

EULEX: a mission in need of reform and with no end in sight

Salvador Llaudes & Francisco Sánchez Andrada | Real Instituto Elcano

Theme¹

The EU's once ambitious EULEX (European Union Rule of Law in Kosovo Mission) needs to be reformed so that it can put an end to its presence in Kosovo after having helped strengthen the Rule of Law.

Summary

The EU's EULEX (European Union Rule of Law in Kosovo Mission) started in 2008. Its aims were to help improve the quality of Kosovo's institutions and to strengthen the Rule of Law while at the same time combating corruption. Some progress has been made but there have also been some notable failures, which make it necessary to reform the Mission. In any case, there is no clear end in sight for EULEX's presence in Kosovo.

Analysis

(1) Introduction: EULEX takes over from UNMIK

Following the Kosovo conflict in 1999, the United Nations approved Security Council Resolution 1244² that authorised international military and civil intervention in the country and created the United Nations Interim Administration Mission in Kosovo (UNMIK).

The UNMIK had a provisional mandate to deal with territorial administration until 2008, the year in which Kosovo declared its unilateral independence. A year before, in 2007, a strategy began to be developed to devolve competences to the EU.

¹ A version of this analysis was published in Spanish by the Instituto Español de Estudios Estratégicos at http://www.ieee.es/Galerias/fichero/docs_opinion/2015/DIEEEE060-2015_EULEX_LlaudesxSanchez.pdf. The authors would like to thank Antonio Cortiñas, Miguel Garijo, Cristina Irujo de Codes, Alan Odobasic, Miguel Rodríguez Andreu and the EULEX office in Kosovo for their help throughout the process of writing this analysis. Any mistake is the authors' responsibility.

² Fragment of Security Council resolution 1244 (1999), which authorises the international presence in Kosovo within the framework of the extinct Federal Republic of Yugoslavia: '10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo', <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement>.

Although at first there were problems cooperating with local institutions, which slowed down the transfer of power, at the end of 2008 the United Nations withdrew the Mission from the area (as shown in Table 1) and transferred power to EULEX (European Union Rule of Law in Kosovo), which became fully operational in April 2009.

Table 1. Evolution of the number of UNMIK law-and-order forces

Date	Deployment
Deployment as of 15 January 2002	4.519 police personnel 3.397 local staff 1.178 international civilian personnel 38 military liaison officers
Current strength (as of 31 March 2015)	Seven police officers 215 local staff 112 international civilian personnel Eight military liaison officers

Source: UN (<http://www.un.org/en/peacekeeping/missions/unmik/facts.shtml>).

The Council Joint Action of 4 February 2008³ and the Council Decisions of June 2010 and June 2012⁴ are the legal basis for EULEX (which has so far been the most expensive EU mission, with an investment of €724 million up to June 2014, as shown in Table 2). In turn, the mission operates within the framework of United Nations Resolution 1244.

As regards the latter there is a certain degree of controversy. On the one hand, the hierarchical relationship between the Resolution and EULEX is evident, as pointed out by Jean-Paul Jacqué, the lawyer assigned by Federica Mogherini to report on internal corruption in EULEX:⁵ ‘The 2008 EULEX Kosovo Joint Action referred to UN Security Council Resolution 1244 and the UN Secretary-General’s authority under this resolution’. On the other hand, some member states insist that although initially the Mission’s presence was due to Resolution 1244, Kosovo’s unilateral Declaration of Independence and, especially, the ending of supervised independence in September 2012, it is now directly justified by the Pristina government.⁶

³ Full text of the Council Joint Action, 4/II/2008, at http://www.eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf.

⁴ Full texts of both *Council Decisions* from June 2010 and June 2012 at <http://www.eulex-kosovo.eu/eul/repository/docs/WE20100608councildecision.pdf> and <http://www.eulex-kosovo.eu/eul/repository/docs/WELEXUriServ-2012.pdf>.

⁵ Annex of the Review of the EULEX Kosovo Mission’s implementation of the mandate with a particular focus on the handling of the recent allegation, http://eeas.europa.eu/statements-eeas/docs/150331_jacque-report-annexes_en.pdf.

⁶ For further details concerning the debate about the recognition of Kosovo, see Jessica Almqvist (2009), ‘The Politics of Recognition, Kosovo and International Law’, Elcano Royal Institute, 16/III/2003, http://www.realinstitutoelcano.org/wps/portal/web/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/Elcano_in/Zonas_in/DT14-2009.

Table 2. EULEX budget

Date	Budget (€ million)
April 2008-October 2010	265
October 2010-December 2011	165
December 2011-June 2012	73
June 2012-June 2013	111
June 2013-June 2014	110

Source: BOE (in Spanish) http://www.boe.es/diario_boe/txt.php?id=DOUE-L-2014-81297.

(2) Executive Division and Division of Empowerment: the two EULEX axes

EULEX was created with the object of establishing the effective Rule of Law in Kosovo, strengthening the region's institutions and facilitating negotiations between Belgrade and Pristina. While establishing the Rule of Law the focus was on combating corruption and cooperating with local institutions in order to promote stability in the area, particularly in the north, which has a large Serb-Kosovar majority.

As explained in more detail below, the Mission has two divisions: (1) Executive, whose mandate is to head investigations and to process and adjudicate criminal cases (mostly those dealing with organised crime, war crimes, corruption and human trafficking), on which it continues to focus given the lack of progress in these tasks; and (2) Empowerment, whose aim is to train, monitor and provide police support of all kinds to members of the court and customs officials. The Empowerment branch has been successful in carrying out most of its core competences.

(a) *Executive Division*: while Kosovar judges and attorneys are already active in District Courts and in the Prosecution Service –still counselled by EULEX personnel–, further up the structure the presence –and mandate rather than just advisory capacity– of EULEX is far greater. However, Mission personnel lack sufficient knowledge of the local law codes and it is difficult for Albano-Kosovar judges to try Serb-Kosovar defendants fairly (and vice versa), considerably complicating the process. An example is the Drenica Case,⁷ in which, after the trial was over, some of the witnesses declared that their testimonies had been manipulated and incorrectly communicated.

Some of the Executive Division's most successful actions in the past few months have been the clearing of all charges against three Serb-Kosovars accused of participating in war crimes in April 1999 in Novo/Brdo, the sentencing of eight defendants accused of corruption in the Passport Case and the first phases of the case charging eight defendants with storming a United Nations convoy in 2012 in Zubin Potok.

⁷ Verdicts published by EULEX on the Drenica Case: Drenica 1 Verdict, <http://www.eulex-kosovo.eu/?page=2,10,228>; Drenica 2 Verdict, <http://www.eulex-kosovo.eu/?page=2,10,229>.

(b) *Empowerment Division*: initially, EULEX had been present in all police, court and customs tasks. Given Kosovo's improvement in these areas, over time its involvement has steadily decreased and it now focuses almost exclusively on the highest and most strategic levels.

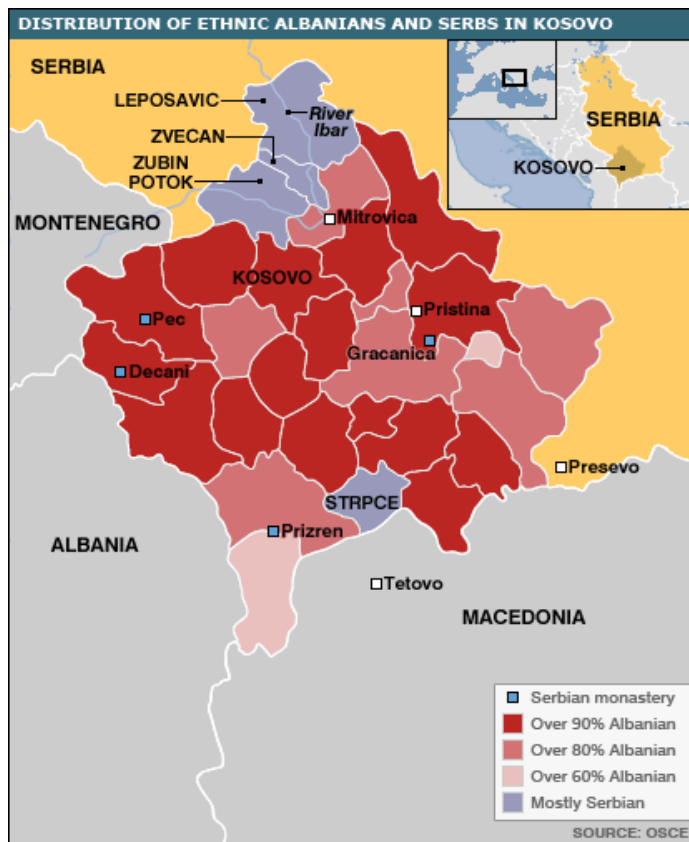
Most recently (from October 2014 to January 2015) the Empowerment Division has focused on giving support to the training of the Kosovo Border Police in respect to the problem of irregular emigration, on counselling the Kosovo Police for improving control over the north following the events at the October 2014 football match between Serbia and Albania and on enhancing surveillance and control during the Serbian Prime Minister Aleksander Vucic's visit to Kosovo on 14 January.

(3) EULEX and the Agreement between the governments of Kosovo and Serbia on normalising relations

The Agreement on the Normalisation of Relations between Belgrade and Pristina was signed in April 2013. It opened up a period of smoother relations between Kosovo and Serbia as a result of their shared goal of joining the EU at some point in the future. Thus, Serbia's parliamentary elections of 2014 were marked by a decline in Euroscepticism in the National Assembly. The 2014 election results in Kosovo also led to the Serbian minority gaining the post of Deputy Prime Minister, along with two other positions in the government.

Theoretically, the Agreement should have had no practical consequences for the development of the EULEX Mission since it is a declaration of principles and not legally binding. However, at the political level it could imply the beginning of the break-up of the status quo, affecting the balance of power in Kosovar regions with a Serbian majorities (as shown on Map 1 there is no Albano-Kosovar majority anywhere in Kosovo) and in the position of the member States which do not recognise Kosovo as an independent state –currently Cyprus, Slovakia, Spain, Greece and Romania–.

Map 1. Kosovo: ethnic distribution



Source: OSCE (<http://news.bbc.co.uk/2/hi/europe/7249034.stm>).

Although Serbia's plans do not yet specifically include recognising Kosovo, both countries have skilfully managed to find a way for the Agreement to focus on less controversial issues to help foster a friendlier relationship. Thus, amongst the 15 points included in the Agreement,⁸ three refer to implementing an effective Rule of Law: a consensus on the telecom market, regularising customs –bearing in mind that the OSCE considers Kosovo a separate customs territory– and, most importantly, a decision on the future institutions for northern Kosovo.

The Agreement should involve substantial changes for the institutions of northern Kosovo. The police and judiciary in Serbian districts were still exercising their functions and thus answered to the Ministry of Justice and the Serbian authorities. However, the new Kosovo police force, created with the aim of integrating both Serb-Kosovars and Albano-Kosovars, was, in practice, unable to act in the north. Furthermore, EULEX courts were also unable to be inclusive as regards the country's different communities. It was not a matter of a lack of Kosovar authorities

⁸ A) 8th point of the Agreement: 'Members of the others Serbian security structures will be offered a place in equivalent Kosovo structures'. B) 10th point of the Agreement: 'The judicial authorities will be integrated and operate within Kosovo legal Framework...', <http://www.rts.rs/upload/storyBoxFileData/2013/04/20/3224318/OriginalInI%20tekst%20Predloga%20sporazu%20ma.pdf>.

but of their inability to act. As an example, the Kosovo police operated in Mitrovica⁹ but no one chose to report incidents to it. The Agreement now puts an end to parallel institutions with the object of unifying them into a single structure. As a result, the Belgrade government will cease to finance them, with the Pristina government taking over control, thus clarifying the position of the EULEX Mission, which had so far engaged in executive and police functions.

The latest report of the EU's High Representative for the UN Secretary General already dealt with north Kosovo, considering it a priority to establish an appropriate contact with the local authorities and reminding the players involved that there is a threat of conflict. However, tensions are still latent, as shown by the recent controversy generated by the invitation of the Serbian NGO Youth Education to the Kosovar Deputy Prime Minister Hashim Thaçi to attend an event in Belgrade on the integration of Balkan countries in the EU. Thaçi has a warrant against him in Serbia for terrorism and the Serbian authorities claimed that if he had set foot in Belgrade he would have been arrested. The situation came to a head with cross-statements, including the Kosovar Deputy Prime Minister's: 'This proves there's still much work to be done to complete the normalisation of relations'. Meanwhile, Serbian diplomats commented that Thaçi's presence 'really was not discussed with the Serb government the way it should have been'.¹⁰

Nevertheless, negotiations on the Agreement's implementation are still in progress. The first of the two latest meetings in Brussels between Federica Mogherini and the Serbian and Kosovar Prime Ministers, Alexander Vucic and Isa Mustafa, was held on 21 April.¹¹ Although the High Representative described the meeting as 'constructive', Vucic and Mustafa agreed that progress was slow at a summit in which three issues were tackled: energy connections, telecommunications and the establishment of an Association of Serb Municipalities.¹²

At the following meeting, on 23 June, the keynote was similar. While Mogherini focused on progress, the declarations of the two Prime Ministers suggested that it would be difficult to reach an agreement on the Association of Municipalities.¹³ To establish a common position on the issue will be essential to helping implement the Brussels Agreement considering that six of its 15 points refer to the Association of Serb Municipalities in northern Kosovo.

(4) Corruption accusations against EULEX: discredit threatens the Mission

Accusations emerged in October 2014 questioning the integrity of certain of the Mission's members: the daily *Koha Ditore*¹³ published a series of internal EULEX

⁹ Also known as Mitrovicë in Albanian and Kosovska Mitrovica in Serb.

¹⁰ 'Thaçi dispute highlights bad will in Serbia relation', *Euobserver*, <https://euobserver.com/foreign/128412>.

¹¹ 'Constructive round of Kosovo talks held in Brussels', B92, http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=04&dd=22&nav_id=93877.

¹² 'No agreement in Mustafa-Vucic second meeting', UNMIK, <http://media.unmikonline.org/?p=51101>.

¹³ 'Progress made during Kosovo round, no agreements reached', B92, http://www.b92.net/eng/news/politics.php?yyyy=2015&mm=06&dd=23&nav_id=94536.

reports that showed that Mission members had allegedly accepted Mafia bribes in order to block proceedings against defendants and even to eliminate proof. It was a direct attack against one of the EULEX Mission's priority objectives.

The Mission's special prosecutor, Maria Bamieh, was accused of leaking the report to the media but denied any responsibility. However, it is important to stress that corruption allegations against EULEX members were not new: in 2012 the Italian judge Florence Florit had already been named by Bamieh as the recipient of €300,000 as a reward for absolving three defendants accused of murder. The British prosecutor also accused the special prosecutor Jonathan Ratel of obstruction in a corruption investigation against the Kosovar politician Azem Syla. As a result and as a preventive measure Maria Bamieh was suspended and was unable to resume her position as she failed to be selected for one of the few places available.

Despite the fact that the first accusations were made two years ago, the European External Action Service (EEAS) failed to take any serious action until November 2014, when the EU's High Representative for Foreign Affairs and Security Policy, Federica Mogherini, appointed the French lawyer Jean-Paul Jacqué¹⁴ as an independent member in charge of examining the EULEX Mission's accusations of corruption. At the same time, the European Ombudsman opened an investigation on the EEAS's management of the accusations of corruption against EULEX¹⁵.

External pressure has not been limited to the media: the non-governmental organisation Human Rights Watch released a report (dated 15 December 2014) denouncing these practices and presented a written request¹⁶ to the High Representative to extend Jacqué's mandate in the investigation (at first only four months) and its competences.

Jacqué's report (*Review of the EULEX Kosovo Mission's implementation of the mandate with a particular focus on the handling of the recent allegation*) was made public on 14 April on the EEAS webpage, casting some light on important aspects of the Mission's development.

First, because of the lack of evidence the French lawyer rejected there had been a corruption cover-up in EULEX. However, he recognised the Mission's endemic problems as regards bad administration and a disastrous communications policy, drawing two main conclusions: that an investigation should have been opened

¹⁴EU and Kosovo corruption: scratching the surface', *Euobserver*, <https://euobserver.com/investigations/126468>.

¹⁵ Own-initiative inquiry OI/15/2014/PMC of the Ombudsman into the European External Action Service's (EEAS) investigation into the allegation of serious irregularities involving the EU Rule of Law Mission (EULEX) in Kosovo, <http://www.ombudsman.europa.eu/es/cases/correspondence.faces/en/58360/html.bookmark>.

¹⁶ Letter to the High Representative of the EU for Foreign Affairs and Security Policy and Vice President of the European Commission, <http://www.hrw.org/news/2014/12/15/letter-high-representative-eu-foreign-affairs-and-security-policy-and-vice-president>.

earlier in order to avoid the problems that have later emerged¹⁷ and that EULEX has to be reformed if it is expected to be continued¹⁸. The latter issue is considered by Jacqué to be essential, since Kosovo is still unable to fend for itself as regards the Mission competences.

Jacqué's complaint about the deficient communications in the Mission was motivated by the latter's failure to start up an investigation and by its lack of transparency. Specifically, the report refers to what happened in 2013, when Bernd Borchardt, the Mission's leader at the time, and Hansjörg Haber, who ran the Civil Planning and Conduct Capability (CPCC) –the authority in charge of planning and operating the civil missions within the Common Security and Defence Policy (CSDP)– created a group to investigate internal corruption in EULEX. Information about the initiative failed to reach either Brussels or Pristina, heightening the perception of a cover up.¹⁹

Although Jacqué denied in his report that there had been any cover-up as regards corruption, his conclusions on EULEX's lack of transparency and poor management have had an evident effect, damaging the legitimacy of the Mission's members after years of shepherding local institutions and imposing its principles to combat corruption.

(5) What is the Mission's future?

In line with the practice since 2008, the expiration of EULEX was again extended by two further years in June 2014. There is now a consensus among the 28 that the most likely outcome is for the Mission to continue beyond 2016. Bearing in mind that EULEX is to be terminated in future, this implies that its objectives have not been achieved and that is still far from having succeeded. A reflection of this is the need to finalise the court cases concerning three types of penal issues: war crimes, organised crimes and corruption.

Among them, those allegedly committed by the leaders of the Kosovo Liberation Army (KLA) are especially noteworthy. Their investigation was divided between, on the one hand, the cases looked into in Kosovo by EULEX judges and, on the other, the allegations of Dick Marty, a Council of Europe senator.

This Swiss senator revealed non-police allegations which concluded that members of the KLA had committed war crimes. The Marty Report was presented to the

¹⁷ 'An investigation should have been opened at the outset. This would have prevented the issues that later arose in connection with the use of secret and special procedures, which fuelled suspicions of a cover-up that fortunately turned out to be unfounded', Jacqué Report, p. 8.

¹⁸ 'The continued presence of EULEX is only feasible if comprehensive reforms are made to improve its effectiveness and thus its credibility', Jacqué Report, p. 12.

¹⁹ 'Only the Head of Mission, the Head of Executive Division and members of this preliminary Internal Investigation team were informed. AS for the Civilian Planning and Conduct Capability (CPCC), only the CivOpsCdr was notified. X confirmed in an interview that he was the only one to be informed of the situation in Brussels', Jacqué Report, p. 25.

Parliamentary Assembly of the Council of Europe in November 2011, where it was approved, pointing to collaborators of the Kosovo Liberation Army (KLA) who were responsible for the criminal network in the late 1990s that harvested organs from Serbian POWs to sell them in the international black market.

Given the Marty Report's endorsement by the Parliamentary Assembly of the Council of Europe, EULEX focused on these crimes by creating a Special Investigation Task Force (SITF). The SITF's report concluded that there was sufficient proof to prosecute the members of the KLA. Nevertheless, there was a problem of responsibility: which court should pass judgement on these cases? Thus, the allegations remained in the air while no legal sentence was pronounced.

The debate about the shape that this tribunal should adopt is still alive. However, the most plausible solution is the creation of a Kosovar court, separate from the jurisdiction and the rest of the EULEX tribunals, to be established in Kosovo but which would largely operate in another country in order to guarantee the protection of witnesses (an as yet unresolved issue, as in the Drenica Case) and prevent corruption. In addition, its competences should not only be limited to crimes listed in the Marty Report but to war crimes committed during and after the Kosovo conflict also. The advantage of this would be that such a court would be created under the umbrella of Resolution 1244 but be staffed by Kosovars.

On 21 April the Constitutional Court of Kosovo accepted the creation of this Special Tribunal pending its subsequent endorsement by the Kosovo Parliament. The UN put pressure on Pristina to give its approval, adding that should it not be forthcoming the Security Council itself would deal with the matter. As recently stated by Samuel Zbogar, the EU's Special Representative: 'This will happen either by the decision of the Kosovo parliament or by the decision of the UN Security Council'.²⁰ Even the US Ambassador in Kosovo has said there would be no objections to its approval in the UN Security Council.²¹

Nevertheless, pressure from the international community has so far been insufficient to force the Kosovo Parliament to act promptly and authorise the establishment of the Special Tribunal. This would require approval by two thirds of the chamber plus two thirds of the minorities' representatives. Apart from the difficulty of winning over the opposition (the Vetëvendosje parties, Alliance for Kosovo's Future and Kosovo Initiative), which is still contrary to the idea, 10 government-coalition deputies have also refused to support the new tribunal due to their rejection of the Drenica Case sentence. Thus, while the process has steadily ground to a halt, the Kosovo government is now attempting to modify the law in order to satisfy a majority.

²⁰EU REP in Kosovo: Special Court will be set up', B92, http://www.b92.net/eng/news/crimes.php?yyyy=2015&mm=04&dd=21&nav_id=93873.

²¹ 'Where the past isn't even past', *The Economist*, <http://www.economist.com/news/europe/21654654-special-court-try-kosovars-war-crimes-moves-closer-where-past-isnt-even-past>.

Meanwhile, Samuel Zbogar has again insisted that there is 'no need for delays in setting up the Special Court'.²²

Besides these judicial matters that have an obvious impact on the Mission, there are other external factors that condition its future: on the one hand there are the consequences of the region's disastrous economic situation and high unemployment rate; on the other, the signing of the Agreement on the normalisation of relations. The latter led to the opening of the borders between Serbia and Kosovo, resulting in a huge outflow of emigrants, with clear consequences for EU member states such as Hungary.

There are evident differences among the EU's member states' as regards the Mission's continuity. Although the 28 agree on the need to ultimately devolve power, some countries are in a greater hurry than others to see the process finalised. Although perceptions about the speed of the transfer of powers to the local authorities and of the Mission's aims might appear to be related to the stance of each member state regarding the recognition or not of Kosovo's independence, in practice this is not the case. Belgium supports the recognition of Kosovo but has doubts about speeding up the transfer of competences, and this is directly related to migration issues. Member states with Kosovar minorities place a greater stress on the need to guarantee that once the Mission is wrapped up there should be effective institutions untainted by corruption.

Conclusions

The effectiveness of the EULEX Mission is being questioned, perhaps now more than ever before. Although it is true that some of its objectives have been achieved, such as the transfer of competences in the Empowerment Division and much more slowly in the Executive Division too, and that relations with Serbia have improved since the Brussels Accord, political interference and corruption are still casting a shadow over it.

So far, the battle against the political interference from within the institutions has been lost. The latter's inefficiency led to the absence of bodies entrusted with protecting the development of civil society. Furthermore, it is in the institutions in which EULEX has been most successful that a certain dependence has paradoxically been generated, with the Kosovar judges submitting to their international colleagues.

Political interference is not the only problem regarding the way Kosovar institutions function. Corruption in the region is still excessive. According to Transparency International's Global Corruption Barometer,²³ which measures the citizens'

²²'No need for delays in setting up Special Court', B92, http://www.b92.net/eng/news/crimes.php?yyyy=2015&mm=06&dd=15&nav_id=94435.

²³ The Global Corruption Barometer, http://www.transparency.org/country#KOS_PublicOpinion.

perception of corruption, in 2013 48% of the people of Kosovo believed that corruption had increased in the previous two years, with the judiciary being the least valued institution. Again, the latter is paradoxical since the Mission was created with the clear objective of establishing an effective Rule of Law in Kosovo. Thus, EULEX cannot be said to have achieved its objective if it has been unsuccessful in combating endemic evil.

Furthermore, it is impossible to establish an institutional supervisory system and the fundamental principles for the efficient Rule of Law if communications are opaque and poor management is prevalent. The fact that the Jacqué Report has confirmed the problem's continuing existence merely makes it even more evident.

EULEX's future is therefore uncertain. To counteract the consequences of these events, the Mission has launched a process to evaluate its impact on the ground. The Programmatic Approach²⁴ will require EULEX personnel and their local counterparts to provide monthly information about the Mission's development in each specialised area. The results obtained will then be compared to the strategic objectives accorded by the member states. This is the first time that the EU will be using a system like this on such a scale. The aim is to guarantee the responsibility of the Mission's personnel and to measure its action statistically, with the focus on the transfer of competences to local institutions.

Despite the attempts by EULEX to analyse its achievements in order to continue making further progress, the Jacqué Report has placed a fundamental issue under the spotlight: the breakdown of what has so far been the dominant triumphalist rhetoric of those supporting the Mission. And even if EULEX could never be the only solution to Kosovo's problems, it is still responsible by default.

To conclude, it can be said that reforms within EULEX are the only solution in the short term for a mission that must be very clear that its priority is not to become institutionalised and remain in Kosovo forever but to help with the establishment of the efficient Rule of Law. If the dynamics employed so far to fight political interference, judicial corruption and opacity change, the situation in Kosovo will improve substantially, at the same time stimulating and speeding up the transfer of competences. Otherwise, the EULEX experience will end up being considered an unmitigated failure, seriously damaging the credibility of the EU's foreign policy in the region.

²⁴ Content of the *Programmatic Approach*, <http://www.eulex-kosovo.eu/en/news/000188.php>.

