

Miodrag A. Jovanović, LL.M., PhD

Associate Professor,
University of Belgrade Law Faculty

EU AND THE RECOGNITION OF KOSOVO – A BRIEF LOOK THROUGH THE LEGITIMACY LENSES

This paper examines the legitimacy of the politics of the European Union after the unilateral declaration of independence of the Serbian province of Kosovo and Metohia. The decision whether to recognize this act or not was left to individual Member States, and so far 22 out of 27 Member States did recognize Kosovo's independence. However, the EU foreign and accession policy is largely built on the principle of unanimity of Member States. Despite the fact that, regarding the recognition of Kosovo, such consensus was not achieved, a number of EU bodies and officials act as if it was. This paper demonstrates that these acts are illegitimate, both in terms of lacking the authorization of all Member States and in terms of undermining the established goal of integrating the entire region of Western Balkans into the EU.

Key words: *Recognition of States. – Kosovo and Metohia. – European Union. – Foreign policy. – Legitimacy.*

1. INTRODUCTION

In its Conclusions, adopted the day after the unilateral declaration of independence of the Serbian province of Kosovo and Metohia, the European Union's External Relations Council stated: "On 17 February 2008 the Kosovo Assembly adopted a resolution which declares Kosovo to be independent. The Council takes note that the resolution commits Kosovo to the principles of democracy and equality of all its citizens, the protection of the Serb and other minorities, the protection of the cultural and religious heritage and international supervision. The Council welcomes the continued presence of the international community based on UN Security Council resolution 1244. The Council notes that Member States

will decide, in accordance with national practice and international law, on their relations with Kosovo.”¹

To be sure, deciding about “relations with Kosovo” amounts by and large to deciding whether to recognize this province as an independent state or not. In what followed, Member States of the European Union have demonstrated that their understanding of international law and their practices with respect to the recognition of states were somewhat different. In the moment of writing, twenty two EU Member States have recognized unilaterally declared independence of Kosovo. In doing so, they principally reiterated the US-launched argumentation that Kosovo is a ‘unique case’ and that as such cannot and shall not set a precedent for some similar cases around the globe.² It seems, however, that some of the EU Member States, like Spain, Cyprus, Slovakia, Greece or Romania, have not taken that argumentation for granted and, thus, have not extended recognition to Kosovo. Interestingly enough, the position of these countries largely coincides with the fact that they themselves have a serious record of mitigating internal ethnic conflicts.

2. EU FOREIGN POLICY – LEGAL AND POLITICAL FRAMEWORK

Recognition of states falls within the domain of foreign policy and the existing primary law of the EU has provisions on common foreign and security policy. Namely, the *Treaty on European Union* (or, Maastricht Treaty), signed on 7 February 1992, and entered into force on 1 November 1993, represented a new step in the process of European integration. It renamed the European Economic Community into the European Community (EC), “thus dropping the word ‘economic’ in order to indicate that many non-economic matters had become part of its architecture.”³ Furthermore, it has also added two ‘annexes’ to the Community pillar – the Common Foreign and Security Policy (CFSP) and the Justice and Home Affairs (JHA), which subsequently became Police and Judicial Cooperation in Criminal Matters (PJCC). All together, they constitute ‘three pillars’ of the EU building.

¹ *Conclusions on Kosovo*, 2851st External Relations Council meeting, Brussels, 18 February 2008

² More on the viability of this argument in, M. Jovanović, *Is Kosovo and Metohia Indeed a ‘Unique Case’?*, available at www.kosovo-law.org; The fragility of this argument was soon persuasively demonstrated when, after the short Georgian war, Russia recognized unilaterally declared independence of South Ossetia and Abkhazia.

³ W. van Gerven, *The European Union – A Polity of States and Peoples*, Hart Publishing, Oxford and Portland, 2005, 8.

After the successive treaty changes, Article 11 of the current Treaty on European Union (TEU)⁴ states that the objectives of the Union in a common foreign and security policy shall, *inter alia*, be “to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter” and “to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders.” Second paragraph of this article calls for the Member States’ active and unreserved support of the EU external policy, as well as for their mutual political solidarity. This implies that they “shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.” Article 12 specifies that the aforementioned objectives are to be pursued by: defining the principles of and general guidelines for the common foreign and security policy; deciding on common strategies; adopting joint actions; adopting common positions; and, strengthening systematic cooperation between Member States in the conduct of policy. In the next article it is said that defining the principles of and general guidelines for common foreign policy falls within the competence of the European Council. This body shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.

As for the role of the Council of Ministers, Article 13 states that it shall take the decisions necessary for defining and implementing the European Council’s general guidelines. It shall also make recommendations to the European Council to adopt common strategies and, when adopted, implement them, in particular by means of joint actions and common positions. In Article 14 (1) it is stipulated that “joint actions shall address specific situations where operational action by the Union is deemed to be require”, while Article 15 states that “common positions shall define the approach of the Union to a particular matter of a geographical or thematic nature.” Article 23 (1) defines the voting procedure, stating that decisions in this area “shall be taken by the Council acting unanimously.”⁵ In performing its functions, the Council shall be assisted by the Sec-

⁴ *Consolidated Version of the Treaty on European Union*, OJ (2006) C 321

⁵ This article also specifies that “abstentions by members present in person or represented shall not prevent the adoption of such decisions”, as well as that the Council shall act by qualified majority in the following cases: when adopting joint actions, common positions or taking any other decision on the basis of a common strategy; when adopting any decision implementing a joint action or a common position; when appointing a special representative. A member of the Council may oppose the qualified majority procedure “for important and stated reasons of national policy” and then the matter may be “referred to the European Council for decision by unanimity.”

retary-General of the Council, who is in the same time High Representative for the common foreign and security policy. He assists the Council by formulating, preparing and implementing policy decisions, and, when appropriate, conducting political dialogue with third parties (Article 26).⁶

One of the major features of the traditional state sovereignty concept is exactly the autonomy in foreign policy choices.⁷ However, the aforementioned overview of the legal framework of the EU foreign policy amply demonstrates that the EU is not a classical state, for it essentially lacks powers of coercion. Namely, as long as matters, such as foreign, defense and security policy, and criminal matters “remain subjected to decisions to be made unanimously by Member State representatives in the European Council and the Council of Ministers, the Union is not, as such, empowered to live up to the legitimate expectations that international recognition implies in a global world.”⁸ Moreover, since not having yet a single legal personality, the EU is obviously apt neither to receive, nor to grant recognition in the international legal sense of the word.

The attempt was made through the *Treaty Establishing a Constitution for Europe*⁹ to achieve a higher level of political integration even in such sensitive areas as foreign policy. Hence, Article I–28 established the institution of the Union Minister for Foreign Affairs, who “shall conduct the Union’s common foreign and security policy”, “preside over the Foreign Affairs Council”, and “be one of the Vice-Presidents of the Commission.” As for another important element of the external aspect of the EU’s legal subjectivity, the one related to the EU position in international law, Article I–7 of the Constitution explicitly stated that “the Union shall have legal personality.” This norm represented a clear departure from the still valid EU Treaty provisions, from which it “does not appear [...] that the

⁶ In addition, the Council is advised by the Political and Security Committee, which monitors the international situation and the implementation of the agreed policies (article 25).

⁷ The others are: internal authority of state, as the supreme political power that has the monopoly over legitimate use of force within its territory; the control over movements across its borders; and the right to be free from external intervention, which is recognized by other states. This taxonomy is borrowed from the 2003 speech of the US governmental official, Richard N. Haass, at the Georgetown University. Quoted in J. Jackson, “Sovereignty-Modern: A New Approach to an Outdated Concept”, *The American Journal of International Law*, Vol. 97, No. 4/1997, 786.

⁸ W. van Gerven, 38. However, this “does not prevent the Union from being a *political system* as it possesses all the elements needed to be such a system: institutional stability and complexity; powers of government through which citizens and social groups seek to achieve their political desires; a significant impact on the distribution of economic resources and the allocation of social and political values; and a continuous interaction between political outputs, new demands on the system, and so on.” *Ibid.*, 38.

⁹ *Treaty Establishing a Constitution for Europe*, OJ (2004) C 310

contracting parties intended to confer the necessary degree of autonomy on the Union.”¹⁰ Nevertheless, even the Constitution provided, in Article III–300, that European decisions in the area of foreign policy “shall be adopted by the Council acting unanimously.”

After the well-known failure of the EU constitution, generated by the refusal of the French and Dutch electorate to ratify this document, the successive *Lisbon Treaty*¹¹ retreats somewhat in the rhetoric and symbolism of the further political integration. Not only that the term ‘Constitution’ is solemnly abandoned, and there is no mentioning of the EU symbols, such as the flag, the anthem or the motto, but ‘Union Minister for Foreign Affairs’ is again renamed into High Representative of the Union for Foreign Affairs and Security Policy. In terms of substance, almost nothing has changed, since the Lisbon Treaty also provides (Article 31 of the Consolidate Version of the TEU) that, by rule, decisions in the area of common foreign and security policy shall be taken unanimously.

3. LEGITIMACY DILEMMAS IN THE EU

One of the pertinent problems – at least, as perceived by scholars of political theory – concerns the legitimacy of the EU institutions. Much has been written so far on this topic, but one of the most comprehensive assessments of this problem is presented in Beetham and Lord’s book *Legitimacy and the European Union*.¹² These authors proceed from the general question of what makes a political authority legitimate. In that respect, they differentiate between the three dimensions. Political authority is legitimate “to the extent that:

1. it is acquired and exercised according to established rules (legality)
2. the rules are justifiable according to socially accepted beliefs about (i) the rightful source of authority, and (ii) the proper ends and standards of government (normative justifiability)
3. positions of authority are confirmed by the express consent or affirmation of appropriate subordinates, and by recognition from other legitimate authorities (legitimation).”¹³

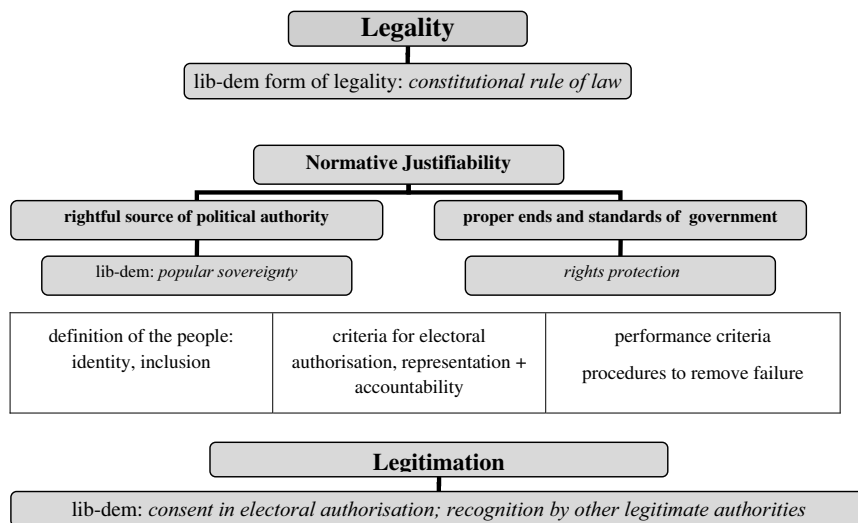
¹⁰ K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, Sweet & Maxwell, London, 1999, 612.

¹¹ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* OJ (2007) C 306; Consolidated versions of both treaties are published in OJ (2008) C 115

¹² D. Beetham and C. Lord, *Legitimacy and the European Union*, Longman, London and New York, 1998.

¹³ *Ibid.*, 3.

Beetham and Lord say that the first level is that of rules, the second concerns justifications grounded in beliefs, while the third one acts of consent or recognition. These authors emphasize that “three levels are not alternatives, since all contribute to legitimacy.” Taken together, “they provide the subordinate with moral grounds for compliance or cooperation with authority.” In turn, each of these elements “has its distinctive negative: illegitimacy (breach of the rules); legitimacy deficit (weak justification, contested beliefs); delegitimation (withdrawal of consent or recognition).”¹⁴ Most importantly, the overall structure of legitimacy, or its “heuristic framework”, is a universal one, while its particular form “is variable according to the historical period, the society in question and the form of political system.”¹⁵ In that respect, they find several defining characteristics of a distinctively liberal-democratic legitimacy. They can be schematically presented as follows:¹⁶



Having this in mind, the key question becomes “whether, and to what extent, these liberal-democratic criteria of legitimacy are appropriate to the institutions of the EU, and its executive, legislative and regulatory authority.”¹⁷ After dismissing the rival standpoints that treat the EU

¹⁴ *Ibid.*, 4.

¹⁵ *Ibid.*, 5.

¹⁶ *Ibid.*, 9.

¹⁷ *Ibid.*, 11.

as predominantly an international organization,¹⁸ or ‘regulatory state’,¹⁹ Beetham and Lord note that “the EU is a political system in its own right, or at least a ‘partial polity’”,²⁰ and that as such should be measured by the liberal-democratic criteria of normative validity and legitimation. These are the following criteria:

1. performance (effective performance in respect of agreed ends);
2. democracy (democratic authorisation, accountability and representation); and
3. identity (agreement on the identity and boundaries of the political community).²¹

As for the *performance* component, one may here distinguish between the two possible sources of the EU legitimacy deficits. The first one concerns fundamental ideological disagreements over the definition of ends and purposes that the EU should serve, while the second possible failure relates to the effectiveness of decision-making procedures.²² When it comes to the democracy component, it can be further subdivided into three mutually connected features of political authority: *authorisation*, *accountability* and *representation*. When assessed by these criteria, the EU institutions prove to be still deficient in each aspect.²³ Finally, *identity* is, in Beetham and Lord’s opinion, an inseparable element of the debate about liberal-democratic criteria of normative validity and legitimation of the EU institutions, because it largely affects the representativeness of the EU organs, especially the European Parliament, or the accountability of the executive branch, etc.²⁴

Despite a rather forceful argument that the EU, in terms of everyday functioning, behaves as one legal entity under three pillars and that it is as such recognized by other international actors,²⁵ it seems justifiable,

¹⁸ According to this view, the EU is foremost a contractual arrangement of its Member States, and not the one that is constituted by the people of Europe. See, e.g., D. Grimm, *Die Zukunft der Verfassung*, Suhrkamp, Frankfurt, 1991.

¹⁹ Majone defends the ‘regulatory’ (technocratic), instead of traditional ‘liberal-democratic’, model of legitimacy. He contends that “it is not misleading but actually heuristically useful to think of EC/EU as a ‘regulatory state’.” G. Majone, “The Rise of Statutory Regulation in Europe”, in G. Majone (ed.), *Regulating Europe*, Routledge, London and New York, 1996, 55.

²⁰ D. Beetham and C. Lord, 14.

²¹ *Ibid.*, 22.

²² *Ibid.*, 24–25.

²³ *Ibid.*, 26–27.

²⁴ *Ibid.*, 28.

²⁵ D. Curtin and I. Dekker, “The EU as a ‘Layered’ International Organization: Institutional Unity in Disguise”, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford, 1999, 83–132.

for the purposes of the legitimacy debate, to differentiate between the first pillar and the two remaining ones. While the first pillar is largely ‘supranational’, the second and third are primarily ‘intergovernmental’ in nature. As pointed by van Gerven, “[i]t is indeed under the first pillar that the integration process, driven by a strong executive, the EU Commission, has advanced the farthest, and, accordingly, that accountability, submission to the rule of law, good governance, and open government are most needed.”²⁶ In contrast, the reason why the second pillar cannot be deemed to comply with the liberal-democratic concepts of Rule of Law and *Rechtsstaat*, “is mainly that judicial review by the Community courts of acts or omissions of the Council, or of the European Council, is unavailable under the second pillar.”²⁷ At the same time, this pillar can be more appropriately assessed by the standards of the international organizations’ type of legitimacy.

According to Beetham and Lord, this type of legitimacy is grounded in the principle “that system of authority is legitimate whose authority is recognised and confirmed by the acts of other legitimate authorities.”²⁸ In the case of the EU’s second pillar, this would imply acquiring the recognition and confirmation by Member States. Furthermore, legitimacy of an international organization is heavily dependant upon the ‘performance’ criterion, that is, the realization of the established ends and purposes.²⁹ Were these two criteria to be employed, then the EU ‘legitimacy deficit’ in the second pillar would have been possible only in the two following cases: 1. if individual Member States have good reasons systematically to challenge the EU’s authority; and 2. if a Member State’s legitimacy itself is eroded, so that the EU policies cannot be effectively implemented at the state level.³⁰

4. EU AND THE SELF-PROCLAIMED ‘STATE’ OF KOSOVO – THE QUEST FOR LEGITIMACY

As indicated at the beginning, 22 out of 27 Member States have so far recognized the self-proclaimed ‘state’ of Kosovo. A rhetorical consolation for this uncomfortable situation, frequently used by various EU authorities, is found exactly in the fact that recognition of states does not

²⁶ W. van Gerven, 62.

²⁷ *Ibid.*, 109, n. 24.

²⁸ D. Beetham and C. Lord, 11.

²⁹ Cf. J. Coicaud, “International Organizations, the Evolution of International Politics, and Legitimacy”, in J. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations*, United Nations University Press, Tokyo, New York, Paris, 2001, 523.

³⁰ D. Beetham and C. Lord, 13.

fall within the Brussels' competences. However, notwithstanding that, legally speaking, this is indeed so, no doubt that the EU would have wanted to achieve political unity with respect to Member States' position towards unilateral declaration of Kosovo's independence. After all, it is the constant strive of the EU – through the failed Constitution and, to a lesser extent, through the Lisbon Treaty – to build a distinctive European political identity via, among other things, a common foreign policy.³¹ The Kosovo case, being the one on the European soil, was a perfect test for this political aspiration. From all we know, the EU has largely failed in building a common political stance on the Kosovo case.³²

Nevertheless, from some statements and acts of certain EU representatives and bodies one might get the impression that no such discrepancy in the policy towards Kosovo exists. Hence, only two days after Kosovo unilaterally declared independence, the European Union's High Representative for the common foreign and security policy, Javier Solana, paid a visit to Priština for talks with the Kosovo officials, Fatmir Sedjui and Hashim Thaci. There, he was reported saying: "We are good friends of Kosovo, and Kosovo is good friend with the European Union." Then he added that "the European perspective of all of the countries of the (Balkan) region is open."³³

Even more explicit was European Commissioner for External Relations and European Neighborhood Policy, Benita Ferrero-Waldner, who said during her visit to Moscow that the EU believes that a stable, democratic and multi-ethnic Kosovo has an EU perspective. At the same time, when asked if other secessionist regions in the world will follow the ex-

³¹ In the Preamble of the TEU of the Lisbon Treaty, it is said that signatories are "resolved to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence [...] thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world."

³² The lowest common denominator that Member States could agree upon was to form the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) (Joint Action 2008/124/CFSP, OJ [2008] L 42, p. 92). According to the statement on its web site, the central aim of EULEX "is to assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs. The mission is not in Kosovo to govern or rule. It is a technical mission which will mentor, monitor and advise whilst retaining a number of limited executive powers." (<http://www.eulex-kosovo.eu/?id=2>) Concerning the highly dubious international legal grounding for such a move, certain Member States abstained from actively participating in this mission. Serbia is vehemently opposed to the transfer of power from UN Mission in Kosovo (UNMIK) to EULEX without the explicit authorization of the UN Security Council and the modification or alteration of the UN SC Resolution 1244 that is still in force. Furthermore, Serbia's reservation towards this mission stems from the fact that it was envisaged by the so-called Ahtisaari's plan, which recommended the independence of Kosovo, but was not as such accepted neither in negotiations between Belgrade and Priština, nor in the Security Council.

³³ EU, Kosovo "good friends" Solana says in landmark trip, at <http://www.eubusiness.com/news-eu/1203437835.56/>

ample of Kosovo and demand independence, Ferrero-Waldner reiterated the well-known argument that Kosovo is a unique case, because it has a specific history over the past decades – “I don’t believe that it is right to make comparisons between the conflicts. Instead, we should try through negotiations to find solutions which are acceptable to all parties.”³⁴

In a similar fashion, the European Union special representative in Kosovo, Peter Feith, has voiced expectation, while visiting Montenegro, that all countries in the region will soon recognize Kosovo’s independence. Feith said that such move might not represent a friendly act towards Belgrade, but that it would nonetheless contribute to the stability in the region. Moreover, he expressed belief that Montenegro’s recognition of the unilaterally proclaimed Kosovo’s independence would have no major consequences, since Serbia might withdraw its ambassador from Pogorica, “and that’s all.”³⁵

On a May 2008 meeting between the European and Kosovo parliamentarians, the flag of the self-proclaimed ‘state’ of Kosovo has been flown over the European Parliament in Brussels. The European Parliament’s rapporteur for Serbia, Slovenian deputy, Jelko Kacin, said that this in effect meant that the parliament had recognized Kosovo’s independence. He defended the flying of the Kosovo flag there, by uttering that “Kosovo, too, has its place in the European Union and I am against any country, including Serbia, obstructing Kosovo on its way to the EU.”³⁶

Finally, at the Kosovo Donors Conference, held in Brussels on 11 July 2008, Olli Rehn, the EU Commissioner for Enlargement, expressed the following words: “Kosovo has committed itself to a tall order of responsibilities. These include: A high standard of protection for human and minority rights, including the rights of Roma communities. This is one of the cornerstones of the plan presented by Martti Ahtisaari. Improving the socio-economic conditions for all people in Kosovo. Good governance through reinforced administrative capacity and sound rule of law. Protection of cultural and religious heritage; as well as Promotion and development of regional cooperation and a commitment to peace and stability in the region. The international community cannot but welcome such commitments. Achieving them across the region of the Western Balkans is a key priority for the EU and the European Commission.”³⁷

³⁴ UNMIK Media Monitoring 4 June 2008, at [http://www.unmikonline.org/DPI/LocalMed.nsf/0/82C173F8BC4C089AC125745E00261A41/\\$FILE/Headlines%20-%2004.06.08.doc](http://www.unmikonline.org/DPI/LocalMed.nsf/0/82C173F8BC4C089AC125745E00261A41/$FILE/Headlines%20-%2004.06.08.doc)

³⁵ http://www.mfa.gov.yu/Bilteni/Engleski/b260608_e.html#N13

³⁶ *European Parliament Flies Kosovo Flag*, at <http://www.balkaninsight.com/en/main/news/10613/>

³⁷ Olli Rehn’s speech is available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/389&format=HTML&aged=0&language=EN&guiLanguage=en>

In all the aforementioned occasions, the EU representatives have more or less openly treated Kosovo as if it was a full-fledged state, recognized as such by the EU as a whole. Since this is not the case, the question is on what grounds these official statements and acts of the EU bodies might be considered legitimate. As indicated in the previous chapter, concerning the predominantly ‘intergovernmental’ character of the EU second pillar, the legitimacy of the EU authority in this domain primarily depends upon the acts of recognition and confirmation taken by other legitimate authorities, that is, Member States. Since several Member States have explicitly stated that they consider the unilateral declaration of Kosovo’s independence to be legally void and that, accordingly, they cannot recognize this province as a state, any action of the EU authorities that assumes the Union’s unanimous stance in favor of Kosovo’s independence can be nothing but illegitimate. The most paradigmatic in this respect is the case of the current High Representative for the common foreign and security policy, Javier Solana, who finds himself in a strange position of emphatically talking about an EU-Kosovo friendship, while his country of origin – Spain – is adamantly opposed to the recognition of Kosovo.

The second element of legitimacy in the EU foreign policy area concerns the ‘performance’ criterion, that is, the realization of the established ends and purposes. Kosovo and Metohia is the Serbian province that is geographically located in the Western Balkans, and one of the Union’s expressed political goals is exactly to integrate all the countries from that region into the EU.³⁸ How successful could the realization of this goal be if the EU does not have a common position regarding the question whether Serbia should enter the Union with its province of Kosovo and Metohia, or the latter territory should be treated as a separate state? In a recent interview to the Serbian daily *Večernje Novosti*, the European Parliamentary rapporteur for Serbia, Jelko Kacin, was being asked whether Kosovo will enter the EU as an independent state. He responded, somewhat cynically, that “only state can become a member. Up to now it has not happened that

³⁸ The EU-Western Balkans Summit in Thessaloniki, held on 21 June 2003, ended with the adoption of the Declaration, which, *inter alia*, states: “The EU reiterates its unequivocal support to the European perspective of the Western Balkan countries. The future of the Balkans is within the European Union. The ongoing enlargement and the signing of the Treaty of Athens in April 2003 inspire and encourage the countries of the Western Balkans to follow the same successful path. Preparation for integration into European structures and ultimate membership into the European Union, through adoption of European standards, is now the big challenge ahead.” Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/76291.pdf.

At Salzburg in March 2006, building on the Thessaloniki agenda, the EU reiterated its commitment that the future of the countries of the Western Balkans lays within the European Union. See, at http://www.consilium.europa.eu/uedocs/cmsUpload/060311-Salzburg_EU_Western_Balkans-Joint_Press_Statement.pdf.

no-state enters the European Union.”³⁹ As we saw, a number of EU officials have already spoken about a Kosovo’s ‘EU perspective’, despite the fact that Article 49 of the TEU stipulates that, upon the application of a candidate state, the Council “shall act unanimously” and the agreement on the conditions of admission shall be concluded between the Member States and the applicant State, and subsequently ratified “by all the contracting States in accordance with their respective constitutional requirements.” Knowing the present situation, it is hardly imaginable that such consensus would be possible, either with respect to the position that Kosovo should enter the EU as an independent state, or to the position that the integral territory of Serbia, with its province of Kosovo and Metohia, should become a Member State. In both cases, the EU would fail in satisfying the ‘performance’ criterion of legitimacy.

5. CONCLUSION

As noted earlier, one of the plausible EU ‘legitimacy deficits’ in the second pillar would amount to a situation of an individual Member State systematically challenging the EU’s authority.⁴⁰ So far, the major legitimacy crisis in the EU has come as a consequence of some ‘big country’ pursuing “its own narrowly defined national interests with little regard for the implications of its actions on its partners.”⁴¹ Three such most striking episodes were the French ‘empty chair’ crisis (1965–66),⁴² the British budget crisis (1979–84)⁴³ and the German recognition of Slovenia and

³⁹ (translation mine) *Srbija stalno greši (Serbia makes mistakes all the time)*, at <http://www.novosti.rs/code/navigate.php?Id=1&status=jedna&vest=122235&datum=2008-06-03>

⁴⁰ If the Lisbon Treaty enters into force, this challenge would be institutionally possible through the so-called ‘withdrawal clause’, whereby a Member State may withdraw from the EU. Article 49 A of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (OJ 2007 C 306) was renumbered Article 50 TEU in the consolidated version (OJ 2008 C 115) More about this secession clause in, M. Jovanović, *Constitutionalizing Secession in Federalized States: A Procedural Approach*, Eleven, Utrecht, 2007, 158–164.

⁴¹ M. Gilbert, “European Federalism – Past Resilience, Present Problems”, in S. Fabbrini (ed.), *Democracy and Federalism in the European Union and the United States*, Routledge, London and New York, 2005, 38.

⁴² In July 1965, President Charles de Gaulle ordered a French boycott of the Council of Ministers, withdrew France’s permanent representative to the Community and instructed the Gaullists to absent themselves from the European Parliament. This ‘empty chair’ policy was occasioned by the ending of a transition period in the Common Market, after which a range of decisions, previously requiring unanimity, would be taken by qualified majority voting. <http://www.euro-know.org/dictionary/b.html>

⁴³ See, e.g., S. George, “Great Britain and the European Community”, *Annals of the American Academy of Political and Social Science*, Vol. 531, 1994, 44–55.

Croatia (December 1991).⁴⁴ It is highly doubtful that the treatment of Kosovo by some EU officials and bodies as it was unanimously recognized as an independent state may actually trigger some fierce reaction of a Member State that rejects Kosovo's recognition. This is so, because even "[w]ithin democratic countries, citizens tend to be least well informed about foreign affairs."⁴⁵ Hence, legitimacy of a government would rarely be taken into question because of some foreign policy choices, especially those concerning recognition of new states.⁴⁶ *Mutatis mutandis*, legitimacy of the EU would most certainly not be challenged if some EU foreign policy moves go against the expressed opposition of certain Member States towards Kosovo's independence. However, not only that the taken course of action is hardly consistent with the EU foreign policy objectives stated in Article 11, but it will in the long run most likely undermine the legitimacy of the EU foreign policy towards the region of Western Balkans, because it will ultimately put individual Member States to literally choose between the territorially integrated Serbia and the self-proclaimed 'state' of Kosovo.⁴⁷

⁴⁴ See, e.g., C. C. Hodge,, "Botching the Balkans: Germany's Recognition of Slovenia and Croatia", *Ethics and International Affairs*, Vol. 12, No. 1/1998, 1–18.

⁴⁵ R. Dahl, "Is International Democracy Possible? A Critical View", in S. Fabbrini (ed.), *Democracy and Federalism in the European Union and the United States*, 200.

⁴⁶ This conclusion is certainly relative, since it largely depends on the significance that one such foreign policy choice can have for the internal politics. Take, for example, the contrary evidence of the recent decision of the Montenegrin government to recognize Kosovo as an independent state that provoked massive riots.

⁴⁷ A new moment came with Serbia's intention to seek the UN General Assembly's support for an advisory opinion from the International Court of Justice on the legality of Kosovo's independence, which was subsequently supported within this UN body. This initiative was from the very beginning challenged by some officials coming from the EU Member States that recognized Kosovo. Hence, Bernard Kouchner, the French foreign minister, called on Serbia to drop its plans, while the British ambassador in Belgrade called this move a "mistake" and argued that it represented a "direct challenge to the EU", which in turn would make cooperation between the EU and Serbia more difficult. One commentator rightly argues that these voices from the EU are counterproductive, because "it would not look good for EU members to demand that their own actions be exempt from legal scrutiny on the grounds of political expediency." Moreover, "[a]fter insisting that the states of the Balkans must not resort to armed force in managing their disputes, and having explicitly warned Serbia not to do so in the case of Kosovo, it is illogical, if not fundamentally wrong, now to try to close off the most peaceful and legitimate methods of conflict resolution." Finally, by pressuring Serbia to drop its plan, countries that recognized Kosovo "only serve to entrench doubts about the legitimacy of Kosovo's declaration of independence, and, in the case of EU members, undermine the European Union's wider foreign policy goals in the Balkans and beyond." J. Ker-Lindsay, *A matter of justice – Europe should not obstruct Serbia's efforts to bring the question of Kosovo's independence to the international court*, available at <http://www.guardian.co.uk/commentisfree/2008/aug/05/serbia.eu?gusrc=rss&feed=worldnews>