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***83 THE GOVERNANCE OF KOSOVO: SECURITY COUNCIL RESOLUTION 1244 AND THE ESTABLISHMENT AND FUNCTIONING OF EULEX**

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I. BACKGROUND

On February 4, 2008, shortly before Kosovo's controversial unilateral secession from Serbia on February 17 of that year, [FN1] the Council of the European Union (EU) adopted a Joint Action creating the European Union Rule of Law Mission in Kosovo/EULEX (hereinafter EULEX), the largest and most important mission thus far undertaken within the common European foreign and defense policy. [FN2] Although EULEX is first and foremost a European undertaking, it is also strongly backed by the United States, which agreed to shoulder 25 percent of the operating costs while the remaining costs would be shared by European and other states. [FN3] In October 2008, the U.S. Department of State further agreed to provide EULEX with eighty police officers and up to eight judges and prosecutors. [FN4]

EULEX was intended to substitute for the rule-of-law functions of the United Nations Mission in Kosovo (UNMIK), which was created for an open-ended period of time by Security Council Resolution 1244 (1999) under Chapter VII of the United Nations Charter. That resolution effectively transferred all legislative, executive, and judicial matters to the special *84 representative of the United Nations secretary-general for Kosovo (the special representative). [FN5] However, although the final say in all areas of governance was vested in the special representative, the execution of many such functions was delegated to other organizations, notably the Organization for Security and Cooperation in Europe (OSCE), the United Nations High Commissioner for Refugees (UNHCR), and the European Union.

UNMIK itself was primarily responsible for restoring the health, educational, and other public services; exercising police functions in the short term and developing the Kosovar Police Service in the long term; and rebuilding the judicial and correctional system (Pillar I). [FN6] The OSCE undertook the tasks of promoting democratization and human rights, as well as capacity building in these areas (Pillar II). [FN7] UNHCR assumed responsibility for the coordination of humanitarian assistance to the many displaced Kosovars (Pillar III). Finally, the European Union took charge of economic reconstruction, including the coordination of international financial assistance and the reorganization of trade, currency, and banking matters (Pillar IV). [FN8]

The nature and scope of the civil administration that had to be undertaken in Kosovo therefore implied that even though the special representative formally had the last word in relation to all matters of governance, in practice he relied heavily on the support and cooperation of various states and international organizations. [FN9] Over time, the different organizations had to adjust their roles to the changes that were taking place on the ground. For example, whereas traditional peace-building and security efforts and the facilitation of the return of large numbers of Kosovar Albanian refugees constituted the main priority in the early years, the administration of justice later became a top priority. [FN10]

Moreover, since 2001 and in particular since 2004, UNMIK has systematically transferred powers to local institutions, which has led to a scaling down of its international personnel. It is within this context of changing circumstances that the participation of the European Union and the United States in EULEX

should be considered, as they have argued that these changed circumstances require a different type of mission, one that is supportive rather than executive in nature. [FN11] Closer scrutiny reveals, however, that the creation of EULEX raised several questions of law and policy.

II. CONTROVERSIES PERTAINING TO THE EULEX MANDATE

A main point of controversy concerned whether the EULEX mandate was reconcilable with Security Council Resolution 1244. Since UNMIK was still in place at the time EULEX was created, the question arose in particular whether Resolution 1244 allowed for the introduction *85 of EULEX alongside UNMIK and, if so, how these two missions were to operate in practice given the potential overlaps in their mandates. [FN12] The matter was further complicated by the positions of the Kosovar government and the representatives of the Serb minority, whose cooperation is also necessary for the smooth functioning of UNMIK and EULEX. [FN13]

Whether EULEX was authorized by Resolution 1244 was hotly disputed within the Security Council itself. On the one hand, no one disputed that the resolution remains in force until the Security Council decides otherwise. [FN14] On the other hand, it was disputed whether it indeed provided a basis for the introduction of EULEX alongside UNMIK. Whereas the EU member states and the United States took the position that EULEX was grounded in Resolution 1244, Russia maintained that it was linked to Kosovo's (illegal) declaration of independence and was not covered by any Security Council mandate. [FN15]

Initially, the supporters of EULEX firmly believed that most states (including Russia and Serbia) would acquiesce in its existence and that the transfer of responsibilities from UNMIK to EULEX would be completed by June 15, 2008, the date that the new Kosovar Constitution was slated to enter into force. [FN16] By May 2008, however, EU officials acknowledged that their optimism in this regard had been premature. [FN17] In addition to encountering logistical and recruitment delays, [FN18] EULEX had not succeeded in securing broader international support for its mandate. [FN19] In the Security Council Russia persisted in questioning its legality, and several EU members still refused to recognize Kosovo. [FN20] This group included larger member states such as Spain, which indicated reluctance to cooperate with EULEX in the face of the persistent legal uncertainties surrounding its mandate. [FN21]

On the ground EULEX was hindered by the refusal of the Serb-controlled territories to recognize its authority while accepting that of UNMIK, which meant that EULEX had to work through UNMIK if it wanted to play any role in those areas. [FN22] At the same time, UNMIK would *86 effectively be removed from its civil administration tasks by the new Kosovar Constitution. [FN23] The Kosovar government had also adopted legislation reclaiming competence for this pillar, in particular in relation to publicly owned enterprises. [FN24] In essence, therefore, UNMIK and EULEX were confronted with a situation in which the Kosovar Albanian government preferred to terminate the UNMIK presence in favor of EULEX and the Serbian minority preferred the exact opposite.

These realities on the ground, combined with the legal challenges to EULEX, necessitated a compromise solution acceptable to all parties--the European Union, the United States, and the Kosovar Albanian government, on the one hand, and Russia, Serbia, and the Kosovar Serbian minority, on the other--before EULEX could become operational. Accordingly, in mid-June 2008, the secretary-general proposed that the operational role of EULEX, "under the over-all authority" of the UN special representative, be enhanced in a manner conforming with the framework provided for in Resolution 1244. [FN25] But differences between the parties as to exactly what this proposal would imply in practice prevented the deployment and functioning of EULEX for several months. By the end of November, the Security Council unanimously accepted a report in which all the protagonists (with the exception of the Kosovar government) claimed to have reached a more concrete agreement on the six controversial areas of police, justice, customs, transportation and infrastructure, boundaries, and Serbian patrimony. As a result, EULEX's deployment, which by this time

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amounted to fewer than five hundred of the planned two thousand personnel, could be accelerated. [FN26]

The following analysis will explore some of the legal and practical ramifications of these events. It explores, in particular, the conditions under which Resolution 1244 provides for the establishment of civil administrations, as well as whether the initial establishment of EULEX conforms (and is likely to remain in conformity) with these criteria. In doing so, the analysis also examines some of the practical challenges that may confront the tandem existence of UNMIK and EULEX as they execute their respective mandates.

III. RECONCILING EULEX WITH RESOLUTION 1244

The Legal Basis of Chapter VII Mandates for Civil Administration

When analyzing the legal basis of mandates for civil administration under Chapter VII of the Charter, one can distinguish three scenarios: mandates for civil administration by the United Nations itself; those for civil administration by (an) individual member state(s); and those for civil administration by a regional organization.

*87 As for the first scenario, by now the Security Council is widely acknowledged to have the power to establish a civil administration under the auspices of the United Nations on the basis of its implied powers under Chapter VII of the Charter. The implied power to establish a civil administration flows from the Security Council's express powers in Article 41 to take nonmilitary measures for the maintenance or restoration of international peace and security. [FN27] Since these civil administrations involve the delegation of Security Council powers to the UN secretary-general in the form of a special representative, Article 98 of the Charter constitutes a further basis for the delegation of powers. [FN28] The creation of UNMIK in Resolution 1244 [FN29] was a manifestation of the Security Council's implied powers in accordance with Articles 41 and 98 of the Charter.

Second, the Security Council also has the power under Chapter VII of the Charter to authorize individual states to implement a civil administration. This was notably the case after the invasion of Iraq in March 2003, when the Security Council authorized the United States and the United Kingdom (the Authority) to conduct the civil administration of Iraq. [FN30] The authorization in that case stemmed from the Security Council's implied powers flowing from Article 41 together with Article 48(1) of the Charter. The latter article allows the Security Council to determine whether the decisions on the maintenance of international peace and security shall be taken by all the members of the United Nations or only some of them.

Furthermore, the Charter enables the Security Council to authorize regional organizations to administer a territory. Article 53(1) provides that the Security Council "shall, where appropriate, utilize regional arrangements or agencies for enforcement action under its authority." [FN31] When Article 53 comes into play as a basis for enforcement action, the question of what constitutes a "regional organization" arises. [FN32] In accordance with Article 52(1), a regional organization has the task of achieving the peaceful settlement of disputes within its own region. [FN33] The term "regional" implies a distinctive feature about the members of the organization, which is generally understood to be of a geographic nature. [FN34] It can relate either to the region from which all the member states come, or to the region in which the organization will operate, or a combination of these factors. [FN35] According to these criteria, the European Union, which is *88 aimed at regional integration, qualifies as a regional organization, [FN36] as do the Organization of American States and the League of Arab States. [FN37]

In addition to explicitly creating the United Nations civil administration that would become known as UNMIK and be controlled by a special representative, [FN38] Resolution 1244, in its paragraph 10, authorizes the secretary-general to establish a civil administration "with the assistance of relevant international organizations." This paragraph vests the secretary-general with the power to administer the territory, and au-

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thorizes him to (re)delegate certain functions of civil administration to other international organizations such as the European Union. As mentioned at the outset, this authority included the delegation of institution building to the OSCE, humanitarian relief to the UNHCR, and economic reconstruction to the European Union.

Scrutiny of the EULEX mandate reveals that it was not authorized by the Security Council, even though paragraph 1 of the preamble to the EU Council's Joint Action creating EULEX expressly refers to paragraph 10 of Resolution 1244. This reference affirms that the European Union considered the latter to be the basis for the creation of EULEX. [FN39] However, it glosses over the fact that EULEX was created at the initiative of the European Union itself. At the time of its creation, the secretary-general merely acknowledged receipt of the letter of Javier Solana, the high representative for the Common Foreign and Security Policy of the European Union (hereinafter the high representative), without issuing any formal response. [FN40] Some European Union member states nonetheless argued that the secretary-general had implicitly authorized EULEX by acknowledging that the evolving reality in Kosovo was likely to have significant operational implications for UNMIK. [FN41]

At the time, however, this position was probably no more than an acknowledgment of a *fait accompli* brought about by the European Union and the United States, rather than an implicit authorization. The first explicit indication of an attempt to transfer power from UNMIK to EULEX appeared in the report of June 12, 2008, in which the secretary-general declared his intention to enhance the operational role of the European Union pertaining to the rule of law under the overall authority of the United Nations. [FN42]

As this report was never endorsed by the Security Council because of disagreement over the way EULEX was to be deployed, it is questionable whether this attempt by the secretary-general conformed with Resolution 1244. The secretary-general seemed to assume that it fell within ***89** his competence to delegate powers to EULEX, regardless of whether the Security Council had endorsed such action. For example, in his report of July 15, 2008, he noted that in light of the inability of the Security Council to provide guidance, he had instructed his special representative to move forward with the reconfiguration of UNMIK. [FN43] Nevertheless, this position remains highly controversial, [FN44] as in the past the secretary-general had consistently sought explicit endorsement by the Security Council of acts resulting in the transfer of governance-related competences from UNMIK to other actors.

These actions included, *inter alia*, the holding of the November 2001 elections, which constituted a basis for the establishment of institutions of self-government; [FN45] the inauguration of the Kosovar Assembly the following year; [FN46] and the subsequent transfer of competences to the so-called provisional institutions of self-government. [FN47] This consistent practice can be interpreted as an acknowledgment by the secretary-general that any reconfiguration of the mandate for civil administration resulting in a transfer of governance powers from UNMIK to other entities requires the explicit approval of the Security Council as a collective entity, including that of its five permanent members.

The Security Council explicitly endorsed the UNMIK reconfiguration only after the secretary-general's report of November 24, 2008, through the adoption of a Presidential Statement on November 26, 2008, which welcomed the cooperation between the United Nations and other international actors within the framework of Security Council Resolution 1244. [FN48] In essence, therefore, EULEX was legalized under Resolution 1244 *ex post facto*, namely, as of this latter date. [FN49]

Since a very limited number of EULEX personnel had been deployed before this time and EULEX became operational only in early December 2008, the initial absence of a legal basis for the EULEX mandate did not have any immediate practical consequences. Nonetheless, this analysis will illustrate that the continued legality of the EULEX mandate also depends on two additional factors: how the mandate is exercised

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and, in particular, whether all stakeholders accept the overriding executive authority of the special representative as long as Resolution 1244 remains in effect.

Corrective Oversight of Mandates for Civil Administration

When the Security Council authorizes a civil administration, it delegates binding powers to other entities such as the secretary-general and, through him, his special representative. For such a delegation to remain legal, the Security Council must retain overall control of the *90 authorized mandate. [FN50] Delegation of the ultimate control of the exercise of such power would amount to an abdication of authority that would undermine the centralized nature of the binding powers that the Security Council may employ in the interest of international peace and security. [FN51] Delegation of extensive discretionary decision-making power to the civil administration to facilitate day-to-day governance must therefore not result in the relinquishment of overall control by the Security Council.

To retain overall control, the Security Council must be able to exercise corrective oversight of the execution of the mandate throughout its duration, meaning that the Council may override the decisions of those acting on its behalf. [FN52] Similarly, when the Security Council authorizes the secretary-general and his special representative under Chapter VII to (re)delegate certain functions of civil administration to other international organizations such as the European Union, they, too, will retain overriding power within the parameters of the original Security Council mandate. Such is the case in Kosovo, where Resolution 1244 explicitly requested that the secretary-general appoint a special representative to oversee the civil administration. [FN53] Consequently, the special representative would have the power to override any decision taken by EULEX, whether with respect to the appointment of personnel, the exercise of its functions, or otherwise.

Closer scrutiny of the command structure of EULEX reveals that at the time of its creation, it did not contain any formal recognition of the overriding powers of the special representative (or even of the Security Council itself). Instead, it provided for a chain of command that exclusively involved EU bodies and its overall authority resided in the EU high representative. [FN54] This position changed formally in July 2008, when High Representative Javier Solana confirmed that EULEX would function under the overall authority of the United Nations and would provide the secretary-general with all necessary reports. [FN55] In practice, regular reporting to the Security Council and/or the secretary-general has become a standard feature of all delegated *91 mandates of a civil or military nature and symbolizes the acceptance of the Security Council as the authorizing source of the mandate. [FN56]

Yet, even though reporting constitutes an important formal element of acceptance of UN authority, the actual behavior of EULEX will ultimately be decisive in determining whether it has indeed embraced the overall authority of the United Nations over the exercise of its mandate. Specifically, EULEX must accept that it is in coexistence with UNMIK (as opposed to being a substitute for it) and must execute its rule-of-law mandate in a manner that does not conflict with the oversight role that the special representative retains in Kosovo.

UNMIK's rule-of-law responsibilities (Pillar I) were primarily directed at restoring the criminal justice system and creating an independent and multiethnic local judiciary. [FN57] On the one hand, these tasks included the recruitment of international prosecutors and judges for dealing with serious (international) crimes and cases where ethnic bias was a major concern. [FN58] On the other hand, the tasks involved general judicial development, such as the recruitment and training of local prosecutors and judges, and oversight of the judiciary. [FN59] In the context of Pillar I, UNMIK also established an international civilian police force responsible for interim law enforcement functions. Simultaneously, it engaged in the establishment of the local Kosovar police department and, with the support of the OSCE, has participated in the recruitment and training of local police officers. [FN60]

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As regards both the judiciary and the police, UNMIK has systematically transferred extensive responsibilities to local institutions. Nonetheless, in accordance with the authority vested in him by Resolution 1244, the special representative retains the power to change, repeal, or suspend laws that are incompatible with the mandate, aims, or purposes of UNMIK. [FN61] Thus, as long as Resolution 1244 remains in place, the special representative formally has the power to annul legislation by the Kosovar government, including any that pertains to the judiciary and the police. [FN62]

Resolution 1244 further implies that the special representative can override any decision taken by EULEX in those areas where it takes over rule-of-law functions of UNMIK. Given the opposition of the Serbian minority to the deployment of EULEX, in practice UNMIK and EULEX will exist alongside each other. [FN63] EULEX will oversee the institutions dominated by Kosovar Albanians, [FN64] and UNMIK will be directly involved in monitoring those in the Serbian-dominated areas of the territory. Like the UNMIK staff, the EULEX personnel will have certain *92 corrective and executive competences in critical situations that the Kosovar police are incapable of handling or where human rights violations require intervention--notably, when it comes to such matters as organized crime, war crimes, financial crime, witness protection, and the prevention of riots. [FN65]

This coexistence, together with the fact that EULEX will exercise functions very similar to those of UNMIK, suggests that divergent or conflicting approaches to the rule-of-law mandate could arise. [FN66] The challenges facing EULEX and UNMIK can be illustrated by some of the difficulties facing the Kosovo criminal justice system, as well as by the potentially divergent approaches of these missions to their international responsibility for violations of international law.

Restoring the Criminal Justice System in Cooperation with Local Actors

Some of the pertinent challenges facing the Kosovar criminal justice system include the lack of coordination between local and international prosecutors and judges, deficient witness protection, and insufficient oversight of the local judiciary and police force. In practice, interaction between national and international prosecutors and judges has remained limited, as the international prosecutors and judges tend to focus only on serious (international) crimes and are physically separated from their local counterparts in terms of work space. The resulting lack of coordination has exacerbated the differences in standards of professional conduct between local and international staff, as well as the difficulties faced by local prosecutors because of inadequate staff and heavy caseloads. [FN67]

Witness protection, currently the responsibility of special units in the Kosovar police force, has proven to be very challenging in a society consisting of small communities and extensive family networks. The risk of exposure and intimidation is aggravated by long pretrial waiting periods and ineffective prosecution of persons interfering with witnesses. [FN68] Police officers remain especially reluctant to act as witnesses in court proceedings out of fear of intimidation. [FN69]

Oversight of the judiciary at the ground level rests with local institutions such as the Kosovar Ministry of Justice, while the Kosovar police force has operational control over policing responsibilities in Kosovo. Limited effective oversight, however, is actually exercised. [FN70] Similarly, the transfer of the so-called Professional Standards Unit to the Kosovar Police Service in 2005 has *93 not resulted in effective oversight of police misconduct. Obtaining information about the status of investigations into misconduct by police officers remains very difficult. [FN71]

Addressing these concerns in a manner that results in a well-functioning and well-supervised judiciary and police service that apply the same standards of policing and criminal justice throughout the territory will require major efforts of coordination between UNMIK and EULEX. [FN72] In addition, it will require in-

tensive collaboration between these institutions and the Kosovar Ministry of Justice, the Kosovar Police Service, and those in charge of the local institutions in the Serbian-controlled areas.

However, as indicated above, the Kosovar Albanian government is rejecting the prolonged presence of UNMIK in the territory despite having paid lip service to Resolution 1244 in the Declaration of Independence. [FN73] It is therefore questionable whether the Kosovar government will be willing to cooperate extensively with the UNMIK authorities for any extended period, or to accept that the special representative can still override any of its decisions. Similarly, it remains doubtful whether the Kosovar government will cooperate with Serbian-dominated local authorities who are supported by UNMIK. Furthermore, that government's willingness to cooperate with EULEX may diminish over time if the latter is perceived as being too deferential to UNMIK, which could occur if EULEX attempts to give proper effect to Resolution 1244 by accepting the special representative's overall authority over the rule-of-law mission.

For their part, Kosovar Serbs have refused to participate in any Kosovar institutions, including the police and the judiciary, since the Declaration of Independence, and do not accept the Kosovar officials' exercise of authority. [FN74] As a result, inter alia, the courthouse of Mitrovicë closed down temporarily and is currently manned by a skeleton staff of international prosecutors and judges dealing solely with urgent criminal cases. [FN75] Since only UNMIK law is applied in the Mitrovicë courthouse (and not that adopted by the new Kosovar government), substantive law in the territory is already fragmented. [FN76] The Kosovar Serb community also remains opposed to the deployment of EULEX in its municipalities. This reluctance to cooperate with either the Kosovar authorities or EULEX might also spill over into a similar reluctance to cooperate with UNMIK, were it to be perceived as being too accommodating to the needs of EULEX and the Kosovar Albanians.

These challenges may additionally have consequences for the medium- and long-term existence of EULEX, which was initially created for two years. [FN77] If the Kosovar Albanian government perceives it as being too close to UNMIK, it may cease to condone EULEX's presence in the territory and frustrate its mandate, even if the Security Council endorses an extension of the mandate. On the other hand, an overly close alliance between EULEX and the Kosovar government may alienate Security Council members such as Russia and thwart the endorsement *94 of any extension of the mandate by the Council. If EULEX remains in Kosovo at the request of the Kosovar Albanian government under those circumstances, its authority would no longer be based on Resolution 1244, making the execution of its mandate on the territory a violation of that resolution.

In essence, therefore, efforts by UNMIK and EULEX to coordinate their rule-of-law practices and policies may alienate the respective local communities they are representing. But cooperating too closely with their respective local communities may alienate them from one another and lead to a de facto violation of Resolution 1244 if EULEX contravenes the will of the special representative in the execution of its mandate. In addition, by cooperating too closely with local communities, the missions may further the perception of de facto partition of the territory along ethnic lines. [FN78]

Coordinating the International Responsibility of UNMIK and EULEX

The focus of UNMIK and EULEX cannot be exclusively local; they will also have to devise a coherent policy of international responsibility. It goes without saying that the credibility of missions directed at developing the rule of law would be severely undermined if the main protagonists did not accept responsibility in a consistent fashion for their own violations of international law. There is a concrete risk that UNMIK and EULEX will take divergent approaches in this regard. When endorsing the reconfiguration of UNMIK, the UN secretary-general explicitly limited the international responsibility of the United Nations for violations of international law to the extent of its effective operational control. [FN79] Thus, with respect to operations

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such as EULEX where the effective control lies with the European Union, the United Nations will not accept international responsibility.

This position is a direct response to the Behrami decision of the European Court of Human Rights whose highly questionable reasoning--if consistently applied--could result in the attribution of international responsibility for the conduct of EULEX to the United Nations. [FN80] In this decision, the European Court attributed the actions of both UNMIK and the NATO Kosovo Force (KFOR) exclusively to the United Nations because their actions were authorized by Resolution 1244. In doing so, the Court did not acknowledge the effective control of certain member states over KFOR's actions as a criterion for the attribution of responsibility for potential human rights violations but, instead, relied on the criterion of overall control of the Security Council.

Although an extensive analysis of the European Court's reasoning falls outside the scope of this essay, [FN81] it is noteworthy that, in relying on the above delegation model to come to its conclusion, the Court interpreted that model too narrowly. It does not necessarily imply that the actions of KFOR must be attributed exclusively to the United Nations. Instead, the model acknowledges that the overall control exercised by the Security Council over KFOR's mandate *95 allows for effective, day-to-day control by (the member states of) KFOR on the ground. [FN82] Therefore, if one regards attribution of responsibility and delegation of powers as two sides of the same coin (which the Court seemed to do), the attribution of responsibility should reflect awareness of the fact that (the member states of) KFOR exercised effective control in Kosovo at the time that the alleged human rights violations occurred. This view suggests that responsibility for human rights violations should be attributed first and foremost to (the member states of) KFOR, as opposed to the United Nations. [FN83]

This position is supported by United Nations practice, as the organization has never before accepted responsibility for violations of international law by troops acting on its overall authority but under unified command and control (as with KFOR). The secretary-general's statement in June 2008 that the United Nations would accept international responsibility in Kosovo only for actions under its effective control underscores that the United Nations has no intention of changing this practice. The statement also amounts to a rejection of the European Court's reasoning in the Behrami decision. [FN84]

If EULEX and its member states nonetheless tried to shield themselves behind the Behrami decision, an accountability vacuum would result, as both the European Union and the member states would then be absolving themselves of responsibility in a situation where no other entity would be likely to take responsibility. [FN85] Consequently, it is crucial for the European Union, as a subject of international law, to accept international responsibility for operations undertaken under its effective control in the context of EULEX. [FN86] In addition, UNMIK and EULEX should agree on addressing issues of international responsibility in an integrated and comprehensive manner to prevent the introduction of divergent practice and standards in Kosovo in this regard.

IV. CONCLUSION

The evolution of the mandate for civil administration in Kosovo illustrates the difficulties that arise in the face of an open-ended mandate for civil administration under Chapter VII of the Charter, [FN87] because of which any formal amendment necessitated by changing circumstances on the ground requires a subsequent Chapter VII resolution. In such a case, amendment can be prevented by the (threat of the) exercise of a reverse veto by any of the permanent members, even when a majority of the Security Council (including a majority of the permanent members) favor an amended mandate.

*96 Under these circumstances, those pressing for change can be expected to attempt to facilitate it by (re)interpreting the existing legal framework (in this instance Resolution 1244). The success of the attempt

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will ultimately depend on the strength of the legal reasoning and political power exercised by those attempting to legitimate their actions in this manner. At the time of EULEX's creation, the protagonists seemed to have underestimated the importance of sound legal reasoning for the success of the mission, while simultaneously overestimating their ability to persuade opponents through political means. Persistent doubts within the United Nations membership about the legality of the EULEX mandate delayed the deployment of the mission for almost ten months and undermined its credibility before the mandate took effect.

Although the Security Council's endorsement of EULEX under overall United Nations control in November 2008 provided an *ex post facto* legal basis for the mandate, its long-term legality will depend on whether EULEX exercises its mandate in a manner that is compatible with the wishes of the special representative. The main resistance to the acceptance of the overriding power of the special representative in this regard is unlikely to come from within EULEX itself but, rather, from the local stakeholders whose interests it represents, the Kosovar government. The widespread opposition among Kosovar Albanians to the compromise solution that placed EULEX under the United Nations umbrella has the potential to undermine any good-faith attempts by EULEX and UNMIK to coordinate their rule-of-law activities.

Ironically, this obstacle to the functioning of EULEX seems to have resulted, at least in part, from the support of Kosovo's powerful Western allies for its maximalist stance throughout the negotiations over the territory's final status. [FN88] With the wisdom of hindsight, this approach can be termed short-sighted to the extent that it underestimated the political strength of the key stakeholders who opposed independence and their ability to thwart an interpretation of Resolution 1244 that would facilitate the replacement of UNMIK by EULEX.

In the absence of willingness on the part of all stakeholders to engage in dialogue and compromise, EULEX is unlikely to be able to exercise its mandate in accordance with Resolution 1244 for the duration of its mission, or to cooperate on a par with UNMIK in developing a coherent rule-of-law strategy for the territory as a whole. These circumstances, in turn, may undermine the viability of the EULEX mission beyond its initial two-year mandate and, by implication, that of the **governance** of **Kosovo** as a unified territory.

[FN1]. Professor of International Constitutional Law, University of Amsterdam; and Extraordinary Professor, North-West University, Potchefstroom campus, and University of Pretoria, South Africa. This contribution forms part of a project of the Netherlands Organization for Scientific Research on the implications of hierarchy in international law for the coherence and legitimacy of international decision making. The author benefited from discussions with Professor Niels Blokker, Mr. Ricardo Gosalbo Bono, Dr. Frederik Naert, Mr. Surya Sinha, and Professor Rüdiger Wolfrum.

[FN1]. *Kosovo Declaration of Independence* (Feb. 17, 2008), 47 ILM 461 (2008), available at <http://www.assembly-kosova.org/common/docs/declaration_indipendence.pdf>; Christopher J. Borgen, *Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition*, ASIL INSIGHTS, Feb. 29, 2008, at <<http://www.asil.org>>. The position of the United Nations with respect to the status of Kosovo is one of strict neutrality. By November 2008, Kosovo had been recognized by fifty-two states. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, para. 2, UN Doc. S/2008/692 (Nov. 24, 2008) [hereinafter Nov. S-G Report]; see also Daniel Fried, *Signing of European Union Rule of Law Mission (EULEX) Agreement* (Oct. 22, 2008), at <<http://2001-2009.state.gov/p/eur/rls/rm/111171.htm>>.

[FN2]. Council of the European Union [EU Council], *Council Joint Action 2008/124/CFSP*, 2008 O.J. (L 42) 92 [hereinafter Joint Action]; see also Daniel Fried, *Kosovo: The Balkans' Moment of Truth?* (Mar. 4, 2008) (testimony before the Senate Committee on Foreign Relations), at <<http://2001-2009.state.gov/p/eur/rls/rm/101722.htm>>.

[FN3]. Article 13 of the Joint Action, *supra* note 2, explicitly provides for the participation of third states in EULEX.

[FN4]. Fried, *supra* note 2.

[FN5]. SC Res. 1244, paras. 5-6, 10-11 & Annex 2, paras. 3, 5 (June 10, 1999).

[FN6]. Michael J. Matheson, [United Nations Governance of Postconflict Societies](#), 95 AJIL 76, 79 (2001).

[FN7]. *Id.* at 79; see also Tom Perriello & Marieke Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo 9* (International Center for Transitional Justice, Apr. 2006), at <<http://www.ictj.org/en/news/pubs/index.html>>.

[FN8]. Matheson, *supra* note 6, at 80.

[FN9]. *Id.* at 79.

[FN10]. Hansjörg Strohmeier, [Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor](#), 95 AJIL 46, 47 (2001).

[FN11]. Neth. Parl., 2d Chamber, *Inzet Nederlandse Politie en Koninklijke Marechaussee bij Internationale Civiele Politie-Operaties* [Letter of the Ministers of Foreign Affairs, Defense, Internal Affairs, and Justice to the Second Chamber of the Dutch Parliament], *Kamerstukken II, 2007/08, Doc. 27476, No. 8*, at 3 (Mar. 20, 2008), at <<http://ikregeer.nl/static/pdf/KST116780.pdf>>.

[FN12]. The issue of coordinating the coexisting mandates is taken up in the text preceding and following note 67 *infra*.

[FN13]. Nov. S-G Report, *supra* note 1, para. 21.

[FN14]. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, para. 291, UN Doc. S/2008/211 (Mar. 28, 2008) [hereinafter *Mar. S-G Report*]; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, paras. 14, 20, UN Doc. S/2008/354 (June 12, 2008) [hereinafter *June S-G Report*]; Neth. Parl., 2d Chamber, *Inzet Nederlandse Politie en Koninklijke Marechaussee bij Internationale Civiele Politie-Operaties* [Responses by the Ministers of Foreign Affairs and Defense to Questions of the Standing Commission of Foreign Affairs of the Second Chamber of the Dutch Parliament], *Kamerstukken II, 2007/08, Doc. 27476, No. 9*, at 2 (May 15, 2008), at <<http://ikregeer.nl/document/KST118346>>.

[FN15]. EurActiv, *EU Kosovo Mission up in the Air*, EURACTIV, Apr. 16, 2008, at <<http://www.euractiv.com>>.

[FN16]. During debates in the Dutch Parliament, the government indicated that the negative attitude of Russia would have no direct effect on the deployment of EULEX. In making this prediction, the Dutch government proved to be overconfident. See *Kamerstukken II*, *supra* note 14, at 2.

[FN17]. Patrick Moore, *Analysis: Are UN, EU Part of the Problem in Kosovo?* RADIO FREE EUROPE RADIO LIBERTY, May 28, 2008, at <<http://www.rferl.org>>.

[FN18]. By May 15, 2008, only three hundred officials had been deployed. See *Kamerstukken II*, *supra* note 14, at 2.

[FN19]. June S-G Report, *supra* note 14, para. 4.

[FN20]. By December 2008, Cyprus, Greece, Romania, Slovakia, and Spain still refused to recognize Kosovo.

[FN21]. See EurActiv, *supra* note 15; Petra de Koning, *Russen Voorspellen Nieuw Geweld: Kosovo Pats-telling Rond Rol Europese Missie in Onafhankelijkheid* [Russians Predicting New Violence: Kosovo Dead-lock Concerning the Role of the European Mission After Independence], NRC HANDELSBLAD, June 12, 2008, at 7, available at <<http://archieff.nrc.nl/index.php/2008/Juni/12/Overig/07/>> (by subscription).

[FN22]. Nov. S-G Report, *supra* note 1, para. 4; see also André Cunha, *EULEX Inside UNMIK, Too Late?* (Apr. 23, 2008), at <<http://www.osservatoriobalcani.org/article/articleview/9463/1/216>>; Moore, *supra* note 17.

[FN23]. June S-G Report, *supra* note 14, para. 7.

[FN24]. Nov. S-G Report, *supra* note 1, Annex 1, para. 1; see also June S-G Report, *supra* note 14, para. 9.

[FN25]. June S-G Report, *supra* note 14, paras. 12-13, 16.

[FN26]. By February 2008, UNMIK had reduced its police personnel from a peak of 3300 persons in 2001 to just under 1500. The remaining United Nations staff members amounted to 462. About UNMIK, at <<http://www.unmikonline.org/intro.htm>>. See also Ian Bancroft, *Confusion in Kosovo*, GUARDIAN.CO.UK, Nov. 17, 2008, at <<http://www.guardian.co.uk>>; European Union, *European Security and Defense Policy, EULEX KOSOVO: EU Rule of Law Mission for Kosovo*, Doc. EULEX/03 (Oct. 2008), attached to EU Council, *Joint Press Statement by the United States of America and the European Union on US Participation in the EULEX Mission in Kosovo*, No. 14619/08 (Presse 295) (Oct. 22, 2008).

[FN27]. This line of argument was also followed with respect to the establishment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*, Appeal on Jurisdiction, No. IT-94-1-AR72 (Oct. 2, 1995), available at <<http://www.icty.org>>.

[FN28]. UN CHARTER Art. 98. The first sentence of Article 98 reads as follows: "The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs."

[FN29]. SC Res. 1244, *supra* note 5, paras. 5-6 & Annex 2, paras. 3-4.

[FN30]. SC Res. 1483, paras. 4, 8 (May 22, 2003).

[FN31]. See CHRISTIAN WALTER, *VEREINTE NATIONEN UND REGIONALORGANISATIONEN: EINE UNTERSUCHUNG ZU KAPITEL VIII DER SATZUNG DER VEREINTEN NATIONEN* 276 (1996); see also ERIKA DE WET, *THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL* 291-93 (2004).

[FN32]. WALTER, *supra* note 31, at 276.

[FN33]. Ige F. Dekker & Eric P. J. Myjer, *Air Strikes on Bosnian Positions: Is NATO Also Legally the Proper Instrument of the UN?* 9 LEIDEN J. INT'L L. 411, 413 (1996); see also WALTER, *supra* note 31, at 276.

[FN34]. WALTER, *supra* note 31, at 40.

[FN35]. *Id.* at 40-41. The distinctive geographic factor can also be accompanied by cultural and historical ties such as those between the members of the British Commonwealth.

[FN36]. Although the legal personality of the European Union was not explicitly provided for in the founding treaties, it developed through practice. HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW* 992 (2003); see also Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Art. 46A, Dec. 13, 2007, 2007 O.J. (C 306) 1, available at <<http://www.eur-lex.europa.eu>>.

[FN37]. For a discussion on whether Article 41, combined with Article 48 of the UN Charter, can serve as an alternative basis for territorial administration by regional organizations, see WALTER, *supra* note 31, at 277.

[FN38]. SC Res. 1244, *supra* note 5, paras. 5-6 & Annex 2, paras. 3, 5.

[FN39]. Joint Action, *supra* note 2.

[FN40]. Secretary-General in Security Council Statement Says UN Aim in Kosovo Stable Political, Security Situation, Protection of Population, Minorities, UN Press Release SG/SM/11426--SC/9253 (Feb. 18, 2008); see also Kamerstukken II, *supra* note 14, at 2.

[FN41]. Kamerstukken II, *supra* note 14, at 2; see also Mar. S-G Report, *supra* note 14, paras. 30, 32.

[FN42]. June S-G Report, *supra* note 14, para. 16 & Annex I. On August 18, 2008, the special representative of the UN secretary-general and representatives of EULEX signed a technical arrangement on the handover of UNMIK assets to EULEX. Technical Arrangement Signed: UN and EU Agree on Handover of Assets Between UNMIK and EULEX, EULEX KOSOVO Press Release 1/2008 (Aug. 19, 2008), available at <<http://www.eulex-kosovo.eu>>.

[FN43]. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, para. 3, UN Doc. S/2008/458 (July 15, 2008) [hereinafter July S-G Report]; see also June S-G Report, *supra* note 14, para. 19; *id.*, Annex I, Letter Dated 12 June 2008 from the Secretary-General to His Excellency, Mr. Boris Tadic.

[FN44]. See UN Doc. S/PV.5917, at 5, 17, 19 (June 20, 2008). While the secretary-general's position attracted support from the United Kingdom, *id.* at 17, and the United States, *id.* at 19, it was criticized by Serbia, *id.* at 5.

[FN45]. Statement by the President of the Security Council, UN Doc. S/PRST/2001/27 (Oct. 5, 2001).

[FN46]. Statement by the President of the Security Council, UN Doc. S/PRST/2002/4 (Feb. 13, 2002).

[FN47]. Statement by the President of the Security Council, UN Doc. S/PRST/2003/1 (Feb. 6, 2003).

[FN48]. Statement by the President of the Security Council, UN Doc. S/PRST/2008/44 (Nov. 26, 2008).

[FN49]. Nov. S-G Report, *supra* note 1, para. 50; see also June S-G Report, *supra* note 14, para. 16 & Annex 1.

[FN50]. This requirement was confirmed in relation to the delegation of military mandates in the Behrami decision of the European Court of Human Rights. *Behrami & Behrami v. France*; *Saramati v. France*, Joint App. Nos. 71412/01 & 78166/01, Admissibility Decision, para. 132 (May 31, 2007), available at

<<http://echr.coe.int/echr/en/hudoc>>.

[FN51]. DANESH SAROOSHI, THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS 5, 33 (1999).

[FN52]. For a discussion of the power of the delegator to override decisions of the delegate, see Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v. High Auth. of Eur. Coal & Steel Cmty.*, 1958 ECR 133. The underlying principles in this case, although developed in the context of EU law, were also affirmed in relation to United Nations mandates, see *Behrami & Behrami*, supra note 50, para. 132. See also DE WET, supra note 31, at 267-68; Niels M. Blokker, *Is the Authorization Authorized? Powers and Practice of the United Nations Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing,'* 11 EUR. J. INT'L L. 541, 553 (2000).

[FN53]. SC Res. 1244, supra note 5, para. 6. See also the statement by the United Kingdom in UN Doc. S/PV.6025, at 19 (Nov. 26, 2008), that the executive authority of the special representative was not derived from Resolution 1244, but from the subsequent constitutional framework, which is not correct. This interpretation ignores not only the wording of the resolution, but also the fact that the constitutional framework was itself a product of an executive act of the special representative, namely, UNMIK Regulation 2001/9, *On a Constitutional Framework for Provisional Self-Government in Kosovo*, UN Doc. UNMIK/REG/2001/9 (May 15, 2001), available at <<http://www.unmikonline.org>>.

[FN54]. Joint Action, supra note 2, Art. 7; EU Council, Javier Solana, EU High Representative for the CF-SP, Welcomes the Appointments of Pieter Feith as EU Special Representative in Kosovo and Yves de Kermabon as Head of Mission of EULEX KOSOVO, Doc. S060/08 (Feb. 16, 2008); see also *Kamerstukken II*, supra note 14, at 7.

[FN55]. EU Council, Summary of the Intervention of Javier Solana, EU High Representative for the Common Foreign and Security Policy Before the Meeting of International Organisations Active on the Ground in Kosovo (EU, NATO, UN, OSCE), Doc. S257/08 (July 18, 2008).

[FN56]. Security Council Resolution 1244, supra note 5, para. 20, requested that the secretary-general report regularly to the Council on the implementation of the civil and military presences authorized by this resolution.

[FN57]. Perriello & Wierda, supra note 7.

[FN58]. Human Rights Watch, No. 4(D), 2006, *Not on the Agenda: The Continuing Failure to Address Accountability on Kosovo Post-March 2004*, at 6, available at <<http://www.hrw.org/en/reports/2006/05/29/not-agenda-0>>.

[FN59]. *Id.* at 6.

[FN60]. *Id.* at 38; Perriello & Wierda, supra note 7, at 9.

[FN61]. UNMIK Regulation 1999/1, *On the Authority of the Interim Administration in Kosovo*, UN Doc. UNMIK/REG/1/1999 §§1-2 (July 23, 1999), available at <<http://www.unmikonline.org>>; see also Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo 39, UN Doc. S/1999/779 (July 12, 1999).

[FN62]. Formally speaking, the special representative could also nullify the 2008 KUSHTETUTA E KOSOVOES [Constitution of Kosovo], available at <<http://www.kushtetutakosoves.info>>. However, in prac-

tice this is not likely to happen.

[FN63]. Nov. S-G Report, *supra* note 1, paras. 21, 25; see also Bancroft, *supra* note 26.

[FN64]. Nov. S-G Report, *supra* note 1, para. 52.

[FN65]. Kamerstukken II, *supra* note 11, at 4. In addition, EULEX had to oversee the implementation of the 2007 "Ahtisaari Plan," which Kosovo accepted unilaterally upon independence. This plan contained, *inter alia*, safeguards for minorities, a program for the decentralization of government, constitutional guarantees for all citizens, and measures for the protection and promotion of cultural heritage. Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, UN Doc. S/2007/168, paras. 1-3 (Mar. 26, 2007). The status of the Ahtisaari Plan is uncertain in light of the compromise reached in December 2008 in accordance with which EULEX will function within the status-neutral framework of UNMIK.

[FN66]. An estimated fourteen hundred EULEX police officers, forty judges, twenty prosecutors, and seventy prison workers are to be deployed throughout Kosovo. Joint Action, *supra* note 2, Art. 3(b); Kamerstukken II, *supra* note 14, at 4; see also Kamerstukken II, *supra* note 11, at 4.

[FN67]. HUMAN RIGHTS WATCH, *supra* note 58, at 11.

[FN68]. *Id.* at 38; see also July S-G Report, *supra* note 43, Annex 1, para. 25.

[FN69]. HUMAN RIGHTS WATCH, *supra* note 58, at 38.

[FN70]. *Id.* at 9.

[FN71]. *Id.* at 44.

[FN72]. Nov. S-G Report, *supra* note 1, para. 51. It will also involve the cooperation of the OSCE, which will remain involved in institution building in the territory. See HUMAN RIGHTS WATCH, *supra* note 58, at 48, 67.

[FN73]. Nov. S-G Report, *supra* note 1, para. 52.

[FN74]. June S-G Report, *supra* note 14, para. 5.

[FN75]. Nov. S-G Report, *supra* note 1, para. 8. In Zubin Potok, the municipal and minor offenses courts are not operational at all, while the court liaison office of the Kosovo Ministry of Justice--which facilitates legal aid for Kosovar Serbs--is functioning at a minimal level because of security concerns.

[FN76]. Some Serb-dominated municipalities also apply the Serbian law of self-governance. See Nov. S-G Report, *supra* note 1, para. 4.

[FN77]. Joint Action, *supra* note 2, para. 20; see also Kamerstukken II, *supra* note 11, at 7.

[FN78]. Im Versuchslabor Kosovo beginnt eine weitere Etappe, N[EUE]Z [URICHER]Z[EITUNG] ONLINE, Nov. 28, 2008, at <<http://www.nzz.ch>>.

[FN79]. June S-G Report, *supra* note 14, para. 16.

[FN80]. *Behrami & Behrami v. France*, *supra* note 50.

[FN81]. For an analysis of this decision, see Pierre Bodeau-Livinec, Gionata P. Buzzini, & Santiago Vil-

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lalpando, Case Report: [Agim Behrami & Bekir Behrami v. France; Ruzhdi Saramati v. France, Germany & Norway](#), in [102 AJIL 323 \(2008\)](#). See also K. M. Larsen, [Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test](#), [19 EUR. J. INT'L L. 509 \(2008\)](#).

[FN82]. DE WET, *supra* note 31, at 265.

[FN83]. Fredrik Naert, [Accountability for Violations of Human Rights Law by EU Forces](#), in [THE EUROPEAN UNION AND CRISIS MANAGEMENT: POLICY AND LEGAL ASPECTS 375, 379 \(S. Blockmans ed., 2008\)](#).

[FN84]. In any event, the United Nations is not bound by a decision of the European Court, as it is not a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No. 5, 213 UNTS 221.

[FN85]. The matter might be different if in future Kosovo became a party to the European Convention on Human Rights and the issue of extraterritorial application did not arise. See [Behrami & Behrami v. France](#), *supra* note 50, para. 150; see also [Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland](#), 2005--VI Eur. Ct. H.R. 107, available at <http://echr.coe.int/echr/en/hudoc>.

[FN86]. Naert, *supra* note 83, at 379.

[FN87]. SC Res. 1244, *supra* note 5, paras. 5-6.

[FN88]. Bancroft, *supra* note 26.

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