UNMIK and EULEX Extraterritorial Governance in Kosovo

Attila Nagy, PhD Candidate

In recent times we have seen that previously established peace and stability instruments have lost their authority. The factors which have guaranteed them for decades have started to self-regulate certain legal and political issues, and thus, such behaviour has produced distrust and global misunderstandings. In this work, our aim will be to connect and understand the recent United Nations (UN) Resolutions, more specifically Security Council Resolution 1244 as related to Kosovo. The UN has been an important factor of stability in the previous century and its role has changed, thus, it is necessary to examine its recent decisions and the legal effects they have produced. In the case of Serbia and Kosovo, we will examine the legal outputs and similar cases. The need for authority in conflict resolution and legal decision enforcement is more than vital for cases such as Ukraine or Syria and (unfortunately) future cases. The UN Interim Administration Mission in Kosovo (UNMIK) has been changed and reshaped in the recent period many times according to its actual (everyday) needs. Contrary to the earlier cases of state recognition in the Western Balkans, the acceptance of Kosovo by the UN never happened. Its recognition by the European Union (EU) member states has caused another inner division in the EU and showed how many decisions without unanimous agreements are harmful. We will focus on the special agreements made between the UN and EU as related to the transfer of authority to Kosovo and what precedents it creates. Kosovo's independence in 2008 has started an avalanche in the World as related to the establishment of new states on the Kosovo principle which has again harmed the UN system of sovereign states and free nations. This case is of vital interest to both the UN and EU and also to the International Court of Justice in The Hague (ICJ), which could soon be challenged again and tempted to define what sovereignty is. The number of international actors present in Kosovo for almost 20 years, including the UN, the EU, the Organization for Security and Cooperation in Europe (OSCE) and various other organizations, provides a very challenging example of conflict resolution and prevention. A recent agreement signed by Serbia and Kosovo in Brussels in 2013, called the Brussels Agreement, deals with very challenging legal questions which requires some constitutional changes in both countries. What binds Serbia to enforce and respect such decisions when its sovereignty is guaranteed by the UN? In Serbia, the question is, who interferes with its sovereignty and how does the EU treat the UN and its Security Council decisions? In sum, extraterritorial governance has changed the understanding of sovereignty for some post-conflict countries as well as more stable countries.

***Keywords*:** EU, UN, Serbia, Kosovo, Extraterritorial Governance

Introduction

When we approach the problem of understanding law and politics and their correlation, it is necessary to see how and who prioritizes one against the other and which is prioritized in specific circumstances. As law is an obvious outcome of some politics it is also plausible that politics can change laws. In the hierarchy of laws, some international laws (agreements) can change both law and politics on a local level, but what happens when those agreements lose authority and there is no enforcement mechanism to back them up:

> "The priority of law over politics that emerges in the notion of conflicts as a law of laws thus weighs in against the likelihood of finding in such law determinate legal solutions or answers to social and global problems and conflicts. In this sense, the law of laws is a useless law" (Constable, 2008).

As long as laws and politics can influence and shape each other the system works and advances, mutual control is established and this is a system called the *rule of law*. On the global level, some political actors are more able to influence laws and other local political actors and enforce their own viewpoints or interests on sovereign nations. "If basic or vital interests of a state are at stake, it is quite likely that the given government will answer by bringing out the mask of Sovereignty "(Fekete, 2008). Sovereignty is a category of Public International Law and serves as a basic principle in establishing and controlling it. Public International Law is a system according to which our world is run, obviously with some political actors finding more interests and benefits in it. "The underlying viewpoint is that public international law is an instrument of colonialism" (Chambers, 2018). Law is an instrument to control and enforce politics on systems which are outside the control of certain interests. The mechanism when a state or politics influence each other goes against the idea of sovereignty, although there are ways to legalize such actions. Sovereignty entails jurisdiction over a certain entity and to some extent it has to conform to norms. "An assumption of extraterritorial jurisdiction necessarily entails the suggestion by one state that the second is acting contrary to human rights within its territory" (Arnell, 2005). This was the case with Yugoslavia in 1999 when the North American Treaty Organization (NATO) bombing started without the prior consent of the UN Security Council. Therefore, the global system of laws was breached and politics started a system of making new policies for such cases. Sovereignty was therefore eradicated from the global concept of law and has never again successfully acted to protect a territory or its citizens. Some states are able to force their politics over another sovereign entity without consulting the previously established system of International Law. For example, "as a relatively weak state in its early history, the United States preferred a Westphalian territorial approach that might help protect it from other states' assertions of extraterritorial authority; but, as the United States grew stronger, it became more willing to assert jurisdiction over actors and activity within the territory of other states and less committed to territoriality"(Whytock, 2018). As the interest of various states changes over time, such as the United States, they are able to influence and shape other sovereign nations. The formation of certain laws where actors in International Public Law can be ultimately changed is a more complex system, and at this point we have no such functioning rules. At the moment we have, globally, various frozen conflicts which have arisen on territories of sovereign states, one of which is Kosovo, with only half of the UN members states recognizing it.

This is making it impossible for Kosovo to join the family of sovereign states if it matters that much after all. "In conclusion, it is quite plausible to say that the classical 19th century approach of sovereignty is outdated, but sovereignty is still in play if the question is the protection of fundamental national interests" (Fekete, 2008). Some rights previously protected by sovereign states are now directly controlled and overseen by International organizations as well. As the UNMIK (United Nations Interim Administration Mission in Kosovo) has initially held the sovereign rights of Kosovo, and it still does, the EULEX (European Union Rule of law Mission in Kosovo) is focusing more on law enforcement. EULEX is not touching upon the sovereign rights of either Kosovo or Serbia, and in the end, the EU itself has a status neutral position towards Kosovo; independence with inner divisions and states which do not recognize the 2008 Unilateral declaration of independence.

> "In 1999, the experience of the Kosovo war became a catalyst for the development of the EU's ambitions in civilian crisis management operations. More than a decade later, the record of EULEX in Kosovo offers no clear blueprint on how best the EU should address questions of contested statehood in its near abroad" (Papadimitriou, 2012).

Therefore, this comparative study and the research of instruments made with an aim for extraterritorial governance should help to better understand and act in the process of post-conflict developments.

Extraterritorial Governance vs. Sovereignty

The story of extraterritorial governance goes deep into the sovereignty of every state, and as we have seen on many occasions states tend to give up a part of their sovereignty to a higher level, be it voluntarily or not. Such sovereign conglomerates have various names, forms and definitions but the present most famous and hybrid one is definitely the EU. In the case of Brexit, it is visible how much sovereignty the UK has given to the EU, which is solely trade related freedoms which do not interfere with common interests in security. The UK will remain part of the EU or better say NATO security agenda and be opposed to the Russian and growing Chinese influence on the European continent following the agenda set by the US government. The recent "Washington Agreement" (Muharremi, 2021) as signed by Serbia and Kosovo, has an aim to normalize relations but also touches upon many foreign policy issues and even tries to diminish Russian and Chinese influence, specifically, Russia's conflict with various European governance ideas is long lasting and it is necessary to understand it and explain it in new contexts. "In 2009 the EU invited further post-Soviet states to the 'waiting room' of European integration—the Eastern Partnership" (Kaminskij and Friess, 2019). While this partnership is merely an act of cooperation, it has endangered the Russian interest in 'extraterritorial governance' which was maintained on the territory of the ex-Soviet Union after its dissolution.

As states are changing their policies and try to maintain their sovereignty and find their sovereign interest with other states than Russia, it challenges the previously established system of mutual interests and policies. "The Russian World, in contrast, especially in the wake of the annexation of Crimea, virtually transformed into a bipolitical doctrine premised on protecting an imagined trans-territorial community of Russian speakers who allegedly share a common macro-identity" (Kaminskij and Friess, 2019). Therefore, governance is not always and necessarily stemming from the people who are supposed to be the holders of sovereign rights. Sovereignty or sovereign rights can therefore be exercised by various actors and even upon some sovereign nations. "Because transnational activity by definition transcends any given state's territory, this form of governance requires a state to assert authority to apply its law (prescriptive authority) or adjudicate disputes in its courts (adjudicative authority) extraterritorially" (Whytock, 2018).

The most important idea extraterritorial governance bears is that it is better than local sovereign governance and thus it has the right to shape and control it. "Because universal jurisdiction and humanitarian intervention are both primarily directed against misconduct by government officials, they challenge national sovereignty" (Binder, 2013). The idea of sovereignty holders, as that of the people, we come to the idea of nations and the issue of national minorities. For example, Russia is territorially extending its governance to all Russians claiming their mutual and common interest, we see a problem with others, in this case, non-Russians. In the EU, the others today are the migrants and the union is maintaining a very specific standpoint towards them, clearly excluding them from its sovereignty and jurisdiction. "The literature on

immigration controls have noted how western potential receiving states have 'externalized' or 'transnationalized' their borders in order to exclude populations from potential citizenship long before they have reached the border" (Glasius, 2017) .

Extraterritorial governance is more than just holding the sovereignty of another state, it is a duty which is based on the same human rights principles as its intervention. Therefore, sovereignty is an idea which cannot be changed today but can certainly be traded and used for various means which do not always prioritize human and minority rights in the future. "In general, Kosovo receives one of the highest levels of funding per capita from international organizations" (Zupančič et al., 2018). When we try to understand and evaluate foreign missions, we need to take such costs into account as well.

UNMIK

The UN mission to Kosovo in 1999 was not a unique regional case since the UN was already running missions in Croatia and Bosnia. The staff consisted of many experienced officials who brought their knowledge to this new and challenging post-conflict environment. The UN itself is divided considering the future fate of Kosovo which gives this small country a very big challenge about its position in an already divided world. "But multilateral agreements are very different to a unilateral exercise of extraterritorial jurisdiction; the desire for one cannot be taken as acceptance of the other" (Chambers, 2018). The constant exodus of Serbs from UNMIK administered Kosovo has put an additional burden on the mission which it was not able to overcome. "This is because human rights as a distinct area of law has not historically been applied extraterritorially, which in turn is a result of human rights obligations being self-imposed by states and only falling upon them" (Arnell, 2005).

Now, as political changes have forced UNMIK to transfer many of its duties to the new Kosovo Government, it has inherited an imperfect system. UNMIK was meant to be an interim administration to develop human and minority rights which it never successfully did:

> "Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations" (Resolution 1244, 1999).

In fact, the situation was changing rapidly and Martti Ahtisaari could not provide a mutually viable solution as requested when UNMIK came to a turning point. "Kosovo declared independence on the 17 February 2008, and it has been recognized by more than 100 UN Member States. UNMIK continues to implement its mandate in a status neutral manner and operate under Security Council Resolution 1244" (United Nations, 2022) The Security Council Resolution 1244 as a 'legal' document has not been evoked many times recently, its status and effects have also been influenced and changed many times.

> "Although the joint action refers in its preamble to Resolution 1244, the EU could not impose EULEX unilaterally as replacing UNMIK or as a new component of the international civilian presence under Resolution 1244 without the consent of the Security Council" (Muharremi, 2010).

Thus, the EU and EULEX were welcomed in Kosovo to help improve the rule of law situation. It is important to note another stakeholder organization in the Kosovo issue is the OSCE (Organization for Security and Co-operation in Europe). OSCE has a very important role in implementing the recent Brussels agreement (BA) of 2013 and dealing with local elections in the Serb controlled municipalities in North Kosovo. As the four Northern Municipalities have been incorporated into the political system of The Republic of Kosovo, which began with the start of the BA implementation, they have also started cooperating with the government. The Kosovo government has introduced a 100% tax on goods from Serbia and Bosnia in order to showcase their non-recognition of Kosovo as an independent state. This measure is completely contrary to the values UNMIK and EULEX are implementing, and the Central European Free Trade Agreement (CEFTA) which Kosovo has been a member of since 2007 through its UNMIK administration. Kosovo and UNMIK have failed to bring the country closer to its neighbors and implemented Resolution 1244 of the UN Security Council: "A comprehensive approach to the economic development and stabilization of the crisis region" (Resolution 1244, 1999).

As Kosovo is no longer solely governed by UNMIK, we need to focus more on the EULEX mission and how it gained its mandate. "The decision to launch EULEX KOSOVO shall be taken by the Council upon approval of the OPLAN. The operational phase of EULEX KOSOVO shall start upon transfer of authority from the United Nations Mission in Kosovo, UNMIK" (Council, 2008). Some areas of extraterritorial governance were transferred to EULEX, and some to Kosovo with the support of EULEX, and others remained with UNMIK. In 2008, the EULEX mission joined this complex state of mandates and authorities to strengthen the new Kosovo state.

EULEX

The EULEX mission in Kosovo was initially established as a supportive mission for the new independent Kosovo state and it was meant to last two years. Now, things have changed and the mission has lasted for more than 10 years without any fixed deadline to withdraw. The EULEX mission is repeatedly renewed for a two-year period with almost the same mandate as initially established. "Taking into account the weak local political culture, it is very likely that this new EU mission shall last longer than future generations" (Hasani, 2022). The EULEX mission is more successful than UNMIK and the EU manages to get the Serbian and Kosovo governments to interact through agreements. However, such agreements do not come without strings attached and the EU is giving benefits to both countries. "By substituting UNMIK with its own mission, the EU wanted to take over the political ownership and oversight of the process of Kosovo's independence, which could not happen without a compromise among EU member states" (Zupančič and Pejič, 2018).

The general interest of the EU with Serbia and Kosovo are the same, but in more specific cases this interest may be completely different, just as it can be different between other EU member states. "The EU seeks to disseminate its governance rules by setting them as conditions that external actors have to meet in order to obtain rewards and to avoid sanctions from the EU" (Schimmelfennig, 2010). Therefore, the EU does have any influence on the inner political decisions of these countries and can request and enforce the previously mutually agreed terms. The EU has a long practice of making states comply with its requirements and it has been duly practiced with various countries on specific EU integration paths. "Just as there is not a single mode of governance within the EU, 'external governance' also varies across geographical and functional space" (Schimmelfennig, 2010).

The EU can, and to a certain extent wants to integrate both Serbia and Kosovo but it has many requirements before that happens. "The incoherent and vague status-neutral approach of the EU aims to prevent local resistance by 'pleasing' both sides and creates a climate of confusion which hinders the implementation of the rule of law in Kosovo" (Mutluer and Tsarouhas, 2018).

Currently, the full implementation of the Brussels Agreement is at stake from which the formation of the future Association/Community of Serbian Municipalities (A/C) is a big challenge for the Kosovo government. “At their core, these institutional arrangements are directed at managing interdependence by aligning neighboring countries with EU policies and rules, while avoiding formal memberships” (Schimmelfennig, 2010). As the EU has already forced Kosovo to establish a new War Crimes Court, it has run out of incentives to make it form the A/C or cancel the imposed 100% tax on Serbian goods, which is also against the CEFTA agreement. “At first sight, geography seems to matter strongly. The further we move away from the EU, the more indirect and weaker its impact becomes” (Schimmelfennig, 2010). For example, the EU has changed and shrunk its extraterritorial governance as related to Armenia in The EU-Armenia Comprehensive and Enhanced Partnership Agreement (CEPA), which lowers the level of cooperation between the EU and Armenia as previously prescribed by the EU-Armenia Partnership and Cooperation Agreement. Namely, in 2015, Armenia joined The Eurasian Economic Union (EEU) and was integrated into the Russian system of (Extra)-Territorial Governance.

EU influence in Ukraine has already caused a conflict with Russia, although Ukraine never received an offer to become an EU member state. “First, the most attractive “carrot” - EU membership - is not on offer” (Schimmelfennig, 2010). EU membership can solve many problems and advance undeveloped countries but it is not a dream as we see it in the case of Brexit, where national interests prevailed over common interests. Also, the Brussels Government disagreed with Poland and Hungary over their prioritization of the national interest over EU interests. Now, the EU treats these states as not having a necessary level of democracy and threatens to use legal means to punish their government. Such cases undermine EU governance on its own territory. The governance EU uses within or outside its territory differs considerably. The EU is not ready to face challenges from inside as it is used to doing from outside. “Where the relevant EU measures are not based directly on existing international standards, they tend to be characterized by a contingent quality that renders them responsive to international development and to diverse and changing circumstances elsewhere” (Scott, 2014). EU support of Kosovo institutions is a valid and reasonable claim until Kosovo institutions start to fail in providing services to all of its citizens. “Eulex Kosovo shall support selected Kosovo rule of law institutions on their path towards increased effectiveness, sustainability, multi-ethnicity and accountability, free from political interference and in full compliance with international human rights standards and best European practices…” (Council Decision, 2018). If Kosovo fails to provide results in the terms of previously agreed requirements, the EULEX administration fails as well. The whole idea of EULEX is to aid Kosovo in achieving certain standards which it could maintain after EULEX leaves and keep them until it, presumably, joins the EU. “Eulex Kosovo shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service…” (Council Joint Action, 2008).

All the recent requirements imposed on Kosovo by the EU are in full conformity with EU standards but go deep into the issue of sovereignty. In any case, sovereignty is the first thing to be compromised once a state joins the EU, and as we see it, this can be tackled before joining EU extraterritorial governance. “Nevertheless, an EULEX failure in Kosovo would be a failure of the European project in Kosovo, and potentially in the entire region of the western Balkans” (Greiçevci, 2011). This type of hybrid management is necessary in order to bring states closer, not just economically, but also politically, and align their policies. In a much broader sense, this kind of administration can be seen and used as a very human and goal oriented post-conflict developmental tool.

Independent International Institutions Interim Ideas

In the following paragraphs we will aim to explain how the authorities conducting extraterritorial governance deal with certain issues and how they establish new forms of hybrid governance. Specifically, we will deal with the introduction of a new hybrid branch of government, The Association/Community of Serbian Municipalities and the new war crimes court, The Kosovo Specialist Chambers. EULEX was seen as a mission which will have all the necessary means to infuse democracy into society and institutions in Kosovo. “In sum, the EU has criticized the United States for failing to ensure a sufficient international orientation when it has enacted legislation with an extended territorial reach” (Scott, 2014). The EU was offering solutions it has developed for the many divided societies that were incorporated into the union. All countries joining the EU had full sovereignty over their territory at the moment of accession and had their own laws and systems in line with the EU (acquis communautaire). As the role and authority of EULEX were questionable, the mission was soon getting an epithet of “EULEXperiment” in the new Kosovo state.

What does independence for states consists of? The Court has concluded above that the adoption of the Declaration of Independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999), or the Constitutional Framework. Consequently, the adoption of the declaration did not violate any applicable rule of international law” (International Court of Justice, 2010). Therefore it is hard to understand and explain how a legally independent state cannot retain its independence but goes from UNMIK to EULEX in dealing with its most vital feature, its sovereignty:

> “If a state is the outcome of jurisdictional decisions, these decisions cannot be reached by reference either to the state's ‘attributes’ or to its ‘interests,’ nor can a given claim be resolved exclusively by reference to the physical location or citizenship of the persons or entities involved” (Harvard Law Review, 1990).

At present, we will introduce the two newest forms of governance dealing with the most problematic issues in Kosovo, namely the Association/Community of Serbian Municipalities (A/C)[1] and The Kosovo Specialist Chambers, which is the new court dealing with War Crimes in Kosovo. As a direct outcome of the Brussels talks in 2013, the Governments of Serbia and Kosovo have signed ‘The First agreement of principles governing the normalization of relations,’ which prescribed the application and acceptance of Kosovo laws by Serbia and the formation of A/C by the Kosovo government. “The Community/Association will be created by statute. Its dissolution shall only take place by a decision of the participating municipalities. Legal guarantees will be provided by applicable law and constitutional law (including the 2/3 majority rule)” (Brussels Agreement, 2013). This new form of autonomy has not been prescribed by either the Serbian or Kosovo constitutions, but, at the moment it is in a binding mandatory governance category; it can be seen as a form of autonomy as it includes more municipalities with a Serbian majority. Earlier, municipalities in Kosovo were divided by their ethnic structure and, therefore, their union is a logical outcome to represent their common interests. “The Association/Community will have full overview of the areas of economic development, education, health, urban and rural planning” (Brussels Agreement, 2013). Probably the biggest concern Kosovo has in delaying the formation of the A/C is that it will be a very autonomous organization with Serbia helping to establish and support it in all areas. It is interesting to see how the Association/

Community will be a region in the area according to the Serbian Constitution, Autonomous Province of Kosovo and Metohija. "The structures of the Association/Community will be established on the same basis as the existing statute of the Association of Kosovo municipalities e.g. President, vice President, Assembly, Council" (Brussels Agreement, 2013). This phenomenon of autonomy in autonomy is very specific.

The closest real life example of the former is Palestine in Israel, or vice versa, but Kosovo's version will have a very specific EU feature which is freedom of movement.

Another very specific idea of Kosovo extraterritorial governance is the establishment of The Specialist Chambers and Specialist Prosecutor's Office dealing with war crimes committed during the Kosovo conflict[2] and previously ignored by the war crimes courts. The large time lapse of some 20 years after the conflict and, as the Kosovo Liberation Army (KLA or UCK on Albanian) directly supported NATO on the field against Serbian (at that time Yugoslav) forces, makes a big challenge for this justice serving institution. "To justify punishment is to explain the political legitimacy of an institution, not the moral permissibility of an act" (Binder, 2013). However, the major concern regarding war crimes and the Albanian perpetrators was that witnesses were disappearing in Kosovo while high ranking KLA officers became the most prominent figures in Kosovo politics. Moreover, "…Witness Protection Program and the responsibility to ensure the maintenance and promotion of public order and security including, as necessary, through reversing or annulling operational decisions taken by the competent Kosovo authorities" (Council Decision, 2018). Therefore, the Kosovo Specialist Chambers and the Specialist Prosecutor's Office have a seat in The Hague, the Netherlands. Their staff is international, as are the Judges, the Specialist Prosecutor and the Registrar which will presumably guarantee its independence from local political actors. As the court is getting ready for its first hearings, it is clear that some politicians present in Kosovo politics in the past 20 years are likely to be summoned as either a witness or the accused. All such Kosovo politicians have closely "cooperated" with both UNMIK and EULEX previously, so it is not a surprise that the whole idea for the court and allegations came from a completely different institution, The Council of Europe. "The Special Investigative Task Force (SITF) conducted a criminal investigation into allegations contained in the January 2011 Report "Inhuman treatment of people and illicit trafficking in human organs in Kosovo" by the Parliamentary Assembly of the Council of Europe (PACE)" (Kosovo Specialist Chambers & Specialist Prosecutor's Office, 2022). The problem of crimes against the Serbian population in Kosovo after NATO intervention and control has been a long debated issue. Still, no one during these 20 years took the initiative or responsibility for addressing the alleged war crimes. "The Specialist Chambers shall have jurisdiction over crimes set out in Articles 12-16 which relate to the Council of Europe Assembly Report" (Assembly of Republic of Kosovo, 2015). Accordingly, the court will focus on the crimes committed by the KLA more than was the case before. Both UNMIK and EULEX administrations have left behind many crimes which happened during their mandate without completing the investigations or processing and prosecuting the perpetrators:

> "EULEX had only limited success prosecuting high-profile individuals for politicized or serious crimes in large part since EULEX, like UNMIK before it, had difficulty recruiting officials who had knowledge of the local languages or who would be willing to stay in Kosovo for a sufficiently long time in order to gain local knowledge" (Radin, 2014).

Apart from language barriers and differences, Kosovo society is divided along ethnic lines, therefore, a specific approach would have to be applied to North Kosovo. Even if the situation in the North is stable after the BA has been signed, it does not mean it is in line with the rule of law requirements, namely, there is no political pluralism.

This is very problematic considering the future formation of the A/C which should have some kind of mechanism for inner control for which political pluralism is necessary. The one-party system on the Serbian side is very welcoming towards EU proposals but it does not mean the EU should not be critical towards such a situation. "Finally, corruption within EULEX was also an issue" (Mahr, 2018). The very fragile tools in implementing post-conflict development can be easily misused and cause wider problems and degrade the EU from the inside and out. Thus, extraterritorial governance institutions need to be under constant scrutiny and observance in order to guarantee both present and future development and conflict resolution potentials.

The Future of Extraterritorial Governance

The case study of two international organizations with extraterritorial governance attributes shows how such a system of governance functions today. "Poverty reduction through the extraterritorial application of human rights has to date occurred only indirectly and in special and limited circumstances" (Arnell, 2005). States which are governed extraterritorially never reach the level of development as their direct supervisors. "Individuals face a myriad of forces that bring them into stronger or weaker relationships with various states, at various times, for various purposes" (Constructing, 1990). So it is the case with Kosovo citizens as they primarily want to be able to work in the EU. It was never an idea that Kosovo or Serbia were to become a federation such as Germany or Switzerland, although they are now even further from this possibility. "Judges and lawmakers need to interrogate assertions of 'imperialism' or 'infringement of exclusive host state jurisdiction' establishing whether or not the assertion is genuine and justifiable" (Chambers, 2018). As all states have some specific regional or cultural differences, we need to aim to bring them closer and understand them while recognizing the differences. Therefore, the use of force in some instances is not the right option as it is not viable to have a mission as expensive as EULEX in all post-conflict societies in the EU neighborhood. "Much, and probably most transnational activity remains ungoverned (or only partially governed) by international law and international courts, and states find it politically difficult to create new international law and international courts" (Whytock, 2018).

The fact that Kosovo related crimes were not efficiently prosecuted and the war crimes court comes in very late and at a politically challenging time is compromising the whole idea of extraterritorial governance in Kosovo. War crimes need to be a priority before making political elites from warlords and tasking them with requests for democratic governance. "As there has been little if any historical state practice relating to the assumption of non-criminal public law jurisdiction, no rules of treaty or custom have been developed to deal with these issues" (Arnell, 2005). As the rules governing extraterritorial governance today are not present or widely acceptable, especially in Kosovo where they are present outside of the UN Security Council mandate. As the EU is trying to impose its internal standards to its outside governance we have faced many human rights issues spreading along EU borders. The refugee crisis of 2015 actually hit very hard in Kosovo, where people were leaving their EU administered country for a better future in the EU. "In addition, the continuous development of databases monitoring the movement of people (mainly third country nationals) and the strengthening of external borders are indispensable for the survival of Schengen" (Mészáros, 2018). The EU external governance showed weaknesses or was broken in many aspects and since then has not been able to recover. Therefore, the newly formed institutions such as the A/C or the War Crimes Court could face

various challenges. "The mission could certainly have been more efficient in responding to new security situations on the ground, such as the increased threat of foreign fighters or on-going challenges related to the migration crisis" (Zupančič et al., 2018). Moreover, Kosovo society is very similar to any other country where divisions are visible in many aspects of the society. Also, the EU is unable to solve many problems it is facing in Kosovo on its own territory.

Such is the case with the EU, where authorities trade certain benefits in order to entice states to comply with EU standards. Once the EU has nothing to offer, states will stop cooperating and will turn elsewhere. Russia learned this weak point when it clashed with the EU in Ukraine and, for now only annexed Crimea. "In turn, Russia used its speedy and successful passport campaign internationally to help legitimate the annexation" (Glasius, 2017). Russia has, through its citizenship, spread its foreign influence and exercised the highest level of governance power by including a territory in its own internal governance. It is similar to the EU enlargement, but for some reason enlargement failed in Kosovo and in the Western Balkans generally. This gap has left the door open to other authorities seeking to establish their extraterritorial powers, such as Russia, China and even Turkey. Although EULEX clearly has full control over Kosovo and is leading it in the direction of the rule of law, other stakeholders are analyzing its acts and mistakes as well. In general, the mission is trying to achieve as much as is possible from its given situation. "The improved security situation in the region is not the result of EULEX's deployment alone" (Zupančič et al., 2018). The overall positive security situation is best described in the sense that it is similar to that in Nagorno-Karabakh, which cannot happen in Kosovo or in the region in general, but this does not mean that the problem is solved and that there are no challenges to be faced in the future. Kosovo itself is not recognized as an independent state by the EU or the UN and the necessary prerequisites in the form of good will from some states, whose recognition is missing, is not likely to happen. "In retrospect, it probably was a mistake to deploy such a large, status, neutral, rule of law mission that was separate from the other international organizations in post-independence Kosovo" (Radin, 2014). One of the biggest challenges extraterritorial governance organizations have faced in Kosovo e.g. rule of law, is present now as much as it was earlier, or even at the time the conflict had finished some 20 years ago.

Conclusion

The reasons for extraterritorial governance have not changed since it was first introduced, but the goals have been improved considerably. The main source and idea for extraterritorial governance comes from various state policies where the local interest of political elites lay outside of state borders. As a sovereign power, every state is able to do in its territory, with its citizens, whatever it considers to be necessary and in some instances continues to practice extraterritorially. Sometimes the role of the extraterritorial governance is blended with local political demands as well, but the whole idea usually lacks legitimate causes. As seen in the case studies of UNMIK and EULEX, both authorities wanted to advance Kosovo from a divided society to a united society, but ultimately failed as the locals did not want to cooperate with each other. UNMIK has transferred its authority to EULEX after Kosovo became independent and EULEX maintains its mission even when the final outcome was not clear, but should it have left an independent country behind?

The success of the Specialist Chambers and the Association/Community of Serbian municipalities will have influence but ultimately cannot change the society as a whole. Kosovo will still be an undeveloped country as it was previously, and the 20 years long foreign governance could not advance its development or make economical investments. In Kosovo, extraterritorial governance has supported the divisions set forth after the conflict and this was the

pattern followed by other actors in Eastern Europe, like Russia. Russia has produced, using the Kosovo pattern, some small quasi-independent states which will never be able to join the UN and thus shares the same destiny with Kosovo. Extraterritorial governance has changed the understanding of sovereignty for some post-conflict countries as well as more stable countries. If we come to the conclusion that sovereignty and independence can be gained only with war, then we are not far from the idea that extraterritorial governance is a way of colonialism and very far from the perspective of modern European democratic procedures. The Rule of Law has been challenged not just in Kosovo but in the EU as well, and as we can see, the lack of professionals who can take up the challenges are in large demand.

ENDNOTES

1. The Association of Serb Municipalities will be based on the CoE/EU legal framework on local self-governance
2. The Kosovo Liberation Army (KLA) was an ethnic Albanian separatist militia that sought the separation of Kosovo, the vast majority of which is inhabited by Albanians, from the Federal Republic of Yugoslavia (FRY) and Serbia during the 1990s.

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Door-Knocking: Extra-Territorial Jurisdiction for In-Transit Forcibly Displaced Persons

Wenjun Yan and Lin Shang

Jurisdiction could be the first obstacle for forcibly displaced persons to enter their countries of destination. Endeavouring to reach a balance between obligations of general public international law and international human rights law, extraterritorial jurisdiction has been recognized both in judicial practice and academic debates to support those forcibly displaced persons in need. With the deepening reform and opening up of China's economy, it is expected that increasing numbers of migrants, including forcibly displaced persons, will choose China as their country of destination. For China to honour its international law obligations, (under both general public international law and international human rights law), this article discusses when and how China shall exercise its extraterritorial jurisdiction when it comes to forcibly displaced persons.

***Keywords*:** Forcibly Displaced Persons, Extra-territorial Jurisdiction, Chinese Perspective, Refugee

Introduction

Jurisdiction could be the first problem encountered by forcibly displaced persons during the process of leaving their homeland and entering the country of destination (i.e. when they are in transit). Under general public international law, jurisdiction, as a core element of state sovereignty, has generally been regarded as territorial: once a person has entered – lawfully or unlawfully – the territory of a state, he/she is under the jurisdiction of that state. Thus, when it comes to the recognition and discharge of human rights obligations extra-territorially, jurisdiction has served notoriously as a doctrinal bar. A state is not obliged to perform its duties under human rights related treaties if it determines that forcibly displaced persons have not entered its jurisdiction.

Efforts have been made from both theoretical and practical aspects to protect in-transit forcibly displaced persons. In theory, the *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* were proposed in 2011 by 40 international law experts all over the world, aiming to bridge the gap caused by jurisdiction on the protection of in-transit forcibly displaced persons. Scholars advocate that jurisdiction of a state could be established when it has effective control or could bring about foreseeable effects on the in-transit persons. In practice, the International Court of Justice (ICJ), the UN Human Rights Committee (UNHRC), and the Inter-American Commission on Human Rights (INCHR), have all suggested that jurisdiction of states may sometimes be exercised outside the national territory.

In an era of deepening globalization, migration touches all states and people more than ever before. In the year 2015, there were 65 million forcibly displaced persons, including over 21 million refugees, 3 million asylum seekers and over 40 million internally displaced persons (IOM, 2018, p. 1). Although China acceded to the United Nations Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees (collectively, the "Refugee