

# THE INTERNATIONAL IDENTITY OF THE EUROPEAN UNION AND ITS ROLE IN THE CASE OF KOSOVO

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## **Abstract**

*This work analyzes the international identity of the European Union (EU) in the context of the new world order with a focus on issues developing in Kosovo. The development of EU and its unique character in relation to Public International Law (PIL) has made the issue of legal subjects more complex. Unlike traditional international organizations, EU is governed by the principle of supremacy. PIL is defined as the law of nations, meaning that the rules and principles are meant to govern relations between states. Although international law has now developed, and organizations and individuals are also considered as subjects of international law, nonetheless, as a starting point, international law is only applicable to those subjects that have international personality. How does the EU claim to have international personality when the member states are sovereign states, but at the same time part of a Union with elements of a state? In this context, the weight of the subject is related to the fact that geopolitics has changed and the capacity of the EU as a geopolitical actor is put to the test in the Balkans, since geopolitical competition is high amongst the big global powers.*

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**JEL Classification:** K33

## **1. Introduction**

The continent Europe has developed since it was covered in ice 11000 years ago. Within it now exist an entity named the EU possessing a supranational entity not seen elsewhere in the planet.

At the same time with the birth of the EU, Carl Schmitt, a renown legal philosopher and sometime legal adviser to the Nazis, had published his book seminal work “The Nomos of the Earth” (1950), in which he explained the historical development of our world and its link with the European International Law, which he considered to be the international law of the time, broke down as a world order the way it had existed until then with the discovery of the new world. This discovery ushered in a new world order. He then turned his attention into analysis of international relations at a global scale.

This analysis of a global developments in the context of the coming into existence of the EU created challenges new for public international law since, as Auguste Comte would put it, only states can be subject to public international law, i.e. only they can enjoy legal personality and rights and obligations, including the right to initiate court proceedings.<sup>2</sup> This issue started to emerge during the interwar years (1918 – 1941), when the issue of subjects of public international law became more complex. At this time public international law expanded to cover other areas and actors on the international stage, such as intergovernmental organizations established by states, most notably the League of Nations (predecessor to the United Nations founded in 1945), other non-governmental organizations established by private individuals, such were Amnesty International, a transnational company as Nestlé etc. All these new entities obtained international legal personality or some rights and duties under public international law.<sup>3</sup>

Besides the emergence of the United Nations (UN) on May 9, 1945, with the Schuman Declaration, the seed of an idea was planted, leading to the formation of the EU celebrating this year its 69 anniversary. As a result of its formation, in the European continent the concept of the state as an absolute sovereign began to dramatically change. The legal foundations of this change were laid down in the Treaty of Paris when the new legal entity was endowed with a full legal capacity in

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<sup>2</sup> Anderson, P.E., *International Law: Legal Capacity of the United Nations: Assertion of Claim in Behalf of Its Agents*, 496-497.

<sup>3</sup> Malanczuk, P., *Akeshurst’s Modern Introduction to International Law*, 7<sup>th</sup> ed., 2. See also: Blokker, N., “The Macro Level: The Structural Impact of General International Law on EU Law - International Legal Personality of the European Communities and the European Union: Inspirations from Public International Law,” 471-472.

international relations. In fact, this capacity endowed with served as a landmark for the future EU as a supranational entity.<sup>4</sup>

This entity was at the same time a legal order based on three treaties: the Treaty on European Union, the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union. They define the organization of the EU, including its main bodies: Parliament, directly elected by the EU citizens, the European Council (EC), which brings together heads of states or governments and member states, Council of Ministers (CM), comprising representatives of member states at the ministerial level, the European Commission (EU Commission), as an executive which promotes EU's general interests, including serving as a guardian of its legal order and, finally, the European Court of Justice (ECJ). This institutional structure of the old continent can also be divided according to the principle of Montesquieu, the balance of powers, whereby the Parliament and the Council are the legislature, the Commission is EU's executive, and the Court its judicial branch.<sup>5</sup>

The EU stated objective is to affirm its identity on the international stage, in particular through the implementation of a common foreign and security policy, including the eventual designation of a common defense policy, which may in time lead to a common defense, and to create an identity in the international arena in a way that corresponds to the economic power it has.<sup>6</sup> This objective of asserting its identity on the international scene has been hampered by a complex and fragmented framework that governs the international relations of the EU, in particular since the emergence of the legal order based on the Maastricht Treaty.<sup>7</sup>

A defining moment in the emergence of the new international relations of the EU began with the entry into force of the Lisbon Treaty. Its main objective was to bring a greater consistency and coherence to the EU's external relations and strengthen it as a global player. The Treaty abolished the three pillars of the Maastricht, which meant that foreign and security policy, justice and internal affairs, that were previously intergovernmental and remained within the sovereign power of members states, now are wholly or mainly within the framework of the EU powers. As a consequence, treaties between the EU and various sovereign states in the world stage cover all policy areas becoming very important legal instrument extending the scope for incorporating international law into domestic orders of its members state although they might have not given their consent to it.<sup>8</sup>

These changes as enshrined in the above treaties make the EU an independent international body, comparable in many ways to a state: from within the EU, it may still seem like an agreement between the states, while from the outside it would look quite like a state in itself.

Changes brought by the Lisbon Treaty have taken the idea forward in terms of the role of the EU in the international system as well as facilitating greater international acceptance of the EU itself. At the same time, this creates a strong obligation for it to contribute to the strict observance and development of international law and to pursue all external activities in accordance with the principles of international law. Such a view was also endorsed by the ECJ in its case law. It has found that the EU has an obligation to act in accordance with general international law as well as customary international law. Illustrative of this is the case of *Costa v. ENEL*<sup>9</sup>, which stated that the EU had been established as an autonomous and legal entity and represents, therefore, a strong and important actor on the international stage. As for the domestic effect, the ICJ affirmed the principles of direct effect and supremacy of the EU's right in relation to the internal law of its member states by elaborating

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<sup>4</sup> Schütze, R., *An Introduction to European Law*, 1.

<sup>5</sup> See Article 13 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

<sup>6</sup> See Title V - General provisions on the union's external action and specific provisions on the common foreign and security policy of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

<sup>7</sup> Craig/de Búrca, *EU Law-Text, Cases, and Materials*, 925.

<sup>8</sup> Treaty of Maastricht 1992. Available at: [https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty\\_on\\_european\\_union\\_en.pdf](https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf), (Viewed on: 26 June 2020).

<sup>9</sup> Case 6-64, *Flaminio Costa v E.N.E.L.*, Judgment of the Court of 15 July 1964.

principles that extend its powers showing a growing movement towards an autonomous order.<sup>10</sup>

This overview is a hint of the very purpose of this article, which is to analyze the challenges of the EU in relation to international law taking into account the case of Kosovo. The actuality and importance of this topic has gained its weight due to the fact that geopolitics is still revolving around borders, no matter the huge impact exercised by non-state actors with a global outreach: states and their governments represent key actors and they remain obsessed with borders and territories (for example Ukraine, Kosovo and Montenegro regarding the demarcation agreement, and recently the dangerous statements to change the borders between Serbia and Kosovo). The focus on long-term economic growth and other related issues remain still desirable goals.<sup>11</sup> This is the framework within which the EU and its foreign, security and defense policy have to take into account.

The capacity of the EU to act as a geopolitical actor is being tested in the Western Balkans, more than elsewhere, especially since geopolitical rivalry is high, and the status quo set by it is unstable: many factors have been brought again to play and act in the Balkans and its forefront. China will soon become the top foreign investor in Serbia, building a high-speed rail between Greece and Bulgaria through Serbia and consequently China will have a trade route between Asia and Europe. What can the EU give in exchange for Serbia and other Western Balkan nations if they refuse such an investment and decide that the EU remains for them the only way? Also, Russia's approach has changed, and the Balkans is seen as a good opportunity to destabilize the EU. What is the US role in all these developments following the meetings, without no memoranda on discussions, that have taken place between Trump and Putin?<sup>12</sup> The approach of Trump goes also against the previous policy of former President Barack Obama, who in 2014 voiced for exclusion of Russia from the group of industrialized nations G8 as a sanction against Russia's aggression in Ukraine: Trump made it clear that Russia should be readmitted to the Group of 7 industrialized nations. Moscow's real offense, argued Trump, had been to embarrass his predecessor, Mr. Barak Obama, who had unsuccessfully warned Russia against seizing Crimea.<sup>13</sup> On the top of this complicated situation is Turkey with its relations with Europe that are at a complete standstill: it is still not clear what will be its role with the Muslim community in the Balkans and is it definitely leaving the West and turning its eyes to the East?

Last but not least, can the EU embrace the Western Balkans with all the problems that are still open and the great challenges that these countries face, such as overcoming permanent history and establishing normal governmental relations? Despite this, there are some positive signs in this regard, such as the name agreement between North Macedonia and Greece and the ratification of the treaty of friendship with Bulgaria, the ratification of the agreement between Kosovo and Montenegro on the border demarcation. This success, however, can soon turn into a loss if the status quo continues and if the EU does not offer something more concrete.

## 2. The new world order

Today's Europe is shaking and, according to Marine Le Pen, France's far-right National Front (FN) leader, "Europe has died, but it still does not know." Marine Le Pen has stated that France will require the EU to restore France's sovereignty over the issue of borders, the economy, the judiciary, etc., or else France will get out of Europe.<sup>14</sup> Le Pen is not alone in Europe: Viktor Urban of Hungary and other populists and the recent events around "Brexit" have put forward the conviction that Europe really does not constitute a framework for settlement of the problems of its peoples.

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<sup>10</sup> Craig/de Burca, *EU Law – Text, Cases, and Materials*, 24-28.

<sup>11</sup> Fazliu, E. (2018), Florian Bieber: In some ways, the EU encourages regional autocrats“, Kosovo 2.0, Available at: <https://kosovotwopointzero.com/en/florian-bieber-in-some-ways-the-eu-encourages-regional-autocrats/>. (Viewed on: 30 June 2020).

<sup>12</sup> Kadobnov, Y. (2018) “In pictures: Trump meets with Putin”, CNN. Available at: <https://edition.cnn.com/interactive/2018/07/politics/trump-putin-summit-cnnphotos/> (Viewed on: 20 August 2018).

<sup>13</sup> Crowley, M. (2019) “Trump Says Russia Should Be Readmitted to G7”, New York Times, Available at: <https://www.nytimes.com/2019/08/20/us/politics/trump-russia-g7.html>, (Viewed on: 26 April 2020).

<sup>14</sup> Pfeffer, S. (2017) “Europa ist tot, aber weiß es noch nicht“, BILD, Available at: <https://www.bild.de/politik/ausland/marine-le-pen/die-eu-ist-tot-aber-sie-weiss-es-noch-nicht-49897662.bild.html>, (Viewed on: 22 December 2018).

In 2015, Europe experienced an influx of thousands of refugees from the Middle East similar to the continuous waves of migrants from the African-influx. In addition to this, there were also increased terrorist attacks in Europe, such as in France and Germany. These lead to the imposition of border controls again and this proved to be a setback for the four freedoms of the European Union.<sup>15</sup> Another shakeup for Europe, in fact one of the first ones, was when the European Constitution was rejected by the French and Dutch as well as the Irish.

The above trends materialized when the biggest blow to the idea of Europe to date occurred with the United Kingdom asking on 23 June 2016 its electorate to answer as to whether the country should remain a member of the EU. The UK voters voted by 52% to 48% to leave the EU and as such Article 50 of the Treaty on Lisbon, which gives the right to member states to withdraw from the European Union, came into consideration. With the UK's departure from the EU, the EU will lose its strong military power, including the British nuclear shield. Britain is one of only two European members possessing nuclear weapons and has a veto power in the United Nations Security Council.

How this will impact the European integration process is difficult to say but these shakes or blows show how fragile the EU is, an EU that does not have a common language, culture or tradition and is divided into the West-East, as well as into the North-South line separating Greece, Spain and the southern part of Italy and Ireland from the rest of Europe, in terms of economic wellbeing and cultural, social and spiritual values. Lack of cultural and social cohesion, which are the basis for every rooted-nation democracy, has its own effect on the European Union.

These shakes in the European integration process find its precursor in the ideas of Carl Schmitt. His theoretical perspective representing a skeptical views on the European integration are elaborated in his seminal work "The Nomos of the Earth in the International Law of the Jus Publicum Europeum" (Telos Press Publishing: New York, 2006) Schmitt noted that the blurred process of European integration have taken place at the end of the 19<sup>th</sup> century and has continued, in the sense outlined above, with the shocks experienced by the EU over recent decades. This is not all as his ideas on issues such as the difference between inside and outside, war and peace as well as between the warriors and criminals continues to permeate the general discourse of international and geopolitical law. For each of them he uses the term "nomos" to denote not law but the manner in which the earth is partitioned and distributed. Second, as noted by Carl Schmitt, there will be no more global order because until the outer space in the universe becomes accessible to appropriation, the global state will remain a fabrication. Third, we also have the European legal system with its dialectical mix of "limited" universality and local features, the variety of its resources at different levels in European life and so on. Fourthly, third "nomos" emerged to cope with the challenges of creating an EU characterized by a multicultural flow of values that has a misty connection to the territory, functioning in the global economy and protected by the agenda for security that goes beyond the traditional international space of Europe. In this sense, the EU was supposed to a "nomos", a spatial order based on law that is developed through the ordering of peoples, cultures, and values in space. This is not an easy task as Europe itself is facing many serious challenges, least not in its fringes in the Balkans.

In the Balkans, in the time of writing this article a race is being developed between world superpowers, including the EU itself. The Balkans remains a black spot since it is surrounded by EU Member States, such as Hungary, Slovenia, Bulgaria, Romania, and Croatia. Balkan states that are not part of the family of the EU are Albania, Bosnia and Herzegovina, Kosovo, Northern Macedonia, Montenegro, and Serbia.<sup>16</sup>

The exclusion of these states from the rest of the EU, in particular with the denial of Albania and Northern Macedonia the right to open negotiations for joining the EU, has opened up a competition between China, the United States, Russia, the European Union, and Turkey to have an impact on this part of the region. The reason why they are left out today is because the EU's policy

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<sup>15</sup> Trojanovski, A. (2016) "Border Checks Return to Where Europe's Open Borders began", The Wall Street Journal, 24 March 2016.

<sup>16</sup> Lachert, J. (2018) „Western Balkans in the Context of Competition Between China, Russia, the European Union, and Turkey“, Warsaw Institute, Available at: <https://warsawinstitute.org/western-balkans-context-competition-china-russia-european-union-turkey/>, (Viewed on: 20 April 2020).

and stance has been to gradually integrate this part of Europe, a part that is considered an inevitable part to be included in the EU for geopolitical reasons. An insecure Balkans also jeopardizes the stability of the EU because as it has resulted in a migration crisis that has affected the Member States and has created space for the far-right spirit. The integration process, however, proves to be not gradual but too slow and ineffective paving the way for the influence of other non-European actors in European affairs.

The world superpowers have different interests in the Balkans. China's interest in the Balkans is mainly related to the construction of a "New Silk Road" (also known as the "Belt and Road Initiative"), the main purpose of which would be to create a new co-operation between Beijing and Europe because the Balkans are considered as a region where democratic procedures and transparency in decision-making are less developed than other European Union Member States. Therefore, China has invested in several projects, mainly infrastructure projects, which the EU has refused to support. These infrastructure projects have the sole purpose of linking China with Europe.<sup>17</sup>

Russia, after geopolitical changes in 1990, was limited to access in Europe. Therefore, The Balkans as a black point of the EU has created a space for it to create an area of influence. This is done through the gas projects and by supporting the extreme nationalist forces in the Balkan states.<sup>18</sup> An example of such support that Russia has been trying to negatively influence is the agreement between North Macedonia and Greece, Montenegro's NATO membership through the attempt to overthrow the Government.<sup>19</sup>

Turkey's influence in the region is mostly based on historical connection with the Balkans since the 14<sup>th</sup> century. It is struggling to convert its historical influence back through Islam. In essence, Turkey's political move in the region is a revenge on the EU for failing to accelerate its accession in the European family.<sup>20</sup>

There is a hope, however, that the long-term impact will be made by the EU compared to the abovementioned superpowers through the promise that one day the door to Europe will be opened and embraced by the family of the European nations even though there may be delays due to institutional weakness, weakness in establishing democratic rule of law standards and lack of adequate measures to combat corruption practices. In addition to these factors that are a hindrance to the European integration process of the Balkan countries, there are European societies that are opposed to further enlargement of the EU. This is due to the integration process that has occurred with eastern European countries such as Bulgaria, Romania, etc., because, after the accession of these states, the EU has not been able to postpone the requirements for reforms in particular in the field of Justice. Unlike China, Russia, and Turkey, the EU's using soft force to encourage the Balkans to make the necessary reforms in respect of rule of law compliance in order to meet the criteria for joining the European Union.<sup>21</sup>

This competition for influence in the Balkans, in particular, the fear of Russian influence in the Balkans, has had the effect that the EU has increased its focus on the Balkans. The region which has historically influenced the history of Europe is still in the spotlight given the tense relations between Kosovo and Serbia and Northern Macedonia and Greece until recently; Montenegro, Serbia and Albania are faced with anti-government protests and Bosnia and Herzegovina is not even mentioned at all; the latest rebuttal by the EU of Albania and Northern Macedonia has only exacerbated the tense situation in the region. Thus, the EU as a global power, what will it do with the

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<sup>17</sup> Ibid.

<sup>18</sup> Bechev, D., *Rival Power: Russia in Southeast Europe*, (depicting how Russia is using every single ethnic rift and other weaknesses among Balkan nations to interfere into their internal policies and play a role in European politics); When it comes to Russia's foreign policy in the areas outside Europe, one thing that is constant is their policy towards neighboring countries ("near abroad policy"). In this respect, the tendency is to create satellites as well as to stir up divisions in the West and among existing alliances. To this end was proposed the idea of exchanging territories between Kosovo and Serbia, which had as its aim damaging the integration processes of Kosovo towards the EU.

<sup>19</sup> Lachert, J. (2018) „Western Balkans in the Context of Competition Between China, Russia, the European Union, and Turkey“, Warsaw Institute, Available at: <https://warsawinstitute.org/western-balkans-context-competition-china-russia-european-union-turkey/>, (Viewed on: 20 April 2020).

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

Balkans and how will the EU balance the fear of the instability of these Balkan states with the fear of expansion and the rise of radicalism in Europe.<sup>22</sup>

In recent years EU Parliament elections, center parties lost seats in the European Parliament, and right-wing populists and nationalists received more votes in some countries. This can bring a policy of hate and disunity. In this respect, the view that the EU is regarded as "[...] an indispensable column of" multilateralism", i.e. the cooperation of states and various interest groups, for solving global problems such as climate change, migration, poverty or digitalization of the economy is at stake. Throughout the world, the EU is a nursery of humanity and human rights, with all its deficits in uncoordinated politics and defense in the field of migration.[...]" . Therefore, as was stated by Mr. Guterres this moment needs to be taken over by politicians and MPs of the new parliament, to give an example of proper activism in an increasingly chaotic world. Populism and nationalism lead to vicious spirals. In Europe and around the world, European citizens should not only look at domestic issues but understand their responsibility in the international community.

"Europe is too meaningful to fail", because "If you want to avoid a new Cold War, if you want to avoid the confrontation of two blocks, probably with a slightly different composition than in the past, if you want to build a true multilateral order, we absolutely need a united and strong Europe as the fundamental pillar of a multilateral order based on the rule of law. The failure of Europe would inevitably be the failure of multilateralism and the failure of a world in which the rule of law can prevail."<sup>23</sup>

This is the main message of Antonio Guterres's speech in Aachen. He is right in many directions. The hope is for Europe to hear it.<sup>24</sup> This optimism has been followed by deeds at the European level and there are mechanisms in place to deliver to the voice of optimism.

Through various initiatives, the EU has set the political and economic conditions for the Balkans as well as providing financial assistance provided that these financial aid beneficiaries respect human rights, democracy, and rule of law. These conditions are also embodied in the Copenhagen criteria and the *acquis communautaire*.<sup>25</sup>

Besides the political, economic and institutional criteria established by the European Council in 1993 in Copenhagen, the Stabilization and Association Process is the main EU policy towards the region since 1999 and this has added other specific criteria: full co-operation with the International Criminal Tribunal for the Former Yugoslavia, respect for human and minority rights, creation of real opportunities for returning from refugees and internally displaced persons, and a visible commitment to regional co-operation.<sup>26</sup>

During the 1990s, the main instruments for promoting these norms were economic (humanitarian aid and technical assistance), which means that the EU strengthens the assessment that the EU is more of a civil power in the classical sense of the concept during this period than a military power. However, the crisis in Kosovo served as a reminder of the EU's power restrictions and this happened precisely at the European yard. Therefore, this was also a push for the EU to change its image as a civil power. This implies that the EU needs to reconsider its Balkan strategy and provide the prospect of membership. It also implies that the EU is aware that it cannot always 'wait and see' if the Americans would come again to save the day. According to Solana (2000a), 'the Balkans has shown that the European Union can no longer remain a peace force simply by way of example. It should also be open to the protection of basic values of democracy, human rights and the rule of law

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<sup>22</sup> Zoric, B. (2017) "Assessing Russian impact on the Western Balkan countries' EU accession: cases of Croatia and Serbia", *Journal of Liberty and International Affairs*, 3(2), Available at: [https://www.ssoar.info/ssoar/bitstream/handle/document/54364/ssoar-jlibertyintaff-2017-2-zoric-Assessing\\_Russian\\_impact\\_on\\_the.pdf?sequence=1&isAllowed=y&lnkname=ssoar-jlibertyintaff-2017-2-zoric-Assessing\\_Russian\\_impact\\_on\\_the.pdf](https://www.ssoar.info/ssoar/bitstream/handle/document/54364/ssoar-jlibertyintaff-2017-2-zoric-Assessing_Russian_impact_on_the.pdf?sequence=1&isAllowed=y&lnkname=ssoar-jlibertyintaff-2017-2-zoric-Assessing_Russian_impact_on_the.pdf) (Viewed on: 26 April 2020).

<sup>23</sup> Guterres, A. (2019) "Address at the International Charlemagne Prize of Aachen for the Unity of Europe", United Nations Secretary-General, Available at: <https://www.un.org/sg/en/content/sg/speeches/2019-05-30/address-international-charlemagne-prize-of-aachen-for-unity-of-europe>, (Viewed on: 26 April 2020).

<sup>24</sup> KOHA (2019) "Gueterres: BE-ja e fortë është e domosdoshme për botën" (Guterres: A strong EU is necessary for the World), Available at: <https://www.koha.net/bote/166397/gueterres-be-ja-e-forte-eshte-e-domosdoshme-per-boten/>, (Viewed on: 26 Prill 2020).

<sup>25</sup> Edited by Whitman, *Normative Power Europe – Empirical and Theoretical Perspectives*, 86.

<sup>26</sup> *Ibid.*

on which it is founded.<sup>27</sup>

This resulted in the development of the European Union's Security and Defense Policy in the Common Security and Defense Policy through the Lisbon Treaty. The Balkans opened the eyes of Brussels on the need to develop military capacity.<sup>28</sup> This is not the end of it as there is EU initiatives and project beyond the military and security sector.

The prospect of enlargement is seen as the main means of maintaining peace and stability in the country and the strongest incentive to have reforms in these countries. Accepting the "European perspective", enlargement becomes a means of expanding not only the values of the European Union but also the process of integration and membership in the European Union, an opportunity for these states to have a voice in EU policy-making.<sup>29</sup>

The EU must "civilize" these countries by promoting democratic and economic reforms and the rule of law. By promoting the adoption of the *acquis communautaire*, the enlargement process has an inclusive character as it aims to bring these countries closer to the EU and become part of the European family one day.<sup>30</sup>

The EU official assessment of the Balkans is that of instability and criminality. This assessment reinforces the psychological and physical division between 'us' and 'others'; a 'secure interior space' and a 'threatening external neighborhood'. The image inside and outside is still very effective in mobilizing citizenship and promoting the process of building a European fortress with an external wall. According to Monar (2000:5), "overseas people who actually or potentially jeopardize the safe inside should be kept out of control or brought under proper control." This is the basis of the "Fortress of Europe" idea, which has been heavily criticized in recent years. More freedom for Europeans means less freedom for foreigners.<sup>31</sup>

### 3. European Union and Kosovo

The EU is developing a new role in Kosovo as the 'guardian' of this new 'neighborhood' of a state, helping to bring it to a consolidated statehood. At the end of the Kosovo war in 1999, a UN resolution imposed Kosovo under UN jurisdiction. Kosovo declared its independence from Serbia but still tries to become a consolidated state. Russia is loud and undoubtedly against Kosovo's independence, and Spain and China are both dissatisfied with developments in Kosovo.<sup>32</sup> This resistance to Kosovo's independence by these countries are played out in their foreign policy orientations towards geopolitics of the Balkans.

The new Kosovo Constitution, enacted following the declaration of independence on February 17, 2008, came into force on June 15, 2008, with no formal role for the UN. The government separately admitted a EU mission called EULEX. The hope was for the UN to hand over its legal prerogatives to EULEX in Kosovo, making it a *de jure* and *de facto* a UN agent. This action was blocked by Russia, relying on the UN Secretary-General. The UN is to hold a presence in Kosovo under its auspices (that is, the UNMIK administration) and the EU will have a reinforced role.<sup>33</sup>

The EU's strategy is a classic use of "soft power" to bring Kosovo and Serbia into its arms. Serbia is undoubtedly dissatisfied with the amputation of Kosovo by Serbia. The EU is putting Serbia and helping Kosovo by rewarding good behavior with the prospect of EU membership. The aim is for the two states to be absorbed within the EU, although its recent rebuttal of Albania and Northern Macedonia seems to be a setback as the leverage to impact the dialogue between Serbia and Kosovo is diminishing as a result of this rebuttal.<sup>34</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid. 94-95.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Dedman, M. J., *The Origins and Development of the European Union 1945–2008—A history of European integration*, 2<sup>nd</sup> edition, 184-185.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

However, looking into the future, though perhaps it seems grim on first impression, a Kosovo integration into the EU will have consequences in the aspect of international law as well. To understand the approach that States have to international law, it is important to analyze the mechanism each of them chooses to make this whole set of norms as part of its domestic law. States with international tendencies are those who choose immediate adaptation and consider international superior norms to domestic norms. On the other hand, states are still hesitant to undertake a series of irreversible international commitments, in relation to the domestic legal systems.

Despite the approach, which is a manifestation of the sovereignty of the state itself, is the fact that international law is becoming more and more present within state borders.

Following the declaration of Kosovo independence, efforts have been made to have a full openness regarding the building of relations with international organizations and institutions, but also with most of the states of the region and the world.

This pro-international approach of Kosovo has not only remained at the political level or public perception but is also extended to the legal system. The Constitution of the Republic of Kosovo attaches great importance to international law and integration processes of Kosovo. This feature becomes apparent in the Preamble, which outlined the general orientations on which the policy of the Kosovar state will be directed in the internal and external frameworks.<sup>35</sup>

A clear projection of Kosovo's foreign policy after Kosovo's declaration of independence is an aspiration to join the European Union. Kosovo is in constant effort to meet the criteria required by this supranational entity.

European integration is the geostrategic and political objective of Kosovo, which is essentially unchanged in domestic and foreign policy. Since the change of the political and economic system in Kosovo following the declaration of Kosovo's independence, this has been a constant for all governments and for all political forces. The pro-European integration stance has widespread public support and institutions of Kosovo have materialized this orientation in several respects.

The Republic of Kosovo and the EU signed the Stabilization and Association Agreement (SAA) on 27 October 2015 in Strasbourg. It was then approved by the Government of the Republic of Kosovo on 30 October 2015, through Decision no. 01/55 on the adoption of the Draft Law on Ratification of the Stabilization and Association Agreement between Kosovo on the one hand and the European Union and the European Atomic Energy Community on the other hand, and ratified by the Assembly of the Republic of Kosovo on 2 November 2015, with the approval of Law no. 05/L-069 on the Ratification of the Stabilization and Association Agreement between Kosovo, on the one hand, and the European Union and the European Atomic Energy Community, on the other.

The SAA establishes the framework of Kosovo's relations with member states and European Union institutions to implement the Stabilization and Association Process (SAP) until full membership in the EU. Regarding the scope, apart from political issues and legal obligations (including those affecting the domestic legal order), the SAA covers all spheres of governance.

The progress of the integration phases that Kosovo has undergone did not evidence any legal problems related to the constitutionality of the respective actions. Since the Constitution of the Republic of Kosovo does not have direct references to EU law, or how its norms can become part of the internal system in Kosovo, this may prove problematic in the future. However, the Constitution regulates how international law will become part of Kosovo's law, including its procedure, hierarchy and enforceability.

What has been said after the accession of different countries to the EU is that the approach these countries have had towards international law before accession has been influential in how these

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<sup>35</sup> See the Constitution of Kosovo: "We, the people of Kosovo, Determined to build a future of Kosovo as a free, democratic and peace-loving country that will be a homeland to all of its citizens; Committed to the creation of a state of free citizens that will guarantee the rights of every citizen, civil freedoms and equality of all citizens before the law; Committed to the state of Kosovo as a state of economic wellbeing and social prosperity; Convinced that the state of Kosovo will contribute to the stability of the region and entire Europe by creating relations of good neighborliness and cooperation with all neighboring countries; Convinced that the state of Kosovo will be a dignified member of the family of peace-loving states in the world; With the intention of having the state of Kosovo fully participating in the processes of Euro-Atlantic integration; In a solemn manner, we approve the Constitution of the Republic of Kosovo."



countries would build up the relationship with European Union law. Kosovo in this regard is different due to its recent tragic history and the lack of any traditions in the field of the rule of law. This is not so with other states of Europe: most of the member states have had consolidated constitutions or constitutional traditions in this regard at the moment of accession, which can hardly be said about Kosovo, which has established the link with the international and European system, almost simultaneously.

In addition to the above, Kosovo is far from being a consolidated country and no progress is seen in this regard. The latest political development only proves that the EU is right to be cautious in accepting new member states.

According to the Progress Report of EU for Kosovo, the country continues to experience great challenges such as follows<sup>36</sup>:

- The Assembly continues to operate in a highly polarised political context, and weaknesses in its overall functioning remains, as demonstrated notably by the frequent lack of quorum, resulting in delays in the legislative activity.

- The findings and recommendations of the election observations regarding municipal and parliamentary elections has not yet been addressed.

- The situation in the north of Kosovo remains particularly challenging.

- The political influence on recruitment of senior civil servants remains a challenge.

- Kosovo's judicial system is still vulnerable to undue political influence and the administration of justice remains slow and inefficient and rule of law institutions need sustained efforts to build up their capacities.

- Corruption is widespread and remains an issue of concern.

- Little progress was made on final confiscation of assets and there are still few financial investigations and final convictions. Measures are needed to strictly ensure there is no political interference with operational activities of law enforcement bodies and the prosecution. The situation in the north of Kosovo with regards to organised crime continues to pose challenges for law enforcement agencies.

- The Kosovo authorities need to be more effective in their efforts to fight money laundering and the relevant law should be brought in line with EU *acquis* and international standards.

- The implementation of human rights legislation and strategies is often undermined by inadequate financial and other resources, particularly at local level, limited political prioritisation and lack of coordination. The existing mechanisms for coordination and implementation of human rights are ineffective. The large dependence on foreign donors remains. More needs to be done to effectively guarantee the rights of persons belonging to minorities, including Roma and Ashkali and displaced persons, to ensure gender equality in practice, to set up an integrated child protection system and to advance the protection of cultural heritage.

- In terms of economic criteria, the large number of unemployed, the informal economy, the slow and inefficient judiciary and an inadequate infrastructure continue to be a challenge in Kosovo.

- The agreement with Serbia remains a challenge and an obstacle for the development of Kosovo.

- In general, Kosovo needs to improve its administrative capacity and coordination, across sectors, to ensure effective implementation of the *acquis*.

#### **4. Conclusions**

The monumental book by Carl Schmitt , “*Nomos of the Earth*”, tells the story of the global order of international law, its origins and the emergence of European international law, which was considered as European International Law after the destruction of the Christian Middle Ages.

Maybe it is time for the EU to take the lead and change its stance as being in between. This

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<sup>36</sup> Progress Report for Kosovo 2018-2019, Available at: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-kosovo-report.pdf>, (viewed on: 14 Maj 2020).

is of interest in the context of the world order and the possibility of the EU to change the international agenda. In this context, the weight of the subject is related to the fact that geopolitics has changed in the sense that the governments are obsessed with borders and territories (for example Ukraine, Kosovo, Montenegro, and Serbia) instead of focusing on economic development. As such, the capacity of the EU as a geopolitical actor is put to the test in the Balkans, especially in Kosovo, since geopolitical competition is high amongst the big global powers such as USA, Russia, China, and Turkey. In this respect, the EU is also put to the test as to the international identity that it is trying to achieve.

Kosovo has played an important role in the development of the EU international security role, because, as it was stated by Javier Solana, “[...] the Kosovo crisis ‘played a fundamental role in the creation of the European Security and Defence Policy.’”<sup>37</sup> The crisis in Kosovo led to the agreement in the EU on a common interest in ensuring stability and security in Kosovo, and, therefore, deploying the EULEX mission to achieve that aim.<sup>38</sup> However, this came only after the failure to respond to the war in Kosovo. Nonetheless, the Kosovo war showed also that the time of the USA shaper of international security is still not reached because seven years after Yugoslavia’s disintegration, the EU lacked still capabilities of addressing conflicts on its doorstep.

One lesson learned though from the above was that the missing link in the EU’s conflict management capabilities was the credible threat or the actual use of force in support of political and diplomatic efforts. Therefore, there was a need for EU to develop its capacities for autonomous action, backed by credible military forces, the means to decide to use them, and the readiness to do so, in order to respond to international crises. As such, the European Union must evolve from being considered only as a soft power, whose primary attributes are culture, values, and legitimate and moral foreign policy, which co-opts people rather than coerces them.

The soft power approach of the EU has the risk of undermining its credibility especially since there is no real progress in the Western Balkans. On the contrary, the EULEX mission by the people of Kosovo is considered as a complete failure and if the prospect for membership will be pushed back further then the leverage of the EU will weaken and a shift in orientation might change and cooperation with other states looked at such as Turkey, China or Russia. This goes in line also with the statement of President Juncker: “We must find unity when it comes to the Western Balkans, once and for all. Should we not, our immediate neighborhood will be shaped by others.”<sup>39</sup>

What is the international identity of the EU in this third *nomos*? Is it time to have a new global order restructuring, which has probably come after the presidential election in the US with Donald Trump? Russia with Vladimir Putin's leadership in recent years has presented a clear relic of the Cold War. Will the world go to the latter, or will it have a US refocus and play its part of a role similar to that of a strong player after the end of the Cold War? As the American *pax* does not seem credible as it had been after 1989, there is no other serious actor to engage in the eventual vacuum created here and there by the passive US foreign politics. This and other ramifications of Carl Schmitt idea on the new “global *nomos*” remain to be seen in the years to come. However, if the EU is going to be part of this international agenda maybe a further step must be taken so that this fragmented identity of the EU is deleted, and a true state evolves because there is no guarantee that bringing together member states into collective positions will stay that way forever.

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<sup>38</sup> *Ibid.*

<sup>39</sup> Fouéré, E. (2019) “The EU’s re-engagement with the Western Balkans: A new chapter long overdue”, CEPS Policy Brief, 2019/01, Available at: [https://www.ceps.eu/wp-content/uploads/2019/01/PB2019\\_01\\_EF\\_WesternBalkans.pdf](https://www.ceps.eu/wp-content/uploads/2019/01/PB2019_01_EF_WesternBalkans.pdf), (viewed on: 26 April 2020).

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