

# The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law

*Robert Muharremi\**

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## Abstract

The article analyzes the legal aspects of the European Rule of Law Mission in Kosovo (EULEX) with particular emphasis on the legal implications under Kosovo constitutional law of EULEX operating under the status-neutral framework of United Nations Security Council resolution 1244 (1999). The article outlines the political and legal constraints of EULEX's deployment following Kosovo's declaration of independence and the failure in the United Nations Security Council to endorse the Comprehensive Proposal for the Kosovo Status Settlement, which proposed internationally supervised independence for Kosovo. EULEX's deployment under United Nations (UN) Security Council (SC) resolution 1244 (1999) and not under the Comprehensive Proposal for the Kosovo Status Settlement has created a situation in which EULEX's exercise of its mandate is questionable under Kosovo constitutional law with the possibility of being declared unconstitutional.

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\* Dr. iur., lectures Public International Law and European Union Law at the University of Business and Technology in Prishtina/Kosovo.

## I. Introduction

On 9.12.2009, the European Rule of Law (EULEX) mission celebrated the first anniversary of its full deployment in Kosovo. It marked what is so far the most ambitious EU mission outside the European Union, under the umbrella of the European Security and Defense Policy, as well as what is the biggest in terms of budget and manpower on the ground.<sup>1</sup> As of December 2009, EULEX had more than 2000 international and local staff members operating in the area of rule of law in Kosovo, primarily in the fields of justice, police and customs.<sup>2</sup> The discussions reflected in the growing literature about EULEX center mainly around the question if and to what extent EULEX's mandate is in accordance with international law, most notably with United Nations Security Council resolution 1244 (1999) of 12.6.1999 (Resolution 1244).<sup>3</sup> <sup>4</sup> There is, however, no discussion from the legal perspective of the host state, i.e. the Republic of Kosovo; notably, if and to what extent the mandate and functioning of EULEX is in accordance with the Constitution of the Republic of Kosovo which entered into force on 15.6.2008. The legal implications of UNSC resolution 1244 (1999) play a role when looking at EULEX from the perspective of international law but their legal impact alters considering that Resolution 1244 has a different standing under Kosovo constitutional law.

The purpose of the present article is to shed light on several legal aspects of the relationship between EULEX's mandate and Kosovo's constitutional order bearing in mind that Kosovo declared independence on 17.2.2008. Since there is plenty of literature on the background to the Kosovo conflict and the administration of Kosovo by the United Nations through the Uni-

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<sup>1</sup> V. Dzibic/H. Kramer, Kosovo After Independence – Is the EU's EULEX Mission Delivering on its Promises, Friedrich-Ebert Stiftung, July 2009, 1 et seq.; E. Pond, The EU's Test in Kosovo, The Washington Quarterly 31 (2008), 97 et seq.

<sup>2</sup> Report of the High Representative of the European Union for Foreign Affairs and Security Policy to the Secretary-General on the Activities of the European Union Rule of Law Mission in Kosovo, in: Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 5.1.2010 (S/2010/5), Annex I.

<sup>3</sup> UN SC Res. 1244 (1999) of 10.6.1999, available at <http://www.unmikonline.org>.

<sup>4</sup> E. de Wet, The Governance of Kosovo: SC Res. 1244 and the Establishment and Functioning of EULEX, AJIL 103 (2009), 83 et seq.; see also D. Zaum, The Norms and Politics of Exit: Ending Postconflict Transitional Administrations, Carnegie Council for Ethics in International Affairs 2009, 189 et seq.; M. Weller, Kosovo's Final Status, J. Int'l Aff. 84 (2008), 1223 et seq.; S. Blockmans/R. Wessel, The European Union and Crisis Management: Will the Lisbon Treaty Make the EU More Effective?, Journal of Conflict and Security Law 14 (2009), 265 et seq.

ted Nations Interim Administration Mission in Kosovo (UNMIK),<sup>5</sup> these aspects require only a very brief explanation and only to the extent necessary to clarify questions pertaining to EULEX's mandate under Kosovo constitutional law. The article will briefly present developments leading to EULEX's deployment followed by an assessment of EULEX's legal basis under international law and under Kosovo's constitutional system. The legal basis of EULEX under Kosovo constitutional law is very weak which may result in the challenge and subsequent reversal of EULEX acts by the Kosovo Constitutional Court. Under such circumstances, the legitimacy and credibility of an EU mission, whose purpose is to support the rule of law in Kosovo, may be diminished significantly. A proper clarification of EULEX's standing under Kosovo constitutional law will be necessary in order to make an effective implementation of its mission goals possible.

## II. Political Background to the Establishment of EULEX

Kosovo was placed under the interim administration of the United Nations on 10.6.1999 following an armed conflict between Serb authorities and the Kosovo Liberation Army, which had reached its peak in 1998/99. In view of massive displacement of the civilian population, increasing numbers of crimes against humanity and failed negotiations for a peaceful settlement of the conflict, NATO undertook a 78-days air campaign against Serbia starting in March 1999 which eventually led to the withdrawal of Serbian administration and military from Kosovo endorsed by the Military Technical Agreement between the Republic of Serbia and NATO<sup>6</sup> and Resolution 1244.<sup>7</sup> According to Resolution 1244, Kosovo would be administered by the United Nations represented by a Special Representative of the Secretary-General (SRSG).<sup>8</sup> The SRSG would be the exclusive authority vested with all executive and legislative powers, including the administration of the

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<sup>5</sup> A. Yannis, *The UN as Government in Kosovo*, *Global Governance* 10 (2004), 67 et seq.; R. Wilde, *From Bosnia to Kosovo and East Timor: The Changing Role of the United Nations in the Administration of Territory*, *ILSA J. Int'l & Comp. L.* 6 (1999-2000), 467 et seq.; C. Stahn, *Justice under Transitional Administration: Contours and Critique of a Paradigm*, *Hous. J. Int'l L.* 27 (2004-2005), 311 et seq.

<sup>6</sup> Military Technical Agreement of 9.6.1999 between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, available at <http://www.nato.int>.

<sup>7</sup> A. Zimmermann/C. Stahn, *Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo*, *Nord. J. Int'l L.* 70 (2001), 423 et seq., 436 et seq.

<sup>8</sup> Res. 1244 (note 3), para. 6.

judiciary, concerning Kosovo.<sup>9</sup> During this UN interim administration, Kosovo would enjoy substantial autonomy until such time as the conflicting parties reach a political solution regarding the final status of Kosovo.<sup>10</sup> Under the authority of Resolution 1244, the SRSG promulgated a Constitutional Framework for the Provisional Self-Government of Kosovo, which established the Provisional Institutions of Self-Government (PISG) including a Government, a President, a Parliament and a court system.<sup>11</sup> Despite a Constitutional Framework, the UNMIK SRSG retained final legislative and executive authority.<sup>12</sup>

The riots of March 2004, whereby Kosovo Albanian groups, motivated by media reports on the alleged murder of Albanian children by Serbs, attacked members of minority communities thereby destroying houses and several religious sites, made it clear to the international community that the unresolved status question and the lack of progress in this respect were causing frustration amongst Kosovo's communities and increasing their readiness to make recourse to force.<sup>13</sup> Status negotiations had to begin if a further deterioration of the security situation was to be prevented. Following a report by UN Special Envoy *Kai Eide* in 2005 that status talks should begin,<sup>14</sup> the UN Secretary-General appointed *Martti Ahtisaari* "Special Envoy for the Future Status Process for Kosovo".<sup>15</sup> Status talks began on 20.2.2006 in Vienna between the PISG and Serb authorities. Despite several rounds of talks and conciliatory efforts made by *Ahtisaari*, Prishtina and Belgrade were not able to reach an agreement on Kosovo's political status. In view of this deadlock, on 26.3.2007, *Ahtisaari* submitted the "Comprehensive Proposal for the Kosovo Status Settlement", which proposed internationally supervised independence for Kosovo with extensive protection mechanisms

<sup>9</sup> UNMIK Regulation No. 1999/1, as amended, on the Authority of the Interim Administration in Kosovo, Section 1.1, available at <http://www.unmikonline.org>.

<sup>10</sup> Res. 1244 (note 3), paras. 6 and 10.

<sup>11</sup> UNMIK Regulation No. 2001/9, as amended, on a Constitutional Framework for Provisional Self-Government in Kosovo, available at <http://www.unmikonline.org>.

<sup>12</sup> UNMIK Regulation No. 2001/9, Chapter 12.

<sup>13</sup> *V. Dzibic/H. Kramer* (note 1), 3.

<sup>14</sup> Statement by the President of the Security Council of 24.10.2005 (S/PRST/2005/51), "The Security Council agrees with Ambassador *Eide's* overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General's intention to start a political process to determine Kosovo's Future Status as foreseen in Security Council Resolution 1244 (1999)."

<sup>15</sup> United Nations Secretary-General Press Release (SG/A/955) of 15.11.2005, available at <http://www.un.org>.

primarily for the Kosovo Serb community.<sup>16</sup> While the proposal was accepted by Prishtina, it was declined by Belgrade. Efforts to have the proposal endorsed by the UN Security Council failed in July 2007 as a result of indications that Russia and China would veto the proposal if voted upon in the Security Council. A last effort to reach a consensual solution was made with the appointment of a Troika consisting of representatives of the United States (US), the European Union (EU) and Russia, which, however, on 10.12.2007 reported that their efforts had ended in failure.<sup>17</sup> Finally, on 17.2.2008, supported by the US and most EU states, Kosovo declared independence with the Constitution of the Republic of Kosovo entering into force on 15.6.2008.<sup>18</sup> As of mid-January 2010, 65 states have recognized the Republic of Kosovo and it has become a member of the International Monetary Fund and the World Bank Group.<sup>19</sup>

### III. Kosovo's Post-independence Constitutional Framework

The three key legal documents, which provide the legal foundations of the Republic of Kosovo are the Declaration of Independence, dated 17.2.2008, the Constitution of the Republic of Kosovo of 15.6.2008 and the Comprehensive Proposal for the Kosovo Status Settlement, dated 26.3.2007.

In its Declaration of Independence, the Assembly of Kosovo declared Kosovo an independent and sovereign state, which reflects the will of the people of Kosovo and which is in full accordance with the recommendations of UN Special Envoy *Martti Ahtisaari* and his Comprehensive Proposal for the Kosovo Status Settlement.<sup>20</sup> In addition to making explicit reference to the Comprehensive Proposal for the Kosovo Status Settlement (the "*Ahtisaari* Plan"), the Kosovo authorities invited and welcomed an international civilian presence to supervise the implementation of the *Ahtisaari* Plan, a European Union-led rule of law mission and the North Atlan-

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<sup>16</sup> Letter dated 26.3.2007 from the Secretary-General addressed to the President of the Security Council (S/2007/168), available at <http://www.unosek.org>; Comprehensive Proposal for the Kosovo Status Settlement dated 26.3.2007, available at <http://www.unosek.org>.

<sup>17</sup> Report of the EU/U.S./Russia Troika on Kosovo dated 4.12.2007, available at <http://www.ico-kos.org>.

<sup>18</sup> For a comprehensive account of the status talks see *M. Weller* (note 4), 1223 et seq.

<sup>19</sup> IMF Press Release of 29.6.2009, available at <https://www.imf.org>; World Bank Group Press Release dated 29.6.2009, available at <http://go.worldbank.org>.

<sup>20</sup> Declaration of Independence of the Republic of Kosovo, available at <http://www.assembly-kosova.org>, para. 1.

tic Treaty Organization (NATO) to retain the leadership role of the international military presence in Kosovo.<sup>21</sup> The declaration of independence is formulated as a unilateral declaration legally binding for Kosovo under international law with *erga omnes* effect as it provides that all states are entitled to rely upon this declaration.<sup>22</sup> Thus, Kosovo's declaration of independence legalizes the *Ahtisaari* Plan, though for Kosovo only, despite failure in the UN Security Council to adopt it. It provides the legal basis in the form of an invitation under international law to the respective international presences as foreseen in the *Ahtisaari* Plan to exercise their mandates as set out in the *Ahtisaari* Plan and, especially for NATO, also under UNSC resolution 1244.

The Constitution of the Republic of Kosovo (the "Constitution") defines the Republic of Kosovo as an independent, sovereign, democratic, unique and indivisible state whose sovereignty stems from the people.<sup>23</sup> The Constitution incorporates the *Ahtisaari* Plan as an integral part of the Kosovo constitutional order requiring all authorities in the Republic of Kosovo to abide by the *Ahtisaari* Plan and take all necessary action for its implementation.<sup>24</sup> In addition, the *Ahtisaari* Plan takes precedence over all other legal provisions in Kosovo,<sup>25</sup> which also includes the Constitution.<sup>26</sup> If there are inconsistencies between the provisions of the Constitution, laws or other legal acts of the Republic of Kosovo and the provisions of the *Ahtisaari* Plan, then the *Ahtisaari* Plan will prevail.<sup>27</sup> The *Ahtisaari* Plan is thus not only an integral part of Kosovo's constitutional order but it also takes precedence over the Constitution in the event that there is a conflict between the two.

Apart from detailed provisions on the elements of Kosovo's constitutional order, the *Ahtisaari* Plan also defines the respective international presences and their mandates. It provides, in form of a general clause, that the international community will supervise, monitor and will have all necessary powers to ensure effective and efficient implementation of the *Ahtisaari* Plan.<sup>28</sup> The international community, as referred to in Art. 1.11 of the *Ahtisaari* Plan, includes the International Civilian Representative, a Euro-

<sup>21</sup> Declaration of Independence (note 20), para. 5.

<sup>22</sup> Declaration of Independence (note 20), para. 12.

<sup>23</sup> Constitution of the Republic of Kosovo, Arts. 1.1 and 2.1., available at <http://www.assembly-kosova.org>.

<sup>24</sup> Constitution of the Republic of Kosovo (note 23), Art. 143.1.

<sup>25</sup> Constitution of the Republic of Kosovo (note 23), Art. 143.2.

<sup>26</sup> Constitution of the Republic of Kosovo (note 23), Art. 143.3.

<sup>27</sup> Constitution of the Republic of Kosovo (note 23).

<sup>28</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 1.11.

pean Union Security and Defense Policy (ESDP) Mission in the field of rule of law, and an international military presence.

## 1. International Civilian Representative

According to the *Ahtisaari* Plan, an International Steering Group (ISG) comprising France, Germany, Italy, Russia, the United Kingdom, the United States, the European Union, the European Commission and NATO<sup>29</sup> would appoint an International Civilian Representative (ICR) and would support and give guidance to the ICR in fulfilling his mandate.<sup>30</sup> The mandate of the ICR would continue until the International Steering Group determines that Kosovo has implemented the terms of the *Ahtisaari* Plan.<sup>31</sup> The ICR would be responsible for the general supervision of the implementation of the *Ahtisaari* Plan and be the final authority for its interpretation.<sup>32</sup> The mandate would include the power to make appointments to certain senior government positions<sup>33</sup> and to take corrective measures to remedy actions taken by Kosovo authorities in violation of the *Ahtisaari* Plan, including the annulment of laws and decisions adopted by Kosovo authorities and the sanctioning or removal of any public official.<sup>34</sup>

## 2. ESDP Rule of Law Mission

The ESDP Rule of Law Mission to be established under the *Ahtisaari* Plan would be headed by a person appointed by the Council of the European Union<sup>35</sup> and would operate under the direction of the European Union Special Representative (EUSR).<sup>36</sup> However, the *Ahtisaari* Plan requires that the powers of the ICR and of the EUSR are vested in the same per-

<sup>29</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Annex IX, Art. 4.1.

<sup>30</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 12.1.

<sup>31</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 12.6.

<sup>32</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 12.3

<sup>33</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Annex IX, Art. 2.2.

<sup>34</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Annex IX, Art. 2.1.

<sup>35</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Annex X, Art. 2.1.

<sup>36</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Annex X, Art. 1.1.

son,<sup>37</sup> the rationale being a better coordination between the ICR and the ESDP Mission. The ESDP Mission would mentor, monitor and advise Kosovo authorities in the area of rule of law generally<sup>38</sup> and would have certain executive and judicial functions in the judiciary, police, border control, customs and correctional services including the investigation, prosecution and adjudication of cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes.<sup>39</sup>

### 3. International Military Presence

NATO would be responsible for establishing an international military presence, which would be responsible for providing a safe and secure environment throughout the territory of Kosovo, in conjunction with the ICR and in support of the Kosovo institutions, until such time as Kosovo's institutions are capable of assuming responsibility for the security tasks performed by the international military presence.<sup>40</sup>

### 4. UNMIK

The provisions of the *Ahtisaari* Plan have to be read bearing in mind that it was intended to be endorsed by the UN Security Council to replace Resolution 1244. This is why the *Ahtisaari* Plan does not foresee any functions for UNMIK apart from the fact that UNMIK would continue to exercise its mandate during a 120-day transition period following entry into force of the *Ahtisaari* Plan.<sup>41</sup> UNMIK's mandate would expire at the end of the transition period and as of that moment all legislative and executive authority vested in UNMIK would be transferred to the Kosovo authorities, unless otherwise provided by the *Ahtisaari* Plan, and ICR – including the ESDP Mission – and the international military presence would assume their respective mandates.<sup>42</sup>

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<sup>37</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Annex IX, Art. 2.3.

<sup>38</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 13.3.

<sup>39</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Annex IX, Art. 2.3.

<sup>40</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Arts. 14.1 and 14.4.

<sup>41</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 15.1 (a).

<sup>42</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 15.1 (g).



## 5. EULEX – Its Legal Basis under International Law

EULEX was established in February 2008<sup>43</sup> but it became fully operational only on 9.12.2008.<sup>44</sup> Anticipating that the status talks would have some results that would at least lead to a significant transfer of responsibilities from UNMIK to the European Union, the European Union had already established a European Union Planning Team (EUPT) in 2006.<sup>45</sup> Its mission objective was (i) to initiate planning to ensure a smooth transition between selected tasks of UNMIK and a possible EU crisis management operation in the field of rule of law and other areas that might be identified by the European Council and (ii) to provide technical advice for the EU to contribute to support and maintain dialogue with UNMIK as regards its plans for downsizing and transfer of competences to local institutions.<sup>46</sup> The deployment of EUPT was made within the framework of Resolution 1244 and was legally based on an invitation made by UNMIK SRSG *Jessen-Petersen* who in a letter dated 4.4.2006 to the EU Secretary-General/High Representative had welcomed the EU's engagement in the discussions on the future international engagement in Kosovo and had invited the EU to deploy EUPT to Kosovo.<sup>47</sup> No formal consent from the Kosovo authorities was required at that time, as the PISG were operating under the legal authority of Resolution 1244. As of March 2007, when the *Abtisaari* Plan was submitted to the United Nations for consideration, EUPT became very active in discussions between UNMIK and the Kosovo authorities concerning the transfer of responsibilities and necessary amendments to existing legislation and changes to administrative structures, which would reflect the *Abtisaari* Plan.<sup>48</sup> While status talks were continuing at the political level, joint UNMIK-PISG working groups, supported by representatives of EUPT and the International Monetary Fund, revisited existing legislation in accordance with the *Abtisaari* Plan to make sure that, once the Plan is endorsed

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<sup>43</sup> Council Joint Action 2008/124/CFSP of 4.2.2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, amended by Council Joint Action 2009/445/CFSP of 9.6.2009.

<sup>44</sup> *V. Dzibic/H. Kramer* (note 1).

<sup>45</sup> Council Joint Action 2006/304/CFSP of 10.4.2006, as amended by Council Joint Action 2007/778/CFSP of 29.11.2007 and Council Joint Action 2008/228/CFSP of 17.3.2008.

<sup>46</sup> Council Joint Action 2006/304/CFSP, Art. 1.2.

<sup>47</sup> Council Joint Action 2006/304/CFSP, Preamble, para. 11.

<sup>48</sup> *E. Pond* (note 1), 99; *M. Weller* (note 4), 1236.

by the Security Council, a quick and smooth transfer of responsibilities would be possible.

Soon after the *Ahtisaari* Plan was submitted to the United Nations, it became evident that a consensual solution to the Kosovo status was not possible and that the *Ahtisaari* Plan would not be endorsed by the Security Council. It also became very clear that the US would strongly support a unilateral declaration of Kosovo. Divisions among EU Member States on the question whether to recognize an independent state of Kosovo emerged and five EU Member States<sup>49</sup> declined to recognize Kosovo in the event of a unilateral declaration of independence. Despite US political pressure, and the support of most EU Member States, for Kosovo to declare independence and to unilaterally assume the legal obligations under the *Ahtisaari* Plan, there was a clear risk that following Kosovo's declaration of independence, due to internal divisions in the EU, it would become impossible for the EU to agree on and deploy the ESDP Rule of Law Mission as envisaged by the *Ahtisaari* Plan.<sup>50</sup> On the other hand, failure on the part of the EU to play its role under the *Ahtisaari* Plan could have caused another transatlantic split such as the one experienced in 2003 with the US invasion of Iraq.<sup>51</sup> It would also expose the EU as being incapable of speaking with one voice in foreign and security affairs concerning a territory which is geographically in Europe.<sup>52</sup> This dilemma was resolved by the European Council of Foreign Ministers who rushed through the joint action establishing EULEX before Kosovo's declaration of independence, thus at a time when at least no EU member would object to the establishment of EULEX.<sup>53</sup> The adoption of the joint action establishing EULEX under Arts. 14 and 25 of the Treaty Establishing the European Union was only possible in view of the agreement that EULEX would only be staffed on a voluntary basis and thanks to the possibility for constructive abstention under Art. 23 (1) of the Treaty Establishing the European Union.<sup>54</sup>

The mandate of EULEX as set out in the joint action is almost identical with the provisions of the *Ahtisaari* Plan on the ESDP Rule of Law Mission. EULEX's task is to monitor, mentor and advise Kosovo institutions in all areas related to rule of law and to investigate, prosecute, adjudicate and enforce certain categories of serious crimes.<sup>55</sup> But EULEX has a more ro-

<sup>49</sup> Spain, Greece, Slovakia, Cyprus and Rumania.

<sup>50</sup> V. Dzibic/H. Kramer (note 1), 7.

<sup>51</sup> E. Pond (note 1), 98 et seq.

<sup>52</sup> E. Pond (note 1), 98 et seq.

<sup>53</sup> V. Dzibic/H. Kramer (note 1), 7.

<sup>54</sup> S. Blockmans/R. Wessel (note 4), 7.

<sup>55</sup> Council Joint Action 2008/124/CFSP, Art. 3 (a) and (d).

bust mandate under the joint action than under the *Ahtisaari* Plan, as it is also responsible for ensuring the maintenance and promotion of the rule of law, public order and security, which could include the reversion or annulment of operational decisions taken by Kosovo authorities.<sup>56</sup> EULEX also has a general mandate to assume other responsibilities, independently or in support of Kosovo authorities, to ensure the maintenance and promotion of rule of law, public order and security.<sup>57</sup> The Head of EULEX<sup>58</sup> operates under the political guidance of the EU Special Representative in Kosovo,<sup>59</sup> who is at the same time the International Civilian Representative (ICR), and whose mandate in this capacity is to supervise the correct implementation of the *Ahtisaari* Plan by Kosovo authorities. The ICR operates under the guidance of the International Steering Committee<sup>60</sup> and exercises his mandate based on the invitation of the Republic of Kosovo as expressed in its declaration of independence.<sup>61</sup>

In addition to a legal basis under EU law, EULEX also needed a legal basis under international law. The exercise of state functions, which includes judicial and executive functions, by a state or group of states within the territory of a foreign state requires the consent of the respective state<sup>62</sup> unless the exercise of such functions is based on the rules of belligerent occupation or mandated under Chapter VII of the UN-Charter.<sup>63</sup> EULEX was faced with the option of obtaining the required consent under international law from two mutually excluding authorities claiming exclusive jurisdiction in Kosovo. The UN asserted that despite Kosovo's declaration of independence Resolution 1244, which had been adopted under Chapter VII of the UN-Charter, remained in force until repealed by the Security Council.<sup>64</sup>

<sup>56</sup> Council Joint Action (note 55), Art. 3 (b).

<sup>57</sup> Council Joint Action (note 55), Art. 3 (h).

<sup>58</sup> Political and Security Committee Decision EULEX/1/2008 of 7.2.2008, Art. 1.

<sup>59</sup> Council Joint Action 2008/123/CFSP of 4.2.2008, Art. 3 (c).

<sup>60</sup> The members of the International Steering Group are Austria, Belgium, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Slovenia, Switzerland, Sweden, Turkey, the United Kingdom and the United States of America, available at <http://www.ico-kos.org>.

<sup>61</sup> Since such double-hat arrangement (ICR and EUSR) causes practical and political problems, efforts were made to separate the two functions but with no success so far. The EU has merely appointed a special EUSR for northern Kosovo thus carving out certain functions from the current ICR/EUSR.

<sup>62</sup> A. Cassese, *International Law*, 2005, 51; Ch. Gloria, *Der Staat im Völkerrecht*, in: K. Ipsen, *Völkerrecht*, 1999, 245 et seq.; M. Dixon, *International Law*, 2005, 156 et seq.

<sup>63</sup> I. Brownlie, *Principles of Public International Law*, 2003, 369.

<sup>64</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12.6.2008 (S/2008/354), para. 4.

This means that the UNMIK SRSG retained the exclusive executive and legislative authority in Kosovo under Resolution 1244 and changing circumstances on the ground due to Kosovo's declaration of independence merely limited UNMIK's operational but not legal capacity. This meant that any EU engagement in Kosovo would need the consent of the UN under Resolution 1244.

On the other hand, as of the declaration of independence the Republic of Kosovo asserted that in view of its sovereignty and independence exclusive jurisdiction over the territory of Kosovo was vested in its authorities unless otherwise determined in the *Ahtisaari* Plan. The Constitution of the Republic of Kosovo explicitly states that Kosovo's sovereignty is indivisible<sup>65</sup> with the exception of the powers of the international presences as set out in the *Ahtisaari* Plan, which were covered by Kosovo's sovereign consent as reflected in its declaration of independence. An international presence such as EULEX would therefore be in violation of international law if it were exercising state functions not covered by the consent of the Republic of Kosovo. The fact that the European Union<sup>66</sup> has not recognized Kosovo does not matter since actions taken under the EU Common Foreign and Security Policy are attributable to the individual EU Member States<sup>67</sup> with most of them having recognized Kosovo as an independent state.

UNMIK's mandate under Resolution 1244 is not compatible with Kosovo's new status as an independent state. As a matter of fact, Kosovo's declaration of independence states that Kosovo welcomes

“the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999)”.<sup>68</sup>

It further states that

“we invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan ...”.<sup>69</sup>

<sup>65</sup> Constitution of the Republic of Kosovo (note 23), Art. 2.2.

<sup>66</sup> With the entry into force of the Lisbon Treaty on 1.12.2009, the European Union has replaced and succeeded into the legal position of the European Community.

<sup>67</sup> *M. Herdegen*, *Europarecht*, 2009, 431 et seq.

<sup>68</sup> Declaration of Independence (note 20), para. 5.

<sup>69</sup> Declaration of Independence (note 20).

The reference to “international presences established on the basis of Resolution 1244” includes both UNMIK and NATO/KFOR.<sup>70</sup> Both UNMIK and KFOR have been established on the basis of Resolution 1244 which is a historical matter-of-fact and which cannot be eliminated by Kosovo’s declaration of independence. This is on the whole the essence of the reference to “international presences established under Resolution 1244”. But this does not mean that Kosovo accepted these international presences to continue exercising their respective powers under Resolution 1244. The statement “welcomes the ... continued support of its democratic development” through these international presences indicates that they have merely a supportive role within the limits of the sovereign consent of Kosovo. The following statement, which includes the explicit invitations to the respective international presences, further supports this interpretation as it contains no mentioning of UNMIK at all. NATO is the only organization to which the reference to its responsibilities under Resolution 1244 relates. This means that only NATO is covered by Kosovo’s consent to exercise its powers under Resolution 1244 but not UNMIK. Another interpretation would also render Kosovo’s declaration of independence *ad absurdum*, i.e. to declare independence but still recognize UNMIK’s exclusive mandate under Resolution 1244 to exercise legislative and executive authority in Kosovo would mean that Kosovo would deny itself the right to effective government as an essential element of statehood. This interpretation is reinforced by the fact that the Constitution of the Republic of Kosovo foresees no role for UNMIK.<sup>71</sup> From a Kosovo constitutional law perspective, UNMIK does not exist as an authority but merely as a historic fact, which needs to be wound up through succession of arrangements under constitutional law.<sup>72</sup> UNMIK’s role under the *Ahtisaari* Plan is limited to the exercise of its authority in accordance with Resolution 1244 for a 120-day transitional period following entry into force of the *Ahtisaari* Plan provided that UNMIK’s exercise of authority during this transitional period is not inconsistent with the *Ahtisaari* Plan.<sup>73</sup> At the end of the transition period UNMIK’s mandate

<sup>70</sup> Res. 1244 (note 3), paras. 6 and 7.

<sup>71</sup> The UN Secretary-General admitted in his report dated 24.11.2008 (S/2008/692), para. 21, that there is a “conflict between resolution 1244 (1999) and the Kosovo Constitution, which does take UNMIK into account”. He added that “the Kosovo authorities frequently question the authority of UNMIK in a Kosovo now governed under the new Constitution”.

<sup>72</sup> Constitution of the Republic of Kosovo, Art. 145, provides that international agreements and legal acts valid on the day of entry into force of the Constitution will remain in force until repealed or amended by Kosovo authorities. This refers primarily to agreements entered into and legal acts adopted by UNMIK on behalf of Kosovo.

<sup>73</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 15.1 (a) and (b).

would be terminated.<sup>74</sup> Under Kosovo constitutional law, the transitional period ended on the day Kosovo's constitution entered into force, i.e. on 15.6.2008.

From the perspective of the UN, on the very day of the adoption of the joint action establishing EULEX, the mission was not mandated under Resolution 1244. The joint action contains no reference to an invitation by the UN or the UNMIK SRSG as was the case of the joint action establishing the preceding EUPT mission. Although the joint action refers in its preamble to Resolution 1244, the EU could not impose EULEX unilaterally as replacing UNMIK or as a new component of the international civilian presence under Resolution 1244 without the consent of the Security Council. A legal basis for the replacement of UNMIK and the installation of EULEX could have been established only with a new mandate from the Security Council<sup>75</sup> which at that time was not given. The UN Secretary-General only noted in his report dated 12.6.2008 that he had received a letter from the High Representative for the Common Foreign and Security Policy of the European Union informing him of the willingness of the European Union to play an enhanced role in the area of rule of law in Kosovo within the framework provided by Resolution 1244.<sup>76</sup> But that did not imply any form of approval of EULEX to operate under Resolution 1244. In fact, EULEX was ignored by the UN Secretary-General which led to EULEX's deployment being stalled.<sup>77</sup> Russia's and Serbia's resistance to EULEX and a possible replacement of UNMIK blocked an attempted compromise solution at the UN which would have allowed UNMIK and EULEX to function in parallel for a while.<sup>78</sup> A "legalization" of EULEX from the UN perspective occurred only in November 2008 under the condition that it would operate under Resolution 1244 and under the overall authority and within the status-neutral framework of the UN.<sup>79</sup> EULEX would have to submit reports to the UN on a regular basis and its deployment would be coordinated with UNMIK.<sup>80</sup> Russia's and Serbia's acceptance of this arrangement was bought for the price of the EU Member States accepting EULEX's

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<sup>74</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Art. 15.1 (g).

<sup>75</sup> V. Dzibic/H. Kramer (note 1), 15.

<sup>76</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12.6.2008 (S/2008/354), para. 8.

<sup>77</sup> E. Pond (note 1), 102.

<sup>78</sup> V. Dzibic/H. Kramer (note 1), 16.

<sup>79</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24.11.2008 (S/2008/692), para. 50.

<sup>80</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (note 79).

“status neutrality” and EULEX participating as part of the UN presence in Kosovo in the implementation of the “Six-Point-Plan”.<sup>81</sup> The “Six-Point-Plan” refers to a proposal made by the UN Secretary-General to Serbia’s President *Tadić* on 12.6.2008, which was accepted by him in November 2008,<sup>82</sup> that, among others, would eliminate control by Kosovo authorities of police, court and customs services in Serb-majority areas and place them under the direct control of the UN in accordance with Resolution 1244 and in defiance of the Constitution of Kosovo and the *Ahtisaari* Plan.<sup>83</sup> In view of EULEX’s “legalization” under these terms, as endorsed by the Security Council,<sup>84</sup> EULEX deployed in Kosovo on 9.12.2008.<sup>85</sup>

From a Kosovo perspective, the legal situation concerning EULEX’s mandate is completely different. In response to the “Six-Point-Plan”, which was rejected by Kosovo,<sup>86</sup> Kosovo authorities made it clear that they

“... are in favor of a quick deployment of EULEX in Kosovo in accordance with the mandate foreseen in the Declaration of Independence, the Comprehensive Proposal for a Kosovo Status Settlement, the Constitution of the Republic of Kosovo, Kosovo’s legislation, the European Union Joint Action of 4 February 2008 and Kosovo’s institutions’ invitation to EULEX”.<sup>87</sup>

Kosovo authorities asserted that they

“will cooperate with EULEX on its deployment throughout the entire territory of Kosovo, based on the mandate foreseen in the documents mentioned above, respecting the sovereignty and territorial integrity of the Republic of Kosovo”.<sup>88</sup>

Both statements, which were deposited with the UN, neither mention Resolution 1244 nor any of the terms, including “status neutrality”, agreed upon between the UN and the EU. From a Kosovo perspective, EULEX

<sup>81</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12.6.2008 (S/2008/354), para. 16; *V. Dzihic/H. Kramer* (note 1), 16.

<sup>82</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24.11.2008 (S/2008/692), para. 52.

<sup>83</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12.6.2008 (S/2008/354), Annex I.

<sup>84</sup> Statement by the President of the Security Council dated 26.11.2008 (S/PRST/2008/44).

<sup>85</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 17.3.2009 (S/2009/149), para. 5.

<sup>86</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24.11.2008 (S/2008/692), para. 52.

<sup>87</sup> Statement dated 18.11.2008, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24.11.2008 (S/2008/692), Annex I.

<sup>88</sup> Statement dated 18.11.2008, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (note 87).

operates lawfully only if it is based on any of the documents listed by Kosovo as being legally constitutive for EULEX's mandate. The joint action establishing EULEX makes no reference to the *Ahtisaari* Plan, the Constitution of the Republic of Kosovo, the Declaration of Independence or an invitation by Kosovo authorities. In other cases, especially where statehood is disputed or there is state failure, e.g. Palestinian Authorities,<sup>89</sup> Afghanistan,<sup>90</sup> Sudan,<sup>91</sup> Bosnia and Herzegovina,<sup>92</sup> Congo,<sup>93</sup> the EU has nevertheless attempted to obtain the consent of the legitimate local authorities, but not so in the case of Kosovo. No relationship can be established between the invitation made by the Kosovo authorities and EULEX's mandate under the joint action as that invitation was not given any relevance as a legal basis for EULEX's establishment and operations. This is further reinforced by the fact that EULEX was placed under the "status neutrality" of Resolution 1244, which is evidently in contradiction to the wording and spirit of the *Ahtisaari* Plan, the Declaration of Independence and the Constitution of Kosovo, all of which clearly assert the independence and sovereignty of Kosovo. Having accepted to operate under Resolution 1244 and within the UN framework of "status neutrality", EULEX, by implication, has renounced all documents listed by Kosovo authorities as a legal basis for its mandate in Kosovo. EULEX as established by the joint action and placed under "status neutrality" and Resolution 1244 is therefore legally not identical with the ESDP Rule of Law Mission as envisaged by the *Ahtisaari* Plan. There might be an overlap in certain areas of their mandates, but legally EULEX under the status neutral framework of Resolution 1244 is substantially different from the ESDP Rule of Law Mission as foreseen by the *Ahtisaari* Plan, which was placed within the framework of an independent and sovereign, though internationally supervised state. The joint action establishing EULEX also defines Kosovo organs, institutions and authorities as those institutions created on the basis of Resolution 1244.<sup>94</sup> This does not include Kosovo's authorities, which were established under the Constitution of the Republic of Kosovo and which derive their legitimacy from the Constitution and no longer from Resolution 1244 or the previous Constitutional Framework. In view of these arguments, it can be concluded that as of the moment that EULEX was placed under the status neutral frame-

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<sup>89</sup> Council Joint Action 2005/797/CFSP of 14.11.2005, Preamble, para. 6; Council Joint Action 2005/889/CFSP of 12.12.2005, Preamble, para. 9.

<sup>90</sup> Council Joint Action 2007/369/CFSP of 30.5.2007, Preamble, para. 8.

<sup>91</sup> Council Joint Action 2005/557/CFSP of 18.7.2005, Preamble, para. 11.

<sup>92</sup> Council Joint Action 2002/210/CFSP of 11.3.2002, Preamble, para. 6.

<sup>93</sup> Council Joint Action 2007/405/CFSP of 12.6.2007, Preamble, para. 13.

<sup>94</sup> Council Joint Action 2008/124/CFSP of 4.2.2008, Preamble, para. 2.



work of Resolution 1244 it had no legal basis to exercise its mandate under the constituting legal documents which are recognized by the Republic of Kosovo.

#### IV. Implications for EULEX under Kosovo Constitutional Law

From a constitutional law perspective, Art. 146.1 of the Constitution provides that

“The International Civilian Representative and other international organizations and actors mandated under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 have the mandate and powers set forth under the said Comprehensive Proposal, including the legal capacity and privileges and immunities set forth therein.”

This provision complements Art. 143 of the Constitution, which establishes a legal obligation for all Kosovo authorities to abide by the provisions of the *Ahtisaari* Plan and to give precedence to the plan in the event of a conflict between the provisions of the Constitution and of the *Ahtisaari* Plan. The importance of Art. 146.1 of the Constitution lies in the fact that it refers to “international organizations and actors mandated” only under the *Ahtisaari* Plan. It thus does not include such international organizations and actors which have their mandate based on another legal instrument.

Art. 146.2 of the Constitution is essential for giving effect to decisions and acts of these international organizations and actors. It states that

“all authorities in the Republic of Kosovo shall cooperate fully with the International Civilian Representative. Other international organizations and actors mandated under the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 and shall, inter alia, give effect to their decisions or acts.”

Thus, giving effect to decisions and acts of international organizations and actors whose mandate is based on the *Ahtisaari* Plan, is an obligation under constitutional law. Failure to do so does not only result in a violation of Kosovo’s legal obligations under international law established by its declaration to respect the *Ahtisaari* Plan, but also constitutes a violation of Kosovo’s Constitution. However, Art. 146.2, like Art. 146.1, of the Constitution refers only to international organizations and actors whose mandate is based on the *Ahtisaari* Plan and not on another legal instrument. As established above, both articles of the Constitution do not apply to EULEX

since its legal basis, apart from the joint action establishing it under EU law, is Resolution 1244 and not the *Ahtisaari* Plan, Kosovo's Constitution or Kosovo's invitation. Failure to give effect to decisions or acts of EULEX therefore does not result in a violation of Art. 146.2 of the Constitution.

The establishment of EULEX on the basis of Resolution 1244 leads to other serious legal problems especially in the area of justice. On 13.3.2008, the Assembly of Kosovo adopted the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo. The purpose of this law is to regulate the integration and jurisdiction of EULEX judges and prosecutors in the judicial and prosecutorial system of the Republic of Kosovo.<sup>95</sup> EULEX judges exercise certain judicial functions including the investigation, prosecution and adjudication of criminal and civil cases listed in the law.<sup>96</sup> EULEX judges exercise their jurisdiction either alone or in panels composed of EULEX and Kosovo judges and they operate within the structures of Kosovo courts.<sup>97</sup> The law reflects in general terms the *Ahtisaari* Plan and the joint action establishing EULEX and adds some further procedural and administrative details. The law is applied by EULEX even following the agreements of November 2008 between the UN and EU to place EULEX under the status neutral framework of Resolution 1244. On the other hand, the law refers explicitly to the integration of EULEX judges and prosecutors in the "judicial and prosecutorial system of the Republic of Kosovo", a statement which is clearly not status neutral. This contradiction can be explained as being the result of the law having been passed before EULEX was placed under Resolution 1244. Although legal circumstances had changed in November 2008, the law was not amended to reflect the status neutral approach EULEX had taken as that would have not been politically feasible vis-à-vis the Kosovo authorities.

The contradictory approach that EULEX has taken with respect to Kosovo legislation is also reflected in the role of EULEX judges who sit as members of the Special Chamber of the Kosovo Supreme Court for Kosovo Trust Agency Matters (hereinafter the "Special Chamber"). The Special Chamber was established by UNMIK<sup>98</sup> to adjudicate disputes related to

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<sup>95</sup> Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, Art. 1, available at <http://www.assembly-kosova.org>.

<sup>96</sup> Law No. 03/L-053 (note 95), Arts. 3 and 5.

<sup>97</sup> Law No. 03/L-053 (note 95), Art. 2.

<sup>98</sup> UNMIK Regulation No. 2002/13, as amended, on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, available at <http://www.unmikonline.org>.

privatization transactions undertaken by the Kosovo Trust Agency,<sup>99</sup> whose mandate was to privatize Kosovo's socially owned enterprises. According to the Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, EULEX judges have jurisdiction over cases falling within the jurisdiction of the Special Chamber.<sup>100</sup> Despite having jurisdiction on the basis of a law adopted by the Assembly of the Republic of Kosovo, the President of the Special Chamber, an EULEX judge, requested on 26.10.2009 a clarification from the UNMIK SRSG on a question pertaining to the legal status of the Kosovo Privatization Agency and the respective law adopted by the Assembly of Kosovo that established this Agency.<sup>101</sup> The fact that a EULEX judge addressed a request for legal clarification to the UNMIK SRSG concerning the applicability of a law adopted by the Republic of Kosovo and the legal status of one of its public agencies indicates that the laws of the Republic of Kosovo are at least of questionable legal validity for a EULEX judge. Furthermore, the Constitution provides that courts must adjudicate based on the Constitution and the law.<sup>102</sup> The Constitution therefore does not allow for a EULEX judge, who is supposed to be integrated in the judicial system of the Republic of Kosovo, to decline the application of a law adopted by the Assembly of the Republic of Kosovo or to seek legal clarification from a body other than the Kosovo Constitutional Court.<sup>103</sup>

Constitutional law concerns emerge also with regard to the appointment of EULEX judges. As EULEX was placed under Resolution 1244 and the status neutral framework of the UN, the UN Secretary-General reported in March 2009 that the UNMIK SRSG has taken steps to ensure that the appointment of EULEX judges and prosecutors is made under his authority and consistent with applicable law under Resolution 1244.<sup>104</sup> An internal EULEX document clearly supports this by confirming that EULEX judges have been appointed by the EULEX head of mission on the basis of the delegation of power received from the SRSG.<sup>105</sup> Appointments of EULEX

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<sup>99</sup> Following the Declaration of Independence, the Kosovo Trust Agency was succeeded by the Kosovo Privatization Agency.

<sup>100</sup> Law No. 03/L-053 (note 95), Art. 5.1 (a).

<sup>101</sup> Clarification by the Special Representative of the Secretary-General under UNMIK Regulation No. 1999/24 (UNMIK/REG/2008/4 – Clarification) dated 12.11.2009.

<sup>102</sup> Constitution of the Republic of Kosovo (note 23), Art. 102.3.

<sup>103</sup> According to the Constitution of the Republic of Kosovo, Art. 113.8, courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court.

<sup>104</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 17.3.2009 (S/2009/149), para. 13.

<sup>105</sup> 5<sup>th</sup> Assembly of the EULEX judges dated 22.4.2009, Annex II, available at <http://www.eulex-kosovo.eu>.

judges by the UNMIK SRSG could be formally based on UNMIK Regulation No. 2000/6, as amended, which provides that the SRSG may appoint and remove from office international judges and international prosecutors.<sup>106</sup> This UNMIK regulation may technically be still in force due to Art. 145.2 of the Kosovo Constitution, which prescribes, that legislation applicable on the date of the entry into force of the Constitution will continue to apply to the extent it is in conformity with the Constitution until repealed, superseded or amended in accordance with the Constitution. On the other hand, an UNMIK Regulation cannot be considered to be in compliance with the Constitution and to remain in force according to Art. 145.2 of the Constitution to the extent it empowers the SRSG to exercise public authority by appointing and removing from office international judges and prosecutors in a manner not provided for under the Constitution. Under Art. 104 of the Constitution, the President of Kosovo appoints judges upon the proposal of the Kosovo Judicial Council. But the *Ahtisaari* Plan, which has precedence over the Constitution, contains different rules regarding international judges who have to be selected by the ESDP Mission and who prior to their appointment require the consent of the International Civilian Representative.<sup>107</sup> While the *Ahtisaari* Plan is silent on who will be the authority appointing judges acting within the framework of the ESDP Rule of Law Mission, neither the Constitution nor the *Ahtisaari* Plan foresees a role for the UNMIK SRSG in the appointment process nor does it permit EULEX judges to be appointed pursuant to “applicable law under Resolution 1244”.<sup>108</sup> Since neither the Constitution nor the *Ahtisaari* Plan recognize the UNMIK SRSG to be a legitimate public authority, any appointment by the UNMIK SRSG of EULEX judges, who are meant to serve within the judicial system of the Republic of Kosovo, would have to be considered unconstitutional.

As a consequence, every decision rendered by a EULEX judge or by a judicial tribunal where a EULEX judge participates, provided such EULEX judge has been appointed under the authority of the UNMIK SRSG under

<sup>106</sup> UNMIK Regulation No. 2000/6 of 15.2.2000, as amended, on the Appointment and Removal from Office of International Judges and International Prosecutors, Section 1.1., available at <http://www.unmikonline.org>.

<sup>107</sup> Comprehensive Proposal for the Kosovo Status Settlement (note 16), Annex IX, Art. 2.2 (c).

<sup>108</sup> The procedure for the appointment of international judges as set out in the *Ahtisaari* Plan was applied only in the cases of international judges to the Kosovo Constitutional Court and the Appeals Panel of the Supreme Court of Kosovo related to the resolution of claims regarding private immovable property. In these cases, the International Civilian Representative (ICR) was the sole appointing authority and acted on the basis of the *Ahtisaari* Plan. The appointment decisions of the ICR are available at <http://www.gazetazyrtare.com>.

Resolution 1244, is challengeable before the Kosovo Constitutional Court. Art. 31 of the Constitution guarantees everyone a fair and impartial trial. The article is a restatement of the right to a fair trial as set out in Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR). Under Art. 22 of the Constitution, Art. 6 of the ECHR is directly applicable in Kosovo at constitutional level and, in case of conflict, has priority over provisions of laws and other acts of public institutions. Art. 6.1 of the ECHR guarantees the right to a fair trial before an “independent and impartial tribunal established by law”.<sup>109</sup> According to the European Court of Human Rights, the phrase “established by law” covers not only the legal basis for the very existence of a tribunal but also the composition of the bench in each case.<sup>110</sup> A breach of domestic rules for appointment of judicial officers is therefore also a breach of Art. 6.1 ECHR.<sup>111</sup> Under the Constitution of Kosovo, laws and other legal acts must conform to the Constitution and courts must adjudicate based on the Constitution and the law.<sup>112</sup> Thus, every tribunal which exercises judicial functions must be established by a law that is in accordance with the Constitution and, by implication, the *Ahtisaari* Plan. A tribunal that is composed of judges, who are appointed in a manner that is not provided for under the Constitution and the *Ahtisaari* Plan, is therefore a defective tribunal which does not meet the requirements of Art. 6.1 of the ECHR. Any decision of such a defective tribunal may be referred to the Kosovo Constitutional Court, which gives every individual the right to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution,<sup>113</sup> including Art. 31 of the Constitution and Art. 6.1 of the ECHR.

## V. Final Remarks

The European Rule of Law (EULEX) mission is meant to serve a noble and important purpose, i.e. to assist Kosovo’s authorities in establishing and developing rule of law, which will be conducive for facilitating internal and

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<sup>109</sup> C. Ovey/R. White, *The European Convention on Human Rights*, 2006, 181 et seq.; C. Grabenwarter, *Justiz- und Verfahrensgrundrechte*, in: D. Ehlers (ed.), *Europäische Grundrechte und Grundfreiheiten*, 2005, 161 et seq.

<sup>110</sup> *Fedotova v. Russia*, ECtHR, Judgment dated 13.4.2006, para. 38; *Moskovets v. Russia*, ECtHR, Judgment dated 23.4.2009, para. 97.

<sup>111</sup> *Fedotova v. Russia* (note 101); *Moskovets v. Russia* (note 101).

<sup>112</sup> Constitution of the Republic of Kosovo (note 23), Artss 16.1 and 102.3.

<sup>113</sup> Constitution of the Republic of Kosovo (note 23), Art. 113.7.

social peace and for supporting economic development. Failure in the UN Security Council to endorse the *Ahtisaari* Plan followed by Kosovo's declaration of independence without a formal termination of the UN's mandate in Kosovo has led to the development of two mutually exclusive legal authorities, each of them considering a different set of rules as applicable law. Apparently, the EU did not want to refrain from deploying EULEX despite events not following the anticipated course of development as it would have been politically costly for the EU to stop a process, which was in preparation since 2006. But at the same time, the EU did not want to deploy EULEX without the approval of the UN once it became clear that Resolution 1244 remained in force. But placing EULEX under the authority of UNMIK and Resolution 1244 meant disregarding the new legal order established by the Republic of Kosovo founded on its Constitution and the *Ahtisaari* Plan. On the other hand, EULEX officials have to operate within the legal system of the Republic of Kosovo and to interact with officials of the Republic of Kosovo although neither of them is recognized under Resolution 1244. This de-facto co-operation, however, provides arguments for Kosovo Serb leaders to perceive EULEX as supporting the interests of the Government of the Republic of Kosovo contrary to its commitment to status neutrality and respect of Resolution 1244.<sup>114</sup> It is impossible for EULEX to accomplish its mandate under such circumstances, i.e. pretending to operate formally under the status-neutral framework of Resolution 1244 while at the same time co-operating *de-facto* in justice and other legal matters with the authorities of the Republic of Kosovo. Instead of supporting the rule of law, EULEX's ambivalent approach leads to legal confusion and to expectations which cannot be met. In a fragile environment like Kosovo this can quickly turn the political tide against EULEX. Its decision to conclude an agreement with the Serbian Ministry of Interior on police co-operation already sparked serious political and legal confrontations between EULEX and the Government of Kosovo, the latter insisting that the conclusion of such agreements with neighboring states was within the exclusive jurisdiction of the Government of the Republic of Kosovo.<sup>115</sup> On top of that, it would be sufficient for a single ruling from the Kosovo Constitutional Court by which a decision made by a EULEX judge is declared unconstitutional to destroy the card house built by the EU by deploying EULEX under such legal uncertainties. Politically, it would have been wiser

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<sup>114</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 30.9.2009 (S/2009/497), para. 11.

<sup>115</sup> Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (note 114), para. 27.

to halt the deployment process once it became clear to the EU that the legal situation on the ground was far from being clear rather than to meddle through Resolution 1244 and the Kosovo Constitution with the sword of Damocles hanging daily over EULEX's head with the likelihood of EULEX being declared unconstitutional.

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