships" of two unequal partners. They may be tailored to the local situation, but the conditions and benchmarks are dictated by the EU. The International Commission on the Balkans calls this "Europe's neo-colonial rule" and notes that if "it becomes further entrenched, it will encourage economic discontent, it will become a political embarrassment for the European project and above all, European electorate would see it as an immense and unnecessary financial and moral burden."⁴² Indeed, EU's power over South Eastern Europe is seen as a burden rather than an opportunity to Chandler. Instead of taking up the responsibility on the future of the region, the EU member states distance themselves from the developments, and the accountability is passed on to the partner states.⁴³

Chandler notes, for example that the European Commission assistance programmes "tend to bypass mechanism of democratic accountability entirely, even though they involve direct regulation of South-eastern European state governance mechanism."⁴⁴ Financing the NGO sector, is not so much to create another voice to provide checks and balances, but to buy legitimisation for international community programmes by financing projects developed by the think-tanks and policy centres that support the international interventionist and technocratic agenda. Thus, the NGOs do not become alternative voices but advocates for the regulatory power of the international community.⁴⁵ When too many task forces and policy making groups bring together international actors, local NGOs and governmental authorities, Chandler sees a risk of the fragmentation of domestic political processes and points out "the corrosive nature of current policy practices."⁴⁶

Chandler's critical approach stresses the lack of social and political legitimacy of these processes. He notes that "the Empire is not in denial because it is not regulating enough, but because the political power of decision-making elites seeks to clothe itself in non-political, therapeutic or purely technical, administrative and bureaucratic forms."⁴⁷ Western governments talk about sovereignty and accountability in the target countries of these policies while avoiding their own political responsibility for their actions and policy prescriptions. Democracy promotion, a keyword of the early 1990s, is no longer fashionable. Indeed, the institutional changes are introduced at the state level, but the external actors pay less attention to how societal pressures and demands are constitutive of stable and legitimate institutional mechanisms.⁴⁸

When Chandler criticises the Empire in Denial he notes that many of the "techniques of evasion" lie in fact in the field of rule of law: questions of tackling corruption and establishing the rule of law.⁴⁹ In Kosovo, international actors, not only EULEX, but for example the US funded International Criminal Investigative Training Assistance Program (ICITAP), the United States Agency for International Development (USAID), the United Nations Development Programme (UNDP), the Organization for Security and Co-operation in Europe (OSCE) and others, participate in a multitude of working groups assisting local authorities in drafting new laws and, when it comes to implementing these laws, assisting in the preparation of action plans, strategies and administrative instructions. Lacking implementation of internationally accepted laws is a noted problem, both in the EU Commission Progress Reports⁵⁰ as well as in the EULEX Programme Reports⁵¹. However, law is a function of a given political order, whose existence alone can make it binding.⁵² There is clearly a paradox between internationally imposed laws and the politically expressed will of the society if these laws are not considered as fully legitimate. Problems arise when externally drafted laws are adopted by the parliaments but lack implementation due to financial reasons or lack of political will. Nevertheless, the responsibility of implementing these laws is fully in the hands of the target state.

42 International Commission on the Balkans 2005, 11.

43 Chandler 2006, 108.

44 Ibid., 111.

45 Ibid., 113–115.

46 Ibid., 27.

47 Ibid., 9 & 11.

48 Ibid., 43 & 48.

49 Ibid., 143.

50 EU Commission Progress Report on Kosovo 2009.

51 For ex., EULEX Programme Report 2010, 14.

52 Chandler points out following the thoughts of E. H. Carr, that law cannot be self-contained; for the obligation to obey it must always rest on something outside itself. It is neither self-creating nor self-applying. For Carr "the ultimate authority of law derives from politics". E.H. Carr (2001, 165) quoted in Chandler 2006, 170.

5 Undesired impacts and how to deal with them

After the 1999 war in Kosovo, the UN agencies and other international organisations (the EU being in charge of the economic reconstruction) took over the core functions of the state. Even if many responsibilities were gradually transferred to local authorities, the policies are still very much drafted by the donors and the international organisations in place in Kosovo, and thus the “local authorities [are] more accountable to the international policy makers” – the donors – rather than to the Kosovo population.⁵³

This issue has been identified within EULEX as a problem, and the EU Rule of Law mission has made conscious efforts to overcome it. It is always easier for the international community to do things for the host country than to mentor the local authorities in hopes to go towards the right direction. However,

(...)the EULEX programmatic approach is designed to help Kosovo’s rule of law bodies to make the changes themselves, rather than rely upon an international presence to do it for them. Whilst Kosovo’s rule of law professionals execute the changes, EULEX staff provide constant assistance and mentoring, thereby aiding the process of organizational change.⁵⁴

The EULEX stated policy line defines that the “local authorities are on the driver’s seat” and EULEX experts (in all but a very limited number of executive cases) are monitoring, mentoring and advising their counterparts. To underline this kind of mutual partnership, the Joint Rule of Law Coordination Board (the high level meeting between EULEX and Kosovo Rule of Law agencies co-chaired by the HoM of EULEX and the Deputy Prime Minister of Kosovo) alternates its meeting between the government location and EULEX headquarters. EULEX experts are mandated not to draft laws or strategies for their local counterparts, but merely to comment and propose amendments for documents prepared by the local authorities.

However, EULEX is not the only player in town. Many other organisations are active in Kosovo. Various NGOs financed by international donors push certain policy agendas supported

by their donors. The USA is a major political player that has an interest in investing in Kosovo’s development. The USAID capacity building projects do not have the same strict line of prohibiting foreign advisors from drafting laws or proposals for the locals – on the contrary. Sometimes the European best practices – models of implementing new laws, for example, adopted from the EU member states – and the American proposed policies do not coincide. This has been seen in a number of cases where both Europeans and Americans have assisted the local beneficiaries in the same field, whether it is to establish a border control data base (either the European or the American model) or to write administrative instructions on the functioning of the courts or to define the role of the prosecutors in a police investigation. Contradictory advice has left the local beneficiaries perplexed and the international community disagreements result in a regression to the old ways.

Disregarding the level of interference (whether the future strategies are written for them or amended by the international actors) the Balkans still remain “policy takers” rather than “policy makers” as Jelica Minic has put it.⁵⁵ This external guidance is done in the name of capacity building. The current Minister of Agriculture of Albania, Genc Ruli, noted in 2003 that when the political sphere is regulated without representation by the elected leaders, there is little domestic accountability. He calls the process “democracy without citizens” or “democracy without politics”.⁵⁶

When there is too large a divergence between international community priorities and domestic concerns, the reform process can have a number of undesired side-effects. Kosovo’s state is not weak only because its independence is not globally recognised, but because the political leaders in power have little interest in strengthening formal organs of the state such as the judiciary and the anti-corruption agency. As their power rests on outside factors (the international community and donor community) and not on pure democracy, the assumption of the donors that the political class is acting in the best interest of the state is sometimes incorrect as it is often

53 Chandler 2006, 30.

54 EULEX Programme Report 2010, 6.

55 Minic 2001, 13.

56 Ruli quoted by Chandler 2006, 120.

the best interest of themselves and their power networks that is placed above the society. Due to the accountability being directed more towards the international actors than the general electorate, it is easy to set aside the domestic concerns and focus on just the closest support structures. Lucia Montanaro calls Kosovo "a 'neo-patrimonial state' where public resources are exploited by the ruling elite and distributed to those in their clan, party and from their region in order to ensure their loyalty."⁵⁷ The Kosovo society is still rooted in family, clan and regional ties and interests.

In this kind of situation, the EU capacity building efforts and regulatory controls of good governance is about the "rules of the game" and not "the game itself" – not the democratic political processes. By "political process", David Chandler refers to the "process of social engagement in the making of policy and in the legitimisation of government; the existence of a public sphere, through which the state's relationship with society is cohered."⁵⁸ The same definition can be utilised in this situation. Political process is about media discussion, public debate, civil society engagement, and all the way to more formal political campaigning and party competition for representation.

Chandler argues that promotion of good governance has done little to promote democratic political processes both in Kosovo and in Bosnia and as such the population is seen as "bearers of human rights – rather than as 'citizens' with rights of political equality."⁵⁹ However, shortcomings of the state-building processes in promoting democracy are rarely seen as shortcomings of the international efforts but, on the contrary, as the fault of the limited capacities of the target countries and thus justifying these efforts themselves.⁶⁰ As the responsibility for the outcomes lies solely in the hands of the target countries, if democracy is not consolidated, the conclusion is that the citizens of these countries have failed to live up to the expectations. This kind of logic denies all political responsibility of the intervening powers.

These state-building strategies seek to build capacity within a state that in the end remains without the genuine capacity for self-government. They remain dependent on the International Monetary Fund (IMF); the World Bank, the EU and other international actors to formulate policies for them. Chandler, however, asks in the end if it is "such a problem if representational politics and traditional frameworks of self-government are sacrificed for new forms of enlightened, externally managed good governance?"⁶¹ This would be to accept that the political sphere is no more able to find better solutions for society than the administrative one. "If governments have no political project for social change then there is no point in the struggle for representation as the job would be purely one of administration" notes Chandler.⁶² Who

would then need elections, as the government officials should rather be chosen on the basis of their technical and professional skills. What could be added on this, Chandler's critical point, is that this kind of technical role of political representatives may be one of the reasons behind the existence of non-responsible local elites, who in Kosovo (and in the Western Balkans in general) do not promote a real political agenda, but on the contrary use the elections to get into the positions of power to be able to fill their pockets through corruption or promote the careers of their family and clan members.

57 Montanaro 2009, 6.

58 Chandler 2006, 51.

59 Ibid., 68.

60 Ibid., 69–70.

61 Ibid., 193.

62 Ibid., 194.

6 Exit strategies – when the international community is no longer needed

The above described state-building practices are, according to David Chandler, “driven less by the desire to extend and enforce Western power than they are by the desire to deny it.” The mechanisms and practices adopted by the Western powers today tell a lot about the West and the international community itself. He observes that “the approaches to the international sphere have never been less future-oriented than today” and that “the end of superpower competition has left the remaining power exhausted, without a mission or a sense of purpose.”⁶³

Thus, the West no longer provides the same certainty, the unquestionable future vision that it used to promote. The emerging Trans-Atlantic rift after the 9/11 terror attacks has contributed to several statements which question whether the “West will still be the West”⁶⁴ or “does ‘the West’ still exist”⁶⁵. As there is no longer the Cold War framework of competition, the power structures lack a clear framework. Zaki Laïdi argues that power “is conceived and experienced less and less as a process of taking over responsibilities, and more as a game of avoidance.”⁶⁶ This is also the basis of Chandler’s criticism as he notes that all state-building efforts of today are characterised by a lack of a clear political goal or vision, which leads to the rejection of the responsibilities that the use of power would normally entail.⁶⁷

At first glance, one could argue the contrary when it comes to EU policies in the Western Balkans. The state-building processes in the region have long been linked with the EU’s enlargement agenda and seen as a kind of member state building. The future vision was about a unified Europe; stable development of the whole continent. It was based on the objective of gradual spreading of European ideals further towards the East. However, since the 2005 internal crisis of the EU, this discourse is changing. The EU’s enlargement discourse plunged into crisis after the 2004 enlargement wave and the following negative referenda of Netherlands and France in

2005 rejecting the EU’s Constitutional Treaty. These two totally separate events were quickly linked by the political elites of the EU sceptic countries and led to a political rhetoric blaming the enlargement for the negative image of the European Union among its citizens. Obviously, the enlargement process is today much slower than in the 1990s. There will be no more dates proposed for future enlargement; learning from Romania and Bulgaria who had been given two possible accession dates much too early to effectively measure whether they were at that time ready to join the EU. All steps of the accession process from the association agreement negotiations all the way to the accession negotiations are cut into smaller and smaller steps as we have witnessed in the case of Serbia, with whom the SAP has dragged for years. Each little step, such as the initiation of the Stabilisation and Association Agreement (SAA) by the Commission in November 2007, its signing in the spring 2008 and the start of its ratification in the summer 2010 have all been hailed as major political achievements. The question remains as to whether (in the case of Kosovo and Serbia) additional unresolved territorial disputes will be accepted inside the EU, as the Cyprus case already causes a number of problems.

In this context the “empire in denial” gets a new connotation. There is no clear political vision leading the EU in the Balkans: the future enlargement is presented as an administrative issue, as a simple question of fulfilling conditions, implementing administrative reforms and streamlining legislation. The responsibility of the advancement of each state on their road to Europe depends solely on their own efforts. The responsibility of the EU (which is the one dictating the reforms to be implemented) is denied. Even the political vision related to the process is more linked to the political aims of the region: “they want to join the EU”. The benefits the EU might get out of this development are rarely mentioned, except maybe security – the regional stability. For the EU the end goal – accession of these countries – is not presented as important, in fact, the process is more important than the goal.

From this point of view, it is interesting to speculate on the future of the state-building processes in the Western Balkans. The enlargement process will continue to be closely linked with

63 Ibid., 18.

64 Kagan 2004.

65 Moisi 2003.

66 Laïdi 1998.

67 Chandler 2006, 19.

these state-building mechanisms such as capacity building and crisis management tools. When it comes to the exit strategies of the civilian crisis management missions, they are presented as a technical question: EULEX will fade out as the mandate is being achieved and as the Kosovo rule of law institutions are progressing. This is tracked through the Programmatic Approach. ICO should be ready when the Ahtisaari plan is implemented. But in the end, the exit strategies are political questions. UNMIK used to talk about standards before status, but in the end its withdraw or continuation in Kosovo depends on the Security Council decisions. Increasingly, the Kosovo Government is giving bold statements that the supervised independence period is coming to an end, that there is a need to get rid of the UNSCR 1244, and that the international missions should gradually fade away. Being economically and politically dependent on the big allies that have recognized its independence, it is however very unlikely that the Kosovo authorities would withdraw their support from EULEX Kosovo.

In the end, the withdrawal of any mission from Kosovo will be a political decision of the international community, which, however, is far from being united on the Kosovo question. When it comes to EULEX, following the results that EULEX presents of its work well done, EU member states will eventually make a unanimous decision to end the mission. This will, however, take a while. First, executive powers need to be transferred fully to the local authorities and must be followed by a period of close monitoring and mentoring. UNMIK cannot leave Kosovo until the UNSCR 1244 has been changed – requiring a support from the permanent Security Council members such as Russia and China. ICO's future depends on the decisions of its governing body, the International Steering Group. The practices presented as technical depend in the end on political decisions; but when there is no clear political vision of where the international community is going (every actor lives in a different reality when it comes to the Kosovo status issue), there is a disunited "empire in denial", which does not have a clear exit strategy. UNMIK is a good example. Hopefully, the EU gets its act together before the final game of EULEX is played in Brussels. The EUSR cannot wear a double-hat acting as the head of the European Commission Delegation as is the case in the Former Yugoslav Republic of Macedonia (to prepare transition from potential candidate status to accession) until all the member states recognise Kosovo and a Commission Delegation is deployed in Kosovo. Right now the Commission is represented by a Liaison Office. Until Kosovo is considered to be on the same level as other Western Balkan countries, participating fully in the Stabilization and Association Process and having full access to EU assistance programmes (such as the Instrument for Pre-Accession Assistance, IPA), as do other Western Balkan countries⁶⁸, the confusion will remain.

It is easy to say that the international community will not stay in Kosovo forever, but technically speaking, its departure is extremely difficult. This is not because the international community would be so willing to take responsibility for

Kosovo's development or because it would want to be there forever, but because in the current political situation the EU actors rather like to deny their political responsibilities which would include having a clear political vision when it comes to future relations with the candidate and potential candidate countries. As the opinions of EU member states differ so much on crucial political issues (for example the status of Kosovo or the possible future accession of Turkey), what should be a political debate is camouflaged with an administrative and technical discourse of state and capacity building without clear exit strategies or road maps. This technical discourse is based on a number of measurement mechanisms such as the "SAP tracking mechanism of the European Commission", the "MMA tracking mechanism" of EULEX, and the monitoring of the implementation of the Ahtisaari package by the ICO. Despite the clear end goals of each of these tools and mechanisms, they do not present a comprehensive vision for the European future of Kosovo. Thus, these technical networks will remain in place in one form or another until a political vision is formed. The future goal should be the Euro-Atlantic integration of Kosovo as stated by Kosovo foreign policy, but until internal disagreements among the current EU members on such a goal are resolved, this vision remains *de jure* the legitimating basis of the above mentioned regulative mechanisms, but *de facto* nothing less than a utopia for the years to come.

68 Due to the status issue, Kosovo cannot benefit from EU financing to cross-border cooperation projects in a similar way to its neighbours for example.

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