

## **KOSOVO'S POST-INDEPENDENCE - TEST FOR THE EU'S COMMON FOREIGN AND SECURITY POLICY. WHAT ROLE HAS THE EULEX MISSION TO PLAY IN KOSOVO?**

KATEŘINA NOVOTNÁ

Masaryk University, Faculty of Law, the Czech Republic

### **Abstract:**

Various interventions of an international community in failed states or otherwise unstable territories showed the crucial importance of the rule of law in establishing or re-establishing an order in post-conflict societies. The territorial status of one of the world's newest states, Kosovo, was resolved by its unilateral declaration of independence on 17 February 2008.

The current situation in Kosovo brings many points of major legal interest. This paper explores some of these legal issues, namely the role of the largest civilian operation the EU has ever launched. This paper assesses the implications of Kosovo's independence, analyses the legal framework of the EU mission and addresses some of the challenges this mission may face.

### **Key words:**

The legal framework of the EULEX mission (the Council Joint Action 2008/124/CFSP); the implications of Kosovo's independence; the UNMIK; organized crime.

### **1. INTRODUCTION<sup>1</sup>**

Various interventions of an international community in failed states or otherwise unstable territories showed the crucial importance of the rule of law in establishing or re-establishing an order in post-conflict societies. The territorial status of one of the world's newest states, Kosovo, was resolved by its unilateral declaration of independence on 17 February 2008.<sup>2</sup>

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<sup>2</sup> The issue of legality of the unilateral declaration of independence under international law by Kosovo will not form a part of this paper. It has been already analyzed elsewhere. See e.g. Ch. J. Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition', *ASIL Insights*, Vol. 12 (2009). See also J. Crawford, *Creation of States in International Law*, 2nd edition, Oxford University Press (2006). The author of this paper is of the opinion that unilateral declaration of the independence of Kosovo and a subsequent recognition by many states including the Czech Republic was contrary to norms of international law. Admittedly, however, the political situation prior to the unilateral declaration of independence did not appear to offer any *realistic* alternative. The declaration of independence had a follow-up in a form of the request by the UN General Assembly for an advisory opinion of the International Court of Justice (ICJ) on the following

The current situation in Kosovo brings many points of major legal interest. This paper explores some of these legal issues, namely the role of the largest civilian operation the EU has ever launched within the European Security and Defence Policy (hereinafter 'ESDP'). Serbia and Kosovo have very different expectations from the EU mission (hereinafter 'EULEX'), although they agree that the mission will face various challenges.

First, it is both useful and necessary to introduce the situation in Kosovo prior to its declaration of independence, i.e. the engagement of United Nations Interim Administrative Mission in Kosovo (hereinafter 'UNMIK'). The relationship between UNMIK and EULEX is often described as EULEX mission 'taking over from UNMIK' or 'replacing UNMIK'. However, it will be argued that change of the legal status of Kosovo has and will continue to have a significant impact on a different role and different mandate of the EU mission as opposed to the UNMIK.

Second, this paper briefly introduces the EULEX missions including its three main components (judiciary, police and customs) and analyses the legal framework under which the EU mission was deployed. EULEX mission started to be fully operational only in 2009. Therefore, it is too early to thoroughly assess its functioning and draw any substantial conclusions at this stage. Nevertheless, the concluding section sets out some challenges this mission may face and offers some preliminary remarks.

## **2. KOSOVO'S PRE-INDEPENDENCE – THE ROLE OF UNMIK**

Prior to Kosovo's independence, the United Nations (hereinafter 'UN') deployed UNMIK, which was established within the legal framework of the UN Security Council Resolution hereinafter UNSCR 1244).<sup>3</sup> UNSCR 1244, which was adopted under the Chapter VII powers, decided on the deployment of international civil administration<sup>4</sup> (UNMIK) and international security force<sup>5</sup> (KFOR) presences under UN auspices.

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question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government in Kosovo in accordance with international law?" (still pending before the ICJ).

<sup>3</sup> S/RES/1244 (1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement> (last accessed 25 March 2009).

<sup>4</sup> Paragraph 10 of Resolution 1244 authorized the Secretary-General "with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic selfgoverning institutions."

<sup>5</sup> The UNSC delegated to NATO the power to establish the international military presence (i.e. International Security Force (KFOR)) while the UNSC was to retain the ultimate authority and control over the KFOR. See also Military Technical Agreement (MTA) of 9 June 1999 signed between KFOR and the Governments of Serbia and the Federal Republic of Yugoslavia (FRY). Under Article 1 (paragraph 2) "The State Governmental authorities of the Federal Republic of Yugoslavia and the Republic of Serbia understand and agree that the international security force ("KFOR") will deploy following the adoption of the UNSCR referred to in paragraph 1 and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission. They further agree to comply with all of the obligations of this Agreement and to facilitate the deployment and operation of this force", available at <http://www.nato.int/kosovo/docu/a990609a.htm> (last accessed 10 April 2009).

UNSCR 1244 envisaged Kosovo as an integral part of the territory within Yugoslavia with a high level of autonomy.<sup>6</sup> The UNMIK was entrusted with the overall legislative and administrative powers, including the administration of judiciary (together with the Special Representative of the UN Secretary General).

During ten years of its presence in Kosovo, the UNMIK faced various challenges undermining the (re)establishment of the rule of law such as organized crime and corruption, serious deficiencies in the justice system (including, inter alia, lack of witness protection), high unemployment or the disagreement among Serbs and Albanians about which legislation (Serbian, Yugoslav<sup>7</sup> or Albanian) was valid and to be considered as legitimate. The UNMIK made the situation often even more complicating by its legislative activities performed both independently and in a form of interventions in the already existing legislation.

The ethnic situation in Kosovo resulted into a parallelism of the judiciary ending with the Supreme Court of Kosovo for the Albanian majority and the Supreme Court of Serbia for the Serbian majority in certain areas such as North Mitrovica. Parallel judicial institutions caused application of different legal standards. Furthermore, this situation often amounted to violations of human rights, including the violation of the principle *ne bis in idem*. This paper claims that most of these challenges are still present and will be equally faced by EULEX mission. It is therefore useful to highlight some of the most pressing and important problems undermining the rule of law in Kosovo.

## **2.1 ORGANIZED CRIME AND INTER-CLAN VIOLENCE**

It is widely agreed that mafia in Kosovo has infiltrated into politics and law enforcement authorities (including border control).<sup>8</sup> Powerful clans control both the government and the mafia.<sup>9</sup> Moreover, competition for power, wealth and status amongst different clans engaged

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<sup>6</sup> See the preamble of Resolution 1244 reaffirming “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2”.

<sup>7</sup> For example old Yugoslav law (1956) applies with respect to property rights, which continues to further complicate the situation.

<sup>8</sup> See e.g. D. Engel, ‘Organized Crime and Terrorism in the Balkans: Future Risks and Possible Solutions’, *HUMSEC Project*, available at: <http://www.humsec.eu/cms/index.php?id=331> (last accessed 5 March 2009), B. Dobovšek, ‘Transnational Organised Crime in the Western Balkans’, *HUMSEC Project*, available at: <http://www.humsec.eu/cms/index.php?id=331> (last accessed 5 March 2009), D. Anastasijevic, ‘Organized Crime in the Western Balkans’, *HUMSEC Project*, available at: <http://www.humsec.eu/cms/index.php?id=331> (last accessed 8 March 2009). One of many examples: all but two witnesses in trials with the so-called the ‘Dukagjini group’ are now dead. One of the members of the ‘Dukagjini group’ was also Daut Haradinaj - brother of Ramush Haradinaj, a leading KLA commander during the conflict who was appointed Prime Minister of Kosovo in December 2004 and who was charged of war crimes but was acquitted of all charges in 2008 by the International Criminal Tribunal for the former Yugoslavia (ICTY).

<sup>9</sup> *BND-IEP Report Kosovo 2007* (‘Operationalisierung von Security Sector Reform (SSR) auf dem Westlichen Balkan intelligente/kreativ Ansätze fuer die langfristig positive Gestaltung dieser Region’) conducted by the German Bundeswehr repeated the accusations against current Prime Minister Thaci claiming that the real power in Kosovo lays with 15 to 20 family clans who control “almost all substantial key social positions” and are “closely linked to prominent political decision makers”. In contrast to the CIA and MI6, German intelligence reports accused Thaci as well as former Prime Minister Ramush Haradinaj and Xhavit Haliti of far-reaching involvement in organized crime.

in organized crime creates very unstable environment. Organized crime is closely interconnected with high unemployment, functioning of an impartial and independent judiciary and serious shortages of foreign investment capital. Moreover, any international loans will be in a current financial crisis arguably even harder to obtain.

Except trafficking in petrol, cigarettes and human beings, it is estimated that ethnic Albanian traffickers controlled over 70% of the heroin entering a number of key destination markets in Europe. This has been described as a “threat to the EU” by the Council of Europe in 2005.<sup>10</sup> According to EUROPOL’s findings “ethnic Albanian criminal groups pose a significant threat to the EU because of their involvement in drug trafficking, THB [trafficking in human beings] and money laundering.”<sup>11</sup>

Some commentators argue that neither Serbia nor UNMIK constitute any longer a common enemy for the clans after Kosovo’s independence.<sup>12</sup> Therefore, it is claimed that in the absence of a common enemy, inter-clan tensions are likely to arise with an increasing frequency.<sup>13</sup> As Kaltcheva puts it “as evidenced during the March 2004 riots and, more recently, during the 2006 attacks against UNMIK Headquarters and the Assembly of Kosovo, a culture of protest does exist in Kosovo and is likely to persist after independence. Similarly, the culture of violence enshrined in the Code of Leke Dukagjini will continue long after independence.”<sup>14</sup>

The tradition of gjakmarrja (blood feuds) has serious impact on the social and political life in Kosovo. For example, the Institute on War and Peace Reporting (IWPR) stated that “old political allegiances play a role in how policemen act”. The IWPR added “as the families of murder victims grow increasingly resentful of the [KPS] inactions, many come to believe that justice will only be done if they take matters into their own hands”.<sup>15</sup>

## **2.2 WITNESS PROTECTION**

Organized crime is closely interconnected with issue of witness protection. It is not only in the context of war crimes or crimes against humanity, but also in the context or prosecution of organized crime where the adequate and effective protection of witnesses is crucial.<sup>16</sup>

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<sup>10</sup> Council of Europe, ‘Organized Crime Situation Report 2005’, December 2005, p.50 (citing EUROPOL’s ‘2005 European Union Organized Crime Report’), available at <http://www.coe.int/Report2005E.pdf> (last accessed 28 April 2009).

<sup>11</sup> *Ibid.*

<sup>12</sup> T. Kaltcheva, ‘Kosovo’s Post-Independence, Inter-Clan Conflict’, *HUMSEC Project*, available at: <http://www.humsec.eu/cms/index.php?id=331> (last accessed 24 February 2009).

<sup>13</sup> Kaltcheva illustrates that the years after the war have already seen a high increase in the number of blood feuds.

<sup>14</sup> *Ibid.*

<sup>15</sup> J. Xharra, M. Hajrullahu, A. Salihu, ‘Kosovo’s Wild West’, available at [http://www.kosovo.net/news/archive/2005/February\\_21/1.html](http://www.kosovo.net/news/archive/2005/February_21/1.html) (last accessed 4 May 2009).

<sup>16</sup> See *supra* note 8.

Unfortunately, protection of witnesses is still not running on the satisfactory level. In the circumstances of Kosovo, it has been so far difficult to change witness's identity and to give witness a required help to lead a 'normal' life (the same holds true for Bosnia and Herzegovina). Inadequate protection heavily impacts on interrogation of witnesses, which has been so far uneasy and largely ineffective.<sup>17</sup>

As regards the issue of relocation of witnesses, according to the Organization for Security and Cooperation in Europe (hereinafter 'OSCE'), there were only informal agreements between UNMIK and receiving country. No formal agreements about relocation of witnesses were arranged. Moreover, judges and prosecutors do not often offered the possibility of relocation. As a result, the failure of responsible authorities to effectively protect witnesses impeded the establishment of the rule of law and diminished the public trust in the justice system.

### **2.3 CONCLUDING REMARKS REGARDING THE UNMIK PERFORMANCE**

UNMIK was the longest and the most expensive UN mission. Was it worth it? As regards the overall evaluation of the UNMIK performance in Kosovo, it should be emphasized that, as opposed to the broad agreement on the need for KFOR to stay in Kosovo, the presence of UNMIK was judged far less positive.

UNMIK personnel often lacked any peacekeeping experience and knowledge about Kosovo's legal and political circumstances, which in turn required more time on the ground to get familiar with the existing state of affairs.

For ten years, UNMIK has had a full executive powers, significant financial resources (biggest per capita of all missions in the world) and support of majority of local population. Despite these facts, UNMIK's performance was subject to much criticism, and rightly so. UNMIK was considered as inefficient and almost impossible to monitor, due to a lack of commitment from the UNMIK to report and also to control the spending of funds.<sup>18</sup> Hopefully, the EULEX mission will be much more cooperative and transparent than UNMIK in this regard.

## **3. WHAT ROLE HAS THE EULEX MISSION TO PLAY IN KOSOVO?**

### **3.1 LEGAL FRAMEWORK FOR THE EULEX MISSION**

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<sup>17</sup> During a personal interview with the OSCE representatives in Pristina, the question was posed with respect to the Witness Protection System (WPS) and the possibility to use 'video conferencing' in a real time. According to the information in 'Assessment of Standard Goals to April 2007', all district courts in Kosovo are now equipped with a WPS allowing to testify without being in a courtroom and with the possible voice distortion. In addition, Pristina and Prizren District Courts can allow witnesses to testify through video conferencing in a real time from the secure location outside Kosovo. However, as confirmed by the OSCE representative, the WPS in the courts is usually either broken or not connected. In other words, not functioning as it should.

<sup>18</sup> Fact-finding delegation of the Budgetary Control Committee to Kosovo (22-25 June 2008), available at: <http://www.europarl.europa.eu/document/activities/cont/200810/20081021ATT40275/20081021ATT40275EN.pdf> (last accessed 21 January 2009).

Recently, three major EU operations have been launched on the basis of EU crisis-management efforts.<sup>19</sup> The European Security and Defence Policy is advancing in many ways including also security sector reforms.<sup>20</sup>

In the context of Kosovo, the European Council of 14 December 2007 underlined “the readiness of the EU to play a leading role in strengthening stability in the region in line with its European perspective”.<sup>21</sup> For that matter, EU shall assist Kosovo “in the path towards sustainable stability, including by means of a European Security and Defence Policy (ESDP) mission”.<sup>22</sup> At the same time, the Joint Action recognized that the EULEX mission will be functioning in a situation which may deteriorate. This could have a harming effect on the objectives of the Common Foreign and Security Policy as set out in Article 11 of the Treaty.<sup>23</sup>

The EULEX is a technical Rule of Law mission which will cover three main components: police, customs and justice.<sup>24</sup> The mission should assist Kosovo authorities by mentoring, monitoring and advising while respecting the local ownership. The legal basis for the establishment of the European Union Rule of Law Mission in Kosovo was the Council Joint Action 2008/124/CFSP (hereinafter ‘Joint Action’) supported by all 27 EU member states.<sup>25</sup>

The Mission Statement described the role of the EU mission in the following terms “EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices” (Article 2 of the Joint Action). Main tasks of the mission are addressed in Article 3.<sup>26</sup> It is evident from the

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<sup>19</sup> Except Kosovo, the EU deployed its mission to Georgia. Thirdly, the EU’s first maritime operation: NAVFOR – Atalanta was launched to respond to pirates activities off Somalia and the Gulf of Aden. ESDP Newsletter (Number 7, 2009), available at <http://www.eulex-kosovo.eu/news/docs/CEU-8-005%20ESDP-7-webRes.pdf> (last accessed 26 March 2009).

<sup>20</sup> The concrete example of the implementation of this policy in the field is the EU’s mission in Guinea-Bissau.

<sup>21</sup> Para. 7 of the Joint Action.

<sup>22</sup> *Ibid.*

<sup>23</sup> Para. 14 of the Joint Action.

<sup>24</sup> Under a deployment, there should be 1900 international judges, lawyers, police, customs and correctional officers and 1100 local support staff. The budget for the initial 16 months is EUR 205 million. EULEX is the biggest civilian mission the EU has ever launched both in terms of personnel and budget. In *Special Report on EULEX*, available at <http://www.eulex-kosovo.eu/news/docs/CEU-8-005%20ESDP-7-webResEULEX.pdf> (last accessed 17 May 2009).

<sup>25</sup> The duration of the EULEX stay in Kosovo has been determined by the Joint Action as a founding document for two years from its signing (i.e. 4 February 2008). Nevertheless, the mission may actually stay longer. According to the Head of Mission Yves de Kermabon, the EULEX may stay until “the Kosovo authorities have gained enough experience to guarantee that all members of society benefit from the rule of law”, available at <http://www.eulex-kosovo.eu/?id=15> (last accessed 25 May 2009).

<sup>26</sup> In order to fulfil the Mission Statement set out in Article 2, EULEX mission shall: (a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs

content of the Article 3 that the organized crime and corruption remain to be serious problems to be dealt with.

Interestingly, EULEX is also claiming to be operating under the general framework of the UNSCR 1244, which is explicitly mentioned in the Joint Action.<sup>27</sup> One could argue that this is a rather broad interpretation of UNSCR 1244.<sup>28</sup> UNSCR 1244 was clearly adopted in a different time (1999) and context (UNMIK as an international administration and KFOR as international security force entered Kosovo as the part of FRY/Serbia)<sup>29</sup>, i.e. in the situation which in no way anticipated the independence of Kosovo. Obviously, there is no reference to the EULEX mission in UNSCR 1244 per se.

At the same time, UN Security Council did not replace UNSCR 1244, therefore the legal basis of a new mission from the international law point of view was not a clear-cut. This can be illustrated also by the fact that the Kosovo authorities have repeatedly stated that UNSCR

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service), whilst retaining certain executive responsibilities; (b) ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities; (c) help to ensure that all Kosovo rule of law services, including a customs service, are free from political interference; (d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities; (e) contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organised crime; (f) contribute to the fight against corruption, fraud and financial crime; (g) contribute to the implementation of the Kosovo Anti-Corruption Strategy and Anti-Corruption Action Plan; (h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies; and (i) ensure that all its activities respect international standards concerning human rights and gender mainstreaming.

<sup>27</sup> See the preamble of the Joint Action referring to the UNSCR 1244, namely to paragraphs 19, 10, 11 and 17 respectively: ‘Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise’ (Paragraph 19), — ‘Authorises the Secretary-General, with the assistance of relevant international organisations, to establish an international civil presence in Kosovo ...’ and ‘Decides that the main responsibilities of the international civil presence will include ... (f) in a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement ... (i) maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo’ (Paragraphs 10 and 11), — ‘Welcomes the work in hand in the European Union and other international organisations to develop a comprehensive approach to the economic development and stabilisation of the region affected by the Kosovo crisis, including the implementation of a Stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation’ (Paragraph 17).

<sup>28</sup> S/2008/692 (18 November 2008), *Report of the Secretary-General on the UNMIK*: “EULEX will fully respect Security Council Resolution 1244 (1999) and operate under the overall authority and within the status-neutral framework of the United Nations. EULEX will submit reports to the United Nations on a regular basis” (para. 50).

<sup>29</sup> See the preamble of Resolution 1244 reaffirming “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2”.

1244 is no longer relevant and that the institutions of Kosovo have no legal obligation to abide by it.<sup>30</sup> As the Head of EULEX Mission Yves de Kermabon admits “the environment in which EULEX is operating in Kosovo is indeed a bit complex.”<sup>31</sup>

This complex environment deserves a closer analysis. As was already noted above, the issue of the recognition of the independence of Kosovo by some states as opposed to other (including both member states of the EU and the UN) has an impact on the EULEX mission status and effectivity on the whole territory of Kosovo including the parts with the Serbian majority. Both the Head of the EULEX mission Yves de Kermabon and the UN Secretary-General Ban Ki-moon described EULEX as a status neutral mission in order to make it acceptable also was Serbia (and other countries which do not recognize Kosovo as an independent state).

### **3.2 SIX-POINT PLAN VERSUS FOURTH-POINT PLAN FOR THE DEPLOYMENT OF THE EULEX MISSION**

In this context, the UN Secretary-General proposed a six-point compromise plan for the deployment of the EULEX mission which was negotiated between the UN Secretary General, Serbia and the European Union. The six-point plan was supposed to cover six issues – police, customs, justice, transportation and infrastructure, boundaries and Serbian cultural heritage.<sup>32</sup> Serbia provided three conditions under which it would accept the EULEX mission, i.e. EULEX mission will be approved also by the UNSC, it will be status neutral and it will not implement the Ahtisaari Plan.<sup>33</sup>

Nevertheless, this plan has been rejected by Kosovo authorities who argued that it compromises Kosovo’s sovereignty.<sup>34</sup> Kosovo authorities were of the view that accepting the 6-point-plan would formally mean a loss of their sovereignty over North Kosovo. At the same time, Kosovo authorities introduced on 18 November 2008 its four-point plan. The fourth-point plan offered by Kosovo authorities included the following points:

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<sup>30</sup> S/2009/149 (17 March 2009), *Report of the Secretary-General on the UNMIK* (para. 4).

<sup>31</sup> *Supra* note 17.

<sup>32</sup> This plan also envisaged that Serb-majority areas would be under police force autonomous from the EULEX and receiving directives only from UNMIK.

<sup>33</sup> The Report of the Special Envoy of the Secretary-General on Kosovo’s future status and, in an addendum, the Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add.1) prepared by Special Envoy for the future status process for Kosovo, Martti Ahtisaari, available at <http://www.unosek.org/docref/report-english.pdf> (last accessed 2 May 2009).

<sup>34</sup> S/2008/692, Annex I, Statement by the authorities in Pristina (18 November 2008): “1. We are in favour of a quick deployment of EULEX in Kosovo in accordance with the mandate foreseen in the Declaration of Independence, the Comprehensive Proposal for a Kosovo Status Settlement, the Constitution of the Republic of Kosovo, Kosovo legislation, the European Union Joint Action of 4 February 2008 and Kosovo’s institutions’ invitation to EULEX. 2. Kosovo’s institutions reject the whole six-point document.”

- ‘the Government of the Republic of Kosovo support the quick deployment of EULEX in Kosovo based on the Independence Declaration, Ahtisaari document and Kosovo Constitution;
- institutions of the Republic of Kosovo reject entirely the Six-Point Plan;
- institutions of the Republic of Kosovo will closely cooperate with EULEX in the entire territory of Kosovo; and
- institutions of the Republic of Kosovo will cooperate as always with the United States of America, the European Union and NATO’.<sup>35</sup>

As a result, the six-point plan cannot be imposed on Kosovo. As Fried summarized “any arrangements that are made have to be coordinated with the Government of Kosovo. And that is a result of the determination of the Kosovo Government that its sovereignty be respected. And, in the end, it was respected”.<sup>36</sup>

### **3.3 JUSTICE COMPONENT**

The main tasks of the Justice Component include involvement of EULEX legal experts in the work of a newly created Ministry of Justice, forensic experts in the Office of Missing Persons and forensics (OMPF)<sup>37</sup> and others personnel in the Kosovo Property Agency. EULEX judges are also assigned to the Supreme and District Courts and EULEX prosecutors to the Office of the Public Prosecutor, Special Prosecutor’s and District Prosecutor’s Offices. EULEX staff is also working in the Penitentiary administration and Kosovo Judicial Council.<sup>38</sup>

According to the Head of EULEX mission Yves de Kermabon, EULEX is not in Kosovo to make laws.<sup>39</sup> Nonetheless, the Report<sup>40</sup> clearly states that EULEX actively participated in “drafting and reviewing a number of laws in the rule of law area prior to their submission to the Assembly of Kosovo, including laws on weapons, public peace and order and private

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<sup>35</sup> New Kosova Report (18 November 2008), available at <http://www.newkosovareport.com/200811181423/Views-and-Analysis/Demonstration-Kosovo-undivided-and-sovereign.html> (last accessed 10 May 2009).

<sup>36</sup> Transcript a/s D., Fried, Embassy of the United States in Pristina, Kosovo, Interview with Kosovo’s RTV 21, November 28, 2008), arranged by EUR/PPD – Washington, available at [http://pristina.usembassy.gov/statement\\_11282008.html](http://pristina.usembassy.gov/statement_11282008.html) (last accessed 5 April 2009).

<sup>37</sup> OMPF together with local counterparts has to still deal with 1900 cases of missing persons and over 400 remains which still has to be identified.

<sup>38</sup> The EU’s new test in the Balkans, *The Independent* (10 December 2008).

<sup>39</sup> <http://www.eulex-kosovo.eu/?id=15> (last accessed 17 April 2009).

<sup>40</sup> Report of the Secretary-General of the Council of the European Union/High Representative for the Common Foreign and Security Policy to the Secretary-General of the United Nations on the activities of the European Union Rule of Law Mission in Kosovo, available at <http://www.eulex-kosovo.eu/?id=15> (last accessed 9 May 2009).

security companies. EULEX has been assisting the Kosovo authorities with the drafting of a number of strategic policy documents, including those on anti-corruption, organized crime, counter-terrorism, and counternarcotics, and an action plan against trafficking in human beings”.<sup>41</sup>

Leaving aside EULEX (non)legislative activities, the situation remains even more unclear with respect to the applicable law (Albanian, Serbian or Yugoslav law) in some areas. Yves de Kermabon stated that the issue on which laws are to be applied is a matter for independent judges to decide on a case by case basis.<sup>42</sup> However, it is claimed that there will be different legal regimes and standards applied depending on the part of the country. For example the court in northern Mitrovicë/Mitrovica now operates on a limited basis with EULEX international judges and prosecutors and local interlocutors in northern Kosovo have been informed about the leading role of EULEX in justice system in a whole territory of Kosovo. Nevertheless, in Zubin Potok, the municipal and minor offences courts remain nonoperational as a result of the resignation of all Kosovo Serb support staff, while the municipal and minor offences courts of Leposaviq/Leposavić continue to function as part of the court system of Serbia (emphasis added).<sup>43</sup> This scenario is undermining the rule of law efforts of EULEX and certainly does not contribute to the application of the uniform legal standards for all ethnic groups.

### **3.4 HUMAN RIGHTS**

There are also several concerns regarding human rights situation in Kosovo such as the inadequate criminal justice system, domestic violence, violence against ethnic minorities, the inability of refugees and displaced persons to return safely to their homes, the plight of the Roma, Ashkali and Egyptian communities.

As regards the compliance with standards and obligations flowing from the international law, EULEX judges noted that Kosovo willingly accepted various international obligations via its Constitution. That is all well. It is however respectfully submitted that the situation in practice might be more difficult.

States enter into international human rights treaties in order to allow anyone under its jurisdiction to challenge possible violations of human rights not only in domestic courts (i.e. Kosovo courts), but ultimately (after exhaustion of all domestic remedies) before international judicial mechanisms, such as the European Court of Human Rights ('ECtHR').

Yet, there is no mechanism for individuals from Kosovo to bring an action against State of Kosovo in front of the ECtHR. Kosovo would have to become a member of Council of Europe. However, Serbia and other states will arguably “block the admission of Kosovo to the

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<sup>41</sup> Report of the Secretary-General of the Council of the European Union/High Representative for the Common Foreign and Security Policy to the Secretary-General of the United Nations on the activities of the European Union Rule of Law Mission in Kosovo (para. 6), available at <http://www.eulex-kosovo.eu/?id=15> (last accessed 9 May 2009).

<sup>42</sup> <http://www.eulex-kosovo.eu/?id=15> (last accessed 17 April 2009).

<sup>43</sup> *Supra* note 28 (para. 14).

UN and to the Council of Europe, and consequently block Kosovo's succession or accession to many human rights treaties, including the ECHR and the ICCPR."<sup>44</sup> Thus, the voluntary incorporation of certain international obligations arising from the treaties without actually becoming the party to the respective treaty as such does not provide a full protection as will be desirable, especially in the given circumstances of Kosovo.

For example Article 17 (1) of the Constitution<sup>45</sup> provides that: "The Republic of Kosovo concludes international agreements and becomes a member of international organization." It is nevertheless submitted that Kosovo can hardly conclude certain international agreements or become member of certain international organization, if it might be subject to approval by concerned states parties to the treaty or members of international organization. This issue is of course very closely interconnected with the non-recognition of Kosovo by many states.

#### **4. SOME CONCLUDING PRELIMINARY REMARKS**

Even after ten years of international administration by UNMIK, Kosovo remains one of the most segregated places in Europe, heavily affected by organized crime, corruption, high unemployment, thousands of refugees and internally displaced persons and many 'ethnically clean' towns and villages.

EULEX mission, in comparison with other EU missions, has had the advantage of a long planning period before becoming fully operational. EULEX is recently the biggest civilian mission the EU has ever launched both in terms of personnel and budget. As for the budget, it is imperative that there is an appropriate and a high-quality planning of the EULEX budget in order to prevent fraud, corruption and mismanagement. Since 1999, approximately 2.3 billion Euros were already granted to Kosovo as an aid. The investigations conducted by the EU Anti-Fraud Office (OLAF), Italian Financial Police and UN investigators revealed many cases of financial embezzlement (mostly in electricity sector).<sup>46</sup>

EULEX mission has a huge potential. However, it has to make sure to bridge its aims, programmes and ideas with their practical implementation on the ground. If it is to lead by example and enhance its legitimacy for the people of Kosovo, it has to subject itself to much greater scrutiny than UNMIK.<sup>47</sup>

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<sup>44</sup> M., Markovic, T., Papić, 'As Bad As It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law', *International and Comparative Law Quarterly* (2009), 58, p. 32. See Art. 48(1) of the ICCPR, which provides that it is 'open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant' and Art. 59(1) of the ECHR, which stipulates that it 'shall be open to the signature of the members of the Council of Europe.

<sup>45</sup> See also Article 19 and Article 22 of the Kosovo Constitution.

<sup>46</sup> Report of the European Anti-Fraud Office, Summary version, available at [http://ec.europa.eu/anti\\_fraud/reports/olaf/2007/en.pdf](http://ec.europa.eu/anti_fraud/reports/olaf/2007/en.pdf) (last accessed 28 May 2009). See also I. Casuneanu, 'Funds Embezzlement Within the European Communities Budgets', *Juridical Journal*, available at <http://www.juridicaljournal.univagora.ro/download/pdf/47.pdf> (last accessed 18 my 2009).

<sup>47</sup> *Supra* note 15.

Admittedly, the transformation of a current state of Kosovo's police, justice and customs to a desirable state of "sustainability, accountability, multi-ethnicity, freedom from political adherence, and adherence to internationally recognised standards and European best practices"<sup>48</sup> will certainly not happen overnight.

It is not possible to force the population to live all of the sudden together in a harmony if it suffered from centuries-old animosities, oppression and civil war. Unfortunately, Kosovo is not (yet) the multi-ethnic society that was intended.<sup>49</sup> Its unstable political, social and legal environment presents a unique challenge to the EULEX mission for which there is no quick solution at hand.

At the same time, the transformation to a desirable state of affairs will have limited results if it is to be 'imposed' only from outside. Change must come from within Kosovo. EULEX and Kosovo authorities should reinforce each other's work. If Kosovo's authorities and institutions do not genuinely cooperate and work together on the change, EULEX mission will either fail or will have to stay in Kosovo 'forever'. Certainly, neither European taxpayers, nor people of Kosovo would appreciate such a scenario.<sup>50</sup>

**Reviewer:**  
**David Sehnálek**

**Contact – email:**  
*katerina.novotna@law.muni.cz*

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<sup>48</sup> *Supra* note 41.

<sup>49</sup> R. Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo, Operational and legal Issues in Practice*, Cambridge University Press (2007).

<sup>50</sup> Special Report on EULEX, available at <http://www.eulex-kosovo.eu/news/docs/CEU-8-005%20ESDP-7-webResEULEX.pdf> (last accessed 5 May 2009).