

EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date

By Martina Spornbauer*

A. Introduction

While the European Union (EU) has been finding itself increasingly involved in providing security in its “near abroad,” the proposal of a “Stabilisation and Association Process for Countries of South-Eastern Europe”¹ has marked the commencement of a nearly all-encompassing commitment to progress in the countries of the Western Balkans. In this context, Kosovo²—for which the European perspective of the Western Balkans has been declared open³—provides a text book example covering all aspects of external assistance as well as security and defense policies. Among the latter, the European Union Rule of Law Mission in the territory of Kosovo (EULEX Kosovo) is indeed characterized by a number of extraordinary factors and circumstances. It is not only EULEX Kosovo’s unparalleled European and local staff size or its partly executive mandate that set this EU mission apart from other civilian missions of the Common Security and Defense Policy (CSDP)⁴ which

* Martina Spornbauer is a Ph.D. Candidate at the European University Institute (Law Department) and a Research Fellow at the Max Planck Institute for Comparative Public Law and International Law. This article is an amended and updated version of a working paper published with CLEER (5/2010). Email: mspornba@mpil.de.

¹ While NATO was flying air raids towards targets in the former Federal Republic of Yugoslavia, including in Belgrade and Pristina, the European Commission on 26 May 1999 published its communication in this respect. See *Communication from the Commission to the Council and the European Parliament on the Stabilisation and Association Process for Countries of South-Eastern Europe: Bosnia and Herzegovina, Croatia, Federal Republic of Yugoslavia, Former Yugoslav Republic of Macedonia, and Albania*, COM (1999) 235 final (26 May 1999).

² The territory is referred to as Kosovo in the Serbian language and as Kosova in Albanian. Without wanting to take a political stance, and only for reasons of simplicity and predominant international usage, the appellation “Kosovo” will be used throughout this contribution. The term “Kosovo” can also be considered as an abbreviation of the term used by European Union institutions, namely “Kosovo under UNSCR 1244.”

³ European Council, Presidency Conclusions, Council Doc. 11638/03, at 41 (June 2003) (endorsing the GAERC Council Conclusions’ “*Thessaloniki Agenda for the Western Balkans: moving towards European integration*” of 16 June 2003). See also *Communication from the European Commission, A European Future for Kosovo*, COM 156 (2005) final.

⁴ With the entry into force of the Treaty of Lisbon, the term European Security and Defense Policy (ESDP) is replaced by Common Security and Defense Policy (CSDP). See Consolidated Version of the Treaty on European Union, Title V, Chapter 2, Section 2, 2008 O.J. (C 115) (9 May 2008).

have thus far been deployed to the Western Balkans. Unsurprisingly, the complexity of the mission has generated difficulty in comprehending its deployment, mandate and implementation. Yet, against the backdrop of the 2003 Security Strategy⁵ which makes the credibility of the EU's foreign policy dependent on its achievements in the Balkans, a clear understanding of EULEX Kosovo appears paramount.

The following paragraphs thus seek to provide an in-depth analysis of the mandate and functioning of EULEX Kosovo. They represent an endeavour to address, in particular, the actual implementation of the mission's police and justice components in terms of its integration into Kosovo's police structures and judicial and prosecutorial system.⁶ After a few remarks on the EU's police missions in the Western Balkans (see Part B), this article will carry on by first laying out the process which has led to the adoption of the Joint Action establishing EULEX Kosovo and to the mission's deployment into an ambiguous legal environment (see Part C), followed by a presentation of the mission's mandate (see Part D). The final part will provide a thorough investigation of the way in which the police and justice components are being implemented and how they operate on the ground (see Part E).

The present contribution benefits from a short recapitulation of the civilian crisis management missions deployed to Bosnia/Herzegovina and Macedonia since, among other reasons, the EU concept of civilian crisis management has grown out of EU member states' experiences in attempting to bring peace to the countries of the former Yugoslavia, and the inability of the military presence to respond to civil violence in Kosovo. The lack of readily available international police personnel (CIVPOL) for deployment to Kosovo after the NATO-led intervention in 1999⁷ in particular has led to—some exceptions outside the Western Balkans put aside⁸—the European Union focusing its CSDP resources on police missions, exemplified precisely by deploying such missions to the Western Balkan countries of Macedonia and Bosnia/Herzegovina. These police missions have an explicit "political" basis in the 2000 Feira European Council Conclusions,⁹ where four priority fields of civilian action in crisis management have been identified. Together with strengthening the rule of law and strengthening civilian administration, the police priority field¹⁰

⁵ See European Council, *A Secure Europe in a Better World* (2003).

⁶ EULEX Kosovo's "customs component" is beyond the scope of this article.

⁷ See also R. Dawn, *Civilian Tasks and Capabilities in EU Operations* in *A HUMAN SECURITY DOCTRINE FOR EUROPE. PROJECT, PRINCIPLES, PRACTICALITIES* 266 (M. Glasius & M. Kaldor eds., Routledge 2006)(providing concrete examples).

⁸ In particular EUJUST THEMIS in Georgia (2004–2005) and the AMM Monitoring Mission in Aceh/Indonesia (2005–2006). The two Security Sector Reform missions in Congo (EUSEC RD Congo) and Guinea Bissau (EU SSR Guinea Bissau) on the other hand integrate elements of both a military and a civilian operation.

⁹ European Council, Presidency Conclusions, June 2000.

¹⁰ The fourth, and most contested area for civilian crisis management, is civil protection.

illustrates the focus of the civilian CSDP missions on Security Sector Reform and peacebuilding. EULEX Kosovo provides no exception.

Yet, it operates under the somewhat misleading EU label of “civilian crisis management mission,” a term which is not found in the Treaties themselves.¹¹ According to its mandate and scope—as will become evident from the following lines—EULEX Kosovo is, in fact, more accurately qualified as a Security Sector Reform¹² and peacebuilding¹³ mission. Interestingly, the amendments brought forth by the Lisbon Treaty now better reflect the type of mission that the EU has deployed thus far, and codify the consistent practice in this

¹¹ The term is misleading in view of the phase of the conflict during which most EU missions are deployed. For a similar argumentation with additional semantic clarifications in this respect, see S. Blockmans and R. A. Wessel, *The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?* 14 JOURNAL OF CONFLICT AND SECURITY LAW 265, at 269 (2009). “Civilian crisis management” is a term particular to the EU and without parallel in the lexicons of the UN, the OSCE or non-European regional organisations. It potentially denotes any non-military policy or instrument directed at the management of crises. See Dawn, *supra* note 7, at 264. The author argues that civilian crisis management lies at the core of a human-security-based approach to global security, and that it is an area in which the EU can make a distinct contribution to global security, reflecting the principles and values it seeks to promote. See M. Glasius & M. Kaldor, *A Human Security Vision for Europe and Beyond* in A HUMAN SECURITY DOCTRINE FOR EUROPE. PROJECT, PRINCIPLES, PRACTICALITIES (M. Glasius & M. Kaldor eds., Routledge 2006)(providing more information on the notion of human security)

¹² The notions of “Security Sector Reform” and “Security System Reform” have increasingly become buzzwords among international donors involved in post-conflict reconstruction but have only fairly recently been adopted into the EU’s external relations discourse alongside the acknowledgment that the “transformation of security institutions so that they play an effective, legitimate and democratically accountable role in providing external and internal security is an essential prerequisite for long-term stability and prosperity of a country”. Clingendael Institute, *Towards a Better Practice Framework in SSR: Broadening the Debate*, International Alert Occasional Paper (2002). See A. Bailes, *Introduction: The EU and Security Sector Reform*, in THE EUROPEAN UNION AND SECURITY SECTOR REFORM (P. Fluri & D. Spence eds., Harper 2008)(providing an overview over the evolution of the concept). The security institutions referred to are those “which have authority to use, or to order the use of force, or threat of force, to protect the state and its citizen, as well as those civil structures that are responsible for their management or oversight.” D. Bleas, *NATO and the EU within the Western Balkans: Partners or Rivals in Security Sector Reform?*, Paper presented at UACES conference (2007)(on file with the author). The concept of transformation and reform of this system is correspondingly large. Yet, it is used by the OECD-DAC on which both the Council (Secretariat) and the European Commission in their respective concept papers on SSR draw upon. See Development Assistance Committee (DAC), *Security System Reform and Governance, Policy and Practice* in GUIDELINES AND REFERENCE SERIES (OECD 2004); see also European Commission, *A Concept for European Community Support for Security System Reform*, COM (2006) 253 final (24 May 2006); Council of the European Union, *EU Concept for ESDP Support to Security Sector Reform (SSR)*, (13 Oct. 2005).

¹³ In practice, post-conflict peacebuilding emerged out of the second generation of UN peace-keeping operations. The notion “post-conflict peacebuilding” was then coined by the United Nations Secretary-General (UNSG) in a 1992 Report, entitled “An Agenda for Peace.” The UNSG had been called upon by the United Nations Security Council to present recommendations on ways of strengthening “the capacity of the United Nations for preventive diplomacy, for peacemaking and for peace-keeping.” The Secretary-General, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping*, U.N. Doc. A/47/277 – S/24111, (17 June 1992).

respect by extending the CSDP spectrum of activities to also include operations with an objective of “post-conflict stabilization.”¹⁴

In essence, the following paragraphs will demonstrate that, while EULEX Kosovo is really remarkable in many of its aspects and particularly in the implementation of its executive mandate, it represents only to a certain limited extent a shift in the conceptualization of the European Union’s civilian CFSP missions. Arguably, this conceptual shift is primarily linked to the specific international context and the legacy of the United Nations Interim Administration Mission in Kosovo (UNMIK). Yet, EULEX Kosovo is not *per se* likely to consolidate the EU as a powerful stability actor, not even in a neighboring territory “which is to be fully anchored in European structures,” although such an assessment necessarily will need to await a post-deployment analysis.¹⁵

B. The EU Police Missions in the Western Balkans

Following the adoption of the Feira Council Conclusions, and especially the Nice European Council Conclusions where two generic concepts of police missions, namely “strengthening of local police forces” and “substituting for local police forces,” have been defined, a number of concept documents have been elaborated on potential operation scenarios, command and control in police operations, training and equipment requirements, and inter-operability of gendarme-type police forces. The planning for the EU police missions in Bosnia and Herzegovina (BiH) and Macedonia which will be presented in this part drew, to some extent, on these documents,¹⁶ in particular—given the non-executive nature of these early missions—on the “EU Comprehensive Concept for Strengthening of Local Police Missions.”¹⁷ Therein, the “strengthening of local police forces” is presented as a key function in conflict prevention, crisis management, and post-conflict rehabilitation. Such

¹⁴ Article 43 of the Treaty on European Union refers to “joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation.” See Consolidated Version of the Treaty on European Union, 2008 O.J. (C 115) (9 May 2008). It is added that “[a]ll these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.” *Id.*

¹⁵ In addition, the potential of the European Union as a stability actor reaches well beyond its CSDP missions. The pre-accession strategies in the context of enlargement are intended to be an important stabilizing factor, as reflected in the policy framework “Stabilisation and Association Process” within which the “anchoring in European structures” of the Western Balkans is spelled out. Ideally, as it is the case in Kosovo, the CSDP mission’s working towards “internationally recognized standards and European best practices” functions hand in hand with financial and technical assistance provided on the basis of external assistance instruments, such as the Instrument for Pre-accession which is the relevant instrument in the present context.

¹⁶ See Dawn, *supra* note 7. Nonetheless, the generic EU Crisis Management Concept, a document elaborated by the EU Military Staff, proved the main guide for these early missions.

¹⁷ See European Council, *EU Comprehensive Concept for Strengthening of Local Police Missions*, Council Doc. 9535/02 (31 May 2002).

EU missions were to be deployed “essentially [in order to] educate, train, monitor and advise, with the aim of bringing the capabilities and conduct of local police up to international (and where appropriate) European standards, in particular in the field of human rights, and making them more effective.”¹⁸ The Comprehensive Concept furthermore emphasizes that the EU “shall have the ability to cover the full range of police work and direct it at all levels,” a task for which the “European Code of Police Ethics” is suggested to be used as a reference framework.¹⁹

The European Union Police Mission (EUPM) in BiH not only has been the mission to pioneer the police and indeed CSDP missions in general, but is also still on the ground with considerable strength.²⁰ While the mission mandate in the operational part is left deliberately broad by referring merely to a purpose of “ensur[ing] the follow-on to the UN International Police Task Force (IPTF),”²¹ EUPM has been working towards the raising of policing standards in four priority areas: namely, institution and capacity building at management level, combating organized crime and corruption, developing financial viability and sustainability, and promoting accountability.²² EUPM has, unlike its predecessor the IPTF,²³ a non-executive mandate and is therefore limited to “monitoring,

¹⁸ *Id.*

¹⁹ Recommendation of the Committee of Ministers of the Council of Europe to the member states on the European Code of Police Ethics, REC (2001) 10 (adopted 19 September 2001) *available at* www.coe.int. This EU Comprehensive Concept also contains a brief presentation of the concept of “substituting for local police forces” for which the main reference document is not de-classified. Thus, “notably where local structures are failing, the main task of the EU police forces, which should be deployed as early as possible, is to contribute to restoring public security as in keeping order, protect people and property.” This is said to mean “tackling violence, reducing tension and defusing disputes of all kinds, by facilitating the reactivation of judicial and penal facilities.” The document also proposes general guidelines and recommendations for the planning of the three main types of strengthening missions, namely strengthening by first organization and restructuring, second training and selection, and third monitoring and mentoring. It is furthermore emphasized that the success of “this type of mission lies in the disposition of the local authorities to be fully involved from the beginning in the achievement of the objectives.” According to the EULEX Head of Police, the EU Comprehensive Concept for Strengthening of Local Police Missions is in the process of being updated (Interview Pristina, September 2009).

²⁰ See Factsheet EUPM of April 2010 (listing 92 International Police Officers, 30 international civilian staff and 157 local staff) *available at* www.consilium.europa.eu.

²¹ Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission, 2002 O.J. (L 70) (13 March 2002). EUPM I operated between 1 January 2003 and 12 December 2005. The UN SC Resolution 1396 of 5 March 2002 had specifically welcomed the Union’s decision in that respect.

²² See T. Mühlmann, *The Police Mission EUPM in Bosnia, 2003 - 2005*, in *EUROPEAN SECURITY AND DEFENCE POLICY—AN IMPLEMENTATION PERSPECTIVE* (M. Ostrauskaitė and R. Merlingen eds., Routledge, 2008). The European Community has provided funding for training and equipment.

²³ Interestingly, the IPTF initially also had a non-executive advising and training role and only subsequently received a limited executive mandate. See Security Council, *Report of the United Nations Secretary-General on the United Nations Mission in Bosnia and Herzegovina*, U.N. Doc. S/2002/1314 (2 December 2002) (providing a full report on the work of the IPTF)

mentoring and inspecting” managerial and operational capacities of local police, in order for it to reform into a professional, and politically and ethnically neutral institution. EUPM’s mandate remained non-executive, even after the launch of a second mission (EUPM II) in January 2006.²⁴ As organized crime had been identified as one of the principal obstacles to the establishment of the rule of law,²⁵ EUPM II is especially mandated to support BiH police in planning and conducting major and organized crime investigations, and in ensuring that the latter provided a secure environment for returnees, particularly from minority groups.²⁶

The concept of the Rule of Law is indirectly referred to in the Annex where the mission’s mandate is laid down in more detailed terms. The mission “should [in fact] as part of a broader rule of law approach, aim, in line with the general objectives of Annex 11 of the Dayton Agreement, at establishing sustainable policing arrangements under BiH ownership in accordance with best European and international practice, and thereby raising current BiH police standards.”²⁷ The reference here to “broader rule of law” seems to have been introduced mainly in order to address the criticized lack of an integrated approach, i.e., an approach that would also aim at supporting rule of law components other than the police.²⁸ Therefore, in the amending Council Joint Action launching the second EUPM, the reference to the rule of law has been upgraded insofar as the operational part now states:

Under the guidance and coordination of the EUSR and as part of the broader rule of law approach in BiH and in the region, [the mission] will aim, through mentoring, monitoring and inspecting, to establish in BiH a sustainable, professional and multiethnic police service operating in accordance with best European and international standards.²⁹

²⁴ See Council Joint Action 2005/824/CFSP of 24 November 2005 on the European Union Police Mission in Bosnia and Herzegovina, 2005 O.J. (L 307) (25 Nov. 2005). This mission was extended until December 2009 by Council Joint Action 2007/749/CFSP of 19 November 2007 on the European Union Police Mission in Bosnia and Herzegovina, 2007 O.J. (L 303) (21 Nov. 2007).

²⁵ This corresponded to a threat assessment by the international community, not shared by the local population. See M. Merlingen & R. Ostrauskaité, *ESDP Police Missions: Meaning, Context and Operational Challenges*, 10 EUROPEAN FOREIGN AFFAIRS REVIEW 229 (2005).

²⁶ See C. Mace, *ESDP Goes Live: The EU Police Mission in Bosnia and Herzegovina*, 16 EUROPEAN SECURITY REVIEW 4 (2003).

²⁷ See Annex to Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission to Bosnia and Herzegovina, 2002 O.J. (L 70) (13 March 2002) (providing details of the EUPM mandate).

²⁸ See A. Juncos, *Bosnia and Herzegovina: A testing Ground for the ESDP?* 4 CFSP FORUM 6 (2006).

²⁹ Council Joint Action 2005/824/CFSP of 24 November 2005 on the European Union Police Mission in Bosnia and Herzegovina, art. 2, 2005 O.J. (L 307) (25 Nov. 2005).

As a consequence, the mission from then on has also included rule of law experts, prosecutors and judges.

When the mission was extended in December 2009,³⁰ its support to the local authorities in the fight against organized crime and corruption was refined insofar as the mandate included in particular the “enhancement of the interaction” between police and prosecution and cooperation on a regional and international level. It is thus noteworthy as a step towards a more inclusive “rule of law mission concept.” This is also reflected in the “targeted” local authorities now comprising all “relevant law enforcement agencies” and no longer just the police.

In Macedonia, EUPOL Proxima,³¹ which was operational between December 2003 and December 2005, had an equally non-executive mandate of supporting police reform, developing a civilian border police, and consolidating law and order, in particular in the fight against organised crime by “monitoring, mentoring and advising” the local police forces. Similarly to the EUPM, the mandate included a reference to the broader rule of law by emphasizing the mission being “in line with the objectives of the Ohrid Agreement, in strong partnership with the relevant authorities, and within a broader rule of law perspective, in full coordination and complementarity with Community institution-building as well as OSCE and bilateral programmes.” An EU police advisory team (EUPAT)³² followed on from Proxima between January and June 2006. EUPAT was to “further support the development of an efficient and professional police service based on European standards of policing [...] on priority issues in the field of Border Police, Public Peace and Order and Accountability, the fight against corruption and Organised Crime.” The mission was intended to “bridge the end of EUPOL Proxima and a planned project funded by CARDS aiming at providing technical assistance in the field.”³³

³⁰ Council Decision 2009/906/CFSP of 8 December 2009 on the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH), 2009 O.J. (L 322) (9 Dec. 2009).

³¹ See Council Joint Action 2003/681/CFSP of 29 September 2003 on the European Union Police Mission in the Former Yugoslav Republic of Macedonia, 2003 O.J. (L 249) (1 Oct. 2003)(extended by Council Joint Action 2004/789/CFSP of 22 November 2004 on the extension of the European Union Police Mission in the Former Yugoslav Republic of Macedonia (EUPOL Proxima), 2004 O.J. (L 348) (24 Nov. 2004)). The latter refocused the training on the middle and senior levels of management.

³² See Council Joint Action 2005/826/CFSP of 24 November 2005 on the establishment of an EU Police Advisory Team (EUPAT) in the Former Yugoslav Republic of Macedonia (fYROM), 2005 O.J. (L 307) (25 Nov. 2005).

³³ Council Joint Action 2005/826/CFSP of 24 November 2005 on the establishment of an EU Police Advisory Team (EUPAT) in the Former Yugoslav Republic of Macedonia (fYROM), preamble, point 8, 2005 O.J. (L 307) (25 Nov. 2005).

The absence of an executive mandate for EU police forces in the Western Balkans has therefore been a constant feature before the launch of EULEX Kosovo. However—in the case of Bosnia and Herzegovina at least—this has been compensated to a certain extent by the parallel deployment of an EU military operation. Indeed, in BiH where the non-executive mandate of the EUPM in comparison to its predecessor the IPTF was especially felt, the EU's military mission, launched in December 2004 under the codename *Althea*,³⁴ included a police element with executive powers. Furthermore, the references to the “broader rule of law” in the mandates of both the EUPM and EUPOL Proxima calls for an analysis of police missions under a wider perspective of institution- and capacity-building for rule of law enforcement authorities in the context of the Stabilisation and Association Process, even if the police missions themselves have, by their very mandate, had an impact on the structure and organization of the law enforcement authorities.

C. EULEX Kosovo: Deployment into a Complex Legal Environment

Following the adoption of Resolution 1244 (1999) by the United Nations Security Council (UNSC) on the basis of Chapter VII of the United Nations Charter, the “international civil presence” was mandated to “perform the basic civilian administrative functions [in Kosovo—including in the police and justice sector—] where and as long as required.”³⁵ Accordingly, the international “transitional” administration, i.e., UNMIK headed by a Special Representative of the Secretary-General (SRSG), was envisaged as an “interim” solution.³⁶ Therefore, following the promulgation of the “Constitutional Framework”³⁷ in 2001, and in particular since 2004, governmental tasks in many policy areas have gradually been transferred to the Kosovo Provisional Institutions of Self-Government (PISG). Also as regards the justice and the police sectors, UNMIK has systematically transferred certain responsibilities to the local institutions. Yet, it has not only retained but also exercised overall authority for “maintaining civil law and order”³⁸ until the events of February 2008.³⁹

³⁴ See Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, 2004 O.J. (L 252) (28 July 2004).

³⁵ S.C. Res. 1244, U.N. Doc. S/RES/1244 (10 June 1999); see also UNMIK Regulation 1999/1 (providing in its Section 1.1. that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General”), available at www.unmikonline.org.

³⁶ S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (10 June 1999).

³⁷ Constitutional Framework for Provision of Self-Government, UNMIK/REG/2001/9 (15 May 2001)(amended by UNMIK Regulations UNMIK/REG/2002/9 of 3 May 2002 and UNMIK/REG/2007/29 of 4 October 2002).

³⁸ S.C. Res. 1244, para. 11(i), U.N. Doc. S/RES/1244 (10 June 1999).

³⁹ Formally, ultimate authority for all areas remained with the Special Representative of the Secretary General (SRSG) according to Chapter 12 of the Constitutional Framework. See also Constitutional Framework, preamble,

In fact, the local legal community was not considered to be sufficiently prepared to take over responsibility for many aspects of the law enforcement sector. This belief has clearly been reflected in international reports, as well as in proposals in the context of the status talks on the future of Kosovo. For example, in his October 2005 fact-finding report on the situation of Kosovo, Kai Eide, the Special Envoy of the UNSG, concluded that

[I]n the light of the limitations of the police and judicial system, there will be a need for a continued presence of international police with executive powers in sensitive areas. A continued presence of international judges and prosecutors will also be required to handle cases related to war crimes, organized crime and corruption as well as difficult inter-ethnic cases. The currently ongoing reduction in the number of international judges and prosecutors is premature and should urgently be reconsidered. [...] There is little reason to believe that local judges and prosecutors will be able to fulfill in the near future the functions now being carried out by international personnel.⁴⁰

Against this backdrop, it is hardly surprising that the Ahtisaari blueprint,⁴¹ in the form of a “Comprehensive Proposal” for a “supervised independence,” specifically suggests that “an ESDP mission under the direction of the EUSR shall [be entrusted with] powers in the field of the rule of law, including in particular, in the judiciary, police, border control, customs and correctional services.”⁴²

The Ahtisaari Plan designates the Council of the European Union to determine the modalities of an “ESDP mission” which shall consist of “[t]he authority to ensure that cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes, and other serious crimes are properly investigated, [...] prosecuted [and] adjudicated including where appropriate by international judges sitting

(“the exercise of the responsibilities of the [PISG in Kosovo] shall not in any way affect or diminish the ultimate authority of the SRSJ for the implementation of UNSCR 1244(1999”).

⁴⁰ K. Eide, *A special review of the situation in Kosovo*, UN Doc. S/2005/635, at 40 (*annexed* to the Letter dated 7 October 2005 from the United Nations Secretary-General to the United Nations Security Council).

⁴¹ The Secretary-General, *Comprehensive Proposal for the Kosovo Status Settlement*, UN Doc. S/2007/168, (*annexed* to Letter dated 26 March 2007 from the United Nations Secretary-General to the President of the Security Council)[hereinafter *Comprehensive Proposal*].

⁴² *Id.* at Annex IX, art. 2, point 2.3.

independently or on panels with Kosovo judges in the court which has jurisdiction over the case.”⁴³ In addition, it suggests that adjudication by international judges should also concern “property related civil cases.”⁴⁴ This constitutes the nucleus of EULEX Kosovo’s executive mandate. Furthermore, it envisages for the EU mission to have the “authority to monitor, mentor and advise on all areas related to the rule of law.”⁴⁵

For the implementation of the executive powers, the Ahtisaari “Comprehensive Proposal” foresees that the “[c]ase selection for adjudication involving international judges shall be based upon objective criteria and procedural safeguards, as determined by the Head of the ESDP Mission,”⁴⁶ and it outlines in detail the composition of the chamber’s new mixed panels. In this respect, the Ahtisaari Plan also expresses a clear desire to avoid the creation, or rather the prolongation, of two parallel systems of law enforcement.⁴⁷ Indeed, it is emphasized that “international judges shall enjoy full independence in the discharge of their judicial duties and shall serve within the Kosovo judicial system.”⁴⁸

Although the Ahtisaari Plan’s eventual fate was unclear at the time,⁴⁹ the European Union, in mid-2006, sent a 40-head strong “EU rule of law mission” Planning Team (EUPT), entrusted with drafting the mandate as well as conceptualizing the eventual structure of the mission.⁵⁰ In doing so, EUPT kept closely to the functions and parameters of the Ahtisaari “Comprehensive Proposal”. This is hardly surprising given the fact that the EUPT had been closely associated with the drafting of the relevant parts in the proposal.

⁴³ *Id.* at Annex IX, art. 2, point 2.3., lit a, b and c.

⁴⁴ *Id.* at Annex IX, art. 2, point 2.3., lit c.

⁴⁵ *Id.* at Annex IX, art. 2, point 2.3., lit g.

⁴⁶ *Id.* at Annex IX, art. 2, point 2.3., lit c.

⁴⁷ G. Gurra, *The Impact of International Presence on Development of Criminal Law in Post-War Kosovo: Challenges of a (Missing) Cooperation between Kosovar and International Judges* (forthcoming 2009)(paper on file with the author).

⁴⁸ *Comprehensive Proposal*, *supra* note 41, at Annex IX, art. 2, point 2.3, lit c.

⁴⁹ After the *prima facie* non-endorsement of the Ahtisaari Plan by the UNSC, so-called Troika negotiations were started as a last resort to reach a negotiated final political settlement. See B. Knoll, *Kosovo’s Endgame and Its Wider Implications in Public International Law*, 18 FINNISH YEARBOOK OF INTERNATIONAL LAW 153 (2007).

⁵⁰ Council Joint Action 2006/304/CFSP of 10 April 2006 on the establishment of an EU Planning Team (EUPT Kosovo) regarding a possible EU crisis management operation in the field of rule of law and possible other areas, 2006 O.J. (L 112) (26 April 2006); and Council Joint Action 2007/778/CFSP of 29 November 2007 amending and extending Joint Action 2006/304/CFSP on the establishment of an EU Planning Team (EUPT Kosovo) regarding a possible EU crisis management operation in the field of rule of law and possible other areas in Kosovo, 2007 O.J. (L 312) (30 Nov. 2007).

During this period and even after the Troika talks had been declared a failure, the European Council still demonstrated remarkable resolve and unity despite some Member States' expressed caution that they would not recognize a unilaterally declared independent Kosovo. In December 2007, it again committed to deploy a rule of law mission and decided for the EU to play a leading role in strengthening stability in the region and in implementing a settlement defining Kosovo's status. Furthermore, it pledged to assist Kosovo on its path towards sustainable stability. The European Council also declared the EU to "be ready to assist [Kosovo's] economic and political development through a clear European perspective, in line with the European perspective of the region."⁵¹ Against the background of this overall commitment, the Council Joint Action establishing EULEX Kosovo⁵² was adopted on 4 February 2008 — not by coincidence shortly before the declaration of independence.⁵³

Needless to say the adoption of the Joint Action was not sufficient for the mission to function and implement its mandate. In close cooperation with the relevant decision-makers in Pristina, the EUPT therefore had prepared a "package of 42 laws"⁵⁴ for the implementation of the Ahtisaari Plan which then was expected to be endorsed by the UNSC. This package also contained the Law of Police and the Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors [hereafter Assembly law on EULEX jurisdiction] on the basis of which the EULEX judiciary was supposed to exercise its jurisdiction in criminal and civil matters.

⁵¹ European Council, Presidency Conclusions, Council Doc. 16616/1/07 REV1, (Dec. 2007).

⁵² Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, 2008 O.J. (L 42) (16 Feb. 2008).

⁵³ Towards the end of 2007, it became apparent that the EU member states would not find a common position on the eventual declaration of independence by Kosovo's Assembly, and that several EU member states were reluctant to support the implementation of the Ahtisaari Plan without express endorsement by the UN Security Council. Indeed, after the declaration of independence on 17 February 2008, the Council had to content itself to "note that Member States will decide, in accordance with national practice and international law, on their relations with Kosovo" and to welcome "the continued presence of the international community based on UN Security Council resolution 1244." See Council of the European Union, Council Conclusions on Kosovo, External Relations Council Meeting, Council Doc. 6496/08 (18 Feb. 2008)(providing a full text of the statement adopted after the declaration of independence); See also NATO North Atlantic Council, Press Release (18 Feb. 2008)("Following Kosovo's declaration of independence yesterday, NATO reaffirms that KFOR shall remain in Kosovo on the basis of UNSCR 1244, as agreed by Foreign Ministers in December 2007, unless the UN Security Council decides otherwise") available at www.nato.int/docu/pr/2008/p08-025e.html (last accessed in June 2010).

Therefore, the adoption of the mission's legal basis had to be accelerated. It was in fact adopted by written procedure, and under "constructive" abstention on the basis of former Article 23 (1) TEU by Cyprus arguing "for an explicit decision of the UN Security Council for the EU mission in Kosovo." See Council Secretariat, Council Doc. CM 448/08 of 4 February 2008, point 2 (available upon request from the Council Document Registry)(document on file with the author).

⁵⁴ Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2009/149 (17 July 2008)(providing the policy areas dealt with by this "package of laws").

On 17 February 2008 Kosovo declared independence. By then it had become clear that the Ahtisaari "Comprehensive Proposal," which was intended to be approved by the UNSC in order to replace the UNSC Resolution 1244 (1999) and to regulate the phasing-out of UNMIK, would not be endorsed by the UNSC. In fact, both the declaration of independence and the Kosovo Constitution, adopted immediately after,⁵⁵ explicitly stipulate Kosovo's commitment to the implementation of the Ahtisaari Plan.⁵⁶ At the same time, due to the latter's non-endorsement, the UNSC Resolution 1244 (1999) remains in force. This has very recently been confirmed by the International Court of Justice (ICJ) in its Advisory Opinion, according to which this resolution and the Constitutional Framework adopted on its basis "constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008".⁵⁷ The ambiguity of the legal situation resulting from the continued validity of these acts is not only a matter of international law, as was the question put to the ICJ,⁵⁸ but also one of Kosovo's constitutional legal order. As such,

⁵⁵ The Ahtisaari "Comprehensive Proposal" had called for the immediate convening of a constitutional commission to draft a constitution for Kosovo, for the approval of this constitution within 120 days and its subsequent entry into force. Accordingly, the Kosovo Constitution is said to have entered into force on the 15 June 2008. At the same time it was foreseen in the Ahtisaari Plan that, after this 120-day transition period, "all legislative and executive authority vested in UNMIK [should] be transferred *en bloc* to the governing authorities of Kosovo, unless otherwise provided for in this Settlement". *Comprehensive Proposal*, *supra* note 41, art. 15, point 15.1.

⁵⁶ According to the declaration of independence, "Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan." Kosovo Declaration of Independence (17 Feb. 2008) *available at* www.assembly-kosova.org. The final provisions of the Constitution of Kosovo provide that "[a]ll authorities in the Republic of Kosovo shall abide by all of the Republic of Kosovo's obligations under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. They shall take all necessary actions for their implementation." Kosovo Constitution, art. 143, *available at* www.kushtetutakosoves.info/repository/docs.

⁵⁷ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (22 July 2010) *available at* www.icj-cij.org. It can be considered implied in the Court's argumentation that both UNSC Resolution 1244 (1999) and the Constitutional Framework are in force as of today. *See id.*, at para. 91. ("The Court notes that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security Council resolution 1244 (1999) expressly provides 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"). No decision amending resolution 1244 (1999) was taken by the Security Council at its meeting held on 18 February 2008, when the declaration of independence was discussed for the first time, or at any subsequent meetings. The Presidential Statement of 26 November 2008 merely "welcome[d] the cooperation between the UN and other international actors, *within* the framework of Security Council resolution 1244 (1999)." Presidential Statement, S/PRST/2008/44 (26 Nov. 2008). In addition, pursuant to paragraph 21 of Security Council resolution 1244 (1999), the Security Council decided "to remain actively seized of the matter" and maintained the item [...] on its agenda.").

⁵⁸ Independent of whether or not the authors of the declaration of independence acted, or intended to act, in the "capacity of an institution created by and empowered to act within that legal order", i.e., the PISG, it is doubtful, already in pure logical terms, that there was in fact no intention for this declaration to "take effect within the legal order created for the interim phase, nor [that it was] capable for doing so". Accordance with International

it had and continues to have important implications and indeed repercussions for EULEX Kosovo.

Firstly, the international disagreement, to say the least, over the international status of Kosovo has affected the reconfiguration of the international presences in the territory, with implications also for EULEX Kosovo's deployment. While the EU mission was intended to substitute for the rule of law functions of UNMIK which would effectively be removed from its civil administration tasks by the new Kosovo Constitution, such formal transfer could not take place. While the Kosovo government preferred the termination of UNMIK's presence in favour of EULEX, Russia, Serbia and the Serbian minority initially only accepted UNMIK's authority.⁵⁹ Under these circumstances, the completion of the mission's deployment and, more importantly, the actual commencement of its operations were delayed considerably.⁶⁰ In fact, EULEX Kosovo's mission staff had only reached 300, when the leadership was finally handed over from EUPT to EULEX by mid-June 2008, and it required the "technical handover of UNMIK surplus equipment and vehicles" through the conclusion of a "Technical arrangement for handover of UNMIK assets for the technical Rule of Law mission" in August 2008⁶¹ in order to allow for the deployment of the additional international staff members.⁶² EULEX's "initial operational capability" was finally declared in December 2008 – a step which meant the actual start of its operations, such as, for instance, the work on the court files and cases in the "justice component." This crucial break-through of "initial operational capability" was made possible only following agreement on the so-called "Six-point plan" between the United Nations and

Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, para. 105, 2010 I.C.J. 141 (22 July 2010).

⁵⁹ See Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, Annex I, S/2008/692 (24 November 2008).

⁶⁰ Other factors for the mission's slow deployment played a role too, such as for instance the EU procurement rules. As EULEX is financed under a CFSP/CSDP budget line, the regular (and therefore oftentimes cumbersome) EU procurement rules apply.

⁶¹ Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 23, S/2008/692 (24 November 2008).

⁶² The mission was initially foreseen to be much smaller. However, throughout the preparatory phase, numbers had been constantly revised upwards to finally reach a level similar to UNMIK, namely roughly 2400. See W. Koeth, *State Building Without a State: The EU's Dilemma in Defining Its Relations with Kosovo* 15 EUROPEAN FOREIGN AFFAIRS REVIEW 237 (2010). In fact, as of January 2009, there were 2364 staff members, out of which 1642 were international staff and 722 were local staff, allocated over the "police component," the "justice component" (therein, 70 for the prison system, 40 judges and 20 prosecutors), and the relatively small "customs component" (27). See Security Council, *Report of the SG/HR-CFSP to the UNSG on the activities of the European Union Rule of Law Mission in Kosovo*, in *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, Annex I, 4, S/2009/149 (17 March 2009).

Serbia in November 2008.⁶³ From the resulting “cut-off” date in December 2008, another roughly five months were needed for EULEX Kosovo to assume, in April 2009, the “full operational capability” in Kosovo for the justice, police and custom sectors.⁶⁴

Secondly, EULEX Kosovo operates in a highly complex and contentious international and constitutional legal environment. Following the “Six-point plan” compromise mentioned above, the President of the UN Security Council issued a statement within which he accepted that “EULEX [would] fully respect Security Council resolution 1244 (1999) and operate[d] under the overall authority and within the status-neutral framework of the United Nations.”⁶⁵ This has turned the initial *rationale* of the EU rule of law mission, i.e., leading Kosovo through a transitional period of supervised independence to full sovereignty, upside down.⁶⁶ While not expressly establishing a UN umbrella for EULEX, this presidential statement—by way of welcoming “the UN Secretary-General’s report on UNMIK (S/2008/692) dated 24 November 2008” in which the reconfiguration plans for UNMIK have taken very concrete shape—arguably seeks to do so in order to place EULEX within the legal framework of UNSC Resolution 1244 (1999) and thus on (internationally) uncontested legal grounds. While the confines of this article do not allow for an appraisal of EULEX Kosovo’s international legal basis,⁶⁷ it is important to note that the ICJ’s Advisory Opinion does not provide, even implicitly, further guidance on that matter as it seeks to avoid giving a clarification on any legal effects of the declaration.⁶⁸ In any case, the line

⁶³ The “Six-point plan” represents in essence “arrangements” for the governance of the Serb majority areas in Kosovo in six sensitive and contentious areas, namely police, courts, customs, boundaries, Serbian patrimony and transportation and infrastructure. See Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2008/692 (24 Nov. 2008).

⁶⁴ Reaching “full operational capability” had required a number of further practical steps, *inter alia*, to ensure the transfer of investigation files and court cases. See Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 12–13, S/2008/692 (24 Nov. 2008).

⁶⁵ Statement by the President of the Security Council, UN Doc. S/PRST/2008/44 (26 Nov. 2008).

⁶⁶ See Koeth, *supra* note 62, at 236.

⁶⁷ In the absence of an explicit invitation by the UN Security Council, the international legal basis for the EU mission can be constructed in various ways. Possible arguments in this respect involve, *inter alia*, considerations on the delegation powers of the UN Secretary General who was authorized under UNSC Resolution 1244 (1999) to “establish an international civil presence with the assistance of relevant international organizations.” There is also the possibility of an *ex post facto* invitation by the UNSC through the November 2008 Presidential Statement. See E. de Wet, *The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX*, THE AMERICAN JOURNAL OF INTERNATIONAL LAW 103 (2009)(discussing the international legal basis for EULEX Kosovo); E. Milano, *Il trasferimento di funzioni da UNMIK a EULEX in Kosovo*, RIVISTA DI DIRITTO INTERNAZIONALE 91 (2008)(discussing, *inter alia*, the international legal basis for EULEX Kosovo); R. Muharremi, *The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 70 (2010)(discussing, *inter alia*, the international legal basis for EULEX Kosovo).

⁶⁸ The legal question submitted for the Court’s consideration was drafted in the “narrow and specific” terms of whether the unilateral declaration of independence [hereafter DOI] by the Provisional Institutions of Self-

endorsed by the Council of the European Union after the Presidential Statement was for EULEX Kosovo to refer neither to the Ahtisaari “Comprehensive Proposal” nor to the Kosovo Constitution.⁶⁹

The ambiguous compromise found on the international level does not remove the complexity of the legal order pertaining to the territory of Kosovo as it has existed since the declaration of independence and especially since the adoption of the Kosovo Constitution. This complexity results from the co-existence, or in fact alleged co-existence, of two competing constitutional orders.⁷⁰ Fact is that EULEX Kosovo, which is supposed to “operate [...] within the status-neutral framework of the United Nations” and in “full respect of Security Council resolution 1244 (1999),”⁷¹ requires further legislative rules for the effective implementation of its mission mandate, especially within the “justice component”. As will be demonstrated below, EULEX judges and prosecutors exercise jurisdiction as an integral part of the judicial and prosecutorial system of the Republic of Kosovo on the basis of the Kosovo Assembly law on EULEX jurisdiction. The required further rules have therefore been enacted. They have however been adopted by the Assembly of Kosovo without a subsequent promulgation by the SRSG⁷² and thus derive

Government of Kosovo was in accordance with international law. According to the Court “[i]t [therefore] does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State.” On the basis of the ICJ’s opinion, it can only be stated that the invitation of a “European Union-led rule of law mission” contained in para. 5 of the DOI was not issued by the PISG, but by “persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.” This does not, however, *per se* allow for the conclusion that this invitation cannot have legal significance for EULEX’s international legal basis. See *supra* note 63 and accompanying text.

⁶⁹ See Koeth, *supra* note 62, at 236.

⁷⁰ On the one hand, there is the Kosovo Constitution which not only seeks to implement the Ahtisaari “Comprehensive Proposal” but also declares it to take precedence over all other legal provisions including the constitution itself and to prevail in case of legal conflict. See Kosovo Constitution, art. 143, paras. 2–3. On the other hand, Resolution 1244 (1999) and the Constitutional Framework promulgated in 2001 formally remain in force.

⁷¹ See Statement by the President of the Security Council, U.N. Doc. S/PRST/2008/44, (26 Nov. 2008).

⁷² According to Chapter 9 of the Constitutional Framework, the Kosovo Assembly has the responsibility to “adopt laws and resolutions in the areas of responsibility of the Provisional Institutions of Self-Government as set out in Chapter 5; [...] The President shall sign each law adopted by the Assembly and forward it to the SRSG for promulgation; Laws shall become effective on the day of their promulgation by the SRSG, unless otherwise specified.” Constitutional Framework for Provision of Self-Government, points 9.1.26 (a), 9.1.44 and 9.1.45, UNMIK/REG/2001/9 (15 May 2001). Indeed, all legislation whether adopted by the Kosovo Assembly according to its powers under Chapter 5 and 9 of the Constitutional Framework or enacted on the basis of the reserved powers of the SRSG based on Chapter 8 of the Constitutional Framework have been promulgated by the SRSG and published in the UNMIK Official Gazette. See www.unmikonline.org. This practice continued until 14 June 2008, the day before the Kosovo Constitution is said to have entered into force. Ambiguously, the EULEX Kosovo

their validity solely from the Kosovo Constitution. This seems to be difficult to reconcile with a full compliance of the UNSC Resolution 1244 (1999).

D. The Mandate of EULEX Kosovo

According to the mission statement in Article 2 of the Joint Action,

[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 recognized standards and European best practices.⁷³

The Joint Action itself, then, “translates” the mission mandate into a number of operational “tasks” horizontally for the three components of EULEX, i.e., the “justice”, the “police” and the “customs component.”⁷⁴ EULEX is, *inter alia*, to “ensure that cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial and other serious crimes, as well as property related issues, are properly investigated, prosecuted,

website merely lists the Assembly law on EULEX jurisdiction as “law approved by the Assembly of Kosovo and published in the official gazette [i.e. not UNMIK’s gazette] after 1 June 2008”.

⁷³ EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, art. 2, 2008 O.J. (L 42) (16 Feb. 2008). The initial duration of the mission covered the period until June 2010. See Council Decision 2010/322/CFSP of 8 June 2010 amending and extending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 2010 O.J. (L 145)(11 June 2010) (providing for the extension of the mission until June 2012).

⁷⁴ EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, art. 6, 2008 O.J. (L 42) (16 Feb. 2008). In the “justice component,” outputs of operations are foreseen for five subsectors: namely, judges in the civil field, judges and prosecutors in the criminal field, judicial experts (or judges) in the Kosovo Ministry of Justice, the Kosovo Judicial Council and the Kosovo Correctional Service. The output-structure for the “police component,” on the other hand, reflects the organizational structure of the Kosovo Police Service: namely, Border (113 staff members), Operations (170 staff members), Crime (120 staff members) and Administration (25 staff members). See EULEX Programme Strategy, *available at* www.eulex-kosovo.eu. The high level of officers in KP Crime can be explained by the fact that it is judged “possibly the most critical area of strengthening in terms of the overall aims and objectives of the EULEX mandate.” EULEX Programme Strategy, www.eulex-kosovo.eu. Indeed—and that is revealing—UNMIK retained control for investigating and analysing serious crimes, organized crime and drug and human trafficking until the summer of 2008. The eventual transfer was poorly planned and chaotic. See International Crisis Group, *The Rule of Law in Independent Kosovo*, 204 EUROPE REPORT 8 (2010). However, for the implementation of the mission on the ground, the distinction between the Police Executive Department (PED), the Police Strengthening Department (PSD) and the Special Police Units (SPU) is more important. See below.

adjudicated and enforced according to the applicable law,” to “contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organized crime,” as well as “contribute to the fight against corruption, fraud and financial crime.”⁷⁵ In addition, there is an important general fall-back clause for residual tasks of both an executive and non-executive nature. Indeed, the Joint Action stipulates that EULEX Kosovo may “assume other responsibilities, independently or in support of the competent Kosovo authorities, [in order] to ensure the maintenance and promotion of the rule of law, public order and security.”⁷⁶ This provision is interpreted as follows: possible additional executive tasks are encapsulated in the notion “independently” whereas non-executive tasks of monitoring, mentoring and advising—see further below—are covered by “in support of the competent Kosovo authorities.”⁷⁷ Presumably, this clause was added in order to give flexibility to the mission from the start and thus to avoid subsequent amendments.

It is interesting to note that EULEX Kosovo’s executive mandate is somewhat concealed within the enumeration of the operational tasks of the mission. The Joint Action merely refers to the retention of “certain executive responsibilities” while “monitor[ing], mentor[ing] and advis[ing] the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service).”⁷⁸ Arguably, a mere textual analysis of the mandate would then seem to lead to the conclusion that its executive aspect is primarily geared towards assistance to the Kosovo judiciary and police in their progress towards sustainable institutions.⁷⁹

Furthermore, EULEX Kosovo has the power to “reverse or annul operational decisions taken by the competent Kosovo authorities in consultation with the relevant international civilian authorities in Kosovo,” in the event that this proves necessary for the “maintenance and the promotion of the rule of law, public order and security.”⁸⁰ Given

⁷⁵ EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, art. 3, lit. d, e and f, 2008 O.J. (L 42)(16 Feb. 2008).

⁷⁶ EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, art. 3, lit. h, 2008 O.J. (L 42)(16 Feb. 2008).

⁷⁷ Interview with a former EUPT staff member, Pristina (Sept. 2009).

⁷⁸ EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, art. 3, lit. a, 2008 O.J. (L 42) (16 Feb. 2008).

⁷⁹ This is also expressed in an EULEX spokesperson’s formulation of “strengthening and not substituting” by which the implementation of the mission is supposed to be guided. Interview, Brussels (Oct. 2008). Yet, and this will be demonstrated further below, the imperatives on the ground and the importance of the executive functions of the mission caused the reality to diverge from the official initial discourse and the emphasis in the Council Joint Action. This holds true for both the police and the justice component.

⁸⁰ EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, art. 3, lit. b, 2008 O.J. (L 42) (16 Feb. 2008). While the English language version is ambiguous

the ambiguity of Kosovo's international status at the time of adoption of the Joint Action—at the beginning of February 2008—these “relevant international civilian authorities” were not made exactly clear. On the one hand, the possibility of reversing operational decisions seems to refer to the powers that the SRSG had previously exercised under UNSC Resolution 1244 (1999) in a regular, albeit decreasing manner. While the Resolution remains nominally in force, the exercise of these powers by the SRSG in practice is considerably limited, not only because of the limitation of UNMIK's scope to certain residual competences.⁸¹ On the other hand, the Ahtisaari-Plan envisaged the International Civilian Representative (ICR), acting also as EUSR, as the highest and final civilian authority with whom consultation requirements were stipulated for the envisaged CSDP mission.

In the fulfillment of its tasks, EULEX has to “ensure that all its activities respect international standards concerning human rights and gender mainstreaming.”⁸² The broad formulation of “international standards” is a drafting technique which seeks to avoid reference to documents of other international bodies while the “international standards” referred to are in practice mainly the European Convention of Human Rights and the UNSC Resolution 1325 (2000) on Women, Peace and Security.⁸³

The EULEX Programme Strategy⁸⁴ affirms a three-fold mantra of “Monitoring, Mentoring, and Advising” and seeks to define these individual elements.⁸⁵ “Advising” is probably the most straight-forward notion, and is referred to as “providing professional counseling to the Kosovo authorities to assist in the development of those elements which lead to the

as to whether this consultation with the relevant international civilian authorities is compulsory or discretionary for EULEX, the German language version makes it clear that the annulment of such decisions requires prior consultation. To add to the confusion, the French language version on the other hand seems to suggest that this consultation is discretionary, i.e. only has to take place if considered necessary. “Operational decisions” have to be understood as opposed to “political decisions.” Interview with a former EUPT staff member, Pristina (Sept. 2009) (explaining the notion of “operational decisions”).

⁸¹ Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 21, S/2008/692 (24 Nov. 2008). See *id.*, at 21: “While my Special Representative is still formally vested with executive authority under resolution 1244(1999), he is unable to enforce this authority. In reality, such authority can be exercised only if and when it is accepted as the basis for decisions by my Special Representative. Therefore, very few executive decisions have been issued by my Special Representative since 15 June [2008].”

⁸² Incoherently, this is listed under the “tasks” of the Joint Action. See EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, Article 3, lit. I, 2008 O.J. (L 42) (16 Feb. 2008).

⁸³ Interview, Pristina (Sept. 2009). The Human Rights and Gender Office (HRGO) is entrusted with the implementation of this provision. As a purely internal office, it has an advisory role. It is to be distinguished from the Human Rights Review Panel (see *infra*).

⁸⁴ See EULEX Programme Strategy, available at www.eulex-kosovo.eu.

⁸⁵ See *id.*

establishment of required structures, including on the appropriate legislation, as well as on the improvement of the authorities' performance."⁸⁶ As for "Monitoring," it is said to imply a system of measuring performance, and therefore an agreed method of accurate recording and reporting, in order to identify changes and—presumably—improvements. This is linked to a programming method which foresees six-month cycles of activity.⁸⁷ Thus, the analysis of data, outputs, and performance indicators after each period of six months of operations is intended to result in modifying, adapting and reorienting performance indicators.⁸⁸ Finally, "Mentoring" is meant to describe the way in which EULEX advises and monitors the Kosovo law enforcement authorities, namely based on mutual trust and professional respect.⁸⁹ Clearly, through these principles, the overall thrust and *rationale* of the mission relies on an already existing level of professionalism in the local law enforcement sector.⁹⁰

In order to achieve the objectives according to the chosen approach, the mission leadership continuously works towards ensuring solid strategic planning,⁹¹ and close coordination with the local authorities on all different levels of hierarchy and at all different stages during the planning process. The body at the highest level of political authority in this respect is the Joint Rule of Law Coordination Board (JRCB), established precisely for this purpose.⁹² The JRCB is a politically hybrid body, composed of representatives of national authorities and multi- and bi-lateral donor institutions, and is co-chaired by the EULEX Head of Mission and the Kosovo Deputy Prime Minister. While its precise composition varies according to the agenda, the meetings are often composed of the EULEX Heads of Justice, Police and Programme Office, as well as of the Head of the European Commission Liaison Office (ECLO) and of representatives of the Kosovo Ministries of Justice and Interior. Normally closed to the media and the public, it convenes at regular intervals.⁹³ Below the level of the JRCB, thematic working groups ensure prior

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ The previous involvement of the international community in this sector has been considered as extremely reactive to the immediate necessities on the ground, lacking strategic over- and foresight.

⁹² "In order to ensure overall strategic coordination of efforts between the authorities in Kosovo (including the ministers of Justice, Internal Affairs, Economy and Finance) and EULEX, the Joint Rule of Law Coordination Board, to be co-chaired by the local authorities and the EULEX Head of Mission, has been established." Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, Annex I, S/2009/149, (17 March 2009); Security Council, *Report of the SG/HR for CFSP to the UNSG on the activities of the European Union Rule of Law Mission in Kosovo*, 5.

⁹³ Interview, Pristina (Sept. 2009).

coordination on a more technical level. The EULEX components, therefore, have to agree on a common EULEX position before discussing the agreed strategy in the JRCB. The official endorsement of the “EULEX overall approach” by the “Prime minister and the Ministers in the JRCB” followed this process.⁹⁴ Following an EULEX-internal decision on the “EULEX overall approach” in May 2008, regular meetings took place within the thematic working groups ahead of the JRCB’s endorsement of this strategy in November 2008.

Only then could the six-month evaluation phase of the rule of law sector start, during which the strengths and weaknesses of each individual aspect were assessed on the basis of electronic questionnaires. This assessment required the analysis of 2500 individual records and was completed according to schedule in June 2009. The “justice component,” for instance, identified eight major issues or topics where specific action would be required, including the independence of judges, implementation of arrest warrants, the presence of defense lawyers during trial, a transparent case allocation, and a fair adjudication and cooperation between the judges and the Kosovo Judicial Council. From this initial evaluation period resulted 70 clear, sometimes cross-cutting, recommendations which stood at the beginning of an eighteen-month strategic planning period starting in July 2009. These recommendations are implemented through so-called “Action Fiches,” which again required endorsement of the JRCB prior to their launch in November 2009.

E. The Implementation of the Justice and Police Components

UNMIK’s International Judges and Prosecutors Program has been criticized extensively on several grounds. Suffice to mention at this point the accusations of political interference in the judiciary through the extremely broad discretion in case selection for the hybrid panels and the lack of local involvement in the oversight of internationally appointed judges. Undoubtedly, EULEX is inheriting a fairly difficult legacy of international involvement in the law enforcement sector. And whereas the *rationale* underpinning EULEX differs from UNMIK’s “police and judiciary” agenda insofar as it has a renewed impetus on capacity-building,⁹⁵ accompanied by a different international and local environment, it is the implementation on the ground that will demonstrate whether EULEX can live up to its mandate. One can certainly perceive an element of “lessons-learned” in EULEX’s “programmatic approach,” in line with the European Union’s “standards beyond status approach”⁹⁶ and the *acquis* alignment strategies.

⁹⁴ See EULEX July 2009 Report, available at www.eulex-kosovo.eu.

⁹⁵ This had also been suggested for UNMIK’s programme, but was then quasi-inexistent. See D. Marshall and S. Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARVARD HUMAN RIGHTS JOURNAL 95 (2003).

⁹⁶ This expression is an adaptation of UNMIK’s “standards before status” policy endorsed by the UN Security Council in 2003. The “standards” or reform goals built on earlier UNMIK benchmarking efforts and meant to serve as a reform incentive by linking the beginning of negotiations on Kosovo’s final status with Kosovo’s reform achievements. This process however had a number of flaws in its incentive structure. See M. Karnitschnigg, *The*

The Mission Programme Office in Pristina has attempted to further clarify the mission mandate by reformulating its elements into six “overall aims,”⁹⁷ and by accompanying them with “workable definitions.” While being a necessary first step, the nature of the mandate renders this task extremely difficult, if not impossible, at such a level of abstraction. In other words, the six overall aims can hardly be more than “guiding principles.”

With respect to the first and second aim of “helping the Kosovo Rule of Law institutions to achieve progress towards sustainability and accountability,” sustainability is identified as requiring the respective institution “to have a legal basis, procedures and policies, resources and human skills to operate in the longer term,” and henceforth to have an adequate budget, a comprehensive legal framework, detailed policies and procedures, sufficient and appropriate buildings and equipment, professional and ethical leaders, properly trained and motivated staff and the support of the population.⁹⁸ Accountability, on the other hand, is defined as “the duty to present accounts of all activities and to provide comprehensive and self-consistent documentation of whatever they do.”⁹⁹ In essence, it is said to refer to the requirement that officials answer to stakeholders on the exercise in accordance with the law of their powers. While this wording is ambiguous as to who exactly is the beneficiary of this obligation, it can be concluded from the report that the relevant stakeholders are the citizens of Kosovo.¹⁰⁰

It is noteworthy that these first two aims are formulated in terms of degree (“progress toward”), whereas the remaining aims are expressed as ambitious end goals: namely, freedom from political interference, multi-ethnicity, as well as adherence to internationally recognized standards and European best practices. Freedom from political interference fairly straight-forwardly refers to the principle of impartial law enforcement. The rule of law institutions are expected to be “politically neutral, in other words they need to uphold the law and serve all citizens in a non-discriminatory way, regardless of ethnicity, religion, sex and also political affiliation.”¹⁰¹ While economically motivated corruption or bribery therefore is not included in this definition, political influence in practice is tied in with

United Nations and the European Union in Kosovo—the Challenges of Joint Nation-Building, in THE UNITED NATIONS AND THE EUROPEAN UNION (J. Wouters et al. eds., T.M.C. Asser Press 2006).

⁹⁷ See EULEX Programme Strategy, available at www.eulex-kosovo.eu.

⁹⁸ See *id.*

⁹⁹ *Id.*

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

organized crime.¹⁰² The principle of multi-ethnicity calls for the institutions “to fully reflect the society they serve.”¹⁰³ The notion of “internationally recognized standards” seeks to capture those norms and laws introduced by international organisations—including the UN and the EU—that recognize and promote fundamental rights and freedoms.”¹⁰⁴ They presumably comprise the standards and rights contained in the European Convention on Human Rights and the UNSC Resolution 1325, as it cannot be assumed that the Joint Action refers to different standards in different provisions, even if the qualification of “concerning human rights and gender mainstreaming” which is found in the Joint Action¹⁰⁵ is missing here. European best practices, on the other hand, are defined as “progressively and to various extents developed in the European Union” and are said to be subject to continuous change and improvement. In case they have been “compiled in technical background or reference documents, these documents frequently contain guidelines and criteria to improve service delivery by the Rule of Law institutions.”¹⁰⁶

As explained above, EULEX, across all three components, effectively initiated its operations on the ground with an evaluation phase starting in December 2008. Thus, across the three components, activities were first directed at “taking stock” of current performance and capabilities of the local law enforcement institutions. In the subsequent programming cycles starting in November 2009, the actual implementation of the mission mandate, however, substantially differs from one component to another. This is particularly obvious in the way “co-location” - as a principle directly interlinked with the “strengthening instead of substituting” or “supporting local ownership” discourse - is put into practice. According to this principle, the EULEX staff members individually or in teams are linked to and collaborate directly with their respective “peers,” i.e., their Kosovo counterparts who are at the same hierarchical level and have a similar function within the organizational structure. Henceforth, the justice and police component, together with their respective national legal basis, are analyzed separately in the following paragraphs.

1. The Justice Component

In the “justice component,” the two aspects of the mission—namely, strengthening on the one hand and substituting on the other hand—function in an overlapping manner. In fact,

¹⁰² Interview, Pristina (Sept. 2009).

¹⁰³ The concept of multi-ethnicity is particularly complex and thus kept at an even more abstract level. Clearly an imperative due to the local post-conflict environment, it may not only be interpreted in various ways, but in addition is extremely difficult to relate to European best practices or a common denominator.

¹⁰⁴ EULEX Programme Strategy, *available at* www.eulex-kosovo.eu.

¹⁰⁵ EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, art. 3 and Part D, 2008 O.J. (L 42) (16 Feb. 2008).

¹⁰⁶ EULEX Programme Strategy, *available at* www.eulex-kosovo.eu.

every EULEX prosecutor and every EULEX judge mostly exercises these two functions simultaneously.

To begin with, the executive powers of an EULEX judge stand for neither more nor less than the exercise—albeit within a foreign jurisdictional domain—of the legal profession of judges. For the exercise of this function, it is imperative that the judge—and this is self-explanatory but nonetheless to be underlined—acts independently, impartially, and in accordance with the applicable domestic law. This requirement is addressed by the “Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo,”¹⁰⁷ [hereafter, Assembly law on EULEX jurisdiction] mentioned above. On the basis of this Kosovo Assembly legislation, European judges and prosecutors¹⁰⁸ become an integral part of the Kosovo judicial and prosecutorial system at the level of the supreme court and the district courts with executive authority in both civil and criminal law where they either exercise compulsory or optional jurisdiction.¹⁰⁹

In the criminal field,¹¹⁰ according to Article 3 of the Assembly law on EULEX jurisdiction, EULEX judges have “jurisdiction and competence over any case investigated or prosecuted by the [Special Prosecution Office of the Republic of Kosovo], the SPRK.” These criminal proceedings, for which the SPRK has exclusive competence for investigation and prosecution,¹¹¹ and for which EULEX judges therefore have compulsory or primary (and in

¹⁰⁷ Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, Law No. 03/L-053, available at www.eulex-kosovo.eu. According to its Article 1, this law “regulates the integration and jurisdiction of the Eulex judges and prosecutors in the judicial and prosecutorial system of the Republic of Kosovo.” Its content has been closely coordinated with the international community, including, most importantly, EUPT.

¹⁰⁸ The following lines focus on the judiciary rather than on the executive and non-executive functions of the prosecution for which however the same principles apply. In essence, the EULEX prosecutors have competence to conduct new and pending criminal investigations and to prosecute new and pending criminal cases in the municipal and district offices as well as at the Special Prosecution Office, either in cooperation with national colleagues or alone. The monitoring, mentoring and advising of local prosecutors is independent of the jurisdiction of the EULEX prosecutors and exercised in accordance with the modalities established by the Assembly of EULEX Prosecutors.

¹⁰⁹ Exceptionally, EULEX district court judges can also have jurisdiction for cases dealt with at municipal court level if the President of the Assembly of EULEX judges decides to assign such a case to EULEX in accordance with the modalities on case selection and case allocation. See Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, art. 3.4 and 5, Law No. 03/L-053.

¹¹⁰ Here, processing the case files inherited from UNMIK has been a priority. The two major categories of cases transferred to EULEX judges at the supreme court and district court levels relate to war crimes against the civilian population committed during the 1998–1999 war and crimes committed during the unrest which took place in March 2004. See EULEX Kosovo, *Annual Report on the judicial activities of EULEX judges 2009* (providing summaries of cases in which EULEX judges have been involved) available at www.eulex-kosovo.org (last accessed in June 2010).

¹¹¹ Law on the Special Prosecution Office of the Republic of Kosovo, art. 5, Law No. 03/L-052, available at www.eulex-kosovo.eu.

fact exclusive) jurisdiction, most importantly concern terrorism, genocide and crimes against humanity, war crimes, inter-ethnic cases, organized crime, financial crimes and other serious crimes listed in the amended Criminal Code of the Socialist Federal Republic of Yugoslavia.¹¹² EULEX's optional or secondary (and in fact subsidiary) jurisdiction, on the other hand, is exercised only when the crime was not investigated or prosecuted by the SPRK, such as smuggling, piracy, ethnic hatred crimes, torture or grave cases of theft or robbery. Upon request by the prosecutor, the President of the competent court, or any other party to the proceedings, the President of the Assembly of EULEX judges has the authority to assign EULEX judges to any stage of a criminal proceeding when it is considered necessary to ensure the proper administration of justice and thus avoid a miscarriage of justice.¹¹³ The proper administration of justice is defined in terms of protection of the Kosovo judge or the witnesses and in terms of complexity or nature of the case.¹¹⁴

As a general rule, and for reasons that are intrinsically linked to the underlying *rationale* of the mission, the jurisdiction of EULEX judges is exercised in mixed or hybrid panels of three judges. These panels are in principle composed of two European judges, including the presiding judge, and a local judge.¹¹⁵ The President of the Assembly of EULEX judges has the authority to derogate from the mixed panel composition "for grounded reasons."¹¹⁶ He or she can either assign a panel with a majority of local judges, or even one entirely composed of local judges. Such a decision can also be limited to a specific stage of the proceedings, such as the autopsy.¹¹⁷ On the other hand, the President of the Assembly of

¹¹² Official Gazette of the Socialist Federal Republic of Yugoslavia No. 44/76 (amended).

¹¹³ In March 2009, the office of the President of the Assembly of EULEX judges issued standard operating procedures (SOPs) detailing the prerequisites and the procedure to be followed when taking over a criminal or a civil case. See EULEX Kosovo, *Annual Report on the judicial activities of EULEX judges 2009*, 28, available at www.eulex-kosovo.org (accessed in June 2010).

¹¹⁴ See Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, art. 3.5, Law No. 03/L-053.

¹¹⁵ During the initial deployment phase, when the Northern Mitrovica Court in the majority Serb populated areas remained closed as of March 2008, EULEX had to use the Vushtrri Court to which the EULEX judges were escorted back and forth on the day of scheduled proceedings. Today, the EULEX staff assigned to the Mitrovica Court consists of two criminal judges, two prosecutors, two civil judges and three legal officers. The court is operational, but there are no mixed panels. See OSCE—Department of Human Rights and Communities, *The Mitrovicë/Mitrovica Justice System: status update and continuing human rights concerns* (February 2010) available at www.osce.org (last accessed in June 2010).

¹¹⁶ Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, art. 3 (7), Law No. 03/L-053

¹¹⁷ Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, art. 4, Law No. 03/L-053.

EULEX judges may also decide to assign a specific case to a panel composed of three EULEX judges if the local judges are not willing to exercise jurisdiction.¹¹⁸

In the area of civil law, EULEX judges, according to Art. 5 of the Assembly law on EULEX jurisdiction, are assigned to proceedings in mainly public and private property related issues.¹¹⁹ As a general category, these are cases which fall within the jurisdiction of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters (SCSC).¹²⁰ They may also be assigned to cases which originally had been assigned to another local court but where there is grounded suspicion for that court's lack of independence and impartiality, or where it is unwilling or unable to deal with the case, or more generally if there is a grounded suspicion of a serious violation of the fairness of the proceedings. The involvement of European judges in the civil field sets EULEX apart from UNMIK's International Judges and Prosecutors Program, and is linked to Kosovo's specific post-conflict environment but also to its pre-conflict legacy of Former-Yugoslavia's social-communism. The contribution of the European judges is considered necessary in view of the frequent use of falsified documents to certify fraudulent transactions, the difficult legal problems surrounding missing or displaced persons, the lack of formal records to prove transactions in the past, and the political dimension of such property claims. Property claims filed against KFOR, UNMIK, and local authorities are said to "point out an additional dimension of problems."¹²¹

¹¹⁸ *De facto*, war crimes against Serbs or involving Serbian citizens and interethnic crimes are mostly dealt with by such panels. Interview, Pristina (Sept. 2009).

¹¹⁹ Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo, art. 5, Law No. 03/L-053.

¹²⁰ The Special Chamber of the Supreme Court of Kosovo on KTA Related Matters (SCSC) was founded by UNMIK in 2003 in order to provide for an independent control mechanism for the privatization process in Kosovo carried out by the Kosovo Trust Agency. After having been redesigned and expanded in early 2009, it now includes a total of 43 EULEX judges. As many of the cases that fall within the scope of the SCSC's jurisdiction are conflict-related cases and/or involve organized crime, continued international involvement is deemed necessary. The EULEX judges in the SCSC differ from other EULEX judges insofar as they are not engaged in MMA activities at all. See EULEX Kosovo, *Annual Report on the judicial activities of EULEX judges 2009*, 43 and 44, available at www.eulex-kosovo.org (last accessed June 2010).

¹²¹ As many cases had been frozen according to an only recently repealed UNMIK regulation, the civil domain suffers from an immense backlog of cases. They are property cases filed by Kosovo Serbs who fled in 1999 (see jurisdiction of the Special Chamber of the Kosovo Protection Agency) and compensation claims by Serbs against local municipalities for failure to protect their property during the events of 1999. Further cases which require the involvement of EULEX are compensation claims filed by Kosovo Albanians against the Serbian government for destruction of property by the fleeing Serbs in 1999. Other concerns are, as generally, the lack of independence, ineffectiveness and the slowness of proceedings. There is also a huge ethnic bias at the level of execution of judgments, for instance the registration of the property into the designated registry. See also EULEX Kosovo, *Annual Report on the judicial activities of EULEX judges 2009*, 34, available at www.eulex-kosovo.org (last accessed June 2010).

The integration of the EULEX judges into the Kosovo judicial system is, however, not complete, especially in relation to disciplinary measures and the disqualification of a judge in a given case on grounds of risks of partiality. The Kosovo Judicial Council for instance, established as “an independent body responsible for the judiciary and the courts and designed for ensuring their impartiality, independence, and professionalism,”¹²² is not competent for disciplinary proceedings against European judges. Furthermore, in cases of complaints from any person claiming to be the victim of human rights violations by EULEX Kosovo, a Human Rights Review Panel (HRRP) has been created. Neither a judicial nor a disciplinary body, the Panel is, however, only mandated to look into whether a violation of human rights has occurred and to formulate recommendations for remedial action not linked to compensation.¹²³

Apart from their executive functions within the Kosovo jurisdictional and prosecutorial system, the judges and prosecutors of the EULEX “justice component” act as monitors, mentors, and advisors (MMA). From the perspective of EULEX judges, “monitoring,” “mentoring,” and “advising” represent “three successive stages of a unitary process,” with “monitoring” being considered as the least intrusive activity, followed with the more “structured phase of mentoring,” and concluding “in cases where monitoring has revealed the need for further action with the exercise of formal advising powers.”¹²⁴ While advising has a status which is somewhat apart and will be dealt with below, the monitoring and mentoring roles on the one hand and the executive functions on the other hand are generally juxtaposed for EULEX staff members in the “justice component.” It is for that reason that the principle of co-location is most consistently implemented in the “justice component.” Monitoring and mentoring work on the basis of informal meetings of EULEX judges with local judges of the same court. “Monitoring,” which is understood straightforwardly as an “objective and transparent observation and assessment of the judicial system,” has been predominant during the six-month evaluation period when EULEX judges were asked to inquire into the functioning of the system as a whole, of individual

¹²² See Regulation on the establishment of the Kosovo Judicial Council (KJC), Regulation No. 2005/52, UNMIK/REG/2005/52 of 20 Dec. 2005 (20 Dec. 2005). For resolving first-instance issues of alleged misconduct of judges and lay-judges, the establishment of a Judicial Disciplinary Committee was foreseen (Section 7). As of September 2009, this Committee was however not yet operational. The judicial councils are self-regulatory bodies of the judiciary which—in order to combat a possibly corrupt executive—have been promoted by the Council of Europe and the European Union in the European transition countries.

¹²³ See www.hrrp.eu (the still incomplete website of the panel). Following the appointment of its members, the HRRP held its first planning session in May 2010 during which the rules of procedure were adopted. The panel has been operational since 9 June 2010 but thus far no complaints have been made. See www.zeri.info/artikulli (last accessed on 17 June 2010).

¹²⁴ See Assembly of EULEX Judges, Guidelines on Monitoring, Mentoring and Advising (MMA) of EULEX judges, (final document)(approved on 23 October 2008). Therein, it is also underlined that contrary to the report activities of different other local and international institutions and organizations, the MMA reports of the EULEX judges are intended to be of an entirely internal nature.

courts and districts as well as into the conduct of individual judges. The “monitoring” function was carried out, *inter alia*, with respect to case allocation, workload distribution, witness protection, corruption or discrimination, enforcement of judicial decisions, prison-sentences, and fines. “Mentoring,” on the other hand, functions on an individual basis between the European judge or prosecutor and their respective local counterpart, especially through the judicial deliberations that take place within the mixed panels, and thus through the very exercise of the judicial or prosecutorial function. In other words, “mentoring,” even more than “monitoring,” is part and parcel of the EULEX judges’ executive function. Throughout 2009, the MM(A) work performed by EULEX judges has focused on the handling of execution cases upon appeal, accessibility to the courts, the establishment of a registration, evaluation and service system of appeals in criminal cases and the implementation of the case allocation system and the computerized case management system.¹²⁵

The “advising” function is an exception insofar as it is implemented only through the intermediary of the Assembly of EULEX judges, which has the possibility to issue formal guidelines or recommendations to the judicial, legislative, or governmental authorities of Kosovo as a means of official counseling on all topics arising from the monitoring and mentoring experience. Recommendations have been issued, for instance, on the public announcement of verdicts, on the distribution of the Official Gazette throughout the Kosovo courts, on the establishment of a proper case allocation system, as well as on a computerized case management system.¹²⁶

EULEX’s MMA activities on both a general and an individual level are, in particular, directed at avoiding political interference and at protecting the independence of the judiciary which is persistently threatened. They thereby importantly complement EULEX executive powers. There are, indeed, numerous examples that illustrate the challenges local judges, prosecutors, as well as defense counselors are facing in Kosovo’s highly politicized environment. While the situation is made worse by personal security threats towards members of the judiciary and the prosecution, often enough the reluctance to participate in investigations and trials can be attributed to ethnic or political bias by the local judges and prosecutors themselves.¹²⁷

¹²⁵ See EULEX Kosovo, *Programme Report 2010*, available at www.eulex-kosovo.org (last accessed June 2010).

¹²⁶ Interview, Pristina (Sept. 2009). These recommendations are as a general rule directed to the Kosovo Judicial Council. While two international members (one EULEX judge and one EULEX prosecutor) have been serving on the KJC since mid-2009, it was completed in February 2010 with 3 members of the local judiciary and only then could start to focus on the long-term needs of the organization of the judiciary, leading to a considerable delay in tackling these important issues. It has accepted and largely implemented EULEX’s action on the case allocation system. See EULEX Kosovo, *Programme Report 2010*, available at www.eulex-kosovo.org (last accessed June 2010).

¹²⁷ The war crimes related criminal case against the “Llapi Group” which was tried by a mixed panel at the district court of Pristina and where a member of the Kosovo government was amongst the defendants, and the trial

Last but not least, the EULEX “justice component,” as part of its MMA activity, is involved in advising on legislation where it is faced—as much as in the involvement in the police and justice sector generally—with difficulties arising from UNMIK’s legacy.¹²⁸ While not explicitly mentioned in the list of operational tasks in Article 3 of the Council Joint Action, this function can implicitly be inferred from other tasks mentioned therein and from Article 6, according to which “a justice component, co-located where appropriate with the relevant Ministries, the Kosovo judiciary, the Kosovo Property Agency, [and] the Kosovo Correctional Service” forms an integral part of EULEX’s structure.¹²⁹ Furthermore, the definition of “advising” in the Programme Strategy includes advising “on the appropriate legislation.” According to the UN SRSG March 2009 Report, EULEX has participated in drafting and reviewing “a number of laws in the rule of law area prior to their submission to the Assembly of Kosovo.”¹³⁰ This is done, in practice, through two EULEX staff members co-located at the Ministry of Justice, one with the Minister himself and one with the legislative drafting unit. In addition, “technical” comments and advice by EULEX reach the Kosovo authorities through cooperation with the International Civilian Office whose staff members in their respective advising role cooperate closely with EULEX and ECLC. Thus, as of July 2009, EULEX has 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 security companies.”¹³¹ It has also 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 counter-narcotics, and an action plan against trafficking in human beings.”¹³² The Programme Strategy finally refers to the “transformation of the Ministry of Justice into a modern and effective ministry, with full resources to respond to the complexity and

against Albin Kurti, the leader of the Kosovo civil society movement *Vetevendosje* (Self-Determination), provide telling examples for political interference and obstruction of justice at all levels. See EULEX Kosovo, *Programme Report 2010*, available at www.eulex-kosovo.org, (last accessed June 2010).

¹²⁸ In 2001 for instance, the Provisional Criminal Procedure Code and the Provisional Criminal Code went through an extensive consultative process among local and regional actors, prior to final consolidation by UNMIK’s Office for Legal Affairs. However, and without explanation to the local legal community for the delay, they were eventually promulgated only in 2004. This had caused much criticism.

¹²⁹ The implementation of this advising activity would call for a comparison to the twinning method and requires further elaboration under a capacity-building aspect. Again, this is envisaged to be dealt with in a follow-up paper.

¹³⁰ Security Council, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2009/149 (17 March 2009).

¹³¹ See EULEX, *July 2009 Report*, available at www.eulex-kosovo.eu.

¹³² Security Council, *Report of the SG/HR- CFSP to the UNSG on the activities of the European Union Rule of Law Mission in Kosovo* in *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, Annex I, 11, S/2009/149 (17 March 2009).

importance of the legal and constitutional role of the MoJ.¹³³ At least indirectly then, EULEX seems to be involved in a fairly classic institution-building type of activity.

II. The Police Component

In the “police component,” contrasting with the way in which the “justice component” operates, the executive functions are strictly separated from any MMA activities. The latter are conducted by EULEX police officers that belong to the Police Strengthening Department (PSD), whereas the former are fulfilled by officers of the Police Executive Department (PED). Only the officers of the PSD are co-located with their counterparts at the respective hierarchical level within the Kosovo Police.¹³⁴ The two departments differ considerably in size with the PED having roughly half the size of the PSD.

The EULEX executive police functions find their only local legal basis in Article 18 of the Assembly law on EULEX jurisdiction. Therein, the EULEX executive officers are considered as police officers in the meaning of the law “applicable to the Kosovo police,” i.e., the “Kosovo Law on Police,” as the Assembly law on EULEX jurisdiction, a law adopted by the Kosovo Assembly.¹³⁵ EULEX executive police works in five clearly defined areas. In these areas—namely, financial crime, organized crime, war crimes, terrorism and corruption—it investigates crimes independently from the Kosovo Police, has its own command structure, and may hand over cases directly to the Special Prosecution Office. While EULEX police competence in these areas is not *a priori* exclusive, it can take an investigative file from the Kosovo Police and thereby acquire exclusivity. As regards the implementation of these powers, the roughly 185 investigators of the PED have, for a considerable time after the declaration of “initial operational capability,” lacked and continue to lack the equipment to professionally conduct surveillances and investigations and support the mandate of intelligence-led policing.¹³⁶ In fact, in this respect, it does not differ much from the Kosovo Police (KP).¹³⁷ With the exception of relations with Interpol,¹³⁸ EULEX in general does not work through the intermediary of UNMIK.

¹³³ See EULEX, *Programme Strategy*, available at www.eulex-kosovo.eu.

¹³⁴ See EULEX Kosovo, Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, art. 6 (b), 2008 O.J. (L 42) (16 Feb. 2008) (“a police component, co-located where appropriate with the Kosovo Police Service, including at the border crossing points”).

¹³⁵ Law on Police, Law No. 03/L-052, available at www.eulex-kosovo.eu. The same applies to the EULEX correctional officers.

¹³⁶ It has even been argued that the PED has not reached “full operational capability” as of May 2010. Interview high-ranking PED Official.

¹³⁷ The 2009 EULEX report, for instance, states with respect to Criminal Intelligence capability that “although EULEX experts note that the lack of more sophisticated equipment and technology is not unusual in the context of the Western Balkans, its absence in the KP is a barrier to further development of proactive policing capability. In

Regarding the non-executive aspect of the mission, co-location, as mentioned, is the principal means by which MMA by the PSD is carried out. Based on physical proximity, co-location subjects—theoretically at least—local police officers to nearly continuous surveillance by mission experts. Detailed observations by these experts of everyday conduct of their local counterparts, in turn, have formed the basis for assessment and evaluation.¹³⁹ The main instruments in the “police component” are the Action Fiches, already referred to, which were developed at the end of the six-month evaluation phase. Altogether, there are 36 Action Fiches for 36 Team Leaders. They are reported as having been developed—at least as far as the first round of Action Fiches are concerned—without much involvement of or coordination with Kosovo counterparts.¹⁴⁰ At the same time, they have been drafted with a degree of flexibility which allows for subsequent adjustments following proposals from the KP. A few concerns in terms of the overall efficiency but also credibility of the approach have to be mentioned. First, the individual Action Fiches are only loosely connected and therefore do not necessarily fall into a coherent overall strategy. Furthermore, the Action Fiches are problematic insofar as the objectives identified therein are drafted in quite vague terms and as they are only valid for a relatively short period of 6 months due to the frequent exchange of EULEX team leaders. Prior agreed clear and workable definitions of concepts and objectives would therefore undoubtedly facilitate the involvement of the EULEX PSD. By June 2010, a total of 7 of the MMA actions have been deferred, while of the remaining 29, only two have successfully been completed while the remaining 27 have either not completed planning stage or are at different stages of implementation.¹⁴¹

other words, the mission aim of achieving the level of European best practice will require significant capital investment.” EULEX, *July 2009 Report*, 35, available at www.eulex-kosovo.eu.

¹³⁸ The only UNMIK police remaining in Kosovo are the eight officers at Interpol. This is necessary until the Interpol Assembly recognizes EULEX as an independent entity. Interview, Pristina (Sept. 2009).

¹³⁹ See M. Merlingen and R. Ostrauskaitė, *EUROPEAN UNION PEACEBUILDING AND POLICING: GOVERNANCE AND THE EUROPEAN SECURITY AND DEFENCE POLICY* 56 (Routledge 2006). According to these authors, experience shows that co-location restrains police conduct, thus limiting brutality, abuse and bias. It also habituates officers to potentially more effective routines concerning crime case management. They furthermore argue that co-locators in the field should put less emphasis on mentoring and more on open-ended dialogical interaction. Mentoring is said to constitute a mimetic process through which European policing norms and practices are disseminated and which is inscribed in a non-egalitarian relationship.

¹⁴⁰ This however does not, *per se*, impede a good working relationship and collaboration with the Kosovo Police. In any case, the KP sometimes seems to follow mentors’ advice without further inquiring into the sense of it. For instance, since UNMIK times, the KP has collected data without subsequently using it. Interview, Pristina (Sept. 2009).

¹⁴¹ See EULEX Kosovo, *Programme Report 2010 15*, available at www.eulex-kosovo.org (last accessed June 2010). This appears to be a fairly modest result even against the backdrop of the difficulty of achieving large-scale organizational change within the course of roughly 20 months. In this respect then, the fact that the KP is becoming a “learning organization” as stated by the 2010 Report is indeed the most significant result. The report furthermore recalls the need to rapidly develop intelligence-led policing as a critical prerequisite to the KP’s

Turning to the third EULEX police department, the Special Police Units (SPU) operate according to yet a different approach. “Ostensibly dealing with riots and civil uprising,”¹⁴² they are to a certain extent comparable to the KFOR “multinational specialized units” (MSUs).¹⁴³ An MSU is an “armed Police Unit with executive policing powers, which can be called upon to provide backup or support to local police authorities in mainstream law enforcement tasks such as crowd and riot control.”¹⁴⁴ They have been introduced in reaction to the criticisms leveled at KFOR which, in the years following 1999, was involved in a number of civilian law enforcement tasks. In general, cooperation of the EULEX Special Police Units with KFOR remains significant. In order to facilitate this, four so-called “technical arrangements” between EULEX and KFOR have entered into force. They concern response to civil disturbance situations, military support to police operations (including protection of patrimonial sites) and exchange of information (including in the field of intelligence).¹⁴⁵ In December 2008, EULEX Special Police helped the Kosovo Police—with KFOR support—to restore order when unrest broke out in Northern Mitrovica.¹⁴⁶ The work of the SPU illustrates well the prevalence of the “strengthening over substituting” approach through the so-called “cascade of responsibilities for security incidents.” These police operational terms refer to the hierarchy of the designated “responder” in the case of a security incident. Thus, the first responder is the Kosovo Police which—in case it finds itself incapable of reacting adequately—calls upon the EULEX-SPU as the second responder which in turn has the possibility to call upon KFOR as the last responder.

success which indeed is subject to intensive MMA activity but without much success, as the KP still fails to allocate sufficient resources.

¹⁴² Interview, Brussels (Oct. 2008). Its only reference in the Council Joint Action can be found in Article 6 dealing with the structure of EULEX according to which co-location is implicitly excluded when these units “may be hosted in camps designed to cater for their operational needs.”

¹⁴³ The KFOR MSU is composed almost entirely of a 300-strong *Carabinieri* regiment from Italy. They are also, *inter alia*, engaged in the seizure of illegal drugs from transshipment locations and of weapons. Their mandate furthermore includes law enforcement and counterterrorism, mainly in order to fight against organized crime, but ultimately their work involves exclusively riot control.

¹⁴⁴ See Merlingen/Ostrauskaitė, *supra* note 139.

¹⁴⁵ Interview with an involved NATO official, Madrid (Oct. 2008).

¹⁴⁶ Security Council, *Report of the SG/HR- CFSP to the UNSG on the activities of the European Union Rule of Law Mission in Kosovo*, in *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, Annex I, 11, S/2009/149 (17 March 2009).

F. Conclusion

Notwithstanding a roughly 10-year involvement of international judges, prosecutors and police under the auspices of UNMIK, the challenges of strengthening the law enforcement authorities in Kosovo and of guiding them to fulfill European standards with respect to independence and impartiality, as well as sustainability and accountability, are still significant today. In this respect, EULEX Kosovo has shouldered an extensive commitment that reaches beyond the formal confines of its mandate. Civilian missions are, after all, about contributing to the effective provision of public security in countries which emerge from crisis or violence and which are going through the crucial and state-forming yet incremental transformation of the institutions representing the nucleus of sovereignty. These institutions are not only expected to enhance their effectiveness, but also to be free from political will and to abide by the principles of the rule of law.

Conceptually, a broader rule of law perspective has already been acknowledged in the above-mentioned EU Comprehensive Concept for Strengthening Local Police Missions, which emphasizes that such strengthening missions, aimed at consolidating a local police structure fully in line with best international practice, “need to be complemented by a functioning judicial and penal system and vice-versa.”¹⁴⁷ The concept thereby parallels the way in which the UN system has been trying to develop itself.¹⁴⁸ In operational terms, a broader rule of law approach has been evolving more incrementally. It plays out, *inter alia*, in the fact that EUPM in Bosnia and Herzegovina which, according to its mandate, is “part of a broader rule law approach in the region,”¹⁴⁹ nowadays also includes rule of law experts such as prosecutors and judges. Ensuring a “broader rule of law perspective” of EUPL Proxima on the other hand was attempted by the complementarity with the follow-up Council-led advisory team and the non-CFSP technical institution-building assistance.

Yet, the inclusion of an entire “justice component” into EULEX Kosovo arguably cannot—at least not to its largest extent—be considered as a result of this development towards a more integrated approach but instead has to be attributed to the specific needs of the situation on the ground. Paradoxically, it also seems that, despite being the most comprehensive civilian crisis management mission to date, the coordination and cooperation of the justice and police experts for the daily implementation of the mission is far from optimal in EULEX. With the individual components working fairly separately from each other, EULEX Kosovo does not endorse a “package approach” despite the all-

¹⁴⁷ Council Doc. 9535/02 (31 May 2002).

¹⁴⁸ Already in 2000 the Brahimi Report called for a doctrinal shift in the use of civilian police and other rule-of-law elements. See G.A., *Letters dated 21 August from the Secretary-General to the President of the General Assembly and the President of the Security Council*, UN Doc. A/55/305 – S/2000/809 (21 Aug. 2000).

¹⁴⁹ Council Joint Action 2009/906/CFSP of 8 December 2009 on the European Union Police Mission in Bosnia and Herzegovina, Article 2, 2009 O.J. (L 322) (9 Dec. 2009).

encompassing mission mandate and all command structures being channeled through one Head of Mission.

However, the fact that the European Union has finally gotten around bestowing the “police component” of the mission not only with an MMA function but with an executive mandate, certainly represents a noteworthy development. Indeed, the prevailing importance of the executive functions on the ground certainly contrasts with the emphasized rhetoric of “strengthening and not substituting.” Yet, as the strengthening of local police forces has also been defined as an essential element in any substitution mission,¹⁵⁰ the conceptual shift in police missions provided by the “police component” of EULEX Kosovo cannot be regarded as fundamental.

In addition, the inclusion of the “justice component” represents a novelty in all its aspects. Therein, the juxtaposition of executive and non-executive roles could be seen as raising concerns with the mission mandate and *rationale*. Indeed, at first sight, the very nature of the judicial activity which relies on impartially and independently hearing and deciding a case, seems difficult to reconcile with the presence of mentors or monitors. However, having laid out the way in which the EULEX “justice component” seeks to fulfill its mentoring function, namely essentially through mixed panels, such concerns can be discarded. The other side of this coin, though, is the fact that in the “justice component,” the MMA role of the judges and prosecutors is to a certain extent dependent on the exercise of their respective executive function, which is problematic in the light of the aim to reach long-term full sustainability in the justice sector as soon as possible. In the criminal field, in particular, the strategy refers to “immediately ensur[ing] the creation of a legacy to the Kosovo judiciary by enhancing local ownership towards a judicial system which is committed to the Rule of Law, sustainably independent, autonomous and impartial.”¹⁵¹

The importance of the executive mandate generally, while representing an important learning experience and “maturity test” for the European Union as a crisis manager, is also problematic under the broader perspective of EULEX Kosovo’s exit strategy. The mission’s mandate foresees the Kosovo police and judiciary to achieve freedom from political interference, to operate as multi-ethnic institutions, and to adhere to internationally recognized standards and best European practices while having reached a sufficient level of sustainability and accountability. Theoretically, the end of the mission’s operations supposes the attainment of, or sufficient progress towards, these objectives, and thus presumably requires the implementation of the non-executive part of the mission mandate only for some time.

¹⁵⁰ See *Comprehensive Concept on Police Substitution Missions*, Council Doc. 8655/02. The document is only available in its few declassified parts.

¹⁵¹ See EULEX, *Programme Strategy*, available at www.eulex-kosovo.eu.

Undoubtedly, reaching these objectives will also depend on the overall progress Kosovo makes in the rule of law sector within the Stabilisation and Association Process. Yet, the challenges arising from the complex international and the very ambiguous constitutional legal situation result in significant legal uncertainties in the day-to-day implementation of both the executive and the non-executive aspects of EULEX Kosovo's mandate and therefore severely hamper the mission's work and credibility on the ground. In the interest of legal certainty and, thus, the rule of law in Kosovo, these issues have to be resolved as quickly as possible. After all, addressing them officially arguably can be considered as implied in EULEX Kosovo's mandate and *rationale*.