The Nexus between EU Rule of Law Programs and EU Security Interests.

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In the final analysis, the Herculean task of re-establishing the rule of law requires a comprehensive definition that addresses interrelated justice and security institutions and good governance with due attention to political, economic, social and, even, psychological factors. (UNDP 2007, p. 30)

1 Introduction

The question of the compatibility of protecting security interest with promotion of Rule of Law, both seen here as foreign policy objectives, is interesting because it could be argued that they are principally incompatible to each other. The assumption of principal incompatibility is not informing this paper, but the expectation that there is at least a partial incompatibility in the foreign policy practice of the EU, is. On the domestic level the tension between security and Rule of Law was felt after the 9/11 terrorist attacks on New York and subsequent terrorist bombings in Europe. Surveillance and data-gathering boomed and has substantially undermined the right to privacy in most Western countries. Yet in the foreign policies of Western countries the Rule of Law has emerged as an institution ready to be exported to any country missing a Rule of Law. An institution moreover that promises to bring security.

In this paper I try to explore the nexus between security and Rule of Law by trying to understand in which way security and Rule of Law connect in EU foreign policy. More specific: I will investigate the connection that is made in the Common Security and Defense Policy (CSDP) between (1) the construction and protection of security interests by the EU and (2) the promotion of Rule of Law (in and) outside the EU. Although the main goal is to understand the way in which within the EU is thought about the connection between security interests on the one hand and the value of Rule of Law on the other hand, I am especially interested in the way the promotion of Rule of Law outside the EU is constructed as compatible with the protection of EU’s security interests.

To do all that I start out with two sketches of theory in paragraph 2 and 3. One the one hand I will discuss securitization theory to help me to get a grip on the EU as a security actor. On the other hand I will skim legal theory for Rule of Law thinking. In legal theory Rule of Law is (and was) discussed

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2 Before the Treaty of Lisbon came into force in 2009 the CSDP was called ESDP: European Security and Defense Policy. The ESDP/CSDP is the operational arm (military and civilian) of the Common Foreign and Security Policy (CFSP) starting out in 1993 as the so-called Second Pillar of the EU. The Pillar structure was abandoned in the Treaty of Lisbon.
extensively. Essential parts of the debate are (a) the discussion about the core meaning of the concept, (b) the question of the feasibility of a Rule of Law and (c) the compatibility of Rule of Law with other ideas and institutions. All three parts of the debate are relevant for this paper.

In paragraphs 4 and 5 I discuss EU security-thinking and EU Rule of Law-thinking on the basis of EU policy statements. Not completely unexpected it will show that both kinds of thinking are quite vague but seem to be clearly connected.

In paragraphs 6 and 7 I will try to understand how these quite thinking-modes are translated and brought together in actual EU-programs and practices. As examples I will use the EU Rule of Law Programs focused on Georgia and Kosovo.

I will finish with concluding that the EU Rule of Law programs are indeed more informed by security interests than it appears on first sight and will try to explain the connection.

2 Security and Securitization

I start out with a short discussion of the theoretical debate about security to clarify my use of the concepts of security and securitization.

Securitization has been a key word in security studies since the end of the Cold War ended the traditional security discourse of keeping the state secure by means of sufficient (and certainly massive) military power to meet the enemy. Instead of reducing concerns over security to a minimum post Cold war developments showed that ‘security’ reemerged as a crucial political discourse. This political/governance process of redefinition and expansion of the security sphere is best captured by the concept of securitization. Securitization clearly does away with overly naturalistic notions of danger and threat.

In my view there have been two major social practices that can be called securitization. One the one hand the political practices called securitization by for example the Copenhagen School. They have pointed out that the objects or interests security policy refer to are not out there as an objectively given fact but are constructed as such in and through the political process. These kinds of securitization practices I will call political securitization. On the other hand the practice that aims at expanding the meaning of the concept of security by letting the concept refer to other actors and new interests. These kinds of securitization practices I will call ethical securitization. The concepts of securitization, political securitization and ethical securitization need a short elaboration.

‘Security’ and ‘security interests’ as concepts do not have a fixed content. In very general terms: security is politically invoked as a policy goal when essential needs or capabilities of an actor are perceived as running the risk of not being met because of unpredictable acts of other actors or by forces of nature. The political processes that construct these security needs, that make them a motive for action, can be seen as political securitization. The formulated security interests are acted upon in the sense that the selected essential needs or capabilities that have come ‘under attack’ have to be shielded against affection/corrosion by these threatening actors or natural forces even if this compromises important rights of the actors involved. A typical example is the way the right to privacy has been eroded by security concerns.
Securitization theories are often divided in three schools of thought. The more empirical approach is promoted by the Copenhagen School, the normative approach that criticizes existing securitization practices as anti-emancipatory is promoted by the Welsh or Aberystwyth School and a political institutional approach through governance (or govermentality) is taken by the Paris School. There seems to be substantial overlap in what they would hold to be processes of securitization. In this paper I will loosely use the approach of the Copenhagen school. I see securitization as a political process wherein the urgency and size of the perceived threat is used to make room for abnormal measures, suspending the normal flow of action.

Securitization processes are short lived in the sense that the urgency of countering a threat cannot be sustained for a long time. Successful securitization is the process wherein new interests are injected in to normalcy. They become part of normal politics after the perceived urgency of the threat has abated. We will see later that in that sense securitization processes have been pivotal in turning the EU from a ‘civilian’ actor using soft power (presenting normality in the EU) into a mixed (civilian and military) actor using both soft and hard power. I will later focus on interests that are already securitized, and not on the process of securitization itself.

An important other development is the development of ethical securitization practices. Ethical securitization is the expansion of security to actors and interests on the basis of moral concerns or ethical theory. As far as the actors are concerned: the focus shifts from state security and its (assumed) implicit concerns for her citizens towards a focus directly on the security concerns of human beings themselves. From state security to human security. The security interests that should be served change shape to. Beside the concern for the physical integrity of the state, not only the physical integrity of human beings but other crucial interests are defined as security related, for instance food security and energy security.

Crucial players in ethical securitization are politicians and academics. Political actors want to counter the centrality of state interest in security thinking by questioning the assumption that defending state security is the best way to ensure the safety and wellbeing of its citizens. But they do not only make a point in discussing the actor who's security interest should be pivotal in the policy process, they also question the interests security should refer to. Not only physical safety of citizens in the sense of keeping them safe from occupation of their country by foreign military powers, but expanding security interest towards essential needs of people to survive and live a decent life. Political actors like NGO's have linked human security to the discourse of essential human needs and to human rights.

Academics have participated in ethical securitization by connecting security to ethical or legal discourses, like those centered on emancipation, human needs and human rights. Booth, writing shortly after the end of the Cold War, states: ‘Emancipation, not power or order, holds true security.’ Building from insights from Critical Theory he is an ardent advocate for bringing back morality into security studies and sees emancipation as the crucial normative goal of the 20th century: ‘...it’s the spirit of our times’. An important other line in academia, for instance in development studies and humanitarian studies, is making a connection between essential human needs and human security. Depending on what are seen as human needs, we can talk about food security, energy security, environmental security and so on. Making sure that the satisfaction of

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5 Idem.
those needs is not threatened is in that view achieving human security. Another ethical securitization line in academia can be found in the connection between human security and human rights. In that view the interests that make up human security are already laid down in human rights. Making sure that people are protected in their human rights is in that view an effective road towards ensuring human security.

Traditional security actors and interests have changed and the illusion of natural threats ‘out there’ have been erased by securitization theory. The security landscape that appears in concrete settings is hard to predict but will certainly be complex. In paragraph 4 we will continue with a sketch of EU security thinking and find out what actors and what interests has emerged from the processes of securitization within the EU.

3 Legal Theory and Rule of Law

The idea of Rule of Law has been discussed widely in legal theory. In my view the essential parts of the debate are (a) the discussion about the core meaning of the concept, (b) the question of the feasibility of a Rule of Law and (c) the compatibility of Rule of Law with other ideas and institutions.

To capture what can be understood in general terms to be the core meaning (the) Rule of Law is not so easy. There is a lively discussion about the essential ingredients a political-legal order must have before it can be called a Rule of Law. It is important to understand that the Rule of Law has a strong normative element. It is clearly not pointing to a legal order as such but towards a legal order that can live up to certain standards. The big discussion is of course what these standards are or should be. A core element of most concepts is formed by the (historically informed notion\(^6\)) of the law as the highest authority in the state. The exercise of legitimate state power is in that view limited/constructed by the legal base of that power.

Fuller points out certain requirements the laws need to contribute to a Rule of Law. The laws ruling state power have to be general in nature, must be published, not working retroactively, have a clear meaning, must not be contradictory, must not require the impossible of the citizen, must not be changed to frequently and official action must be according to the declared rules.\(^7\) Institutionally this can be realized by having a separation of state-powers, making an independent judiciary possible.

These three elements (authority, laws meeting certain requirements and an independent judiciary) seem to be necessary they are not sufficient to elevate a legal order to the status of a Rule of Law. I find the suggestion of Krygier in that respect helpful: he redirects the question of Rule of Law away from its content and suggest we should always first ask: what’s the point of having a Rule of Law?\(^8\)

Although some questions come up about seeing the Rule of Law as purely instrumental for achieving other goals, the question why we need a Rule of Law forms a commonsensical starting point.

My second point, the feasibility of legal order deserving the qualification Rule of Law, can be discussed in a more principal and in a more practical way. The principal discussion is about the question whether any legal order can live up to the promises contained in the idea of the Rule of Law. Is law, in any form at all, capable of containing (state) power? Although the somber overtones of Carl Schmitt’s observation that power will always dominate law keeping appearing in the debate, there is at least a readiness to accept that legal orders can be distinguished as being better or worse

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\(^6\) An insightful and short introduction in the historical meaning of both Rule of Law in the English tradition as in the idea of ‘Rechtsstaat’ in the German tradition can be found in Franz Neumann (1936/1980) pp. 203-210.


\(^8\) Krygier 2012, p. 33.
than others. The practical discussion on feasibility is about what in social reality counts as Rule of Law and how it can be measured.

A third aspect of the discussion in legal theory is informative for this paper because it concerns the compatibility of Rule of Law with other ideas and/or institutions. The discussion is relevant because policy makers routinely connect Rule of Law with other ideas and institutions like human rights, democracy, (good) governance and market economy. We cannot discuss all these connections here. The main point is that we should look at the Rule of Law also in connection with other ideas, institutions and interests.

My discussion of Rule of Law thinking in legal theory focused on three points that will help charting the ideas on Rule of Law in EU policy documents (paragraph 5) en EU Rule of Law missions (paragraph 6 and 7)

4 Securitization practices in the EU and its results

An important aspect of the securitization discourses is the identification of the actors involved. The actors’ security concepts refer to seem to be either states or individual human beings. Some other actors, like for instance NATO, are identified. The reference to the European Union needs to be precise. What kind of actor is the EU on the international stage and in what way can it be a security actor? It is important to acknowledge the fact that the European Union is still for the largest part not much more than an economic actor, standing on the old legitimacy of creating a European common market as the founding idea. For a long time any openly step towards becoming a supranational political union was shunned. Looking after security interests was something seen as essentially a national and sovereign affair, that could be looked after both on that national level and in the transatlantic (and not supranational) NATO.

Yet, the EU has been an important international actor outside the sphere of hard (military) power for a long time. The EU has for a long time presented itself as acting not only for the collective self-interest of its member states but also as an idealistic project, as an example of regional cooperation and as a benevolent and altruistic international partner for other countries (mainly from the Global South). Much can be said about the question if this self-presentation of the EU is a reality or a construction for political purposes. Let’s leave that discussion aside and assume that at least some of EU’s actions can be explained as altruistic and sincere. Fact is that the EU has operated without a substantial military power in her outside politics. The emphasis or reliance on ‘soft power’ has sparked a discussion between those who see that strategy as new and as a value-driven choice and those who stress that using ‘soft power’ is simply the only option open as long as you cannot count on serious military might. The proponents of the first position have sketched the EU as a Civilian Power, a Civilizing Power and as ‘Normative Power Europe’. The second proponents simply expect the EU to behave differently as soon a substantial hard power is available. The debate has an extra normative edge in the sense that the first position tends to see the behavior of the EU as normatively desirable and the second position holds that acquiring hard power, autonomous military might, is essential for the EU to become an effective actor in the world. At least some steps are taken to build a hard power capacity in the EU. The Common Security and Defense Policy taking over the role of the

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9 The well known debate between Robert Kagan (see Kagan 1998 and Kagan 2002) and Robert Cooper (see Cooper 2002) is part of this discussion.
European Security and Defense Policy since the Treaty of Lisbon shows that slowly a minimal military capacity is build up without neglecting the soft power, the civilian might, of the EU.

These general notions of security and security interests help to find what actors in reality construct as being their security interests and how they act upon these interests. For the EU, as a (quasi-unified) actor, I will explore the notion of security enclosed in the European Security Strategy (ESS) as a good indicator of the EU’s security concept and as informative of actual security needs/concerns. The ESS is comprehensive and ties in with the self-perception of the EU as a benign world power and replicates quite explicitly the typical vision of what Europe sees as a good global order.\textsuperscript{10}

The European Security Strategy (ESS) identifies as ‘key threats’\textsuperscript{11}: Terrorism, Proliferation of Weapons of Mass Destruction, Regional conflicts, State failure, and Organized Crime. In combination they can form a ‘radical security threat’\textsuperscript{12}. There is a clear focus on acting outside of the EU borders: ‘With the new threats, the first line of defense will often be abroad.’\textsuperscript{13} There is a strong focus on good governance especially in neighboring countries: ‘Even in an era of globalization, geography is still important. It is in the European interest that countries on our borders are well-governed.’\textsuperscript{14} Building of legal regimes and international institutions is seen as major way to reach these goals: ‘In a world of global threats, global markets and global media, our security and prosperity increasingly depend on an effective multilateral system. The development of a stronger international society, well functioning international institutions and a rule-based international order is our objective.’\textsuperscript{15}

Beside the official security interests and security strategies as presented in policy papers like the ESS there are some other areas of action, mainly development aid and migration policy and border control, that could be seen as securitized or at least have become connected to the pursuit of security interests.

\textit{Development aid policy}: The EU has seen a securitization of its development policy in the sense that the connection is made between development aid and security. The ESS states that security is precondition for development.\textsuperscript{16} Promoting security in developing nations is helpful for reaching EU’s own security goals. A typical EU win-win story. The securitization of development aid could be understood as a means to enhance legitimacy for EU’s foreign policy by using the positive altruistic image of EU’s development policy.\textsuperscript{17}

\textit{Migration policy}: Boswell argues that the threat of terrorism at the turn of the century is not used to securitize migration: ‘(…) migration policy practices have been exploited for counter-terrorism purposes, rather than vice versa (…)’.\textsuperscript{18} She explains that immigration data gathering is used for anti-terrorism practices and that the framing of the immigration debate is certainly not focused on making every immigrant a potential terrorist threat. Neal agrees with Boswell and adds that the idea that Europe faced a new (common) threat after the terrorist attacks of 9\textsuperscript{\textsl{\textbackslash}11} was not picked up in

\begin{footnotesize}
\footnotesize{\textsuperscript{10} The European Council sees the ESS as a central document for her foreign and security policy. See European Council 2004.}
\footnotesize{\textsuperscript{11} ESS (2003), p. 3-4.}
\footnotesize{\textsuperscript{12} ESS (2003), p. 6.}
\footnotesize{\textsuperscript{13} ESS (2003), p. 6.}
\footnotesize{\textsuperscript{14} ESS (2003), p. 7.}
\footnotesize{\textsuperscript{15} ESS (2003), p. 9.}
\footnotesize{\textsuperscript{16} ESS (2003), p. 2.}
\footnotesize{\textsuperscript{17} Anderson & Williams 2011, p. 12-13.}
\footnotesize{\textsuperscript{18} Boswell 2007, p. 590.}
\end{footnotesize}
Europe as such and did not materialize in a discourse that could securitize issues like border control. Neal: ‘FRONTEX is arguably the opposite of securitization or exceptionalism, in that it aims to regulate and harmonize the border practices of individual states, preventing the arbitrariness and erosion of rights that are associated with national sovereignty over borders and migration. In this sense, FRONTEX is not the institutionalization of exceptionalism, but the institutionalization of normalization in the form of European Union technologies and regulations.’.¹⁹ Yet, ‘(…) despite its unexceptional origins, FRONTEX may nevertheless be a tool of securitization or a securitizing actor.’.²⁰

EU security policy comes up with a list of quite traditional security threats. The interesting part is that there is no talk about using hard power. There seems to be a single focus on working in other ways to neutralize these threats. In paragraph 6 we find out how this focus works out in the actual presence of the EU on Georgia and Kosovo.

5 EU Rule of Law thinking

Within the EU the attention for the Rule of Law has been growing. Two (related) developments within the EU generated considerable attention for Rule of Law. Both developments stemmed from the necessity for the EU to establish itself. The European Court of Justice used the principle of the Rule of Law to beef up the EU as a separate supranational legal order. While the European Court changed the EU legal order internally, the end of the Cold War gave the EU room to reformulate itself as a regional and global actor. One of the objectives for its external policy was establishing the Rule of Law in other countries.

The European Union is stressing that establishing and/or strengthening the Rule of Law is a key policy objective, both domestic as foreign. The objective is pursued on three levels, the national, the community and the global level. The ruling of the European Court of Justice, focused on the community level, will be discussed later in this paragraph.

On the national level the EU aims its Rule of Law ambitions on three groups of states:
1. Strengthening the Rule of Law on the national level in the current members states
2. Establishing and strengthening the Rule of Law on the national level in states that want to become member of the EU
3. Establishing and strengthening the Rule of Law on the national level in states that will not become member of the EU but have accepted the assistance of the EU in building a Rule of Law.

The examples of EU Rule of Law policy I will discuss concern both the second and third level. The programs in Georgia and Kosovo are aimed at the national or state level; even now the international legal status of Kosovo has to be determined more definitely, the EU treats Kosovo as a de facto state. It’s not clear in which group of nations they belong. Both Kosovo and Georgia are not part of the community but they certainly (especially Kosovo) could be in the future.

The promotion of Rule of Law on the global level also needs some attention. The EU has cultivated a self-image of benign world power. Promoting Rule of Law on the global level fits into that image. It suggests that we could strive towards building (or expanding) the existing international legal order towards a substantial order for the good of all mankind. As we already saw in the discussion of the

²⁰ Neal 2009, p. 346.
ESS: the optimism about what the current international legal order is or could become is quite high in Europe. And quite important: ‘building a good global legal order’ could also be used as a deeper justification for transnational legal intervention by the EU.

One of the first actors to talk about Rule of Law and Europe in a forceful way was the European Court of Justice in its ruling *Les Verts*: ‘It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.’  

Using the concept of the Rule of law to point out that (1) the legal order of the European Community itself had the Rule of Law as one of its organizing principles and (2) that the Rule of Law had implications for the jurisdiction of the court itself. That jurisdiction was in the eyes of the court to be quite comprehensive by allowing ‘direct action’ in many cases because ‘...the general scheme of the Treaty is to make a direct action available against ‘all measures adopted by the institutions... which are intended to have legal effects’, as the Court has already had occasion to emphasize in its judgment of 31 March 1971 (Case 22/70 Commission v Council [1971] ECR 263).’  

The idea of the Rule of law the Court presents here clearly reflects an often mentioned idea in the Rule of Law discourse: all governmental power should have a legal base and must be scrutinized when necessary by an independent judiciary.

The ruling of the court shows that the concept of the Rule of law begins to show up in a significant way. Yet the notion of the court only relates to the internal legal order of the EU. Its notion of Rule of Law is not embraced enthusiastically by policy makers on the national level who feel the court is infringing on their power.

The breakthrough for Rule of Law as an EU policy objective came after the fall of the Berlin wall. The end of the Cold War paved the way for a different, more “impartial” approach in foreign policy. The concept of the Rule of Law became part of the treaties of the European Community. Starting the European Union with the Maastricht Treaty the then 12 member states present themselves in the preamble ‘(...) CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law, (...)’.  

The Rule of Law was directly adopted as part of the foreign and security policy. Thus, the new pillar for Common Foreign and Security Policy also mentions in Article J.1 as an objective of such a policy: ‘(...) to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms(...).’ The same objective appears in relation to the EC’s future development policy. In that general way the EU establishes a connection between Rule of Law and security (and the between Rule of Law and development is). The link between security and Rule of law seems to be self-evident for EU policy makers when they made the Rule of Law programs part of the ESDP en CFSP

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21 LES VERTS v PARLIAMENT, JUDGMENT OF THE COURT 23 April 1986 in Case 294/83, under (23).
22 Idem, under (24).
23 Interesting in this respect is that the EU Court is often criticized for being ‘activist’, meaning that they are to active in law making (in in this case by equating the Treaty with ‘the basic constitutional charter’ and by assuming there is ‘the general scheme of the Treaty’) and don’t stick to only interpretation of legal norms. In the perception of that critique the court itself engages in breaking a possible element of the Rule of Law: the Trias Politica.
24 For an elaborate analysis of the *Les Verts* case and the meaning attached by the court to Rule of Law, see for instance Pech 2009, p.11-16.
EU Rule of Law thinking can be ordered with the three points I made about Rule of Law theory in paragraph 3. First of all: What is the point of having a Rule of Law? On this point the EU concept of Rule of Law seems to be quite vague. It tends towards seeing the Rule of Law as an institution that is a necessary precondition for any ordered society. It is added to a list of other universal goods like human rights and democracy. The precise content is never made clear. The second question: Is it feasible to establish a Rule of Law? Again, there seems to be not much hesitation in answering this question. The assumptions seems to be that in Western countries there already is a Rule of Law (so we don’t have to worry about establishing it in those countries) and second that Western Rule of Law practices can offer a blueprint for realizing a Rule of Law elsewhere. It seems to be just a question of putting in enough effort. The third question: Is the Rule of Law compatible with other ideas and institutions? Again the answer is simple and optimistic. The Rule of Law fits in a total package of ideas and institutions that is presented as a road to a good society. The compatibility of Rule of Law with human rights, good governance, democracy or a market economy is not just assumed it is presented as if these ideas and institutions have necessary links to each other and can best be realized all together at the same time. Again there seems to be an assumption that Western countries already have this ideal and coherent package of institutions.

6 EUJUST THEMIS: The EU Rule of Law Mission to Georgia

Establishing the Rule of Law has been an objective for different EU missions. I will start out with discussing the Rule of Law Mission in Georgia. In the next paragraph the Rule of Law project in Kosovo will be discussed.

Before starting the EUJUST THEMIS Rule of Law mission in Georgia the EU was already involved in reforming the Georgian Justice sector through her Technical Assistance to Commonwealth of Independent States (TACIS)-program, starting out in 1991. The TACIS program aimed at influencing the rebuilding of the former USSR states, some of them recollected under leadership of Russia in the Commonwealth of Independent States (CIS), by offering these states assistance on a broad spectrum of problems. The TACIS-program for Georgia contained the subprogram “Support of the institutional, legal, and administrative reform” but only one element of that program can be related to establishing a Rule of law: ‘training of the newly appointed judges’.26

Establishing the Rule of Law in Georgia was important for European policy makers because: ‘The rule of law needs to become a reality, since it is the indispensable condition for the development of the country. The weakness or absence of rule of law provides for continued human rights violations, delays in reform, expansion of organized criminal activities in the economic sphere and - last but not least - continued problems of internal security. Improving governance by promoting rule of law also means addressing the continuing problem of corruption, that is to say the abuse of public office for private gain.’28

Although its stated importance, the TACIS-program involvement in Georgia had a modest size because Shevardnadze, president from 1995-2003, tried to steer an independent course from both Russia and the EU. At the end of 2003 the political climate became more positive for the EU by the

ascend to power of the Saakashvili government. In 2004 EUJUST THEMIS, the first official EU Rule of Law Mission ever, could start.

Although the mission is part of the European Security and Defense Policy, the mission is a completely non-military (civilian) mission. The objectives of the mission are strongly oriented towards (re)building a criminal justice and prison system. It wants to assist reforms initiated by the Georgian authorities. The Council Joint Action states: ‘(...) in the field of the Rule of Law, the new Georgian government has taken some decisive steps since coming to power. The EU is willing to help Georgia in its further progress and is committed in particular to continue to assist the new government in its efforts to bring local standards with regard to the rule of law closer to international and EU standards, (...)’.

The link to security interests is made in the next section of the preamble: ‘The security situation in Georgia is stable but may deteriorate with potential serious repercussions on regional and international security and the strengthening of democracy and the rule of law. A commitment of EU political effort and resources will help to embed stability in the region.’

The linking pin between security interests and promoting the Rule of Law seems to be ‘stability’. It is plausible to assume that the line of thinking could be like this: Establishing the Rule of Law is (probably) functional for enhancing ‘stability’, and enhanced stability is an ingredient of what is needed to reach security. Let us see if the more concrete objectives and practices of the EUJUST THEMIS mission are in line with this explanation.

The official goals of the mission are:
‘1. EUJUST THEMIS, shall, in full coordination with, and in complementarity to, EC programmes, as well as other donors’ programmes, assist in the development of a horizontal governmental strategy guiding the reform process for all relevant stakeholders within the criminal justice sector, including the establishment of a mechanism for coordination and priority setting for the criminal justice reform.

2. Within its means and capabilities, EUJUST THEMIS more specifically could:
(a) Provide urgent guidance for the new criminal justice reform strategy;
(b) Support the overall coordinating role of the relevant Georgian authorities in the field of judicial reform and anti-corruption;
(c) Support the planning for new legislation as necessary, e.g. Criminal Procedure Code;
secondarily:
(d) Support the development of international as well as regional cooperation in the area of criminal justice.’

The mission is focused on supporting the government in her criminal justice reform policy. Three more specific topics are mentioned: ‘judicial reform’, ‘anti-corruption’ and ‘new legislation’, and there is an additional focus on ‘regional coordination in the area of criminal justice’. The mission is quite small for EU standards. The one year mission has a budget of a little over 2 million Euros and consists practically for a big part in sending ten EU experts to work in Georgia.

31 Idem, under (3).
32 Idem, Article 2 sub 1. and 2.
Did the EU succeed in reaching the objectives of the mission? Kurowska gives a detailed report of the activities of the mission, the ‘politics’ surrounding the mission and a critical appraisal of the results.\(^{33}\) Negotiating not only Georgian but also internal EU politics turned out to be quite difficult. Kurowska: ‘(...) the political support of the Georgian post-revolutionary authorities was volatile.’, resulting for instance in frequent staff reshuffles in the judicial system and the appointment of inexperienced officials in the Georgian administration.\(^{34}\) The mission was slowed down because it ‘(...) had to comply with the complex Community financial and procurement procedures’.\(^{35}\) She sees as the main results of the mission: ‘First, a reform strategy was drafted as stipulated by the OPLAN. Second, the mission managed, in line with one of the premises of the mandate, to bring together the different local stakeholders of the fragmented criminal justice system and to entice them to cooperate on the reform plans. Third, its shortfalls notwithstanding, the strategy for the reform of the Georgian criminal justice system is a blueprint to nudge the country closer to European standards. Fourth, Themis allowed to demonstrate that ESDP is a larger project than one confined to the Western Balkans.’\(^{36}\)

The local officials seemed to have other ideas about what a Rule of law could look like. Kurowska mentions blockades by Themis of local proposals (a) that do not strengthen the impartiality of the judiciary, (b) that do not strengthen the fight against corruption and (c) that make the executive even stronger vis-à-vis the judiciary.\(^{37}\) According to Kurowska an essential lesson for building a Rule of Law was learned by the EU. To make progress towards reform it was necessary to have your own experts on the ground and working with local legal experts.\(^{38}\) One objective the EUJUST THEMIS mission surely did not reach was judicial reform. Only in 2007 there was some progress made. Simons sees them as ‘(...) the tentative first steps to creating independent and professional bodies, sweeping away the old legacy of corruption, inefficiency and clientelism’.\(^{39}\) Chkheidze, Deputy Public Defender (Ombudsman) of Georgia, observes that in 2009 the Georgian public still sees the judiciary as the most corrupt state institution. He blames the selection procedure and the pressure from the executive on the judiciary for their lack of independence.\(^{40}\)

Overall the EUJUST THEMIS mission showed a strong focus on institution building (especially focused on building an independent judiciary). I did not achieve much in terms of Rule of Law building. There were some lessons learned, a political presence was established and the ESDP was translated into action.

7 The EULEX Rule of Law mission in Kosovo

The EULEX mission in Kosovo starts in 2008. From 1999 onwards the main intervening actor in Kosovo was/is the United Nations Mission in Kosovo (UNMIK). In the beginning of 2008 the Rule of

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\(^{33}\) Kurowska 2009.
\(^{34}\) Kurowska 2009, p. 205.
\(^{35}\) Kurowska 2009, p. 205.
\(^{36}\) Kurowska 2009, p. 207. OPLAN is an acronym for the Operational Plan of the mission.
\(^{37}\) Kurowska 2009, p. 207.
\(^{38}\) Kurowska 2009, p. 208-209.
\(^{39}\) Simons 2012, p. 279.
\(^{40}\) Chkheidze 2009, pp. 33-34.
Law program of that mission is taken over by the EU. The EU-mission is called EULEX Kosovo and is again a mission under the ESDP/CSDP. Planned first as a replacement of UNMIK, it works under the extended UNMIK mandate as a consequence of political opposition of Russia.\textsuperscript{41} The EULEX mandate is valid till 2014 (extended two years from 15 June 2012). Compared to the EUJUST THEMIS mission to Georgia it is a huge mission with over 2500 staff (shrinking a bit after 2012) and a budget well over a hundred million euros a year.\textsuperscript{42} It is the largest civilian mission ever launched under the CSDP.\textsuperscript{43} The UNMIK had not been very successful in building up the country. The EULEX mission faces major problems that indicate a very weak or even absent Rule of Law in Kosovo. Kosovo suffers from rampant corruption, an extensive presence of organized crime, a deep ethnic division in the country, an inefficient and weak judiciary (both judges and public prosecutors), and last but not least the reluctance of the police to work with new methods and fight organized crime.

EULEX has adopted a ‘programmatic approach’, based on step by step progress to be made by the Kosovo authorities themselves. The basis for this approach is to be found in the Mission statement: “EULEX will assist Kosovo authorities, judicial authorities and law enforcement agencies in their progress toward sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and a multi-ethnic police and customs, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices. The mission (...) will implement its mandate through monitoring, mentoring, and advising, while retaining certain executive functions”\textsuperscript{44}

Although this mission is a much bigger than the mission to Georgia and must have learned from the previous experience, the results of the mission are not good. Actually, the EU is quite honest in its self-critique. Especially the 2012 report from the European Court of Auditors frankly concludes that the mission is too expensive and not very successful. Given the goals of the mission their conclusions are quite devastating. Their main conclusion: ‘Despite significant EU assistance, progress in improving the rule of law is limited and levels of organized crime and corruption remain high.’\textsuperscript{45} The part of the program aimed at the police is an evaluated (a bit) more positive: ‘Kosovo Police: EU interventions audited by the Court had modest success but major challenges remain, in particular in the fight against organized crime.’\textsuperscript{46} But the crucial fight against organized crime is not won because ‘The investigation of serious crimes is still ineffective due to limited experience and political interference.’\textsuperscript{47} The reform of the judiciary is not successful either: ‘EU interventions audited helped build capacity but the judicial system continues to suffer from fundamental weaknesses’.\textsuperscript{48} Quite serious weaknesses because ‘(...) the local judiciary is still not able to deal with certain types of serious cases (organized crime, economic crimes and corruption, as well as war crimes) due to insufficient expertise

\textsuperscript{42} European Court of Auditors 2012, p. 12-13.
\textsuperscript{44} COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, Article 2.
\textsuperscript{45} European Court of Auditors 2012, p. 15.
\textsuperscript{46} Idem, p. 16.
\textsuperscript{47} Idem, p. 18.
\textsuperscript{48} Idem, p. 19.
as well as threats and intimidation.‘.\textsuperscript{49} And: ‘Political interference with the judiciary remains a major problem in Kosovo, notwithstanding the presence of EULEX judges and prosecutors.’\textsuperscript{50} Non-transparency in assigning cases to judges is for instance creating room for interference. The whole judiciary is suffering from inefficiency and is understaffed, creating a huge back log in cases.\textsuperscript{51}

The Court Of Auditors is more upbeat over the reform of the Customs: ‘Kosovo Customs: EU interventions have been largely successful in building the capacity of Kosovo Customs.’\textsuperscript{52} They mention increased revenues and working with a new data system. Yet, success must be far away: ‘Kosovo Customs itself is still perceived by Kosovo citizens as one of the most corrupt government services, although few corruption cases are brought to court.’\textsuperscript{53}

We already saw the courts are not willing and/or able to tackle corruption cases. In general the fight against corruption is not a success: ‘Anti-corruption: EU interventions have had limited results in tackling corruption which remains a major concern.’\textsuperscript{54} The report discusses the complete lack of cooperation by the Kosovo government in this respect and concludes rather understated: ‘In general, the Kosovo authorities have given a low priority to anticorruption activities.’\textsuperscript{55}

The Court of Auditors is not confident the changes that have been made will be sustained. The absence of local political will to do so and a weak civil society do not look promising in that respect.\textsuperscript{56}

Other observers report along the same line over the lack of results of the EULEX-mission. The 2010 report by the International Crisis Group notes a crucial problem facing the EULEX-mission: the political elite is not in favor of actually establishing a Rule of Law. ‘Virtually none of Crisis Group’s interlocutors in the judiciary, police and associated institutions and among EULEX and other international officials believe the government fully supports the rule of law. Many expressed the opposite belief, that the government prefers a weak judiciary.’\textsuperscript{57}

Taking on the authorities seems to be a problem. Critics have pointed out that the EULEX is not aiming any anti-corruption cases towards members of the political elite while there is considerable proof they are part of illegal operations in Kosovo.\textsuperscript{58} Actually, working without the help of the authorities is doomed to fail and working with them seems to foster no results.

Obradovic thinks one of the central problems is the low legitimacy of the mission: ‘The problem with EULEX is that it holds no legitimacy with Kosovo Serbs, who make up 10-15\% of the country’s 2 million population. (...) Kosovo Albanians are not thrilled with EULEX either, which they see as an undermining of the new country’s sovereignty.’\textsuperscript{59}

Both in Kosovo as in Georgia a lot of time and money is spend. With little results to show for. Both missions give insight into EU Rule of Law thinking and doing and show where links between security

\textsuperscript{49} Idem, p. 20-21.
\textsuperscript{50} Idem, p. 21.
\textsuperscript{51} Idem, p. 22.
\textsuperscript{52} Idem, p. 22.
\textsuperscript{53} Idem, p. 23.
\textsuperscript{54} Idem, p. 23.
\textsuperscript{55} Idem, p. 24.
\textsuperscript{56} Idem, p. 26.
\textsuperscript{57} Idem, p. 28-29.
\textsuperscript{58} International Crisis Group 2010, p. 1.
\textsuperscript{59} Obradovic 2009, p. 2.
and Rule of Law can be made. Rule of Law building and promotion of security interests are mixed with each other.

8 Security interests and Rule of Law programs

What is the relation between EU security interests and the Rule of Law promotion in countries like Georgia and Kosovo? The Rule of Law policies both on paper as on the ground seem to support the EU security interests to a high degree. The following security interests play a role in the EU Rule of Law programs: fighting Organized crime, fighting illegal immigration, enhancing border security in order to frustrate transnational smuggling of goods and human trafficking, enhancing political stability, restructuring of (corrupt) police forces and, more indirectly, securing international trade in essential goods. There is a fuzzy mix of security promotion and Rule of Law building. This entwining of practices is possible because in EU policy documents there is the strategy of adding up: to justify policies all kind of desiderata (democracy, good governance, human security, human rights, rule of law and so on) are just added up without explaining the content of these desiderata and their relation to each other. Adding up all kind of goals and interests obscures any insight in specific motives for specific practices. This phenomenon is not typical for the policy discourse of the EU but it is in the case of the EU boosted by the necessity to accommodate the views of different actors within the EU.

There are four things clearly standing out in this nexus:
1. there is not much attention paid to locally existing legal orders. Those orders are seen as the wrong kind of order or as not working. The existing legal orders are seen as not holding any value and local ideas and practices cannot play a substantial positive role in building the Rule of law.
2. there is a strong focus on the Rule of Law as an institution. Rule of Law is thus seen as about building institutions: designing roles, educating people to play the roles and creating conditions for the role players to play their new roles.
3. The Rule of Law missions are transnational projects carried out by a combination of external interveners, the most important in our case, the EU, and local actors. An important implicit idea is packed into this: the interests of the external and the local actors are (at least) compatible.
4. The main practical use for the EU in promoting Rule of Law in other countries seems to be enhancing stability. Building Rule of Law programs become instruments working for stability.

9 Conclusion

The external practices of the European Union in Georgia and Kosovo show an active entwining of security interests with rule of law making. Rule of Law programs can be understood as serving certain security interests.
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