

## EDITORIAL COMMENTS

### *And in the meantime...Kosovo...*

Next to the terrible news of the world-wide economic contraction, we have recently been able to read a lot of upbeat news about Kosovo in the European press. EU-Lex Kosovo, the EU's so-called civilian ESDP mission, was slowly but surely reaching its peak strength of some 2000 persons. This should be rated a great achievement and should certainly contribute to greater stability in the region.

It is sobering to realize that it is already well over a year ago that Kosovo unilaterally proclaimed its independence, on 18 February 2008,<sup>1</sup> claiming to be following the scenario of and the conditions set out in the Ahtisaari report,<sup>2</sup> which had fallen victim to a threatened Russian veto in the Security Council. Russia blocked any progress towards an adaptation of the mandates of UNMIK and the non-UN organizations involved in the Kosovo operation – KFOR (NATO) and the EU – as was also foreseen in the report of Mr Ahtisaari. Nevertheless, things must somehow have changed in the meantime, if EU-Lex Kosovo, that biggest of all civilian ESDP operations, is now approaching full strength.

This editorial proposes to look briefly into what has changed, how it has changed and what is the result. Is the biggest ever civilian operation of the EU now safe and secure, politically and legally? Or is it a giant with feet of clay? And what does the answer to these questions say about the situation of the ESDP and the EU in general?<sup>3</sup> In order to get an answer to these questions the

1. See [www.assembly-kosova.org](http://www.assembly-kosova.org), last visited on 8 March 2009. See also Borgen, "Kosovo's Declaration of Independence: Self-determination, secession and recognition", 12 *ASIL Insights* (29 Feb. 2008, Issue 2), [www.asil.org/insights080229.cfm](http://www.asil.org/insights080229.cfm).

2. Report by Finnish former President Martti Ahtisaari (UN Special Envoy at the Kosovo status process negotiations), see UN doc. S/2007/168

3. The question of whether the EU-Lex mission raises perhaps some of the same problems that were raised in the so-called *Ecowas* case (Case C-91/05, *Commission v. Council*, judgment of 20 May 2008, nyr) about the boundary between foreign policy and military action under the second pillar on the one hand, and development cooperation under Art. 181 EC on the other hand, but this time in respect of the boundary between the external aspects of the third pillar and technical cooperation under Art. 181A EC Treaty, will be left aside in this Editorial. It is clear from some preambular paragraphs that strongly emphasize the crisis management aspect of the operation and the harm that could be done to the objectives of the CFSP that the Council sought to protect itself in this respect.

reader of these lines will have to put up with an unusually high dose of UN law and diplomacy.<sup>4</sup>

Some recent history:

The Ahtisaari report, which essentially advocated a controlled transition to Kosovo independence on condition of extensive minority rights and protection for Kosovar Serbs, was “not endorsed by the Security Council”, as UN diplomatic language so delicately puts it. The blockage became crystal clear in the course of the last months of 2007, when the report of the so-called “troika”, consisting of Russia, the US and the EU, was submitted to the Security Council and stated that “neither party was willing to cede its position on the fundamental question of sovereignty.”<sup>5</sup>

Life went on regardless. Presidential elections in Serbia were won by President Tadic on 3 February 2008. The next day, the EU Council of Ministers adopted two Joint Actions, one creating the EU-Lex Kosovo Mission<sup>6</sup> and another appointing an EU Special Representative (EUSR) for Kosovo, the Dutchman Peter Feith.<sup>7</sup> Two weeks after that came the declaration of independence – which obviously made the blockage only worse. It contained a fifth paragraph in which it welcomed important aspects of the Ahtisaari plan, including “a European Union led rule of law mission.”

It should be stressed here that the adoption and setting up of the EU-Lex mission was in itself a major achievement. Obviously the adoption of the Joint Action itself was not yet marred by the declaration of independence and hence by the dissension it created within the Union, between those who recognized Kosovo and those, such as Greece, Cyprus and Spain, who absolutely resisted that. In the end it turned out to be possible to go ahead with the mission on the basis that participation was voluntary, while the Member States that resisted recognition of Kosovo abstained from blocking later decisions.<sup>8</sup>

Originally the European Community, actually mostly the Commission, was primarily taking care of the so-called Pillar IV of UNMIK, the social-economic administration of the territory.<sup>9</sup> In the controlled independence scenario

4. The only serious legal study to be published on the issue so far is by Milano, “Il Trasferimento di Funzioni da UNMIK a EULEX in Kosovo”, (2008) *Rivista di Diritto Internazionale*, 967–990.

5. See doc. S/2007/273.

6. Council Joint Action 2008/124/CFSP of 4 Feb. 2008 on the European Rule of Law Mission in Kosovo, EULEX KOSOVO, O.J. 2008, L 42/92.

7. Council Joint Action 2008/123/CFSP of 4 Feb. 2008 appointing a European Special Representative in Kosovo, O.J. 2008, L 42/88, mandate extended by Council Joint Action 2009/317/CFSP of 16 Feb. 2009, O.J. 2009, L 46/69.

8. See Art. 23(1) TEU.

9. How the support for UNMIK Pillar IV started out as a succession of short term CFSP Joint Actions in 1999 and was then changed to a Community Regulation (Council Reg. No. 1080/2000,

of Ahtisaari this was a task to be transferred to the Kosovo Government. On the other hand, the EU would take on the narrow police work, as well as the broader justice work.

Organized crime and corruption are endemic in Kosovo, as in many other areas of the former Yugoslavia, and needed all possible attention. KFOR would concentrate in future essentially on the narrow security tasks, in particular securing the Kosovo border. In spite of the Ahtisaari plan not having been endorsed by the Security Council this is still in broad outline what is happening today. How is that possible, in the light of the constant declarations from the Serbian and Russian sides that no cooperation with anything going in the direction of independence was acceptable?

### *Through the looking glass*

The legal context at the UN level in which the parties in the former Yugoslavia and the other countries and organizations involved continue to operate is that of Security Council Resolution 1244 of 10 June 1999 (S/Res/1244). Insofar as is relevant here, that Resolution establishes as an interim goal of the UN operation a substantial measure of self-government for Kosovo taking full account of the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia.<sup>10</sup> On the other hand, the Resolution also leaves considerable freedom to UN Member States and relevant international organizations to establish a security presence in Kosovo and to the Secretary-General to establish an international civil presence in Kosovo, with the assistance of relevant international organizations, in order to provide an interim administration.<sup>11</sup>

It was essentially this second aspect of S/Res/1244 that Secretary-General Ban Ki Moon and the EU sought to use in order to continue the replacement of certain elements of UNMIK by the EU-Lex mission and the termination of the

O.J. 2000 L 122/27) based on Art. 308 EC (later amended by Council Reg. 2098/2003) is well documented by Karnitschnig, "The United Nations and the the European Union in Kosovo – The Challenges of Joint Nation-building", in Wouters, Hoffmeister, Ruys (Eds.), *The United Nations and the European Union: an Ever Stronger Partnership* (T.M.C. Asser Press, The Hague, 2006), pp. 323–351, at p. 327, esp. footnote 14. On the basis of these Regulations, the Commission was authorized, on behalf of the Community, to conclude financing agreements with UNMIK and the Office of the High Representative. The Commission also seconded many of its civil servants and civil servants of the Member States to UNMIK.

10. See 10<sup>th</sup> preambular paragraph and Annex I to S/Res/1244, indent 6.

11. See respectively paras. 7 and 9 (military presence) and 10 (civil presence) of S/Res/1244.

EC administration of Pillar IV and its transfer to the Kosovo authorities.<sup>12</sup> In June 2008, shortly before the entry into force of the new Kosovar constitution,<sup>13</sup> the Secretary-General prepared a first report on the UNMIK restructuring, which sought to exploit his freedom in particular to structure the international civil presence as he thought reasonable. It had, however, to remain within the confines of S/Res/1244, that is to say under the “overall status neutral authority of the UN”, as his report expressed it.<sup>14</sup>

Moreover, Ban Ki Moon attempted to keep the Government of President Tadic on board, after the Serbian legislative elections in May, which had seen a victory of the pro-European camp, by sending him a letter (annexed to his report) in which he re-affirmed the status neutral position of the UN in respect of Kosovo and addressed six points on which he proposed temporary arrangements without prejudice to the status of Kosovo.<sup>15</sup> This so-called six point plan, however, raised serious problems with the new Kosovo Government, which did not accept it.

It took until the November 2008 before the Secretary-General, in his annual report on UNMIK, largely reconfirmed his ideas of June, again being confronted with a rejection of his, allegedly slightly modified, six points by the newly independent Kosovo. In the meantime the Serbian Government had had the satisfaction in October 2008 of securing the narrow adoption of a request for an advisory opinion from the International Court of Justice by the General Assembly.<sup>16</sup> Perhaps the latter move may have contributed to a relative depoliticization of the conflict, though one cannot suppress entirely a sentiment of pity for the ICJ, which is landed with the question of whether the unilateral declaration of independence of Kosovo is in accordance with international law.<sup>17</sup>

12. In this respect it is clear from the report of the Secretary-General that he was simply informed by the European Commission that it was no longer prepared to finance Pillar IV (the personnel of which consisted largely of seconded Commission officials and experts paid by the Commission), see UN doc S/2008/354, point 9.

13. Milano has pointed to this somewhat suspicious timing, *op. cit. supra* note 4, at 971.

14. See doc. S/2008/354, point 12.

15. These points were: (1) Kosovo police in Serb-majority areas; (2) Courts in Serb-majority areas; (3) Customs, allowing Kosovo to function as a single customs area; (4) Transportation and infrastructure and the cooperation in that respect; (5) KFOR's continued surveillance of Kosovo's boundaries; (6) Protection of Serbian (religious) patrimony.

16. A/Res/63/3 adopted on 8 Oct. 2008 by 77 votes in favour against 6, with 74 abstentions. It was, therefore, adopted by a mere plurality of votes.

17. For the moment the Court, by order of 17 Oct., has fixed 17 April 2009 and 17 July 2009 as the dates by which States and international organizations may file respectively written statements and written comments on these statements.

*Conclusion on the legal situation*

During the Security Council Meeting of 26 November 2008, Serbia and Russia emphasized the fact that the operations in Kosovo remained within the framework of S/Res/1244 and that this implied a complete respect of the territorial integrity of Serbia. Others, such as the US, UK and France, stressed the authority of the Secretary-General to change the composition of and restructure the civilian presence. As a matter of fact, the earlier assertions that a new Security Council resolution would be necessary for this were no longer heard.<sup>18</sup> As so often, the meeting was concluded, not with a resolution, but with a highly ambiguous President's statement, reading in part as follows: "The Security Council welcomes the cooperation between the UN and other international actors, within the framework of S/Res/1244, and also welcomes the continuing efforts of the European Union to advance the European perspective of the whole of the Western Balkans, thereby making a decisive contribution to regional stability and prosperity."<sup>19</sup>

No doubt this was a well-deserved pat on the back for the EU, but what does it mean for the international legal basis of the EU-Lex Kosovo operation? It certainly does not amount to an authorization of the operation as such. From a UN legal perspective, the position of EU-Lex Kosovo remains rather fragile and redolent of constructive ambiguity. One side in the Security Council puts the emphasis on the UN corset placed around the EU Kosovo operation by S/Res/1244, whereas the other side prefers to see the freedom that the Secretary-General, in collaboration with the "relevant international actors", enjoys in restructuring the operation. One side can argue that the EU-Lex operation can only stay in Kosovo because of its dependence on S/Res 1244,<sup>20</sup> while the other side may argue that it has been invited in by paragraph 5 of the Kosovar Declaration of Independence.<sup>21</sup> No doubt each side hopes to buy time this way, seemingly being assured that time and the Advisory Opinion of the ICJ will be on its side.

18. For the report of the meeting see [www.un.org/News/Press/docs/2008/sc9512.doc.htm](http://www.un.org/News/Press/docs/2008/sc9512.doc.htm) last visited on 11 March 2009.

19. See doc. S/prst/2008/44.

20. That resolution is based on Chapter VII of the UN Charter and can therefore impose the presence of UNMIK, and EU-Lex in the UNMIK framework on what is still Serbian territory under that resolution, see Art.2(7) UN Charter.

21. This is not a position that has been openly advocated by the EU or its Member States, but it would be a logical one, once a State has recognized Kosovo. Note that Art. 10 of Joint Action 2008/124/CFSP, establishing the EU-Lex mission, is highly ambiguous on the status, privileges and immunities of EU-Lex and its Staff, saying merely that this shall be agreed "as appropriate". The present writer is not aware of any Status of Forces Agreement between the EU and Kosovo.

*Some additional remarks*

Clearly the objective of President Ahtisaari in bringing out his report was not to let Kosovo degenerate into another so-called frozen conflict. Unfortunately he has failed, at least for now, and Kosovo runs a considerable risk, given that S/Res/1244 continues to be the vital parameter of the operation, to disappear into the deep-freeze of long-lasting (quasi)-international administration by EU-Lex Kosovo, KFOR and the token remnants of UNMIK.

On the other hand, one can only have admiration for the skilful diplomacy and manoeuvring, the careful orchestrating of moves in Brussels, moves on the Balkans and moves at the UN, that has made it possible that EU-Lex Kosovo in the end was in a position to take over large swathes of responsibility in the field of policing, customs and the judiciary. There is little doubt that this is in the interest of the European Union as a whole: a stable Western Balkans, without ethnic strife and with the possibility of a future inside the Union, is something that all Union citizens should wish for, since the alternative, as the events in that region in the 1990s have taught us, is too horrible to contemplate.

However, one can be sure that in the end, if this large and costly operation is going to continue for a very long time, there will be problems explaining this to the European electorate and justifying the expenses. Here we run once again into the paradox of European integration, which is even greater in the area of foreign policy than elsewhere. As has been demonstrated above, it was largely inherent in the situation that this big operation was lifted off the ground in a gradual, almost unobtrusive, manner. This inevitably exposes the EU later to possible populist accusations that this was done in a non-transparent manner, entailing huge expenses etc. How to create a climate again of confidence between the European electorate or the sum of national electorates and the EU authorities so that it is accepted that the latter sometimes have to undertake actions on a considerable scale without extensive publicity, since that is the only way one can maintain both sufficient internal coherence and achieve effective external action at the same time?