

The European Union Rule of Law Mission in Kosovo: Remarks on its Legality and its Relations With UNMIK

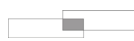
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SUMMARY: 1. Executive Summary. – 2. A brief history of the international presence in Kosovo: UNSC Resolution 1244/1999 and the establishment of UNMIK and KFOR. – 3. Towards a new phase in the political process in Kosovo: from the “Guiding Principles” to Martti Ahtisaari’s “Comprehensive proposal for Kosovo Status Settlement”. – 4. The Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo (EULEX Kosovo). – 5. The Council Joint Action 2008/123/CFSP appointing a European Union Special Representative in Kosovo. – 6. Defining the nature of the EULEX Kosovo Mission: a few preliminary considerations. – 7. Critical reactions to the decision to deploy EULEX Kosovo. – 8. The Kosovo Declaration of Independence, the new Constitution and their impact on the issue of the legality of the international presence in Kosovo. – 9. The legal basis of EULEX Kosovo Mission according to Council Joint Action 2008/124/CFSP: a critical overview. – 10. The legal basis of EULEX Kosovo: a different line of reasoning. – 11. UNMIK and EULEX Kosovo: competition, cooperation and labour sharing, replacement or (geographical) specialization?


1. Executive Summary.

Kosovo has been a very difficult and slippery issue for the international community since the end of the North Atlantic Treaty Organization (NATO) led military operation against the then Yugoslav armed forces in June 1999¹. The configuration of the architecture of the international presence in Kosovo, stemming from UN Security Council Resolution 1244/1999, has

proved to be quite effective in the field. Both the United Nations Mission in Kosovo (UNMIK) and NATO’s Kosovo Force (KFOR) have been able to carry out their respective mandates in a not excessively controversial manner. However, it has left untouched the decisive issue of the future status of Kosovo. In recent years the Balkan region has become a key priority for the European Union (EU) as the future of the Western Balkan countries lies firmly in their European outlook². The EU’s efforts in Kosovo build on the significant support it has been providing over the past years. At nearly 2 billion euros to date, the EU is already the largest donor to Kosovo. In the coming years (2007-2010), it will allo-


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¹ For an interesting reconstruction of the events that led to the war, see N. MALCOLM, *Kosovo: a Short History*, London, 1998 and F. DE VRIEZE, *Kosovo: Civil Society Awaits a Chance for Reconciliation*, in P. VAN TONGEREN - H. VAN DEN VEEN - J. VERHIEVEN, *Searching for Peace in Europe and Eurasia*, Boulder (Colorado) 2002, p. 289 a.


² In this regard see also the General Affairs and External Relations Council Conclusion on Kosovo of February 18, 2008.

cate more resources to Kosovo per capita than to any other place in the world, nearly 330 million euros³. In recent months, after a long and fruitless round of negotiations about the future of Kosovo, the EU decided to increase its role in this area through decisions to deploy the EULEX Kosovo mission and to appoint an EU Special Representative. Both these decisions have raised serious criticism from various major international players with specific interests in that area. In recent times, concerns about the legality of the EULEX Mission and its relations with UNMIK also have been raised within the EU. According to press reports:

Spanish Foreign Minister Angel Moratinos told a meeting of European Union Foreign Ministers in Slovenia over the weekend that Madrid will not send its contingent of 15-20 staff to the 2,000-strong EULEX mission until there has been a formal transfer of powers from the United Nations⁴.

The main goal of this paper is to examine the legal basis of the European Union's decision to launch the EULEX Kosovo Mission from an international law perspective. If, from the point of view of the EU Treaty, the legal foundations of the Joint Action seem solidly based on articles 14 and 25 of the Treaty on European Union, from an international law perspective, the question of the legality of EULEX's deployment seems much more complex and disputable. The issues at stake are quite complex as they involve, among others: the clarification of the Mission's nature; Kosovo's legal status at the moment when the EU Joint action was adopted, and after Kosovo's Declaration of inde-

pendence, the question of Kosovo's recognition by various EU member states, and its relationships with United Nations Security Council (UNSC) Resolution 1244/1999 and with the UN Mission in Kosovo and NATO-led KFOR.

2. A brief history of the international presence in Kosovo: UNSC Resolution 1244/1999 and the establishment of UNMIK and KFOR.

After a year of fighting within the province, the failure of international efforts to resolve the conflict by diplomatic means and at the conclusion of the brief but dramatic tensions between a number of other states and the Federal Republic of Yugoslavia, accused of gross violations of basic human rights in Kosovo, NATO decided to launch a military operation which lasted from 24 March to 2 June 1999. The war, the legality of which will not be addressed in this paper⁵, was started, according to NATO sources, as a "humanitarian intervention".

The military operations ended on June 2, 1999, when the Federal Republic of Yugoslavia formally accepted the nine principles set forth in a document presented in Belgrade on June 2⁶. For the purposes of this paper, the relevant principles are 3, 4 and 5. According to principle 3, there will be a deployment in Kosovo:

under United Nations auspices, of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.

³ See the *European Union Background, The EU in Kosovo*, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/080216THEEUINKOSOVO.pdf>. Also see M. ALFONS, *Of Standards and Status: the Role of the European Union in Kosovo from UNSC 1244 to the Future Status Talks*, in *Suedosteuropa*, n. 3/2006, p. 339 ff. and G. SCORDINO, *L'Unione europea ed il Kosovo*, in *Il Contesto*, No. 5, 2006, p. 141 ss.

⁴ The Minister was quoted by *Balkan Insight*, available at <http://www.balkaninsight.com/en/main/news/9028/>.

⁵ The question of the legality of the NATO intervention in Kosovo is widely discussed in I. DAALDER, *NATO, the UN and the Use of Force*, in *International Peacekeeping*, January-April 1999, p. 27 ff.; N. RONZITTI (ed.), *Nato, conflitto in Kosovo e Costituzione Italiana*, Milano, 2000 and E. SCISO (ed.), *L'intervento in Kosovo: aspetti internazionalistici e interni*, Milano, 2001.

⁶ The 9 principles are contained in annex 2 to the UNSC Resolution 1244/1999.

Principle 4 deals with the international security presence in Kosovo, while principle 5 states that an *interim* administration for Kosovo will be established:

as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations.

On June 10, 1999, the UNSC adopted Resolution 1244/1999 on the situation relating to Kosovo: for the purposes of this paper, the most important part of the Resolution is paragraph 5, in which the Security Council:

Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required.

In order to implement this key decision, the Security Council

Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.

As far as the length of these operations is concerned, the resolution's phrasing is quite unusual. In almost all⁷ previous cases of peace-keeping operations, a final date has always been set, with an indication that an extension was possible should the Security Council so decide. In this case, the Security Council decided that: the international civil and security presences



⁷ In fact, there has been one other case (the UN peace-keeping operation deployed in 1960 in Congo) in which the absence of any temporal limit for the peace-keeping operation created numerous problems. On the basis of that experience, the UNSC decided in the future always to indicate a final date for the mission that could then be extended.

are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise⁸.

In other words, a careful examination of the wording of this paragraph makes it clear that, after the initial period of twelve months, the two presences are authorized to remain indefinitely until the Security Council decides otherwise. Therefore, only the UN Security Council can decide the closure or the replacement of these operations.

UNMIK and KFOR were deployed in June 1999 on the basis of the UNSC decision. The results achieved so far by the missions are described in the UNMIK 2008 Factsheet⁹, and in reports the UN Secretary General has delivered on a regular basis to the UN Security Council.

The UN has described UNMIK as a typical peace-keeping operation. In fact, the basic principles and prerequisites for these types of operations have been fully respected¹⁰.

It is important to mention that the authorities of the Federal Republic of Yugoslavia agreed to the creation of both the security and the civil presences in Kosovo at the moment they accepted the principles presented to them on June 2, 1999¹¹. It should be underlined that acceptance of those principles by the national authorities of Yugoslavia was considered of pivotal importance by the Security Council at the moment when Resolution 1244 was adopted¹².



⁸ Para 19 of the UNSC Resolution 1244/1999.

⁹ The Fact Sheet is available at http://www.unmikonline.org/docs/2008/Fact_Sheet_February_2008.pdf. See also W. PETRITSCH - R. PICHLER, *Kosova, Der lange Weg zum Frieden*, Klagenfurt, 2004 and D. ROSSBACHER, *Friedenssicherung am Beispiel der Interimsverwaltung der Vereinten Nationen im Kosovo (UNMIK) – Die Zivilverwaltung als neue Form der Friedenssicherung*, Hamburg, 2004.

¹⁰ See more in G. CELLAMARE, *Le operazioni di peace-keeping multifunzionali*, Turin, 1999; P. GARGIULO, *Le Peace Keeping Operations delle Nazioni Unite*, Napoli, 2000.

¹¹ The document is available on http://www.unmikonline.org/doc/2008/Fact_sheet_February_2008.pdf.

¹² In para 2 of the body of the Resolution, the

3. Towards a new phase in the political process in Kosovo: from the "Guiding Principles" to Martti Ahtisaari's "Comprehensive proposal for Kosovo Status Settlement".

In May 2005, eight years after UNMIK's deployment, having expressed his firm belief that the time had come to move into the next phase of the political process in Kosovo, the Secretary-General appointed Ambassador Kai Eide his Special Envoy to carry out a comprehensive review of Kosovo. This decision was endorsed by the Security Council on October 24, 2005¹³. On October 31, 2005, with the full support of the UN Security Council¹⁴, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy (SE) for the Kosovo future status process.

In November 2005, to support the Special Envoy in his efforts, the members of the Contact Group (France, Germany, Italy, Russian Federation, United Kingdom and United States) issued ten "Guiding Principles" for a settlement of the status of Kosovo. Interestingly enough, principle 1 restates that the settlement of the Kosovo issue should be fully compatible with international law. Principle 10 is also extremely significant for the purposes of this paper, as it states that:

For some time Kosovo will continue to need an international civilian and military presence to exercise appropriate supervision of compliance of the provisions of the Status settlement, to ensure security and, in particular, protection for minorities as well as to monitor and support the authorities in the continued implementation of standards.

At the end of intensive negotiations held over 14 months, during which 17 rounds of direct talks and 26 expert missions to

Security Council formally welcomes the acceptance of the set of principles by the Federal Republic of Yugoslavia.

¹³ S/PRST/2005/51 of 24 October 2005.

¹⁴ S/2005/709.

Belgrade and Pristina were organized, Special Envoy Ahtisaari concluded that potential for negotiations on Kosovo's status was exhausted¹⁵. On March 26, 2007, he presented his final proposals to the UN Security Council¹⁶ entitled the "Report of the Special Envoy of the Secretary-General on Kosovo's future status". This report included a chapter devoted to the international presence in Kosovo. After having reiterated that Kosovo would be responsible for managing its own affairs and for fulfilling its obligations under the settlement, it was foreseen that an International Civilian Representative would be appointed to supervise the implementation of the settlement and support the relevant efforts of Kosovo's authorities and that KFOR would continue to be present throughout Kosovo and work in support of Kosovo's authorities. The content of this proposal deserves to be presented in a more detailed manner as the entire proposal was integrated into the new Constitution of Kosovo adopted by the Constitutional Commission on April 2, 2008¹⁷.

The main aspects of Ahtisaari's proposal that concern the **International Civilian Representative** can be summarized as follows:

i) An International Civilian Representative (ICR), who will also be the EU Special Representative (EUSR), will be appointed by an International Steering Group (ISG) comprised of key international stakeholders.

ii) The ICR will be the final authority in Kosovo regarding interpretation of the civilian aspects of the settlement.

iii) The ICR will be supported by an International Civilian Office (ICO). The ICO will be smaller and its role will be substantially different than UNMIK.

¹⁵ UNOSEK/PR/19, Saturday, March 10, 2007.

¹⁶ S/2007/168.

¹⁷ The text of the Constitution is available on <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf>.

iv) Unlike UNMIK, the ICR will not have an executive mandate to administer Kosovo. The ICR will have specific powers to allow him/her to take the actions necessary to oversee and ensure successful implementation of the settlement. The ICR may, for example, correct or annul decisions by Kosovo public authorities that he/she determines to be inconsistent with the letter or spirit of the settlement.

v) The mandate of the ICR will continue until the International Steering Group for Kosovo determines that Kosovo has implemented the terms of the settlement. The ISG will conduct its first review of the status of settlement implementation after two years.

The Ahtisaari proposal also included the deployment of a **European Security and Defence Policy (ESDP) Mission** with the following main characteristics:

i) An ESDP Mission, under the direction of the EUSR, will assist Kosovo in the development of effective, fair and representative rule of law institutions.

ii) The ESDP Mission will have the authority to ensure that specific sensitive crimes are properly investigated, prosecuted, and adjudicated, including, where appropriate, by independent international prosecutors and judges.

iii) The ESDP Mission will also have the authority to assume limited executive functions to ensure the maintenance and promotion of the rule of law, public order and security.

Finally, in his proposal Ahtisaari devoted a few paragraphs to the **International Military Presence (IMP)**, which had the following main characteristics:

i) KFOR will remain in Kosovo as the International Military Presence (IMP) to provide a safe and secure environment, in conjunction with the ICR and in support of Kosovo institutions until such time as those institutions are capable of assuming responsibility for Kosovo's security.

ii) At the beginning of settlement im-

plementation, KFOR will provide security to a number of pre-designated sites of the Serbian Orthodox Church.

iii) For an initial period, the IMP will also supervise, monitor and have executive authority over a new Kosovo Security Force.

The Ahtisaari proposal has not, to date, ever been formally endorsed by the UN Security Council.

4. The Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo (EULEX Kosovo).

After a long and complex internal negotiation, on February 4, 2008 the Council of the European Union finally adopted "Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo"¹⁸. As a matter of fact the Council did prepare, already two years earlier, the ground for the deployment of EULEX adopting the 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 in Kosovo"¹⁹. Interestingly enough, the decision to deploy the EUPT was based on a specific request by the UN codified in a letter sent by the UN SRSG Jessen-Petersen to the EU SG/HR on 4 April 2006. In his letter the UN SRSG

welcomed the EU's engagement in the discussions on the future international engagement in Kosovo and invited the EU to deploy an EU



¹⁸ Official Journal of the European Union, L 42, 16 February 2008. On this Joint Action see the comments by G. VENNARI, *The hour of Europe could come ... Perspectives of the EU presence on Kosovo*, in ISPI, *Policy Brief*, No. 77, March 2008.

¹⁹ Official Journal of the European Union, L 112, 26 April 2006.

Planning Team for Kosovo (EUPT Kosovo) to Pristina²⁰.

The main issue dealt with in the 2008 Joint Action is the establishment of the EULEX Kosovo Mission, with a mandate to:

... assist the Kosovo institutions, judicial authorities and law enforcement agencies and 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.

More specifically, according to article 3 of the Joint Action, EULEX Kosovo is expected to carry out the following tasks:

a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;

b) ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities;

c) help to ensure that all Kosovo rule of law services, including a customs service, are free from political interference;

d) ensure that cases of war crimes, terrorism, organised crime, corruption, interethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;

e) contribute to strengthening cooperation

and coordination throughout the whole judicial process, particularly in the area of organised crime;

f) contribute to the fight against corruption, fraud and financial crime;

g) contribute to the implementation of the Kosovo Anti-Corruption Strategy and Anti-Corruption Action Plan;

h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies; and

i) ensure that all its activities respect international standards concerning human rights and gender mainstreaming.

According to article 2, paragraph 2 of the Joint Action, this mandate has to be fulfilled in full cooperation with the European Commission Assistance programmes through monitoring, mentoring and advising, while retaining certain executive responsibilities.

Interestingly enough, article 5 (Launching and transition period) of the Joint Action states that:

1. The decision to launch EULEX Kosovo shall be taken by the Council upon approval of the OPLAN. The operational phase of EULEX Kosovo shall start *upon transfer of authority from the United Mission in Kosovo, UNMIK*²¹.

According to the Joint Action, EULEX Kosovo will, therefore, only assume its responsibilities after a build-up period of 120 days after its launch. This means that UNMIK will remain fully in charge until the end of the transition period, when the EU will, possibly, step in to support the Kosovo authorities in their efforts to create a sustainable rule of law system.

Once it reaches full operational capability, the mission will have around 1900 international police officers, judges, prosecutors and customs officials and approximately 1100 local staff. It will be based in headquarters in Pristina and located throughout the judicial and police system in

²⁰ See paragraph 11 of the Preamble of the Joint Action 2006/304/CFSP. Italics added.

²¹ Italics added.

Kosovo. A contingent of around 300 police and border officials is foreseen, but will only be deployed if deemed necessary. Yves de Kermabon (France) has been appointed Head of Mission²².

The initial mandate is for 2 years but the mission is expected to be terminated when the Kosovo authorities have gained enough experience to guarantee that all members of society benefit from the rule of law. The financial contribution necessary to cover the expenditures for a period of sixteen months will be 205 million euros²³.

5. The Council Joint Action 2008/123/CFSP appointing a European Union Special Representative in Kosovo.

On February 4, 2008, the same day in which the EULEX Kosovo mission was decided, the Council of the European Union adopted a Joint Action to appoint the EU Special Representative in Kosovo²⁴. As already mentioned in paragraph 3 of this paper, according to the Ahtisaari plan, an International Civilian Representative (ICR), who will also be the EU Special Represen-

tative (EUSR), must be appointed. He/she will be given be the final authority in Kosovo regarding interpretation of the civilian aspects of the settlement.

According to the Joint Action the EUSR's mandate includes to:

- a) offer the EU's advice and support in the political process;
- b) promote overall EU political coordination in Kosovo;
- c) provide local political guidance to the Head of the European Union Rule of Law Mission in Kosovo (EULEX KOSOVO), including on the political aspects of issues relating to executive responsibilities;
- d) ensure consistency and coherence of EU action towards the public. The EUSR spokesperson shall be the main EU point of contact for Kosovo media on Common Foreign and Security Policy/ European Security and Defence Policy (CFSP/ESDP) issues. All press and public information activities will be conducted in close and continued coordination with the SG/HR spokesperson/Council Secretariat Press Office;
- e) until the expiry of Council Joint Action 2006/623/CFSP of 15 September 2006 on the establishment of a EU team to contribute to the preparations of the establishment of a possible international civilian mission in Kosovo, including a European Union Special Representative component (ICM/EUSR Preparation Team), give political guidance and operational direction to the Head of the Preparation Team established thereby, preparing for the EU contribution to an International Civilian Office;
- f) contribute to the development and consolidation of respect for human rights and fundamental freedoms in Kosovo, including with regard to women and children, in accordance with EU human rights policy and EU guidelines on Human Rights.

Pieter Feith has been appointed European Union Special Representative (EUSR) in Kosovo. He will work in close cooperation with the EU rule of law mission, EULEX KOSOVO and in this context, he will provide political guidance to the EULEX Head of the Mission, including on the political aspects of issues relating to executive responsibilities. According to the EU Council, it has to be expected that:

the powers and authorities of the future Inter-

²² Political and Security Committee Decision EULEX/1/2008 of 7 February 2008, in *Official Journal of the European Union*, L 42 of February 16, 2008.

²³ *European Union. Fact sheet. EULEX Kosovo, February 2008*, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/080216EULEXKOSOVO.pdf>.

²⁴ *Official Journal of the European Union*, L 42 of February 16, 2008. On the role of the EUSR see G. GREVI, *Pioneering foreign policy, The EU Special Representatives*, Paris (Chaillot Paper No. 106), 2007. Too in this case the decision to appoint the EUSR has been preceded by Council Joint Action 2006/623/CFSP of 15 September 2006 «On the establishment of a EU-team to contribute to the preparations of the establishment of a possible international civilian mission in Kosovo, including a European Union Special Representative component (ICM/EUSR Preparation Team)»: see *Official Journal of the European Union*, L 253 of September 19, 2006. It seems worth underlying that too in this case the decision to deploy this EU-team was based on a specific request of the UN contained in a letter of August 11, 2006 from the UNSRSG to the EU SG/HR.

national Civilian Representative will be vested in the same person as the EUSR²⁵.

As a matter of fact, on February 28, 2008, the first meeting of the International Steering Group for Kosovo was convened in Vienna, amid the protests of Serbia²⁶ and Russia²⁷. In the presence of the fifteen self-invited States²⁸, the ISG was formed to «help guide Kosovo's democratic development in the years ahead». According to the statement released at the end of the meeting:

Kosovo's leaders have formally requested that we establish this body, which was envisioned in the Ahtissari Plan²⁹.

During the same meeting the ISG appointed Peter Feith, already EU Special Representative in Kosovo, to be the International Civilian Representative for Kosovo and gave him the responsibilities and powers outlined in Annex IV of the Ahtissari Plan.

6. Defining the nature of EULEX Kosovo Mission: a few preliminary considerations.

In several important documents, the EULEX Kosovo Mission has been defined

²⁵ European Union. *Fact sheet. EUSR in Kosovo, February 2008*, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/080216EUSRINKOSOVO.pdf>.

²⁶ *Kosovo Steering Group enrages Serbia*, available at <http://www.presstv.ir/detail.aspx?id=45295§ionid=351020606>.

²⁷ *Russia protests Kosovo Steering Group establishment* available at <http://en.rian.ru/world/20080303/100494001.html>.

²⁸ The following States are members of the International Steering Group for Kosovo: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Slovenia, Sweden, Switzerland, Turkey, United Kingdom and United States.

²⁹ The Press statement of the first meeting of the ISG is available at <http://www.ico-kos.org/pdf/Pressstatement28feb.pdf>.

by the EU³⁰ as a EU crisis management mission. This is one of the typologies of EU field operations listed in the Treaty on European Union³¹.

In general terms, and making reference to a significant, although recent, practice within the EU, the main features of these kinds of missions, as opposed to other kinds of field operations, are very similar, if not identical, to those characterising traditional peace-keeping operations³².

They can be summarized as follows: peace treaty or ceasefire in place, request/consent of the hosting State, impartiality of the field operation, and clear cut temporary mandate aimed at consolidating the peace and assisting in the rebuilding of

³⁰ See, for example, the Council Joint Action 2006/304/CSFP of April 10, 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 in Kosovo», cit.

³¹ According to art. 17 para 2 of the Treaty on European Union «Questions referred to in this Article shall include humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking». Furthermore, according to Art 27 para 3 of the Treaty on European Union, «The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation, without prejudice to Article 47». See more on this in M. ORTEGA, *Military Intervention and the European Union*, Paris (Chaillot Paper No 45), 2001, N. RONZITTI (ed.), *Le Forze di Pace dell'Unione Europea*, Rome, 2005 and M. MERLINGE-R. OSTRUSKAITE, *European Union Peacebuilding and Policing: Governance and the European Security and Defence Policy*, London, 2006.

³² On the relations between UN peace-keeping operations and similar operations carried out by regional organisations or by a "coalition of the willing" see: H. Mc COUBREY-J. MORRIS, *Regional Peacekeeping in the Post-Cold War Era*, The Hague, 2000; U. VILLANI, *Les rapports entre L'ONU et les organisations régionales dans le domaine du maintien de la paix*, in *Recueil des cours de l'Académie de droit international de La Haye*, 2001, tome 290, p. 299 ff.; R. DELLBRUCK, *The Role of Regional Organisations in Maintaining Peace and Security*, in M. BOTHE-M. O'CONNELL-N. RONZITTI (eds.), *The Use of Force after the Cold War*, Ardsley (NY), 2005, p. 145 ff. and A. SITKOWSKI, *UN Peacekeeping: Myth and Reality*, London, 2006.

the country to achieve international standards.

7. Critical reactions to the decision to deploy EULEX Kosovo.

The EU's decision to launch EULEX Kosovo has been fiercely opposed by a few members of the international community. *In primis*, for obvious reasons, are Serbia and the Russian Federation³³. On February 14, 2008, the Serbian Government adopted a «Decision to annul the illegitimate acts of the provisional institutions of self-government in Kosovo and Metohija on their declaration of unilateral independence»³⁴, and requested the National Assembly to immediately call a special session to confirm this government decision.

This decision reiterates that “United Nations Security Council Resolution 1244 has explicitly stipulated that Kosovo and Metohija form an integral part of the Republic of Serbia” and “that this resolution has affirmed the commitment of all the states to its sovereignty and territorial integrity”, and then states that all acts of the new Kosovar States are annulled and declared not to have “any legal effect either in the Republic of Serbia or in the international legal order”³⁵.

Moreover, in article 6 of the decision, it is clearly stated that:

Recalling the National Assembly Resolution on the Protection of Sovereignty, Territorial Integrity and Constitutional Order of the Republic of Serbia and, in particular, point 5 thereof by which the National Assembly demands from the Government of Serbia to determine

³³ As a matter of fact China as well expressed “grave concern” about the decision of Kosovo to proclaim unilaterally independence: see the statement of the Chinese Foreign Ministry Spoke-person of February 17, 2008 available at <http://www.china-un.org/eng/fyrth/t408032.htm>.

³⁴ The text of the Decision is available on: <http://www.srbija.sr.gov.yu/vesti/vest.php?id=43154>.

³⁵ Art. 1 of the Decision.

with the EU that EU missions may not come to the territory of Serbia, to Kosovo and Metohija without an appropriate UN Security Council decision to that effect, *the Government of Serbia considers all the decisions of the EU bodies on sending a mission to Kosovo and Metohija to be invalid*. Thus, these decisions produce no legal effect for Serbia nor any obligations for Serbia as regards their implementation³⁶.

This position has been confirmed several times by the Serbian authorities. In his statement at the Security Council meeting on March 11, 2008, called to discuss the situation in Kosovo, Vuk Jeremic, Minister for Foreign Affairs of Serbia expressed his country's point of view on two aspects which are relevant in this framework. First of all, he addressed the question of the relationship with the UN. In this regard he stressed that:

Resolution 1244 (1999) must be observed in full. That is the only way to prevent a further deterioration of the situation on the ground. There must be no erosion of the clearly defined mandate of the United Nations Interim Administration Mission in Kosovo (UNMIK) by the Security Council. Therefore, we strongly demand that no further transfer of competencies from UNMIK to any other body take place. That is of vital importance³⁷.

Secondly the Minister touched upon the question of the EU's decision to deploy EULEX Kosovo. He stated that:

It is a great pity that some European countries have joined in that dubious exercise, first by recognizing the unilateral declaration of independence by the authorities in Pristina, thereby gravely setting back the region's European prospects, and then by establishing the European Union Rule of Law Mission in Kosovo (EULEX) and the affiliated International Steering Group (ISG) of countries. Both EULEX and the ISG have set for themselves the goal of assisting in the implementation of the Comprehensive Proposal for the Kosovo Status Settlement – the so-called Ahtisaari proposal – but the Proposal has never been endorsed by

³⁶ Italics added.

³⁷ S/PV.5850, p. 3.

the Security Council, which is the only institution endowed with the power to legitimate changes in the nature of the international presence in Kosovo. *It is therefore the basic position of the Republic of Serbia that both EULEX and the ISG operate well outside the parameters set forth by resolution 1244 (1999) and that their activities are strongly inconsistent with the principles of the United Nations Charter and the Helsinki Final Act.* Let me be clear: it is not that the European Union is unwelcome in our southern province – for we do welcome, as a matter of principle, any demonstration of Europe’s deepening commitment to our country, including Kosovo – *but there has to be a clear legal mandate for any such commitment, and that can be achieved only by getting the approval of the Security Council.* We must work together to overcome that problem within this very forum³⁸.

Immediately after Kosovo’s proclamation of independence, the Russian Minister of Foreign Affairs also issued a statement in which, after having denied the legality of the Declaration of Independence, he expressed the hope that:

... the UN Mission in Kosovo and NATO-led Kosovo Force will take immediate action to fulfill their mandates as authorized by the Security Council, including voiding the decisions of Pristina’s self-governing institutions and adopting severe administrative measures against them. Russia calls for the immediate convocation of an emergency UN Security Council meeting to examine the situation and take resolute and effective measures for a return to the political settlement process in accordance with the provisions of UNSCR 1244³⁹.



³⁸ S/PV.5850 p. 4. Italics added. Almost identical arguments have been used by the President of the Republic of Serbia in his statement during a private meeting of the UN Security Council held on April 21, 2008 and in the letter dated April 17, 2008 from the Permanent Representative of Serbia to the UN, *Comments on the Report of the UN Secretary-General on the United Nations Interim Administration in Kosovo*, S/2008/287.

³⁹ Ministry of Foreign Affairs of the Russian Federation, Information and Press Department, Statement by Russia’s Ministry of Foreign Affairs on Kosovo of February 17, 2008, at http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/041c5af46913d38ac32573f30027b380.

Furthermore, in a statement delivered on February 20, 2008, the Russian Ministry of Foreign Affairs Spokesman Mikhail Kamynin, declared that:

The decision to deploy an EU mission in Kosovo likewise has no legal grounds. As is known, the preparations for deploying the EU mission were – and still are – being conducted in circumvention of the UN Security Council. In this context the mentions, in the conclusions, of UNSCR 1244 look absurd. These EU actions do not conform to the principles of interaction set forth in the Russia-EU roadmap for the common space of external security, primarily in the part of strengthening the central role of the UN ... The EU, by continuing to follow the unilateral scenario of solving the Kosovo problem, is acting to the detriment of stability in the Balkans and in Europe and encouraging separatism in the world⁴⁰.

He then added:

Russia remains firmly convinced that the problem of Kosovo’s status can and should be resolved in a reliable and long-term manner by way of the elaboration of, with the UN Security Council in a leading role, a compromise solution. Russia’s constructive proposals on the options for continuing the status process have been presented in the UN Security Council. Our initiative to jointly devise a roadmap which would take into account the interests of both parties, the priorities of key international stakeholders and chart the guidelines for movement by the parties towards an agreement in tandem with their Euro-integration perspective is still valid and relevant⁴¹.

The statement of the Permanent Representative of the Russian Federation to the UN at the meeting of the SC devoted



⁴⁰ Ministry of Foreign Affairs of the Russian Federation, Information and Press Department, MFA Spokesman Mikhail Kamynin Answers a Media Question on Kosovo on February 20, 2008, at http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/fbb3a3226cd8cef7c32573f500405651.

⁴¹ Ministry of Foreign Affairs of the Russian Federation, Information and Press Department, MFA Spokesman Mikhail Kamynin Answers a Media Question on Kosovo on February 20, 2008, at http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/fbb3a3226cd8cef7c32573f500405651.

to the Kosovo settlement was even more clear-cut. He stated that:

The so-called European Union Rule of Law Mission (EULEX) has been launched without the necessary decision of the Security Council. The parameters of the EU Mission in Kosovo, above all from the viewpoint of the mandate given to it in Brussels, do not agree with the UNSCR 1244 provisions and the subsequent UNSC decisions on the functions and composition, including modalities on the “distribution of contributions” among UN partners, and most importantly on the mandate of the international civil presence in Kosovo. The UN Security Council has not authorized the launch of this operation. Nor can EULEX be part of the international civil presence as defined in UNSCR 1244, since according to Paragraph 1 of the Secretary-General’s report (S/1999/672) UNMIK covers all of the “space” allocated by this resolution to the international civil presence⁴².

At a press conference delivered at the end of a visit to Moscow by the UN Secretary General, the Minister of Foreign Affairs of the Russian Federation took the opportunity to restate that his country reaffirmed its position on the key role to be played by the UN Security Council for an acceptable solution of the Kosovo crisis and reiterated:

the necessity to strictly fulfill the UN Mission in Kosovo mandate ... I think that we have an understanding of the good prospects of further efforts in upholding just this kind of approach⁴³.

To sum up, two are the main lines of criticism on the EU’s decision to deploy



⁴² The statement of the Russian Permanent Representative is available at http://www.un.int/russia/new/MainRoot/Statements/ga/ga_docs/Statement180208en.htm.

⁴³ Ministry of Foreign Affairs of the Russian Federation, Information and Press Department, transcript of Remarks and Replies to Media Questions by Russian Minister of Foreign Affairs Sergey Lavrov at Joint Press Conference After Meeting with UN Secretary General Ban Ki-moon, Moscow, April 10, 2008, at http://www.mid.ru/brp_4.nsf/0/91DEB1C66CECC457C325742800389F93.

EULEX Kosovo. One is related to the illegality of the Kosovo Declaration of Independence of February 17, 2008, and the second is related to the incompatibility of the EU decision with UN Resolution 1244. These arguments will be discussed in the following paragraphs.

8. The Kosovo Declaration of Independence, the new constitution and their impact on the issue of the legality of the international presence in Kosovo.

Just a few days after the adoption of the two EU Council Joint Actions, on February 17, 2008, the Assembly of Kosovo adopted the Kosovo Declaration of Independence⁴⁴ (the legality of which is beyond the scope of this study⁴⁵). As is well known, in this declaration it is stated that: We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign State. This Declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive proposal for the Kosovo Status Settlement.

The Declaration clearly indicates willingness to:

... accept fully the obligations for Kosovo contained in the Ahtisaari Plan, and welcome the framework it proposes to guide Kosovo in the years ahead. We shall implement in full those obligations including through priority adop-



⁴⁴ The Kosovo Declaration of Independence of February 17, 2008 is reproduced on the web site of the Assembly of Kosovo: www.assembly-kosova.org.

⁴⁵ On the Declaration of Independence see T. BRUHA, *Mit ausreichendem Mandat? Rechtliche Grundlagen der internationale Praesenz im Kosovo heute und in Zukunft*, in R. MUTZ-J. NARTEN-T. BRUHA, *Zukunft des Kosovo, Hamburger Informationen zur Friedensforschung und Sicherheitspolitik*, n. 42/2007, Hamburg 2007 and A. FERRARI, *Il Kosovo indipendente*, ISPI Policy Brief n. 78, 2008.

tion of the legislation included in its Annex XII, particularly those that protect and promote the rights of communities and their members.

In paragraph 5 of the Declaration it is further underlined that the Assembly welcomes:

the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council Resolution 1244 (1999)

and extends an invitation and a warm welcome to:

an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council Resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities.

Furthermore, the Kosovar authorities decided to give great emphasis to the Ahtisaari Plan in their new Constitution. Article 143 of the new Constitution adopted on April 9, 2008, clearly states that:

Notwithstanding any provision of this Constitution:

1. All 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.
2. The provisions of the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 shall take precedence over all other legal provisions in Kosovo.
3. The Constitution, laws and other legal acts of the Republic of Kosovo shall be interpreted in compliance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007. If there are inconsistencies between the provisions of this Constitution, laws or other legal acts of the Republic of Kosovo

and the provisions of the said Settlement, the latter shall prevail.

There are two additional articles of the Kosovar Constitution worth mentioning in this framework. Both have been inserted in Chapter XIV, which is devoted to the transitional provisions. The first is article 146 (International Civilian Representative), which reads as follows:

Notwithstanding any provision of this Constitution:

1. The International Civilian Representative and other international organizations and actors mandated under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 have the mandate and powers set forth under the said Comprehensive Proposal, including the legal capacity and privileges and immunities set forth therein.
2. All authorities in the Republic of Kosovo shall cooperate fully with the International Civilian Representative, other international organizations and actors mandated under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 and shall, *inter alia*, give effect to their decisions or acts.

The second important rule is found in article 147 (Final Authority of the International Civilian Representative), according to which:

Notwithstanding any provision of this Constitution:

The International Civilian Representative shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive Proposal. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations referred to in Article 146 and this Article.

According to international sources, the draft Constitution of Kosovo had received a political blessing from the EU. Peter Feith, the EU Special Representative, has been quoted as saying that the draft was in line with the international standards to which Pristina committed itself when de-

clarifying independence from Serbia on February 17, 2008⁴⁶.

9. The legal basis of the EULEX Kosovo Mission according to the Council Joint Action 2008/124/CFSP: a critical overview.

Both EU Joint Action 2008/124/CFSP and the Kosovo Declaration of Independence repeatedly make reference to UN Security Council Resolution 1244/1999. The aim of this paragraph is to analyse the contents of that Resolution in order to ascertain whether, under international law, it can constitute the legal basis for the establishment and deployment of the EULEX Mission.

If, from the point of view of the Treaty on the European Union, the legal foundation of the Council Joint Action seems solidly based on both Articles 14⁴⁷ and 25⁴⁸ (third paragraph) of the Treaty itself, from an international law perspective the question of the legal foundation of the deployment of the EULEX Kosovo raises many more doubts and definitively seems more problematic.

Compared to other similar decisions or Joint Actions, the one examined in this paper is not very generous in giving explicit details about the decision's legal basis according to international law. While abundant reference is made in the Council

Joint Action to the legal basis within the EU framework, the references to the legal basis in international law are drafted in quite an ambiguous manner. Before entering into the details of the precise wording of this Joint Action, it might be opportune to restate that previous Council Joint Actions devoted to the establishment of EU crisis management operations have been based alternatively on the consent of the hosting state:

a) and a UN enabling resolution (as an example we might cite the Council Joint Action 2007/405/CFSP⁴⁹ on the EU Police mission EUPOL RD Congo);

b) and a UNSC Resolution welcoming the EU's decision to deploy a field operation (Council Joint Action 2002/210/CFSP⁵⁰ of March 11, 2002 on the European Union Police Mission in Bosnia and Herzegovina, Council Joint Action 2004/570/CFSP⁵¹ on the European Union Military Operation in Bosnia and Herzegovina, and Council Joint Action 2007/369/CFSP⁵² of May 30, 2007 on establishment of the European Union Police Mission in Afghanistan);

c) clearly spelled out (Council Joint Action 2005/190/CFSP⁵³ of March 7, 2005 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX, Council Joint Action 2005/797/CFSP⁵⁴ of November 14, 2005 on the European Union Police Mission for the Palestinian Territories, Council Joint Action 2005/889/CFSP⁵⁵ of December 12, 2005 on Establishing a European Union Border Assistance Mis-

⁴⁶ GOLDIROVA, *Kosovo Constitution Approved by EU*, in *EUOBSERVER.com*, April 3, 2008 (at http://www.euobserver.com/9/25912?rss_rk=1).

⁴⁷ Art. 14 of the Treaty on European Union states that «The Council shall adopt joint actions. Joint actions shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation».

⁴⁸ Art. 25, para 3 states that «The Council may authorise the Committee, for the purpose and for the duration of a crisis management operation, as determined by the Council, to take the relevant decisions concerning the political control and strategic direction of the operation, without prejudice to Article 47».

⁴⁹ *Official Journal of the European Union*, L 151 of June 13, 2007.

⁵⁰ *Official Journal of the European Union*, L 70 of March 13, 2002.

⁵¹ *Official Journal of the European Union*, L 252 of July 28, 2004.

⁵² *Official Journal of the European Union*, L 139 of May 1, 2007.

⁵³ *Official Journal of the European Union*, L 62 of March 9, 2005.

⁵⁴ *Official Journal of the European Union*, L 300 of November 17, 2005.

⁵⁵ *Official Journal of the European Union*, L 327 of December 14, 2005.

sion for the Rafah Crossing Point, EU BAM Rafah).

In an international law perspective, for the first time in the history of similar documents, in Council Joint Action 2008/124/CFSP, dealing with the establishment of EULEX Kosovo, reference to the legal basis has been addressed in an entirely different manner.

The first element to be noted is the total absence of any reference to the consent of the hosting State to the deployment of the mission. For the first time, the Council of the European Union decided to establish a crisis management operation without the prior approval of the state on whose territory the mission will be deployed.

Although the reasons behind this situation are self-evident and do not need any additional explanation, it must be underlined that the lack of any agreement/invitation by the hosting state, which, as we have seen before, has always represented one of the fundamental pillars and prerequisites for a peace-keeping operation, could have a significant impact on the very nature of the operation.

As a matter of fact, it also should be mentioned that a new trend has emerged in UNSC practice, especially in two recent cases concerning Sudan and Somalia, in which the decision to launch a peace-keeping operation was taken notwithstanding the fact that the hosting states did not in any way express their consent. In those cases, however, the actual implementation and deployment of the mission in the field occurred only after additional negotiations with the hosting states, at the end of which the states gave a green light to the troop deployment.

That said, it remains to be ascertained whether, having been unable to base the legality of the mission on the consent of the hosting state, the EU can base its decision on an enabling UNSC resolution. An attempt in this direction was made in the phrasing of the preamble of the Joint Action and in a few (unfortunately rare) statements by EU authorities⁵⁶.



⁵⁶ See, for example, the statement delivered at a

In the preamble of the Council Joint Action several references and quotations are devoted to UNSC Resolution 1244 of June 10, 1999, which authorized the establishment of an international civil presence as well as an international security presence in Kosovo. After careful examination in an international law perspective, these references all seem totally inappropriate and inadequate as legal bases for EULEX Kosovo. In paragraph 10, the UNSC Resolution clearly stipulates that the international civil presence has to be established by the Secretary General with the assistance of the relevant international organizations. In the case we are examining in this paper, it is evident that the UN Secretary General, although repeatedly welcoming EU cooperation in helping to solve the crisis in Kosovo and its contribution to the stability of the region, has never formally endorsed the establishment of EULEX Kosovo.

In this situation, it should be recalled how, in a very similar situation in 1999, the EU decided to contribute to the international civil presence in Kosovo, taking the responsibility to lead the "Reconstruction pillar" within UNMIK. A Council Joint Action was adopted on July 29, 1999, "Concerning the installation of the structures of the United Nations Mission in Kosovo (UNMIK)"⁵⁷. In the preamble of that Joint Action it was clearly spelled out that the EU's decision to contribute to the international civil presence in Kosovo (UNMIK) was based on a request by the then UN Secretary General Kofi Annan⁵⁸.



press conference in Brussels by the President of the European Commission on February 21, 2008 in which the issue of the legality of the mission was touched upon. Extracts of the statement are available at http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=02&dd=23&nav_id=47920.

⁵⁷ *Official Journal of the European Communities*, L 201 of July 31, 1999.

⁵⁸ This request from the UN Secretary General to the EU to support the "Reconstruction pillar" in UNMIK is confirmed as well in the Report of the Secretary General to the UN Security Council pursuant to Paragraph 10 of the SC Resolution 1244 (1999): S/1999/672 of June 12, 1999.

The EU took the decision to take part in UNMIK whereas:

The United Nations Secretary General wished to entrust the task of economic reconstruction, rehabilitation and development of Kosovo to the European Union.

Moreover, in the same Joint Action of the Council the European Union clearly states that:

United Nations Security Council Resolution 1244 (1999) of 10 June 1999 establishes the principle of organisation of the civil administration in Kosovo (UNMIK) headed by a Special Representative of the United Nations Secretary General.

This paragraph leaves no doubt about how, at that moment, the EU interpreted UNSC Resolution 1244, and more specifically, paragraph 10: the international civil presence in Kosovo was organised under the authority of the UN Secretary General.

To further consolidate this view it is important to recall that on July 17, 2007, several EU Member States⁵⁹ together with the USA presented to the Security Council a draft resolution on Kosovo⁶⁰ in which the sponsors, having stated that “the unresolved situation in Kosovo continues to constitute a threat to international peace and security”, confirmed the “primary responsibility of the Security Council for the maintenance of international peace and security”. The main goal of the draft Resolution can be easily found in its paragraph 7 in which the SC

Authorizes the establishment of a European Union ESDP Mission and decides that the Mission shall have powers and authorities set forth in Annex I of this Resolution after the



⁵⁹ Belgium, France, Germany, Italy, United Kingdom of Great Britain and Northern Ireland.

⁶⁰ S/2007/437 of July 17, 2007. This draft proposal has been the fifth attempt to bring to the UNSC a Resolution on the future status of Kosovo: all of them failed.

end of the transition period referred to in paragraph 5⁶¹.

Paragraph 5 is extremely relevant too as the Security Council was requested to formally decide that

The mandate of the international civil presence shall terminate at the end of a 120- day transition period following the adoption of this resolution and that the existing international civil presence shall implement with the ICR and ESDPO during this period all appropriate arrangements for the details and modalities of the transition.

Although this draft resolution has never been approved by the Security Council, it reinforces the theory that a UN Security Council resolution would have been of essential importance for a proper and sound regulation of the relations between UNMIK and EULEX Kosovo.

Furthermore it is important to recall that the 2006 Council Joint Action “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”, which has already been quoted, clearly states that the decision to deploy the EUPT is based on an formal invitation from the UN⁶².

Finally, in paragraph 3 of the preamble of the Council Joint Action there is a reference to another UNSC resolution, which could be read as an additional attempt to legitimize the deployment of the mission in Kosovo. Paragraph 3 states that:

There is a need to prevent, on humanitarian grounds, possible outbreaks of violence, acts of persecution and intimidation in Kosovo, taking



⁶¹ It has to be noticed that in this case the States which were sponsoring the Resolution requested the UNSC to “authorize” (and not simply to “endorse” politically or to “welcome”) the deployment of the ESDP Mission: as already clarified, in those circumstances (as at that moment the Kosovo State did not yet exist) the deployment of an ESDP mission without the prior authorization of the UNSC would have been definitively of dubious legality.

⁶² See previous footnote 20.

into account, as appropriate, the responsibility towards populations as referred in Resolution 1674 by the United Nations Security Council on 28 April 2006.

The UNSC resolution mentioned is Resolution 1674, "Protection of civilians in armed conflict". This Resolution, which constitutes an updated version of previous UNSC Resolutions 1265 (1999) and 1296 (2000), has had a very high profile impact on the issue of protection of civilians during armed conflicts. However, it does not mention at all any kind of authorization, *de jure* or even *de facto*, nor any specific right of any state or regional organization to intervene to stop or "to prevent, on humanitarian grounds, possible outbreaks of violence, acts of persecution and intimidation in Kosovo". This conclusion is reinforced by a legal analysis of UN General Assembly Resolution 60/1 (2005) World Summit Outcome, in which, after having reiterated that each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that the international community, through the United Nations, also has the responsibility to use appropriate means to help to protect populations in danger of suffering these kind of violations, clearly states:

in this context, we are prepared to take collective action, in a timely and decisive manner, *through the Security Council*⁶³, on a case-by-case basis and in cooperation with relevant regional organisations, as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations ...

In the case we are examining, there has been no specific UNSC decision authorizing the EU to deploy the mission in Kosovo nor has there been an official and formal invitation by the UN Secretary General to deploy EULEX Kosovo.

To sum up, it appears evident that, differing from previous cases, in the Council



⁶³ Italics added.

Joint Action dealing with Kosovo there is no clear and convincing indication of the grounds on which the decision to establish EULEX Kosovo is based according to international law.

The silence of the Joint Action on this specific aspect and given that, in this case, the legality of the mission is not based on a UNSC resolution or the consent of the hosting State (Serbia), makes the importance of the mission's legal basis in international law more evident. In the following paragraph we will try to address this issue.

10. The legal basis of EULEX Kosovo: a different line of reasoning.

Given what we have seen, it appears that the traditional arguments used in similar cases to establish legality of missions cannot be used. Therefore, additional efforts have to be made to find a solution concerning the mission's legality in an international law perspective.

As a preliminary consideration, it should be pointed out that, so far, the EULEX Mission has not yet been officially deployed in the field. As already mentioned, according to article 5 of Joint Action 2008/124/CFSP:

the operation phase of EULEX Kosovo shall start upon transfer of authority from the United Nations Mission in Kosovo, UNMIK⁶⁴.

That said, decisive elements which have



⁶⁴ As a matter of fact, the EU has already officially dispatched the EU Planning Team to Kosovo: see more at previous para 4. They were given the mandate to support the Kosovo authorities by monitoring, mentoring and advising on all areas related to the rule of law, in particular in the police, judiciary, customs and correctional services and to ensure, in close cooperation with the Kosovo authorities, that serious crimes are properly investigated, prosecuted and that any outcome of these procedures are thereafter properly enforced. *De facto*, the first wave of international personnel of EULEX already arrived in the country in April 2008.

to be taken into consideration are the Declaration of Independence adopted by the Assembly of Kosovo on February 17, 2008 and the subsequent recognition of the new State of Kosovo by several states⁶⁵. In my opinion, after February 17, 2008, the legal basis of the deployment of the EULEX Kosovo mission can be based on the ex-post endorsement of its deployment contained in the Kosovo Declaration of Independence and, later, in the new Constitution of the Republic of Kosovo. As has been pointed out already, in paragraph 5 of the Declaration the Assembly welcomes:

the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council Resolution 1244(1999)

stating also:

we invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council Resolution 1244(1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities.

Therefore, the state has given its authorization for the deployment of EULEX Kosovo and any doubt about its legality should be resolved thanks to the subsequent confirmation by the hosting state, which arrived, in any case, prior to the effective deployment of the field operation.

Similar conclusions were reached in a previous case concerning Sudan when the UN Security Council, through Resolution 1706/2006, decided to expand the mandate of the United Nations Mission in Sudan (UNMIS) and to significantly increase its strength without having received any



⁶⁵ As of April 4, 2008, 36 states, including 19 member states of the European Union formally recognized the independence of the Republic of Kosovo.

prior consent from the Sudanese Government, which, on the contrary, fiercely opposed the adoption of the Resolution. In that case, as in the one examined here, the actual deployment took place much later and only after formal and *de facto* agreement was given by the competent Sudanese authorities.

In the Kosovo case, however, this conclusion is not without its consequences. It implies that Kosovo is recognized as a state with all rights and responsibilities. It also carries with it *de facto* recognition⁶⁶ of the new state by those EU member states who formally have not yet recognized it but decide to take part to EULEX Kosovo. (As of April 4, 2008, 19 EU member states have formally recognized the new entity).

In any case, it is worth underlining that by applying this line of reasoning it is only possible to solve the problem of the legality of the EU deployment in Kosovo. The issue of relations between EULEX Kosovo and UNMIK remains an open one. The following paragraph will be devoted to this specific aspect, which, because of its legal and political implications, continues to be extremely sensitive.

11. UNMIK and EULEX Kosovo: competition, cooperation and labour sharing, replacement or (geographical) specialization?

After the launch of EULEX Kosovo and the appointment of the EU Special Representative, the institutional architecture of the international presences in Kosovo, both civil and security, presents unique features which, if not addressed properly and in a timely fashion, may create serious problems.



⁶⁶ It is interesting and relevant to underline, at this regard, that Romania's Foreign Minister stated that the participation of the country's policemen and Gendarmerie in EULEX does not mean "that Bucharest *de facto* acknowledged the unilaterally proclaimed independence of Kosovo": the statement is available at http://www.mfa.gov.yu/Policy/CI/KIM/210208_html.

The central and most delicate issue is shaping the future relations between EULEX Kosovo and UNMIK. The main problem is that UNMIK, established by the UNSC in Resolution 1244/1999 and then implemented by the UN Secretary General according to paragraph 10 of the above-mentioned Resolution, has no time limit attached. This means that UNMIK will remain active in Kosovo until a new UNSC Resolution decides otherwise. This is also NATO's official position. In a statement by the North Atlantic Council after Kosovo's declaration of independence, 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 otherwise⁶⁷.

The Secretary General of the UN recently also fully endorsed this position. During a statement released at a press conference in Moscow on February 17, 2008, Secretary-General Ban Ki-moon stated officially that:

the UN Mission in Kosovo (UNMIK) will continue to exercise its authority in the area unless the Security Council decides otherwise⁶⁸.

Alternatively, according to paragraph 10 of Resolution 1244, the UN Secretary General can at any moment formally endorse the deployment of a new international civil presence in Kosovo to reinforce the activities of UNMIK. Paragraph 5 of the UNSC Resolution makes it very clear that the deployment in Kosovo of an international civil presence has to occur "under United Nations auspices".

As mentioned earlier, the phrasing of this specific part of the Resolution sounds very similar to that used in UNSC Resolution 143/1960, devoted to the Congo question, in which the Security Council

decided, without any temporal limit, to:

authorize the Secretary General to take the necessary steps, in consultation with the Government of the Republic of the Congo, to provide the Government with such military assistance as may be necessary until, through the efforts of the Congolese Government with the technical assistance of the United Nations, the national security forces may be able, in the opinion of the Government, to meet fully their tasks.

In that case as well, the UNSC did not fix any final date for the mission's deployment in the field. This contributed to the creation of a very difficult situation and a lot of embarrassment for then Secretary General Dag Hammarskjöld as, due to profound disagreement among the members, both the Security Council and the General Assembly were unable to give any appropriate instructions to the Secretary General on what to do in the changing environment in Congo⁶⁹. From that case on, the UN Security Council has always authorized deployment of field operations with temporal limits, which could then be extended by the Council itself.

The Kosovo case and Resolution 1244 represent, therefore, a clear exception and derogation from a consolidated practice which will most probably create additional difficulties, both in political and in legal terms, that could have a negative impact on the work carried out by the international presence in Kosovo and in the end, affect the human security of Kosovars.

Several scenarios are possible. The first is *cooperation and labour sharing*. Given the position expressed by Russia and other members of the Security Council who opposed the unilateral declaration of independence proclaimed by the Kosovar authorities and the subsequent recognition

⁶⁷ The Statement of February 18, 2008 is available at <http://www.nato.int/docu/pr/2008/p08-025e.html>.

⁶⁸ The press statement is available at <http://www.unmikonline.org/news.htm#0704>.

⁶⁹ For a detailed description of those event please see D. BOWETT, *UN Forces*, London, 1964, p. 157-165 and J. SOUBEYROL, *Aspects de la fonction interpretative du Secrétaire general de l'ONU lors du l'affaire du Congo*, in *Revue Générale de Droit International Public*, 1966, p. 565 ff.

of the new State by several members of the international community, it can be expected that Russia will use its veto-power to block any new UNSC Resolution aimed at terminating UNMIK's mandate and, in the meantime, pressure the UN Secretary General not to endorse any new field operation in Kosovo. Should this happen, it seems obvious that UNMIK and EULEX might have to live together for a certain period and adjust their operational deployment to deal with the developments and changes on the ground. This would imply that both UNMIK and EULEX Kosovo would have to readjust their activities, as many of EULEX Kosovo's tasks are identical, or at least very similar, to those assigned to UNMIK by UNSC Resolution 1244.

Ideally, a formal or even *de facto* agreement between UNMIK and EULEX Kosovo on how to share the different tasks would very much help to improve the quality and the effectiveness of cooperation and avoid misunderstandings that could create dangerous tensions. This might happen only if the UN Secretary General will formally endorse the deployment of EULEX Kosovo, according to the power conferred on him by paragraph 10 of Resolution 1244.

As an alternative, under pressure not to formally endorse any EU field operation, it might well be possible that the UN Secretary General could simply take note of the EU's decision and not oppose it ("the silent nod"). Considering that Resolution 1244 is not explicit on how the UN Secretary General has to involve the relevant international organizations in establishing the international presence, he could take a *very active approach*, as in the initial phase of UNMIK's establishment, when he continuously sought support from international institutions to carry out his mandate in Kosovo, or a *more passive approach*. In the latter case, the Secretary General simply could take note of the offers of cooperation presented by the interested international institutions and expressly or *de facto* accept or reject them. This would seem to be the UN Secretary General's most recent approach. In his

closing remarks at the UNSC meeting devoted to Kosovo on February 18, 2008, he expressed his opinion in the following manner:

As I have stated, the Secretariat continues to operate in Kosovo on the understanding that resolution 1244 (1999) remains in force, unless the Council decides otherwise. I expect everyone in Kosovo to act in a manner consistent with the operational framework for the international civil presence established in accordance with resolution 1244. As I noted earlier, *I have taken note of the European Union's decision to deploy a rule of law mission and an EU Special Representative. I would consider that an enhanced role of the EU in Kosovo would be assessed in the context of the overall concept of operations of UNMIK, the objectives of the UN in Kosovo and the objectives of protecting the UN legacy in Kosovo and the Balkans*⁷⁰.

This also seems to be the European Commission's line of reasoning. In a joint press conference with British Prime Minister Gordon Brown held on February 21, 2008 in Brussels, in reaction to remarks by reporters that the Ban ki-Moon did not allow the deployment of EULEX, President of the European Commission Jose Manuel Barroso denied that this was true saying that the UN Secretary General "officially did not oppose the sending of the EU mission"⁷¹.

To achieve the goal of a labour-sharing between the two field missions in Kosovo, it has been speculated that the UN Secretary General might respond to the pressure from Russia and launch new talks between Kosovo and Serbia and, in the meanwhile, prolong the transition period of Kosovar independence from Serbia⁷².

⁷⁰ The Secretary's General closing remarks at the UNSC meeting on Kosovo of February 18, 2008 are available at <http://www.un.org/apps/sg/sgstats.asp?nid=3011>. Italics added.

⁷¹ See *EC Chiefs defends mission*, available at http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=02&dd=23&nav_id=47920.

⁷² H. BONE-M. HALPIN, *Envoys fear UN chief Ban Ki Moon may go soft on Kosovo*, in *The Times*, April 11, 2008.

It is quite evident that the UN Secretary General is, in any case, the key player, as, according to Resolution 1244, he is the only actor entitled, to establish "an international civilian presence in Kosovo" with the assistance of relevant international organizations.

The second scenario, *replacement*, would come into play if the UNSC adopted a resolution deciding the formal closure of UNMIK and its replacement by the EULEX Kosovo Mission. It is obvious that such a resolution would contribute to radically eliminating any ambiguity in the institutional architecture of the international presence in Kosovo and also would offer a solid legal basis for the deployment of EULEX Kosovo in the field.

According to one line of thinking, EULEX Kosovo will replace UNMIK on June 15, 2008, when the new Constitution will come into force. This thesis has been defended, for example, by Peter Feith, the EU Special Representative and most probably head of the future International Civilian Office. He declared on Radio Free Europe on April 7, 2008, "As far as I am concerned, yes, it [UNMIK] ends then [on June 15]"⁷³.

This theory is mainly based on the content of the new Kosovar Constitution, expected to enter into force on June 15, which in articles 146 and 147 explicitly makes reference to this new figure, the International Civilian Representative, which, as we mentioned earlier, was first seen in the Ahtisaari Plan. This new institution is clearly meant to substitute UNMIK's existing mandate and role. This seems, as well, the line of reasoning of Kosovo: in his speech at a private meeting of the UN Security Council on Kosovo of April 21, 2008, the Kosovar's President Thaci declared that

Our relationship with the the UN ... will change now that the reality on the ground has changed. The Government of Kosovo looks

forward to working with the UN as it adapts to the new circumstances.

Nevertheless, to fully apply this *substitution*, it must be reiterated that a new UNSC Resolution will be needed, something which, at this moment, seems quite unlikely. In this regard, paragraph 19 of UNSC Resolution 1244 provides a sound legal basis, stating 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.

This also seems to be the UN Secretary General's line of reasoning. He explicitly mentioned in a statement on Kosovo on February 17, 2008:

Pending guidance from the Security Council, UNMIK will continue to consider Security Council resolution 1244 (1999) as the legal framework for its mandate and will continue to implement its mandate in the light of the evolving circumstances⁷⁴.

A third scenario, *geographical specialization*, could be that, *de facto or de jure*, UNMIK and EULEX will operate in different settings: the EULEX Kosovo Mission working in the southern part of Kosovo, mainly inhabited by Albanian Kosovars and UNMIK in the north, mainly inhabited by Serbian Kosovars. Some indications that this could really be a possible scenario are based on recent discussions between UNMIK and the Serbian authorities aimed at allowing the Serbian authorities to hold Serbian parliamentary elections, scheduled to take place on May 11, 2008, in Kosovo. This has been interpreted as a Serbian "diplomatic" attempt to divide the newly independent Kosovo along ethnic lines⁷⁵. Another element that

⁷⁴ The statement of the UN SG of February 17 is available at <http://www.un.org/apps/sg/sgstats.asp?nid=3008>.

⁷⁵ D. BILEFSKY, *Serbia Formally Proposes Ethnic Partition of Kosovo*, in *The New York Times*, March 25, 2008.

⁷³ *Balkan Insight*, April 8, 2008, available at <http://www.balkaninsight.com/en/main/news/9315/>.

can be used to argue that this scenario is a realistic one is the fact that due to security reasons following the unilateral declaration of independence, Peter Feith, the EUSR confirmed on February 23, 2008, temporarily withdrew EU mission personnel from the northern part of Kosovo⁷⁶.

Finally, there is a fourth scenario, *competition*, which in my opinion, would be the worst. UNMIK and EULEX will continue to work in Kosovo as if nothing has happened in an atmosphere of competition and reciprocal mistrust. This could have very negative consequences for the consolidation of the situation in Kosovo and for the credibility of the role of the international community and its institutions, both at the UN and at the EU level.

To a certain extent, the EU decision to end the operations of the EU Pillar in UNMIK by June 30, 2008 could be interpreted as a sign of the opening of institutional hostilities, although this would, most probably, not be the correct interpretation. In fact, the argument used by Paul Acda, head of the EU Pillar, does not help in avoiding misunderstandings which, at this moment, could be extremely dangerous:

The European Commission is currently funding and will continue to fund two other missions, EULEX and ICO, so it felt it contributed as much as it could to UNMIK⁷⁷.

This scenario could have very negative consequences including, for example, a "Mostarisation" of Kosovo. In other words, the international presence, and especially



⁷⁶ See *EULEX withdraws from North*, available at http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=02&dd=23&nav_id=47920.

⁷⁷ The press release is available at www.euinkosovo.org. In his statement to a private meeting of the UN Security Council on April 21, 2008, the UN Special Representative of the Secretary General for Kosovo, declared that this decision of the EU "will have a significant operational impact upon UNMIK'S ability to administer key areas of Kosovo's economy, as the mission, as currently budgeted, does not have the capacity, at this stage, to fill the gap".

UNMIK, becomes so open-ended that it becomes impossible to leave and instead of healing, cements the partition.

The Kosovo case, which from the beginning has been a very complex and slippery topic for everyone involved in it, continues to be a very delicate and sensitive issue which, if not dealt with properly and in a timely fashion, could have severe negative consequences, not only for the stability of the region, but for the future of relations between the European Union, its major neighbours and the United Nations as well. Just consider, for example, the issue of Kosovo's representation in international fora.

In such circumstances, I humbly suggest that it would be strongly advisable for everybody involved in the issue to fully adhere to the existing rules and, at the same time, also be flexible enough to find practicable solutions which do not contradict well established rules of international law that, especially in time of tension, represent a common reference point. This basic concept, which is shared in many recent EU documents⁷⁸, must also be reflected in the daily behaviour of all those working in the field and at headquarters responsible for the Kosovo dossier. This idea seems to be in line with the opinion of UN Secretary General, who, during the meeting of the UNSC devoted to the Kosovo situation stated that all should be fully aware of the urgent need:

to act in an effective, realistic and concrete manner. In doing so, pending Security Council guidance, I might have to adjust to developments and changes on the ground. My efforts – and those of my Special Representative in Kosovo – are aimed at ensuring that the political and security situation in Kosovo and in the wider region remains stable, and that the po-



⁷⁸ For example, in the General Affairs and External Relations Council of February 28, 2008, in which a Conclusion on Kosovo has been adopted, the Council reiterates "... the EU'S adherence to the principles of the UN Charter and the Helsinki Final Act, *inter alia*, the principles of sovereignty and territorial integrity and all UN Security Council Resolutions". Italics added.

pulation of Kosovo, and in particular, the minority communities are protected⁷⁹.

The SRSG for Kosovo at a private meeting of the UN Security Council of April 21, 2008, delivered a very similar statement in which he confirmed that

The UNMIK Mission will continue to discharge the mandate given to it by this Council under SCR 1244 according to the guidance received from the Secretary-General. But we must acknowledge that the environment is changing around us, and our performance of this mandate today does not mean the same as it did in 1999, when there were no Kosovo institutions and UNMIK intervention was necessary in all sectors to prevent a total absence of

government and public order. That is evidently not the situation today.

The fact that EULEX Kosovo has been launched but not yet officially deployed offers valuable space for negotiation. In this framework the role to be played by the UN Secretary General will be of pivotal importance. In the name and interest of the local population which has suffered enough from the terrible consequences of war and instability, it must be hoped that his involvement meet the expectations of those institutions and communities who are seeking to find a durable, sustainable and just solution to the endless problems of that area.



Abstract: L'Unione Europea ha investito nel Kosovo molte risorse ed un notevole impegno politico. La recente decisione del Consiglio dell'Unione europea di dispiegare la missione EULEX Kosovo rappresenta un ulteriore passo della strategia europea nella difficile area balcanica. In questo contributo si esaminano i profili di legittimità, dal punto di vista del diritto internazionale, della decisione europea e si analizzano i rapporti, che si presentano non semplici e che rischiano di divenire conflittuali, tra EULEX Kosovo e UNMIK, la missione civile delle Nazioni Unite che opera nel Kosovo dal 1999.



⁷⁹ The statement of the UN Secretary General at the Security Council is available at <http://www.un.org/apps/sg/sgstats.asp?nid=3010>.

