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EULEX Kosovo – Mandate, structure and implementation: Essential clarifications for an unprecedented EU mission

Martina Spernbauer

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CENTRE FOR THE LAW OF EU EXTERNAL RELATIONS

**EULEX KOSOVO – MANDATE, STRUCTURE AND
IMPLEMENTATION: ESSENTIAL CLARIFICATIONS FOR
AN UNPRECEDENTED EU MISSION**

MARTINA SPERNBAUER*

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1. INTRODUCTION

While the European Union has been finding itself more and more 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, confirmed in the Thessaloniki Declaration of 2003’ has explicitly been ‘declared open’ – provides for a text book example covering all aspects of external assistance as well as security and defence policies. Among the latter, EULEX Kosovo, the European Union Rule of Law Mission in the territory of Kosovo, is characterized by a number of extraordinary factors and circumstances. Indeed, it is not only its 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 Defence Policy (CSDP)³ which have thus far been deployed in 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 Strategy,⁴ 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.

This Working Paper thus seeks 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 the Kosovo Police structures and the organization of the judiciary.⁵ After a few remarks on the EU’s police missions in the Western Balkans (section 2), this paper will first lay out the process which has led to the adoption of the Joint Action establishing EULEX Kosovo and to its

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 European Commission, ‘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 (99) 235 final of 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 stand, and only for reasons of simplicity and predominant international usage, the appellation ‘Kosovo’ will be used throughout this contribution. This can be considered at the same time as an abbreviation of the term used by European Union institutions, namely ‘Kosovo under UNSCR 1244’.

³ Since the entry into force of the Treaty of Lisbon, the European Security and Defence Policy (ESDP) has been renamed Common Security and Defence Policy (CSDP). The treaty provisions in this article refer, unless otherwise indicated, to the current provisions after the entry into force of the Treaty of Lisbon, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

⁴ European Council, *A Secure Europe in a Better World* (Brussels, 2003).

⁵ The customs component is beyond the scope of this article.

deployment (section 3), followed by a presentation of the mandate and structure of the mission (section 4). The final part of the analysis 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 (section 5). A few concluding remarks will wrap up this working paper (section 6).

The present contribution therefore benefits from a short recapitulation of the civilian crisis management missions deployed to Bosnia and Herzegovina and Macedonia, since, among other reasons, the EU concept of civilian crisis management has grown out of EU member states' experience in an attempt to bring peace to the countries of the former Yugoslavia and the inability of the military presence to respond to civil unrest in Kosovo. The lack of readily available international police personnel for deployment to Kosovo after the NATO-led intervention in March 1999⁶ in particular has led to – some exceptions outside the Western Balkans put aside⁷ – 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 and Herzegovina. These police missions have an explicit 'political' basis in the 2000 Feira European Council Conclusions,⁸ 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 field⁹ illustrates the focus of the civilian CSDP missions on Security Sector Reform (SSR) and peacebuilding.¹⁰ EULEX Kosovo provides no exception.

Yet, it operates under the somewhat misleading EU label of 'civilian crisis management mission', a term which is not used by the Treaties themselves.¹¹

⁶ See, also for a number of concrete examples, R. Dawn, 'Civilian Tasks and Capabilities in EU Operations', in M. Glasius and M. Kaldor (eds.), *A Human Security Doctrine for Europe. Project, Principles, Practicalities* (London, Routledge 2006), at 266.

⁷ In particular EUJUST THEMIS in Georgia (2004–2005) and the AMM Monitoring Mission in Aceh/Indonesia (2005–2006). The SSR 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.

⁸ European Council, Conclusions of the Presidency (June 2000) Santa Maria da Feira.

⁹ The fourth, and most contested area for civilian crisis management, is civil protection.

¹⁰ See also S. Keukeleire en R. Thiers, 'EULEX Kosovo: Walking a Thin Line, Aiming for the Rule of Law', in S. Blockmans, J. Wouters & T. Ruys (eds.), *The European Union and Peacebuilding: Policy and Legal Aspects* (The Hague, T.M.C. Asser Press 2010), 353–374.

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* (2009), 265, at 269. '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 n. 6, 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. On the notion of human security, see M. Glasius and M. Kaldor, 'A Human Security Vision for Europe and Beyond' in Glasius and Kaldor, supra n. 6.

According to its mandate and scope, and this will become evident from this paper, 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 respect by extending the CSDP spectrum of activities to also include operations with an objective of ‘post-conflict stabilization.’¹⁴

In essence, this Working Papers will demonstrate that while EULEX Kosovo is really remarkable in many of its aspects and particularly in the implementation of its executive mandate, it only to a limited extent represents a shift in the conceptualization of the European Union’s civilian CSDP missions. Arguably, this conceptual shift is primarily linked to the specific international context and the legacy of 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

¹² The notions of ‘Security Sector Reform’ and ‘Security System Reform’ have increasingly become buzzwords among international donors involved in post-conflict reconstruction but 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’. See Clingendael Institute, ‘Towards a Better Practice Framework in SSR: Broadening the Debate’ *International Alert Occasional Paper* (2002). For an overview over the evolution of the concept, see for instance A. Bailes, ‘Introduction: The EU and Security Sector Reform,’ in P. Fluri and D. Spence (eds.), *The European Union and Security Sector Reform* (London, Harper 2008). 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.’ See D. Blease, ‘NATO and the EU within the Western Balkans: Partners or Rivals in Security Sector Reform?’ *Paper presented at UACES conference* (2007), on file with 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, and see Council of the European Union, ‘EU Concept for ESDP Support to Security Sector Reform (SSR)’, Brussels, 13 October 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’. United Nations Secretary-General, ‘An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacekeeping,’ (New York, 1992).

¹⁴ Article 43 TEU 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.’ 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.’

fully anchored in European structures,⁷ although such an assessment necessarily will need to await a post-deployment analysis.¹⁵

2. EULEX KOSOVO IN CONTEXT: THE POLICE MISSIONS IN THE WESTERN BALKANS

Following the adoption of the Feira Council 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 European Union Police Mission (EUPM) in Bosnia and EUPOL Proxima in Macedonia which will be presented in this section 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 and the EU mission is 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.’ 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.¹⁸

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, and arguably achieve this goal, 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 implementation of the CSDP mission works hand in hand with assistance under the Instrument for Pre-accession, the most important financial external assistance instrument used in Kosovo. An in-depth analysis of the cooperation between EULEX Kosovo and the European Commission Liaison Office (ECLO) in Kosovo in particular with respect to ‘internationally recognized standards and European best practices’ will be the subject of a forthcoming article by the same author in which the international legal basis for the EU ‘presences’ in Kosovo is also discussed.

¹⁶ See Dawn, *supra* n. 6, at 270. Nonetheless, the generic EU Crisis Management Concept, a document elaborated by the EU Military Staff, proved the main guide for these early missions.

¹⁷ Finalised in Council doc. 9535/02 of 31 May 2002.

¹⁸ 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 on 19 September 2001, available on the website of the Council of Europe at <<http://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

EUPM in Bosnia and Herzegovina (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.¹⁹ 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)’²⁰, 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.²¹ EUPM has, unlike its predecessor the IPTF²², a non-executive mandate and is therefore limited to ‘monitoring, 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 for judicial enforcement. The mandate remained non-executive, even after the launch of a second mission (EUPM

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).

¹⁹ 92 International Police Officers, 30 international civilian staff and 157 local staff. See Factsheet EUPM of April 2010, available on the Council of Ministers’ website at <<http://www.consilium.europa.eu>>.

²⁰ Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission, OJ 2002 L 70/1. EUPM I operated between 1 January 2003 and 12 December 2005. The UNSC Resolution 1396 of 5 March 2002 had specifically welcomed the Union’s decision in that respect. The transition has been argued to have been smooth for two reasons in particular. Firstly, nine months before the actual handover, an EU planning mission was sent. Secondly, Sven-Christian Frederiksen acted simultaneously as head of IPTF and as head of the EUPM Planning Team. See T. Ruys, ‘Background Paper on EU Crisis Management Operations,’ *Institute for International Law Working Paper* no. 108 (2007). At the same time, this arrangement has been criticized, as he was so occupied with the running of IPTF that the planning of EUPM was deemed insufficient.

²¹ See T. Mühlmann, ‘The Police Mission EUPM in Bosnia, 2003-2005,’ in M. Ostrauskaitė and R. Merlingen (eds.), *European Security and Defence Policy - an Implementation Perspective* (London, Routledge 2008). The European Community has provided funding for training and equipment.

²² Interestingly, the IPTF initially also had a non-executive advising and training role and only subsequently received a limited executive mandate. Its mandate, set out in Annex 11 of the General Framework Agreement for Peace (Dayton Peace Agreement), consisted of ‘(...) various tasks, including training and advising local law-enforcement personnel and monitoring and inspecting law-enforcement activities and facilities.’ It effectively was involved in the registration and vetting of police officers in terms of qualification and non-involvement in war crimes, and in increasing the number of officers from minority groups. It later also contributed to the building and strengthening of state-level policing. For a full report on the work of the IPTF, see Security Council, ‘Report of the United Nations Secretary-General on the United Nations Mission in Bosnia and Herzegovina’, UN Doc. S/2002/1314, 2 December 2002.

II) in January 2006.²³ As organized crime had been identified as one of the principal obstacles to the establishment of the rule of law,²⁴ 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.²⁵

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. It '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.'²⁶ 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.²⁷ 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 that '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 as sustainable, professional and multiethnic police service operating in accordance with best European and international standards.'²⁸ 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 2009²⁹ for an indefinite time, its support to the local authorities in the fight against organized crime and corruption was refined insofar as it mentioned 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' – together with the refinement or extension of the mission man-

²³ See Council Joint Action 2005/824/CFSP of 24 November 2005 on the European Union Police Mission in Bosnia and Herzegovina, OJ 2005 L 307. 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 of 19 November 2007, OJ 2007 L 303.

²⁴ This corresponded to a threat assessment shared by the international community, but not by the local population. See M. Merlingen and R. Ostrauskaitė, 'ESDP Police Missions: Meaning, Context and Operational Challenges,' 10 *European Foreign Affairs Review* (2005), 229.

²⁵ See C. Mace, 'ESDP Goes Live: The EU Police Mission in Bosnia and Herzegovina,' 16 *European Security Review* (2003), 4.

²⁶ For details of the EUPM mandate, see Annex to Council Joint Action 2002/210/CFSP of 11 March 2002 on the European Union Police Mission to Bosnia and Herzegovina, OJ 2002 L 70.

²⁷ See A. Juncos, 'Bosnia and Herzegovina: A testing Ground for the ESDP?' 4 *CFSP Forum* (2006), 6.

²⁸ Council Joint Action 2005/824/CFSP of 24 November 2005 on the European Union Police Mission in Bosnia and Herzegovina, OJ 2005 L 307, Article 2.

²⁹ Council Decision 2009/906/CFSP of 8 December 2009 on the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH), OJ 2009 L 322.

date insofar as the ‘targeted’ local authorities now comprise all ‘relevant law enforcement agencies’ and no longer just the police.

In Macedonia, EUPOL Proxima,³⁰ 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)³¹ 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’.³²

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 a 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*,³³ included a police element with executive powers. Furthermore, the reference to the ‘broader rule of law’ in the mandates of both the EUPM and 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 – impacted on the structure and organization of the law enforcement authorities.

³⁰ Council Joint Action 2003/681/CFSP of 29 September 2003 on the European Union Police Mission in the Former Yugoslav Republic of Macedonia, OJ 2003 L 249, 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), OJ 2004 L 348. The latter refocused the training on the middle and senior levels of management.

³¹ 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), OJ 2005 L 307.

³² 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), OJ 2005 L 307, preamble, point 8.

³³ Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina, OJ 2004 L 252.

3. EULEX KOSOVO: CONCEPTUALISATION AND DEPLOYMENT

Following the adoption of Resolution 1244/99 by the United Nations Security Council (UNSC), UNMIK was given a mandate over Kosovo's administration in its entirety, including the police and justice sectors. Yet, unlike many other policy areas where governmental tasks have gradually been transferred to the Kosovo Provisional Institutions of Self-Government (PISG) since the promulgation of the 'Constitutional Framework'³⁴, all aspects of the police and justice sector have firmly been kept in the hands of the international community. UNMIK had therefore effectively been administering the law enforcement sector until the February 2008 declaration of independence.

The local legal community was not considered to be sufficiently prepared to take over responsibility in the law enforcement sector. This belief has clearly been reflected in the international reports and 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 – Special Envoy of the UNSG – concluded that

‘in 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. The result of such reductions would be a further loss of credibility of the justice system and of confidence in it among the population in general and the minority communities in particular. There is little reason to believe that local judges and prosecutors will be able to fulfil in the near future the functions now being carried out by international personnel.’³⁵

It is hardly surprising then that the Ahtisaari blueprint³⁶ in the form of a ‘Comprehensive Proposal’ for a ‘supervised independence’ specifically suggests that ‘an ESDP mission under the direction of the EUSR [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.’³⁷ The Ahtisaari Plan foresees that the Council of the European Union determines the modalities of the mission in accordance with a mandate for an ESDP mission which consists of ‘the authority to ensure that cases of war crimes, terrorism, organized crime, corruption, inter-eth-

³⁴ Constitutional Framework for Provision of Self-Government UNMIK/REG/2001/9 of 15 May 2001, amended by UNMIK Regulations UNMIK/REG/2002/9 of 3 May 2002 and UNMIK/REG/2007/29 of 4 October 2002.

³⁵ K. Eide, ‘A special review of the situation in Kosovo’, annexed to the Letter dated 7 October 2005 from the United Nations Secretary-General to the United Nations Security Council, UN Doc. S/2005/635, at 40.

³⁶ United Nations Secretary-General, ‘Comprehensive Proposal for the Kosovo Status Settlement’ annexed to Letter dated 26 March 2007 from the United Nations Secretary-General to the President of the Security Council, UN Doc. S/2007/168.

³⁷ Annex IX, Art. 2, point 2.3 of the ‘Comprehensive Proposal’.

nic crimes, financial/economic crimes, and other serious crimes are properly investigated,[...] prosecuted [and] adjudicated including where appropriate by international judges sitting independently or on panels with Kosovo judges in the court which has jurisdiction over the case.’ In this respect, it is proposed that the ESDP mission have the ‘authority to monitor, mentor and advise on all areas related to the rule of law’. Furthermore, ‘[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’.³⁸

In addition, the Ahtisaari Plan suggests that adjudication by international judges also concern ‘property related civil cases’. Here the proposal is more detailed, at least with respect to claims arising from the privatization process. In principle the final determination of ownership and the adjudication of actions filed with the Kosovo Trust Agency (KTA) which continues to hold the trusteeship for socially owned enterprises ‘shall continue to be handled by the Special Chamber within the Supreme Court established for this purpose by UNMIK Regulation 2002/13’.

With respect to the more concrete implementation of the envisaged mission, the Ahtisaari ‘Comprehensive Proposal’ outlines in detail the composition of the chamber’s new mixed panels, namely panels consisting of two international judges and one local judge at the second tier, in addition to the existing panel of five judges, which under the proposal shall be transformed into a third tier court with the same subject matter jurisdiction.³⁹ It equally stipulates that ‘the Kosovo authorities shall facilitate such efforts and grant immediate and complete access to any site, person, activity, proceeding, document or other item or event in Kosovo.’

In addition – and this refers as much to the mandate as it does to the implementation of the envisaged mission – the Ahtisaari Plan expresses a clear desire to avoid the creation – or rather the prolongation – of two parallel systems of law enforcement. 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.’⁴⁰

Despite the Ahtisaari Plan’s eventual fate being still unclear,⁴¹ the European Union, in mid-2006, nevertheless sent a 40-head strong ‘EU rule of law mission’ Planning Team (EUPT), entrusted with drafting the mandate as well as conceptu-

³⁸ Annex IX, Art. 2, point 2.3, lit a, b and c of the ‘Comprehensive Proposal’. In fact, this logic continues with the reconfigured UNMIK which is still, and almost exclusively, concerned with law enforcement via its OSCE ‘pillar’ dealing with trial monitoring.

³⁹ Report of the Special Envoy of the Secretary General on Kosovo’s Future Status – Comprehensive Proposal for Future Status Settlement/Annex VII, Articles 3 and 5. See 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,’ (2009), paper on file with author.

⁴⁰ Annex IX, Art. 2, point 2.3, lit c of the ‘Comprehensive Proposal’.

⁴¹ After the prima facie non-endorsement of the Ahtisaari Plan by the UN Security Council, so-called Troika negotiations were started as a last resort to reach a negotiated final political settlement. See for instance B. Knoll, ‘Kosovo’s Endgame and Its Wider Implications in Public International Law’, 18 *Finnish Yearbook of International Law* (2007), 153.

alizing the eventual structure of the mission.⁴² In doing so, EUPT kept closely to the parameters envisaged for the ESDP mission in the Ahtisaari Plan. This is hardly surprising given the fact that the EUPT had been closely associated with drafting Annex X on the civilian international presence in Kosovo as an integral part of the Ahtisaari Plan.

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 to also send an EUSR, and generally decided for the EU to 'play a leading role in strengthening stability in the region and in implementing a settlement defining Kosovo's status (...) [and to] assist Kosovo in the path towards sustainable stability (...)'. The European Council also declared the EU to 'be ready to assist economic and political development through a clear European perspective, in line with the European perspective of the region.'⁴³ Against the background of this overall commitment, the Council Joint Action establishing EULEX Kosovo was adopted on 4 February 2008 – not by coincidence shortly before the declaration of independence.⁴⁴

⁴² 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, OJ 2006 L 112; 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, OJ 2007 L 312. EUPT also organized the trainings for the first incoming judges.

⁴³ Brussels European Council 14 December 2007, Presidency Conclusions, Council doc. 16616/1/07, at 70.

⁴⁴ Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, OJ 2008 L 42. 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 on 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'. For a full text of the statement adopted after the declaration of independence see GAER Council Conclusions of 18 February 2008, Council doc. 6496/08. See in this context also the statement by the NATO North Atlantic Council: '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 <<http://www.nato.int/docu/pr/2008/p08-025e.htm>>, 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 which argued '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, available upon request from the Council Document Register, point 2, on file with author. For backgrounds and analysis on the entire episode, see J. Ker-Lindsay, *Kosovo: the Path to Contested Statehood in the Balkans* (London, I.B. Taurus 2009).

Having thus secured the internal legal basis and framework for action of the mission, it was obvious that this would not be sufficient to allow the mission to function and implement its mandate. The EUPT therefore prepared – in close co-operation with the relevant decision-makers in Pristina – the famous ‘package of 42 laws’ that would then – after the declaration of independence – be adopted by the Kosovo Assembly on the basis of and in accordance with the Kosovo constitution which was foreseen to enter into force on 15 June 2008. Next to, for instance, decentralization, borders, and the creation of a Kosovo Foreign Ministry and Intelligence Service,⁴⁵ this package also comprised 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 exercises its jurisdiction in criminal and civil matters.

Undoubtedly, an EU ‘Rule of Law mission’ in Kosovo constituted an original part and essential element of the ‘international presence’ called for in the Ahtisaari Plan and as part of the concept of ‘supervised independence’. The Kosovo authorities in the declaration of independence and the Kosovo constitution had committed to the implementation of the Ahtisaari Plan despite its non-endorsement by the UN Security Council. This had a two-fold implication. First, it is inaccurate to speak of a ‘direct transfer’ from UNMIK to EULEX, in the sense of a planned handing-over of responsibilities in the police and justice sectors from UNMIK to other stakeholders – as it had been done previously with respect to other areas, for instance, to the Provisional Institutions of Self-Government. The process in the present case, by contrast, can be defined as ‘nationalized’ or ‘internalized’ by the institutions unilaterally proclaiming the independence of Kosovo.

Secondly, the fact that the international status of Kosovo therefore continued to lack international agreement, to say the least, negatively affected the reconfiguration of the international presences generally and of UNMIK specifically, and also had considerable repercussions on EULEX Kosovo’s deployment⁴⁶ – among other factors.⁴⁷

⁴⁵ Security Council, ‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’, S/2009/149, 17 July 2008.

⁴⁶ In fact, the eventual completion of EULEX’s deployment and the actual commencement of its operations after declaring ‘initial operational capability’ on 9 December 2008 (see below) was directly tied to agreement on the so-called ‘Six-point plan’ between the UN and Serbia, which in turn allowed for the adoption of a highly consequential statement by the President of the UN Security Council. Therein, he accepts that ‘EULEX will fully respect Security Council resolution 1244 (1999) and operate under the overall authority and within the status-neutral framework of the United Nations’. See Statement by the President of the Security Council, S/PRST/2008/44 of 26 November 2008. While not expressly establishing a UN umbrella for EULEX, this presidential statement – by way of welcoming ‘the UN Secretary-General’s Report of the Secretary-General’s report on UNMIK (S/2008/692) dated 24 November 2008’ – undoubtedly seeks to do so in order to place EULEX within the framework of UNSC resolution 1244. On the international legal basis for EULEX Kosovo, see E. de Wet, ‘The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX,’ 103 *American Journal of International Law* (2009), 81, and in particular E. Milano, ‘Il trasferimento di funzioni da UNMIK a EULEX in Kosovo,’ 91 *Rivista di Diritto Internazionale* (2008), 967.

⁴⁷ Other reasons identified for the slow deployment (especially between December 2008 and April 2009) are EU procurement rules. As EULEX is financed under a CFSP/ESDP budget line, the

In any case, when the mission leadership had been handed over from EUPT to EULEX by mid-June 2008,⁴⁸ its staff had reached 300. After the conclusion of a ‘Technical arrangement for handover of UNMIK assets for the technical Rule of Law mission’ in August 2008,⁴⁹ the roughly 1000 international staff members remaining – some of which merely required a transfer from the UNMIK justice and police departments to the respective EULEX components – started being deployed. This technical arrangement ‘on the sale of UNMIK surplus equipment and vehicles’⁵⁰ was essential in building-up the necessary operational capabilities and lead to a ‘technical handover’ – not to be confused with the ‘transfer of authority from UNMIK.’ The latter, in Article 5 of the Joint Action had been designated to officially mark the start of the mission’s operational phase. In effect, EULEX declared having reached its ‘initial operational capability’ in December 2008. 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.⁵¹ As of January 2009, there were 2364 staff members, out of which 1642 were international staff and 722 local staff⁵² allocated over the

regular (and therefore very cumbersome) EU procurement rules apply. Furthermore, the executive powers in the judiciary were dependent also on the entry into force of the Kosovo Constitution on 15 June 2008.

⁴⁸ It is appropriate at this juncture to add a few lines on the leadership of the mission at the strategic level in Brussels. The Director of the Brussels-based Civilian Planning and Conduct Capability (CPCC) unit within the Directorate-General for External and Political-Military Affairs in DG E at the Council Secretariat is at the same time the Civilian Operation Commander for every civilian mission. This position, currently held by Kees Klompenhouwer, has been created in order to ensure better and shorter command and control linkages between the strategic, operational and tactical levels. The Civilian Operation Commander exercises command and control at the strategic level, under the political and strategic control of the Political and Security Committee (PSC) – the ‘linchpin of civilian crisis management’ - while the Head of Mission assumes responsibility at theatre level (See Articles 7 and 8 of the Council Joint Action establishing EULEX). The introduction of the CPCC – where all operational planning both initial and ongoing is conducted now - also had an organizational impact on DG E leading to its restructuring in June 2007. Of interest to the operational planning aspects of civilian missions and their cooperation with the military missions, is the Civilian-Military Cell (Civ/Mil Cell), which is in fact situated within the EU Military Staff (EUMS) (see Council Decision 2005/395/CFSP amending Council Decision 2001/80/CFSP on the establishment of the Military Staff of the European Union, OJ 2005 L 132). It is the military missions’ equivalent to the CPCC. Operational since 2005, the Civ/Mil Cell was designed to achieve greater coherence between the instruments in EU crisis management, in particular with respect to civil-military coordination, and has a number of tasks including enhancing the early-warning role of the EUMS, conflict prevention and post-conflict stabilization. The Commission has agreed to appoint two liaison officers to the Cell. On institutional aspects, see for instance S. Duke, ‘Peculiarities in the Institutionalization of CFSP and ESDP,’ in S. Blockmans (ed.), *The European Union and Crisis Management: Policy and Legal Aspects* (The Hague, T.M.C Asser Press 2008), 75-105.

⁴⁹ European Parliament resolution of 5 February 2009 on Kosovo and the role of the EU.

⁵⁰ Security Council, ‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’, S/2008/692, 24 November 2008, at 23.

⁵¹ See W. Koeth, ‘State Building Without a State: The EU’s Dilemma in Defining Its Relations with Kosovo’, 15 *European Foreign Affairs Review* (2010), 237.

⁵² Annex I, Report of the SG/HR- CFSP to the UNSG on the activities of the European Union Rule of Law Mission in Kosovo, in Security Council, ‘Report of the Secretary-General on the United

police component, the justice component (therein 70 for the prison system, 40 judges and 20 prosecutors) and the relatively small customs component (27).⁵³ ‘Initial operational capacity’ meant that within the justice component, for instance, work on the court files and cases could be started.⁵⁴

From this ‘cut-off’ date in December 2008, roughly five months were needed for EULEX Kosovo to assume, in April 2009, so-called ‘full operational responsibility’ as the international presence in Kosovo for the justice, police and custom’s sector.⁵⁵

4. THE MANDATE OF EULEX KOSOVO

According to the mission statement in Art. 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.’⁵⁶

The Joint Action itself then ‘translates’ the mission mandate into a number of operational ‘tasks’ horizontally for the three different components of EULEX, i.e. the justice, police and customs components. EULEX is to, *inter alia*, ‘ensure that cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes,

Nations Interim Administration Mission in Kosovo’, S/2009/149, 17 March 2009, at 4. This is the first report of the reporting practice to the UN on its activities that EULEX agreed to undertake on a regular basis in accordance with the November 2008 Report.

⁵³ It is interesting to note that the United States have agreed to provide 25% of the operating costs and to send 80 police officers and 8 judges and prosecutors. See de Wet, *supra* n. 46.

⁵⁴ Between December 2008 and March 2009, the EULEX justice component received almost 200 case files from UNMIK as the latter closed down its judicial activities. These complex criminal cases had charges varying from war crimes and money laundering to organized crime and terrorism. EULEX retained 120 cases while the remainder for which there was no primary or secondary competence (see below) was referred to the local courts or forwarded to EULEX prosecutors for consideration. The declaration of the initial operational capability therefore also marked the beginning of the exercise of executive powers (see below) by the EULEX judges in the courts of Kosovo.

⁵⁵ With the exception of an ongoing criminal trial and four proceedings of the Special Chamber of the Supreme Court. The taking over of the full responsibility required a number of further practical steps. UNMIK police for instance over a period of three days reported to their former posts in civilian outfits and introduced the EULEX police monitors/advisors to their Kosovo Police counterparts. Agreements were signed between UNMIK and EULEX on the transfer of crime investigation files, and justice-related investigative and case files. See Security Council, ‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’, S/2008/692, 24 November 2008, at 12 and 13. The scope of this ‘full operation capability’ is however contested, at least as to the date of April 2009, by the Executive Police Department. Interview Pristina September 2009.

⁵⁶ Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, OJ 2008 L 42, Article 2.

financial/economic crimes and other serious crimes, as well as property related issues, are properly investigated, prosecuted, adjudicated and enforced according to the applicable law', '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'.⁵⁷ 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] to ensure the maintenance and promotion of the rule of law, public order and security'.⁵⁸ 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'.⁵⁹ Presumably, this clause was added to avoid having to amend the mission mandate, given the difficulties that would undoubtedly arise in order to reach agreement in this respect.

It is interesting to note that the mission'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' whilst '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)'.⁶⁰ 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.⁶¹

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 case that this proves necessary for the 'maintenance and the promotion of the rule of law, public order and security'.⁶² However given the ambiguity of Kosovo's international status at

⁵⁷ Article 3, lit. d, e and f.

⁵⁸ Article 3, lit. h.

⁵⁹ Interview with a former EUPT staff member, Pristina September 2009.

⁶⁰ Article 3, lit. a.

⁶¹ 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 October 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.

⁶² Article 3, lit. b. While the English language version is ambiguous 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, as the expression 'as necessary' refers to the decision to exercise this executive power in the first place. 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, Pristina September 2009.

the time of adoption of the Joint Action— at the beginning of February 2008 – the ‘relevant international civilian authorities’ with whom consultation was to be undertaken were not exactly clear. On the one hand, the possibility of reversing operational decisions seems to refer to the powers that the Special Representative of the Secretary-General (SRSG) as Head of UNMIK under UN Security Council Resolution 1244 (1999) had previously exercised 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.⁶³ On the other hand, the Ahtisaari-Plan foresaw as the highest and final civilian authority the International Civilian Representative (ICR), acting also as EUSR, with whom consultation requirements were stipulated for the envisaged CSDP mission. The ICR/EUSR is reported to use its executive authorities daily. In any case, this obligation of consultation for EULEX seems to suggest that EULEX – while having ‘full operational responsibility’ in the rule of law sector – is definitely not the highest civilian authority in this area. This is yet another clear indication that it would be incorrect to speak of a replacement of UNMIK by EULEX in terms of the administration of a territory being exercised by an international organization.

In the fulfilment of its tasks, EULEX has to ‘ensure that all its activities respect international standards concerning human rights and gender mainstreaming.’⁶⁴ The broad formulation of ‘international standards’ is a drafting technique which seeks to avoid reference to documents of other international bodies while in fact 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.⁶⁵

The EULEX Programme Strategy⁶⁶ affirms a three-fold mantra of ‘Monitoring, Mentoring and Advising’ and seeks to define these individual elements. Advising is probably the most straight-forwardly understandable 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 establishment of required structures, including on the appropriate legislation, as well as on the improvement of the authorities’ performance’. As for monitoring, it is said to imply a system of measuring performance, and therefore an agreed method of accurate recording

⁶³ Security Council, ‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’, S/2008/692, 24 November 2008, 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]’.

⁶⁴ Incoherently, this is listed under the ‘tasks’ of the Joint Action. See Article 3, lit. i.

⁶⁵ Interview, Pristina September 2009. S/RES/1325/2000. 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. On the latter, see below.

⁶⁶ See EULEX Programme Strategy, available at <<http://www.eulex-kosovo.eu>>.

and reporting, in order to identify changes and – presumably – improvements. This is linked to a programming method which foresees six-month cycles of activity. Thereby, the analysis of data, outputs and performance indicators after each period of six months of operations are intended to result in modifying, adapting and reorienting performance indicators.⁶⁷ 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. Clearly, through these principles, the overall thrust and *rationale* of the mission relies on an existing level of professionalism in the local law enforcement sector so that it eventually can reach a level of efficiency and sustainability sufficient for the administration and governance of the sector.

In order to achieve the objectives according to the chosen approach, the mission leadership continuously works towards ensuring solid strategic planning⁶⁸ 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.⁶⁹ The JRCB is a politically hybrid body, composed of representatives of national authorities and multi- and bilateral donor institutions and is co-chaired by the EULEX Head of Mission (HoM) 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.⁷⁰ Below the level of the JRCB, thematic working groups ensure prior coordination on a more technical level. The EULEX components therefore first have to agree on a common EULEX position and internal clearance ahead of discussing the agreed strategy in the JRCB.

The process leading to the official endorsement of the ‘EULEX overall approach’ by the ‘Prime minister and the Ministers in the JRCB’ may serve as an illustration of this coordination.⁷¹ First, an intensive evaluation phase which had started in May 2008 with the adoption of so-called ‘logical frameworks’ had pre-

⁶⁷ Id.

⁶⁸ Previously, the involvement of the international community in this sector had been considered as extremely reactive to the immediate necessities on the ground, lacking strategic over- and foresight.

⁶⁹ ‘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.’ See Security Council, ‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’, S/2009/149, 17 March 2009, Annex I, Report of the SG/HR for CFSP to the UNSG on the activities of the European Union Rule of Law Mission in Kosovo, at 5.

⁷⁰ Interview, Pristina September 2009.

⁷¹ See EULEX July 2009 Report, available at <<http://www.eulex-kosovo.eu>>.

ceded the EULEX-internal decision on the overall approach. Drafted by the EULEX Programme Office, the logical frameworks are intended to provide a methodology for a first-time full assessment of the entire rule of law sector, and at the same time are a mechanism that enables the ‘translation of the CONOPS into operational documents’ in order for them to be shared with the local institutions.⁷² Following the adoption of these frameworks, regular meetings – EULEX-internal first and then within the thematic working groups – took place which eventually lead to the endorsement of the overall strategy by the JRCB in November 2008.

Only then could start the six-month evaluation phase of the rule of law sector, during which the strengths and weaknesses of each individual sector on the basis of electronic questionnaires were assessed. It was completed according to schedule in June 2009. During this period 2,500 individual records were analyzed. 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 defence lawyers during trial, a transparent case allocation, 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 have been made ready for implementation and operationalisation through so-called ‘Action Fiches’ which again required endorsement of the JRCB prior to their launch in November 2009.⁷³

A mandate as inclusive as EULEX’s requires an appropriate structure. The CSDP mission – while being a ‘unified mission across Kosovo’ – is structured around three components, namely a customs component, a police component and a justice component, with the latter two being further sub-divided.⁷⁴ 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, and judicial experts

⁷² See interview with staff members of EULEX Programme Office, Pristina September 2009. According to this office, logical frameworks are a common tool used in programming strategies, including by the European Commission. From the EULEX July 2009 Report the following elements of this methodology can be deduced: assessment of current performance, identification and record of areas of strength and weaknesses, joint development of strategies to address the areas of weakness and assessment of the implementation of these strategies. CONOPS is an abbreviation for ‘Concept of Operations’ which is prepared for each EU mission by the Council-Secretariat, the PSC and Coreper II, before being endorsed by the Council. Via the Council Document Registry, only the partially declassified version of the CONOPS can be obtained. See Council Doc. 5978/08 of 31 January 2008.

⁷³ In fact, opinions diverge greatly as to the ownership of these Action Fiches. On the one hand, they are said to have been developed without the Kosovo counterparts, and to have been drafted in such flexible terms that the opinion of the latter could subsequently be taken into account. On the other hand, they are called Action *Fiches* and not projects in order not to provoke the idea that the organizers would guarantee the outcome - as is it would be for projects - but that the Kosovo Police Teams ‘produce the product and the EULEX advisers merely assess the production and product’. Interviews, Pristina September 2009.

⁷⁴ Council Joint Action 2008/124/CFSP, Article 6.

(or judges) in the Kosovo Ministry of Justice, the Kosovo Judicial Council and the Kosovo Correctional Service.⁷⁵ The output-structure for the police component on the other hand reflects the organizational structure of the Kosovo Police Service into four departments, namely Borders (113 staff members), Operations (170 staff members),⁷⁶ Crime (120 staff members)⁷⁷ and Administration (25 staff members). However, within the police component another organizational distinction, arising out of the specific exercise of the police executive mandate which will be demonstrated below, is more significant, namely between the Police Executive Department (PED), the Police Strengthening Department (PSD) and the Special Police Units (SPU).

5. THE IMPLEMENTATION OF THE JUSTICE AND POLICE COMPONENTS

UNMIK's International Judges and Prosecutors' Programme (IJP) has been criticized extensively on several grounds. Suffice it 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 is different from UNMIK's 'police and judiciary' agenda, in particular in its renewed impetus on capacity-building⁷⁸ and while it is conditioned by the different environment paradigm within

⁷⁵ A few numbers may serve to illustrate the size of the justice component (numbers as of September 2009). There are 10 civil judges at District Court level, and a total number of 17 EULEX judges at District Court level working in the criminal field, as well as 3 judges at Supreme Court level. As for prosecutors, one is being deployed to the Office of the State Prosecutor of Kosovo, 5 to the Kosovo Special Prosecutor Office and 11 at District Court level. While 2 EULEX advisors have been deployed to the Ministry of Justice (MoJ), there are 6 advisors co-located at the Office of Missing Persons and Forensic Medicine. See EULEX Programme Strategy, available at <<http://www.eulex-kosovo.eu>>.

⁷⁶ The fairly high number of staff members attributed to KP Operations can be explained by it being by far the largest part of the KP organization. Revealing the highly centralized model inherited from the KPS through its structure and organization, it includes a range of central support functions, divided into five sub-units relating to traffic, the specialized units, planning and development, information system and community policing.

⁷⁷ The high level of officers in KP Crime on the other hand 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.' See EULEX Programme Strategy, available at <<http://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', *Europe Report* No. 204 (2010), at 8.

⁷⁸ This had also been an argument brought forward for the introduction of UNMIK's international judges, but was then quasi-inexistent within UNMIK's IJP programme. 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* (2003), 95.

which it is operating, 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’⁷⁹ and the *acquis* alignment strategies.

At the first ‘level of implementation’ the Mission Programme Office in Pristina has attempted to further clarify the mission mandate by reformulating its elements into six ‘overall aims’,⁸⁰ 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’. Nonetheless, or rather precisely for that reason, it is certainly appropriate to briefly consider the way in which they have been elaborated, before dwelling on the next level of implementation and functioning of EULEX in the respective components.

With respect to the first and second aim of ‘helping the Kosovo Rule of Law institutions to achieve progress toward 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.⁸¹ 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’. 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 the democratic Kosovo.⁸²

It is noteworthy here 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

⁷⁹ This is an adaptation of UNMIK’s ‘standards before status’-policy endorsed by the United Nations Security Council in 2003. The eight reform goals which built on earlier UNMIK benchmarking efforts were meant to serve as a reform incentive by linking the beginning of status negotiation talks with Kosovo’s reform achievements. This process however had a number of flaws in its incentive structure. See for instance M. Karnitschnigg, ‘The United Nations and the European Union in Kosovo - the Challenges of Joint Nation-Building,’ in J. Wouters, F. Hoffmeister & T. Ruys (eds.), *The United Nations and the European Union: An ever Stronger Partnership?* (The Hague, T.M.C. Asser Press, 2006), 323-351. The EU’s policy is - and is almost forced to be - independent of its status.

⁸⁰ See EULEX Programme Strategy, available at <<http://www.eulex-kosovo.eu>>.

⁸¹ Id.

⁸² See EULEX Programme Strategy.

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’. While economically motivated corruption or bribery therefore is not included in this definition, political influence in practice is tied in with organized crime.⁸³ The principle of multi-ethnicity calls for the institutions ‘to fully reflect the society they serve’.⁸⁴ 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 freedoms⁸⁵. 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 Action⁸⁶ 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’.

As explained above, EULEX – across all three components – effectively initiated its operations on the ground with the six-month evaluation phase starting in December 2008. Across the three components, its activities were first directed at ‘taking stock’ of current performance and capabilities of the local law enforcement institutions in order to establish a ‘baseline’ for further monitoring of progress during the following operational phases. Both the methods of this first programming cycle and in particular the follow-up, namely the actual implementation of the mission mandate in a second programming cycle which started in November 2009 with the launch of the ‘Action Fiches’, differ however substantially 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’ discourse⁸⁷ – is put into practice. According to this principle, the EULEX staff members individually or at least 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 sub-sections.

⁸³ Interview, Pristina September 2009.

⁸⁴ 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.

⁸⁵ See EULEX Programme Strategy.

⁸⁶ See Council Joint Action 2008/124/CFSP, Article 3.

⁸⁷ Interview with EULEX Kosovo Communications Officer in Brussels, October 2008.

5.1. 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, 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 a judges. For the exercise of this function, it is imperative that the judge – and this is self-explanatory but needs nonetheless to be underlined – acts independently and impartially and in accordance with domestic law. This requirement is addressed by the ‘Law on the jurisdiction, case selection and case allocation of EULEX judges and prosecutors in Kosovo’⁸⁸, which was part of the package of 42 laws that the Kosovo Assembly adopted immediately after the declaration of independence and whose content has been closely coordinated with the international community, including, most importantly, EUPT. Indeed, on the basis of this Kosovo Assembly legislation, the European judges and prosecutors⁸⁹ 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.⁹⁰

In the criminal law domain, 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

⁸⁸ Law No. 03/L-053, available at <<http://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.’

⁸⁹ The following lines focus on the judiciary rather than on the prosecution for which, however, the same principles underlying the executive and non-executive functions apply. In essence, EULEX prosecutors have the 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 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. EULEX prosecutors have recently made headlines in the context of investigations against the Minister of Transport and Telecommunications, Fatmir Limaj. Johannes van Vreeswijk, EULEX acting chief prosecutor, said he had strong evidence of money laundering, organised crime, abuse of public office, fraud and bribes in the ministry. As reported at <<http://www.euobserver.com>> on 21 May 2010. Generally, the lack of progress in establishing the basic mechanisms of cooperation between prosecution and police, and between the prosecution and the judiciary, remains a cause for concern. As one of the few positive steps, the report mentions the establishment of an anti-corruption task force in the Office of the SPRK. See EULEX Kosovo, Annual Report on the judicial activities of EULEX judges 2009, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010.

⁹⁰ 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 this case EULEX in accordance with the modalities on case selection and case allocation. See Art. 3.4 and 5 of the Assembly law on EULEX jurisdiction. Interview, Pristina September 2009.

of Kosovo], the SPRK'. These criminal proceedings, for which the SPRK has exclusive competence for investigation and prosecution⁹¹ and for which EULEX judges therefore have compulsory or primary (and in 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.⁹² 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 this is considered necessary to ensure the proper administration of justice and thus to avoid a miscarriage of justice.⁹³ 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.⁹⁴ In the criminal law domain, processing the case files inherited from UNMIK has been set as a priority. The two major categories of cases transferred to EULEX judges at supreme court and district court level relate to war crimes against the civilian population committed during the 1998-1999 war in Kosovo, and crimes committed during the unrest which took place in Kosovo in March 2004.⁹⁵

⁹¹ Article 5 ('Exclusive Competence of the SPRK') of the Law on the Special Prosecution Office of the Republic of Kosovo, Law No. 03/L-052, available at <<http://www.eulex-kosovo.eu>>.

⁹² Official Gazette of the Socialist Federal Republic of Yugoslavia No. 44/76, as amended. The comparison with Article 3 of the JA is interesting. It provides that the mission shall ensure, as mentioned, that these cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, *where appropriate* by international investigators, prosecutors and judges *jointly* with Kosovo investigators, prosecutors and judges *or independently*, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities [emphasis added].

⁹³ In March 2009, the office of the President of the Assembly of EULEX judges issues standard operating procedures (SOPs) detailing the prerequisites and the procedure to be followed when taking over a criminal or a civil case (on EULEX jurisdiction in civil matters see below). See EULEX Kosovo, Annual Report on the judicial activities of EULEX judges 2009, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010, at 28. During the reporting period of 2009, 53 requests were made – by the entire spectrum of those who have the right to do so. The report contains summaries of some of the criminal cases taken over by EULEX judges.

⁹⁴ See Article 3.5 of the Assembly law on EULEX jurisdiction.

⁹⁵ For a summary of these categories of cases where judgments have been issued with the involvement of EULEX judges, see EULEX Kosovo, Annual Report on the judicial activities of EULEX judges 2009, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010. Involving illegal arrest and detention of civilians (*Selim Krasnqi et alia*) and large destruction and theft of property, intimidation, and endangering lives through the use of explosives and firearms (*Miroslav Vuckovic*) for instance, these cases are interesting from a factual as well as a procedural point of view and have required comprehensive examination of the applicable concepts of international humanitarian law, such as the temporal and geographical scope of the 'armed conflict' in the

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 panels of three judges, that is in hybrid panels which in principle comprise two European judges, including the presiding judge, and a local judge.⁹⁶ The President of the Assembly of EULEX judges has the authority to derogate from the mixed panel composition ‘for grounded reasons.’ S/he can either assign a panel with a majority of local judges or even entirely composed of local judges. Such a decision can also be limited to a specific stage of the proceedings, such as the autopsy.⁹⁷ On the other hand, the President of the Assembly of 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.⁹⁸

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.⁹⁹ 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 (KTA) related matters (SCSC).¹⁰⁰ 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 represents an important

light of ICTY case law. The 20 criminal cases inherited from UNMIK at the supreme court level have already been concluded while the completion of the cases at district court level is expected for mid-2010.

⁹⁶ During the initial deployment phase, a particular *modus vivendi* had to be found for the majority Serb populated areas north of the river Ibar. As the northern Mitrovica Court house has remained closed since March 2008, EULEX could not use court houses other than the Vushtrri Court house to which the EULEX judges were escorted back and forth from the south on the day of scheduled proceedings. Today, the EULEX staff assigned to this court consists of two criminal law judges, two prosecutors, two civil law 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 <<http://www.osce.org>>, accessed in June 2010.

⁹⁷ Art. 4 of the Assembly law on EULEX jurisdiction.

⁹⁸ *De facto*, war crimes against Serbs or involving Serbian citizens and interethnic crimes are mostly dealt with by such panels. Interview Pristina September 2009.

⁹⁹ Art. 5 of the Assembly law on EULEX jurisdiction.

¹⁰⁰ 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. In early 2009 it was redesigned and largely expanded, now involving 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 as there is a high probability of the involvement of 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. In the reporting period of 2009, the SCSC has taken 668 procedural decisions and has issued 29 judgments. See EULEX Kosovo, Annual Report on the judicial activities of EULEX judges 2009, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010, at 43 and 44.

novelty, especially in comparison to UNMIK's IJP, even if linked to the specific post-conflict environment but also to Kosovo's pre-conflict legacy of former Yugoslavia's communism. The contribution of the European judges is deemed necessary due to 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'.¹⁰¹

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, established as 'an independent body responsible for the judiciary and the courts and designed for ensuring their impartiality, independence, and professionalism'¹⁰² is not competent for disciplinary proceedings against European judges. 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 or not a violation of human rights has occurred and to formulate recommendations for remedial action not linked to compensation.¹⁰³ The matter of a possible disqualification of an EULEX judge does in

¹⁰¹ The civil domain also suffers from an immense backlog of cases which had been frozen according to an only recently repealed UNMIK regulation. They are property cases involving 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. Other concerns are, as generally, the lack of independence, ineffectiveness and the slow proceedings. There is also a huge ethnic bias at the level of execution of judgments, i.e. the registration of the property into the designated registry. Another form of compensation claims prone to require the involvement of EULEX are the cases filed by Kosovo Albanians against the Serbian government for destruction of property by the fleeing Serbs in 1999. Indeed, the civil law cases taken over by EULEX judges in 2009 were mainly property-related cases with an inter-ethnic aspect with all of them involving a fraudulent property transaction with the claimants having left their property in Kosovo in 1999 after the NATO intervention. These cases have been unreasonably prolonged, which was a clear indication of the unwillingness of the local judiciary to deal with them. They involved allegations of fraudulent property transactions or of political influence. See EULEX Kosovo, Annual Report on the judicial activities of EULEX judges 2009, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010, at 34.

¹⁰² See Regulation No. 2005/52 on the establishment of the Kosovo Judicial Council (KJC). UNMIK/REG/2005/52 of 20 December 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 transition countries.

¹⁰³ See the still incomplete website of the panel, available at <<http://www.hrrp.eu>>. 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 <<http://www.zeri.info/artikulli>>, accessed on 17 June 2010.

fact not amount to an exception – in terms of non-integration of the EULEX judiciary in the Kosovo judicial system – properly speaking as, according to Article 3 of the Assembly law on EULEX jurisdiction, the Assembly of EULEX judges develops the modalities on case selection and case allocation, in compliance with this law. It is only coherent then that the Assembly of EULEX judges also has the competence to decide on ‘grounded reasons that an EULEX judge is not assigned to the respective stage of the criminal proceeding’.

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).¹⁰⁴ From the point of view of EULEX judges, monitoring, mentoring and advising represent ‘three successive stages of a unitary process’ with monitoring 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’.¹⁰⁵ 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. Both monitoring and mentoring happens on the basis of informal meetings either individually or collectively between EULEX and Kosovo judges of the same court. Monitoring, which is understood straight-forwardly 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 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, evalu-

¹⁰⁴ Generally on MMA, the EULEX Programme Strategy emphasizes the assistance in the development of new skills by transfer of knowledge and experience and by acting as a living example.

¹⁰⁵ See Guidelines on Monitoring, Mentoring and Advising (MMA) of EULEX judges, Final Document, Approved by the Assembly of EULEX judges on 23 October 2008. Therein, it is also underlined that, contrary to the reporting activities of other local and international institutions and organisations, the MMA reports of the EULEX judges are intended to serve an entirely internal purpose.

ation and service system of appeals in criminal law cases and the implementation of the case allocation system and the computerized case management system.¹⁰⁶

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 Kosovo judicial, legislative or governmental authorities – as opposed to the individual members of the judiciary – as a means of official counselling 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 through-out the Kosovo courts, on the establishment of a proper case allocation system as well as of a computerized case management system.¹⁰⁷

EULEX's MMA activities at both the general and the individual level are particularly directed at avoiding political interference and at protecting the independence of the judiciary which is persistently threatened. They thereby complement EULEX's executive powers. There are indeed numerous examples that illustrate the challenges local judges, prosecutors as well as defence counsellors 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,¹⁰⁸ 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.¹⁰⁹

¹⁰⁶ See EULEX Kosovo, Programme Report 2010, available at www.eulex-kosovo.org, accessed in June 2010.

¹⁰⁷ Interview, Pristina September 2009. These recommendations are, as a general rule, directed towards the Kosovo Judicial Council. While two international members (one EULEX judge and on 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. Some progress has however been made in terms of logistics and IT. Furthermore, EULEX's action on the case allocation system has largely been accepted and implemented. See EULEX Kosovo, Programme Report 2010, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010.

¹⁰⁸ In fact, Kosovo judges and prosecutors ignore the provisions on witness protection – the lack of which continues to be another persistent problem – arguing that they themselves are suffering from security threats while at the same time lacking practical knowledge to implement them. See EULEX Kosovo, Programme Report 2010, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010, at 35.

¹⁰⁹ In 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, the Prime Minister of Kosovo intervened personally, stating in the media that he expected EULEX to be wiser than UNMIK and that since the prosecuted member of the government was a freedom fighter for Kosovo he had to be found not guilty and be acquitted. When however the panel had issued a guilty verdict, the local judge first addressed the presiding EULEX judge in order to get his name deleted from the minutes and – after this was unsuccessful – gave a TV interview stating that he was overruled by the EULEX judges, thereby violating the principle of secret deliberation. See EULEX Kosovo, Programme Report 2010, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010, at 31. The trial against Albin Kurti, the leader of the Kosovo civil society movement *Vetevendosje* (Self-Determination), re-opened by EULEX at the beginning of 2010 with charges of, *inter alia*, participating in

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 the UNMIK’s legacy.¹¹⁰ 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.¹¹¹ 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’.¹¹² This in practice is done 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 ECLO. 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.’¹¹³ 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.’¹¹⁴ 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 importance of the legal and constitutional role of

a group disrupting the performance of official duties on the occasion of the February 2007 demonstrations, showed an obstruction of justice on all levels. Not only did the local judge of the mixed panel refuse to appear in court, but no local lawyer was willing to act as defence council and the arrest order was not executed by the Kosovo Police. However, on 14 June 2010, the district court of Pristina finally issued its judgment. See <<http://www.eulex-kosovo.org>>, accessed in June 2010.

¹¹⁰ 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 which caused much criticism.

¹¹¹ 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.

¹¹² Security Council, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/149 of 17 March 2009.

¹¹³ See EULEX July 2009 Report, available at <<http://www.eulex-kosovo.eu>>.

¹¹⁴ Annex I, Report of the SG/HR- CFSP to the UNSG on the activities of the European Union Rule of Law Mission in Kosovo, in Security Council, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2009/149 of 17 March 2009, at 11.

the MoJ.¹¹⁵ At least indirectly then, EULEX seems to be involved in a fairly classic institution-building type of activity by assisting the ‘weak MoJ’ whose ‘structure has not been finalized’. The reference to the ‘constitutional role of the MoJ’ very likely also relates to its role in legislative drafting. By the same token, the Kosovo Judicial Council is said to require extensive assistance in view of the ‘tremendous shortfalls’ in the judiciary, so that it may fulfil its function as an ‘independent professional body responsible for an impartial, integrated, independent, professional and accountable judiciary.’¹¹⁶

5.2. 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 monitoring, mentoring and advising 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.¹¹⁷ 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 national 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’ – a Kosovo Assembly legislation.¹¹⁸ The EULEX executive police works in five clearly defined areas. In these areas, namely financial crime, organized crime, war crimes, terrorism and corruption, it investigates into crimes independently from the Kosovo Police, has its own command structure and may hand over cases directly to the Special Prosecutorial Office. While EULEX police competence in these areas is not exclusive it can take an investigative file from the Kosovo Police and thereby acquire exclusivity. In terms of practical implementation, it needs to be mentioned that the roughly 185 investigators of the PED have for a considerable time after the declaration of ‘initial operational capability’ lacked and still lack equipment to professionally conduct surveillances and investigations and support the mandate of intelligence-led policing.¹¹⁹ Matter-of-factly, in this respect, it does not differ much from the Kosovo Police (KP).¹²⁰ With the exception of relations with

¹¹⁵ See EULEX Programme Strategy, available at <<http://www.eulex-kosovo.eu>>.

¹¹⁶ Id.

¹¹⁷ See Council Joint Action 2008/124/CFSP, Article 6 (b) ‘a police component, co-located where appropriate with the Kosovo Police Service, including at the border crossing points’.

¹¹⁸ Law on Police, Law No. 03/L-052, available at <<http://www.eulex-kosovo.eu>>. The same applies to the EULEX correctional officers.

¹¹⁹ It had even been reported that they would not reach full operational capability before March 2010. (Interview Pristina September 2009). In fact, as of May 2010, it has still not been reached.

¹²⁰ 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 technol-

Interpol,¹²¹ EULEX in general does not work through the intermediary of UNMIK.

As regards the MMA activity, co-location is again the principal means by virtue of which the non-executive part of the mandate is carried out. Based on physical proximity, it subjects – if implemented intensively – local police officers to nearly continuous surveillance by mission exporters. The latter’s detailed observations of the everyday conduct of their local counterparts, in turn, formed the basis for their evaluations.¹²² The main instruments in the police component are the Action Fiches, already referred to previously, 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.¹²³ 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 had been deferred, while of the remaining 29, two had been successfully completed and 27 were in different stages of implementation or had not even completed their planning stage.¹²⁴

ogy 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 other words, the mission aim of achieving the level of European best practice will require significant capital investment’. EULEX July 2009 Report, available at <<http://www.eulex-kosovo.eu>>, at 35.

¹²¹ The only UNMIK police remaining in Kosovo are the eight officers at Interpol. This is necessary until the Interpol Assembly which only meets once a year recognizes EULEX as an independent entity. Interview Pristina September 2009.

¹²² See M. Merlingen and R. Ostrauskaitė, *European Union Peacebuilding and Policing* (London, Routledge 2006), at 125. According to these authors, experience shows that the disciplines administered by co-locators restrain police conduct, thus limiting brutality, abuse and bias, and that they habituate officers to modern, 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 a mimetic process through which European policing norms and practices are disseminated, inscribed in a non-egalitarian relationship in which one party directs and the other takes the advice.

¹²³ This however does not, *per se*, impede a good working relationship and collaboration with the Kosovo Police. In any case, the KP sometimes rather seems to follow advice from internationals without seeing or further inquiring into the sense of it. For instance, since UNMIK times, they have become used to collecting data but without knowing why or without using it. They also hold meetings every Friday since this has been introduced by CIVPOL. Interview, Pristina September 2009.

¹²⁴ See EULEX Kosovo, Programme Report 2010, available at <<http://www.eulex-kosovo.org>>, accessed in June 2010, at 15. This appears to be a fairly modest result even against the backdrop

As the third and last EULEX police department, the Special Police Units (SPU) operate according to yet a different approach. ‘Ostensibly dealing with riots and civil uprising’¹²⁵ they are to a certain extent comparable to the KFOR ‘multinational specialized units’ (MSUs).¹²⁶ An MSU is an ‘armed Police Unit with executive policing powers, which can be called upon to provide back-up or support to local police authorities in mainstream law enforcement tasks such as crowd and riot control.’¹²⁷ The latter has been introduced in reaction to the criticisms levelled at KFOR which in the early years after 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).¹²⁸ In December 2008, EULEX Special Police helped the Kosovo Police – with KFOR support – to restore order when unrest broke out in Northern Mitrovica.¹²⁹ 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. Thereby, 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.

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

¹²⁵ Interview, Brussels October 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’.

¹²⁶ 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.

¹²⁷ See Merlingen and Ostrauskaitė, *supra* n. 122, at 56.

¹²⁸ Interview with an involved NATO official, Madrid October 2008.

¹²⁹ Annex I, Report of the SG/HR- CFSP to the UNSG on the activities of the European Union Rule of Law Mission in Kosovo, in Security Council, ‘Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo’, S/2009/149, 17 March 2009, at 11.

6. CONCLUSION

Notwithstanding a roughly 10-year involvement of international judges, prosecutors and police under the auspices of the United Nations Mission in Kosovo, the challenges for strengthening the law enforcement authorities in Kosovo in order for them to fulfil European standards in terms of independence and impartiality, as well as sustainability and accountability are still significant today. EULEX Kosovo has in this respect shouldered an extensive commitment that reaches beyond the formal confines of its mandate. Civilian missions, after all, are about contributing to the effective provision of public security in countries emerging from crisis or violence and that are going through the crucial and state-forming yet incremental transformation of the institutions which represent the nucleus of sovereignty. These institutions are not only expected to become more effective but also free from political will and abiding 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.’¹³⁰ The concept thereby in fact parallels the way in which the UN system has been trying to develop itself.¹³¹ 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’, nowadays also includes ‘rule of law experts such as prosecutors and judges’. Ensuring a ‘broader rule of law perspective’ of EUPOL 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 has to be attributed to the specific needs of the situation on the ground. Paradoxically, it furthermore 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 being optimized in EULEX. With the individual components working fairly separately from each other EULEX Kosovo does not endorse a ‘package approach’ despite the all-encompassing mission mandate and all command structures being channelled through one Head of Mission.

¹³⁰ Finalised in Council doc. 9535/02 of 31 May 2002.

¹³¹ Already in 2000 the Brahimi Report called for a doctrinal shift in the use of civilian police and other rule-of-law elements. See United Nations General Assembly, ‘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.

The fact however that the European Union has finally got around to bestowing the police component of the mission with an MMA function *and* an executive mandate certainly represents a noteworthy development. Indeed, the prevailing importance of the executive functions on the ground stands in a certain contrast with the 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,¹³² 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 may be seen as raising concerns with the mission mandate and rationale. At first sight indeed, the very nature of the judicial activity – which relies on impartially and independently hearing and deciding a case – seems difficultly reconcilable with the presence of mentors or monitors. Having however laid out the way in which the EULEX justice component seeks to fulfil its mentoring function, namely essentially through mixed panels, these 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 can be considered problematic in light of the clear preference of the Programme Strategy on strengthening over substituting. In the criminal law 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.’¹³³

The significance of the executive mandate overall, while representing a very important learning experience and ‘maturity test’ for the European Union as a crisis manager, is particularly problematic from a much wider perspective, namely in view 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 European best practices while having reached a sufficient level of sustainability and accountability. Theoretically, the closure of the mission’s operations supposes the attainment of these objectives, and thus presumably requires the implementation of the non-executive part of the mission mandate only for some time. At the same time, reaching these objectives will also depend on the overall progress Kosovo makes in the rule of law sector within the Stabilisation and Association Process.

¹³² See Comprehensive Concept on Police Substitution Missions, Council doc. 8655/02. The document is only available in its few declassified parts.

¹³³ See EULEX Programme Strategy, available at <<http://www.eulex-kosovo.eu>>.