

The Promotion of the Rule of Law in the Western Balkans: The European Union's Role

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A. Introduction

The principle of the rule of law is a well-established notion at the core of modern constitutionalism and the undisputed building block of democratic governments. This principle is characterized by the breadth of its scope, the difficulty to strictly define its content, and the increasing possibility of a more or less broad interpretation. This explains the wide-ranging debate on the rule of law which has been developed over time with significant contributions from several disciplines, including philosophy, constitutional law, and international law.

Given the narrow purposes of this article, it is not possible to address these complex theoretical issues here. It is useful, however, to recall that the different legal traditions regarding the principle of the rule of law—developed in both common law and civil law systems¹—have some common traits which allow to acknowledge that, as accurately summarized in a distinguished scholar's definition, the rule of law corresponds to a version of the modern European State in which the legal system is assigned the function of

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¹ The notion of the rule of law has been conceived over time and different geographical areas, receiving various interpretations. Although this principle can be perceived, *prima facie*, as a guarantee of the supremacy of law—in other words as a limit on the exercise of political power against the risk of its possible arbitrary expansion—it is well known that it corresponds to different patterns in the common law (rule of law) and in the civil law (*Rechtsstaat*, *État de droit*, *Stato di diritto*, *Estado de derecho*) legal traditions. For a thorough study on these legal traditions and their possible convergence in light of the existence of some common traits, see PIETRO COSTA & DANILO ZOLO, *LO STATO DI DIRITTO STORIA, TEORIA, CRITICA* (3rd ed. 2006); for a mainly historical analysis of the principle of the rule of law, see ROBERTO BIN, *LO STATO DI DIRITTO* (2004).

protecting individual rights against the excessive expansion of political power and arbitrary or *ultra vires* exercise of authority.²

The principle of the rule of law—besides its longstanding theoretical examination at the domestic law level—has, for some time, been receiving considerable attention in the international legal and political debate. Indeed, this principle is the subject matter of much controversy both because it has become one of the guiding principles in democratic transitions—which have reshaped, particularly after the end of the Cold War, the world geo-political map—and because it has been going through a significant process of re-definition evidenced by the tension that the concepts of State—in particular the ideas of sovereignty and nation-state—and law are currently experiencing as a consequence of the dynamics of globalization.

A key contribution in this debate is offered by the most prominent international and supranational organizations actively involved, through complex and composite activities, in promoting the rule of law.³ These activities are clearly consistent with the institutional purposes of each organization, and therefore the promotion of the rule of law is intended—depending on the international actors which pursue this objective and the specific context where they operate—as a means for achieving different goals, such as promoting democracy and the protection of human rights, establishing favorable conditions for economic development and integration into the global market, maintaining security and preventing conflicts. This is substantiated by the valuable contributions that, in particular, the UN,⁴ the Council of Europe,⁵ and OSCE⁶ have been giving for some time

² See Danilo Zolo, *Teoria e critica dello Stato di diritto*, in *LO STATO DI DIRITTO STORIA, TEORIA, CRITICA* 17, 33 (Pietro Costa & Danilo Zolo eds., 3rd ed. 2006).

The judicial protection of fundamental rights is, in fact, the most significant expression of the principle of the rule of law. The emphasis on the effectiveness of the protection of rights is the basis of the distinction between two possible connotations of the rule of law. In its formal (“thin”) meaning, the notion of the rule of law mainly embodies the procedural limits to the exercise of State’s authority; in other words, it represents a guarantee of compliance with the formal procedures pertaining to the assignment and exercise of public powers. In its substantial (“thick”) meaning, the notion of the rule of law incorporates the concept of judicial protection of rights by taking into consideration the content of the exercise of public authority. In accordance to this latter version, the rule of law entails that the legitimacy of rules—or more generally of the law-making activity—is linked not only to the respect of formal procedures (mainly related to the principle of the division of powers) but also to the respect of fundamental rights. On these two different meanings of the notion of the rule of law, see in particular Luigi Ferrajoli, *Lo Stato di diritto fra passato e futuro*, in *LO STATO DI DIRITTO STORIA, TEORIA, CRITICA*, 349 (Pietro Costa & Danilo Zolo eds., 3rd ed. 2006).

³ With regard to international organizations’ activities for promoting the rule of law, see in particular Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 *STAN. J. INT’L L.* 51 (2009).

⁴ In the United Nations context, the rule of law is closely associated with the protection of fundamental human rights; in this perspective, see the Universal Declaration of Human Rights, G.A. Res. 217 A (III) (Dec. 10, 1948), U.N. Doc. A/810 at 71 (1948), in particular para. 3 of the preamble. Moreover, the principle of the rule of law is a critical issue with regard to the promotion of development and democratic principles; in this perspective, see in particular the 2005 World Summit Outcome, G.A. Res. 60/1, paras. 11 and 119, U.N. Doc. A/RES/60/1 (Sept. 16,

to the debate surrounding the principle of the rule of law. These contributions, as a whole, confirm that despite an increasingly widespread emphasis on the rule of law at the international level, the content and scope of this principle are still characterized by significant vagueness. The UN Secretary-General, for example, clarified the concept of the rule of law making reference to some of the typical principles developed in States' constitutional and legal practice, in particular: equality of all before the law, supremacy of law, separation of powers, and legal certainty.⁷ Anyway, the magnitude of the scope of

2005) and the United Nations Millennium Declaration, G.A. Res. 55/2, para. 24, U.N. Doc. A/RES/55/2 (Sept. 8, 2000). In addition, the rule of law is gaining increasing importance in relation to security and conflict prevention; in this perspective, see Simon Chesterman, *The UN Security Council and the Rule of Law, The Role of the Security Council in Strengthening a Rules-based International System, Final Report and Recommendations from the Austrian Initiative, 2004-2008*, in Annex, UN Doc. A/63/69-S/2008/270 (2008).

⁵ The difficulty of depicting the meaning of the rule of law, due to the existence of various theoretical patterns developed in the legal and constitutional practice of States, has been analyzed in-depth in the framework of the Council of Europe; with regard to this, see in particular EUR. PARL. ASS., *Motion for a Resolution on The Principle of the Rule of Law*, Doc. No. 10180 (2004) and EUR. PARL. ASS., *Report of the Committee on Legal Affairs and Human Rights on The Principle of the Rule of Law*, Doc. No. 11343 (2007), both available at <http://assembly.coe.int>. The concept of the rule of law upheld by the Council of Europe—identified with the expression *prééminence du droit* (i.e. supremacy or primacy of law), which is used in both the French version of the Statute of the Council of Europe and in the preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms—summarizes the common traits of the different legal traditions concerning the rule of law, *inter alia* the principle of legality and rules on fair trial; on this issue, see EUR. PARL. ASS. RES., *The Principle of the Rule of Law*, Doc. No. 1594 (2007), available at <http://assembly.coe.int>.

⁶ In the context of the OSCE, the concept of rule of law—which plays a central role in the activities for the protection of human rights—encompasses not only formal legal aspects, but also the idea of justice aimed at the full respect for human dignity. In supporting the enhancement of the rule of law, OSCE assistance covers several areas, such as legislative reforms, human rights monitoring, fight against corruption, law enforcement. The concept of the rule of law endorsed by the OSCE has been clarified in some important documents adopted, in the aftermath of the fall of the Berlin Wall, in the framework of the Conference on Security and Cooperation in Europe, i.e. the Charter of Paris for a New Europe, adopted by the Meeting of the Heads of State or Government of the Participating States of the Conference on Security and Co-operation in Europe (CSCE), Paris, Nov. 21, 1990 (hereinafter Charter of Paris) and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, June 29, 1990 (hereinafter Copenhagen Document).

⁷ See Secretary General, *Report of the Secretary-General: Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 6, U.N. Doc. S/2004/616 (Aug. 23, 2004):

The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and legal transparency.

the principle at issue is evident when considering that, as recalled by the Secretary-General, activities for promoting the rule of law cover manifold areas ranging from setting up mechanisms for transitional justice, to the strengthening of institutions (particularly judiciaries), to the fight against corruption and organized transnational crime, and the reform and training of police forces.⁸

Even in the European Union (EU) framework, the principle of the rule of law has gained considerable importance, both with reference to its internal dimension and to external relations.

This article specifically aims to offer an overview on the role that the EU, as an international actor, plays in promoting the rule of law, with special reference to the activities performed in the Western Balkans. To this end, first of all, we will focus on the significance of the principle of the rule of law in the EU's legal system, and on the means by which it is protected in the EU's internal dimension and promoted in third countries. In this latter perspective, relations with the Western Balkans seem to be a particularly significant case study. In fact, the promotion of the rule of law in these countries is encompassed in a complex and prolonged multi-dimensional intervention through which the EU pursues the objective of stability and security, in view of the progressive integration and possible future accession of Balkan States. The means for promoting the rule of law in the Western Balkans will be examined, taking into account both those set up in the framework of the Stabilization and Association Process—devoting specific attention to the application of the principle of democratic conditionality attached to them—and those developed within the context of the Common Foreign and Security Policy. The analysis of the EU's activities for promoting the rule of law in the Western Balkans is aimed at clarifying the substantial content of that principle and to highlight, in the conclusions, some problematic aspects of the promotion (“export”) of the rule of law, taking into account both the complexity of this notion and the challenges that it is facing, in this historical period, primarily due to the process of globalization that, far from being confined within the economic and financial milieu, is increasingly permeating the legal domain.

B. The Principle of the Rule of Law in the European Union's Legal System: an Overview

In the EU's legal system, the principle of the rule of law—as well as other fundamental principles like democracy and respect for human rights and fundamental freedoms—has undergone a gradual process of affirmation and definition. Even lacking an express reference in the early versions of the Treaties establishing the European Community (TEC)⁹

⁸ See Secretary General, *Report of the Secretary-General: Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law*, para. 40, U.N. Doc. A/61/636-S/2006/980 (Dec. 14, 2006).

⁹ Treaty Establishing the European Economic Community, Mar. 25, 1957, and subsequent modifications, up to the consolidated version following the amendments introduced by the Treaty of Amsterdam: see Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 173.

and the EU (TEU),¹⁰ these principles were well-established in the Community's political and judicial practice. Indeed, they can be considered as inherent to the legal experience of the European integration process even before they were formally recognized through subsequent revisions of the founding Treaties.

As it is known, these principles were formally established as the structural, *latu sensu* "constitutional," cornerstones of the EU's legal system following the amendments introduced by the Treaty of Amsterdam (1997). Liberty, democracy, respect for human rights and fundamental freedoms and the rule of law were acknowledged as principles on which the Union is founded and which are common to the member States.¹¹ A mechanism for taking enforcement measures in the event of a serious and persistent breach of these principles by a member State was also envisaged.¹² Moreover, respect for the same principles expressly became a necessary precondition for the admission of new member States.¹³ In addition, confirming what had already been formalized by the Treaty of Maastricht (1992), the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms were included among the general objectives of the Common Foreign and Security Policy (hereinafter CFSP),¹⁴ as well as of the European Community (EC) development cooperation policy¹⁵ and, as subsequently provided by the Treaty of Nice (2001), of the EC policy of economic, financial and technical cooperation with third countries.¹⁶

The Treaty of Lisbon¹⁷, in force since 1 December 2009, essentially confirms these rules but introduces some modifications. First and foremost, the explicit reference to democratic principles and the rule of law disappears in the new wording of art. 6 TEU.¹⁸ However,

¹⁰ Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 4, and subsequent modifications, up to the consolidated version following the amendments introduced by the Treaty of Amsterdam: see Treaty on European Union, Nov. 10, 1997, 1997 O.J. (C 340) 145.

¹¹ TEU art. 6 para. 1.

¹² *Id.* at art. 7.

¹³ *Id.* at art. 49.

¹⁴ *Id.* at art. 11, para. 1.

¹⁵ TEC art. 177, para. 2.

¹⁶ *Id.* at art. 181A, para. 1.

¹⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

¹⁸ Consolidated Version of the TEU, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter Consolidated TEU] art. 6, para. 1 establishes, *inter alia*, that "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 . . .", in addition para. 3 establishes that "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and

according to the new art. 2 TEU, the rule of law is among the fundamental values of the Union.¹⁹ These values—specifically qualified as values common to the member States—are promoted in the relations with third countries²⁰ and are the basis of the relations with neighboring countries.²¹ Art. 7 TEU is amended by replacing the reference to the principles encompassed by the former art. 6, para. 1 TEU, with the reference to the values mentioned in the new art. 2 TEU. Respect and commitment to promote these values continue to be, as stated in art. 49 TEU, a necessary precondition for the admission of new

Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

It seems appropriate to recall that, by virtue of art. 6, para. 1 of the Consolidated TEU, the Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. (C 364) 1 [hereinafter Charter of Nice]—repeated and replaced by the text proclaimed at Strasbourg, Dec. 12, 2007, 2007 O.J. (C 303) 1, *see also* 2010 O.J. (C 83) 389—has the same legal value as the Treaties. It is worth noting that the preamble of the Charter of Nice states that the Union is founded on the principles of democracy and the rule of law. Moreover, the Charter of Nice enshrines some principles which are distinctive elements of the notion of the rule of law: *inter alia*, the equality of all before the law, Charter of Nice art. 20, the right to an effective remedy and a fair trial, *id.* at art. 47, the principle of legality, *id.* at art. 49. The European Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights [hereinafter ECHR], to which art. 6, para. 1 of the consolidated TEU makes reference too, contains as well several provisions entailing some typical principles pertaining to the rule of law: *inter alia*, the right to liberty, ECHR art. 5, the right to a fair trial, *id.* at art. 6, the principle of legality (*nulla poena sine lege*), *id.* at art. 7, and the right to an effective remedy, *id.* at art. 13.

¹⁹ *See* Consolidated TEU art. 2 (“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”).

For a critique of the choice made by the drafters of the Treaty of Lisbon to replace the term “principle” with the term “value”, which would somehow engender a regression of the meaning of the rule of law, *see* Laurent Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Papers 04/09, 20 (available at: www.jeanmonnetprogram.org/papers/09/090401.doc). The author argues, in particular, that this modification cannot involve a change in the interpretation of the rule of law leading, to some extent, to the weakening of this principle.

For a similar critique, with regard to the amendments envisaged by the former Treaty establishing a Constitution for Europe, *see* Eduardo Gianfrancesco, *Il principio dello Stato di diritto e l'ordinamento europeo*, in *L'ORDINAMENTO EUROPEO. I PRINCIPI DELL'UNIONE*, 235, 289 (Stelio Mangiameli ed., 2006). According to the author, although the regression from “principle” to “value” is likely to cause a weakening of the concept of the rule of law in contradiction with EU legislation and case-law, the rule of law must continue to be regarded as an inherent principle of the EU's institutional architecture.

²⁰ *See* Consolidated TEU art. 3, paras. 1 and 5 (“The Union's aim is to promote peace, its values and the well-being of its peoples. . . . In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens.”).

²¹ *See id.* at art. 8, para. 1 (“The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterized by close and peaceful relations based on cooperation.”).

members in the Union.²² According to the new general provisions concerning the Union's external action, the consolidation and promotion of the rule of law—which, in a manner somehow incongruent with the abovementioned art. 2, is mentioned among the principles on which the Union is founded—continue to be a key objective pursued by the EU (art. 21 TEU).²³ Moreover, the principles and objectives of the external action, thus also the rule of law as well as its consolidation and promotion, are the framework within which the promotion of development and the economic, financial and technical cooperation with third countries²⁴ are carried out.

The abovementioned rules clearly provide evidence of the fundamental character of the principle of the rule of law within the EU legal order. However, the absence of a clear definition of this principle in the Treaties and the fact that it is closely interconnected, and sometimes overlapping, with the other fundamental principles enshrined in the TEU, such as democracy and respect for human rights and fundamental freedoms, certainly affect its actual scope and application.

To address these issues, it is appropriate to further distinguish the notion of the rule of law developed in the EU's internal dimension, which, as specified below, corresponds to the idea of "Community based on the rule of law,"²⁵ and compare it to the notion of the rule

²² See *id.* at art. 49 ("Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. . . .").

²³ See *id.* at art. 21, paras. 1 and 2:

The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. . . . The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; . . .

²⁴ See Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter Consolidated TFEU] art. 208, para. 1 ("Union policy in the field of development cooperation shall be conducted within the framework of the principles and objectives of the Union's external action.").

See also Consolidated TFEU art. 212, para. 1 ("[T]he Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its external action.").

²⁵ *Infra* Part B.I and accompanying text.

of law promoted by the EU in third countries which has, as will be explained below,²⁶ a broader meaning than that ascribed to the first notion.

I. The Principle of the Rule of Law in the European Union's Internal Dimension

Lacking an exact definition, the content of the principle of the rule of law invoked in the TEU is reconstructed primarily on the basis of the common traits developed in the constitutional experience of member States. In fact, the Court of Justice's case-law has often recalled some typical precepts covered by the national dimension of the rule of law such as, *inter alia*: the effectiveness of judicial remedies, the rights of the defense, legal certainty, the principle of proportionality, protection against arbitrary or disproportionate intervention by public authorities, the principle of transparency.²⁷

However, despite the indisputable link with the constitutional traditions of member States,²⁸ the EU's notion of rule of law cannot be regarded merely as their "lowest common denominator." Indeed, within the EU's legal system the concept of the rule of law has a further connotation: that of the "Community based on the rule of law." Through this formula the Court of Justice has conveyed the rule of law paradigm into the Community context. More specifically, in *Les Verts* case, the Court explained that "the European Economic Community is a community based on the rule of law, inasmuch as neither its member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty"²⁹ Moreover, making reference to relevant institutional and procedural aspects regulated by the Treaty, the Court underlined the existence of a system which ensures not only that public authorities adopt measures in compliance with hierarchically superior rules, but also the right of individuals to judicial protection of their rights and

²⁶ *Infra* Part B.II and accompanying text.

²⁷ In fact, as explained in a remarkable academic work, the most prominent activity of the Court of Justice which makes reference to the notion of the rule of law is accomplished without explicitly mentioning this notion and represents a constant work of definition of a set of individual rights *vis-à-vis* the EC institutions resulting from the constitutional traditions common to the member States; see Gianfrancesco, *supra* note 19, at 275.

For some references to the Court of Justice's case-law concerning the rule of law, see Pech, *supra* note 19, Annex; see also EUR. PARL. ASS., *Report of the Committee on Legal Affairs and Human Rights on The Principle of the Rule of Law*, Doc. No. 11343 (2007), *supra* note 5.

²⁸ As remarked in a noteworthy scholar's analysis, the concept of the rule of law developed in the context of the member States' legal systems and the notion of the rule of law endorsed by the EU share some common traits, including in particular the nature of "constitutional" principle; see Pech, *supra* note 19, at 48. As maintained by another distinguished scholar, the European legal system seems to be a case of application of the paradigms of constitutionalism to a non-State organization, that is a case of "constitutionalism without a State"; see Gianfrancesco, *supra* note 19, at 274. With regard to these issues, see also Dimitry Kochenov, *The EU Rule of Law: Cutting Paths through Confusion*, 2 ERASMUS L. REV. 5 (2009).

²⁹ Case 294/83, Parti écologiste "Les Verts" v. European Parliament, 1986 E.C.R. 1339, para. 23.

interests. Hence, the concept of “Community based on the rule of law”—as expressed in *Les Verts* case—embodies a formal meaning of the principle of the rule of law which essentially corresponds to the existence in the EC legal system of a complete system of judicial remedies aimed to ensure compliance with the Treaty. In addition, the same concept clearly recalls and incorporates some of the fundamental cornerstones of the principle of the rule of law, such as the right to effective judicial protection and judicial review of acts.³⁰

In a subsequent ruling concerning the case *Union de los Pequeños Agricultores*, the Court of Justice shifted from a formal interpretation of the principle of the rule of law to a substantial one. In fact, in this decision, the notion of the “Community based on the rule of law” was, for the first time, invoked with specific reference to the protection of fundamental rights, as the Court clarified that “[t]he European Community is . . . a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.”³¹

Thus, the Court of Justice’s case-law has indisputably contributed to the definition of the concept of rule of law within the EU legal system, and specifically of the notion encapsulated in the formula “Community based on the rule of law.” This notion is similar in many respects to the rule of law paradigm conceived in the Anglo-Saxon legal tradition, whose essential features are: (1) the limitation of public power in order to protect the rights and freedoms of individuals; and (2) the fact that—given the absence of a constitutional bill of rights—this protection is mainly assured by the “normative” activity of the Courts.³²

Nonetheless, when considering the meaning of the principle of the rule of law within the EU’s internal dimension, two wide-ranging facets have to be taken into account: (1) the rule of law paradigm, as variously connoted in the European States legal practice, and (2) the “Community based on the rule of law.” As a result of this complex and multifaceted meaning of the principle at issue, the protection of the rule of law in the EU’s internal dimension is assured in more than one perspective.

³⁰ See MARIA LUISA FERNANDEZ ESTEBAN, *THE RULE OF LAW IN THE EUROPEAN CONSTITUTION* 108 (1999) and Pech, *supra* note 19, at 10.

³¹ Case C-50/00 P, *Union de los Pequeños Agricultores v. Council of the European Union*, 2002 E.C.R. I-06677, para. 38.

³² With reference to the role of the Court of Justice’s case-law *see*, amongst the others, Paolo Mengozzi, *La rule of law e il diritto comunitario di formazione giurisprudenziale*, in *RIVISTA DI DIRITTO EUROPEO* 511, n. 3 (1992); Roberto Toniatti, *Il principio di rule of law e la formazione giurisprudenziale del diritto costituzionale dell’Unione europea*, in *COSTITUZIONE ITALIANA E DIRITTO COMUNITARIO* 503 (Silvio Gambino ed., 2002); Mattia Magrassi, *Il principio comunitario di rule of law e l’evoluzione dei rimedi giurisdizionali: il contesto della Carta*, in *DIRITTO, DIRITTI, GIURISDIZIONE* 31 (Roberto Toniatti ed., 2002).

First, with reference to the “Community based on the rule of law” it is apparent that it is protected through the EU’s system of judicial remedies which, by means of the legal review of all acts of States and EU institutions, aims to ensure compliance with the Treaty and fundamental rights, and ultimately the supremacy of EU law.

In another perspective, as already recalled, the TEU—specifically art. 7—envisages a mechanism for safeguarding the respect for the rule of law within member States. In fact, as it is known, art. 7 TEU provides that in the event that a member State is responsible for a serious and persistent breach of the rule of law—or other fundamental principles mentioned in the former art. 6, para. 1 TEU, now the values mentioned in art. 2 TEU as amended by the Treaty of Lisbon—the EU may have recourse to a mechanism for imposing sanctions, consisting of the possible suspension of certain of the rights deriving from the application of the Treaties to that member State, including the voting rights of the representative of the government of that State in the Council.³³

Furthermore, when discussing the means for protecting the rule of law in the EU’s internal dimension, it seems worth noting the recent institution of an *ad hoc* instrument for monitoring the rule of law performance of those member States which have most recently joined the EU. According to the “Cooperation and Verification Mechanism” established in 2006,³⁴ Romania and Bulgaria shall annually submit a report to the Commission on the progress made with regard to certain benchmarks established by the Commission including, in particular, the judicial reform and the fight against corruption and organized crime. Through these reports the Commission assesses the progress made by these two member States in strengthening the rule of law and, in the absence of adequate

³³ With regard to this issue, see the Communication from the Commission to the Council and the European Parliament, *Article 7 of the Treaty on European Union—Respect for and promotion of the values on which the Union is based*, COM (2003) 606 final (15 Oct. 2003) and the European Parliament legislative resolution on the Commission communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, P5_TA(2004)0309, 2004 O.J. (C 104 E) 408. For a relevant scholar’s contribution see, amongst the others, Ugo Villani, *Osservazioni sulla tutela dei principi di libertà, democrazia, rispetto dei diritti dell’uomo e stato di diritto nell’Unione europea*, 2 STUDI SULL’INTEGRAZIONE EUROPEA 27 (2007).

³⁴ See Commission Decision 2006/928/EC, 2006 O.J. (L 354) 56 (establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption), and Commission Decision 2006/929/EC, 2006 O.J. (L 354) 58 (establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime). The relevant documents concerning the activities carried out through these mechanisms are available at http://ec.europa.eu/dgs/secretariat_general/cvm/index_en.htm. On this topic see also Susie Alegre et. al., *Safeguarding the Rule of Law in an Enlarged EU: The Cases of Bulgaria and Romania*, Centre for European Policy Studies, Special Report, 24 April 2009 (available at: <http://www.ceps.eu>).

advancement in addressing the abovementioned benchmarks, the Commission may apply safeguard measures based on art. 37 and 38 of the Act of Accession.³⁵

The establishment of this *ad hoc* mechanism, and the conditionality that it entails,³⁶ seems worthy of attention not only because it is not addressed to all EU member States, but solely to Romania and Bulgaria, but also because it reveals the EU's necessity and willingness to intensify the protection of the rule of law in its internal dimension, especially in the aftermath of the most recent enlargements. Moreover, it cannot be ruled out that the pattern established with the Cooperation and Verification Mechanism with regard to Romania and Bulgaria could serve as a model that could be replicated with respect to possible new member States, particularly those in the Western Balkans area.

II. The Promotion of the Rule of Law in the European Union's External Relations

As recalled above, the promotion and protection of democratic principles, respect for human rights and the rule of law are key priorities of the EU's agenda concerning political and economic external relations. In this respect, the EU has been engaged for a long time in a broad range of activities intended to promote these principles in third countries, an engagement which has been realized primarily in the contexts of the EC development cooperation policy, as well as in the EU's enlargement policy and, more recently, in the framework of the CFSP.

Hence, the meaning of the concept of rule of law embraced by the EU can also be further clarified in light of the practice of the EU's external relations. In particular, the EU's external relations provide perspective to assess whether the rule of law concept promoted in third countries has the same meaning of that related to the EU's internal dimension.

The recognition that the rule of law—in addition to respect for human rights and the existence of democratic institutions—is essential in order to promote sustainable development has been underlined in the EU's documents since the very early 90's of the last century.³⁷ Moreover, as already recalled, according to the TEU, the promotion of the

³⁵ As recalled in the aforementioned decisions, *supra* note 34, art. 37 and 38 of the Act of Accession empowers the Commission to take appropriate measures in case of imminent risk that these States would cause a breach in the functioning of the internal market by a failure to implement the commitments they have undertaken, or in case of imminent risk of serious shortcomings in these two States in the transposition, state of implementation, or application of acts adopted under Title VI of the EU Treaty and of acts adopted under Title IV of the EC Treaty.

³⁶ With reference to this issue, see in particular Martina Spornbauer, *Benchmarking, Safeguard Clauses, and Verification Mechanisms—What's in a Name? Recent Developments in pre- and post-Accession Conditionality and Compliance with EU Law*, 3 CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY (CYELP) 273 (2007).

³⁷ See, e.g., the Resolution on Human Rights, Democracy and Development adopted by the Council and representatives of the member States meeting in the Council on 28 November 1991, available at http://archive.idea.int/lome/bgr_docs/resolution.html.

rule of law—as well as democratic principles and respect for human rights—is among the general objectives pursued in relations with third countries.

Consistently with this approach, the recent document regarding the strategy for development policy—the so-called “European Consensus”³⁸—states that the EU’s partnership and dialogue with third countries will promote common values, and *inter alia* the rule of law.³⁹ This document adds that respect for good governance, human rights, democratic principles, and the rule of law will be regularly assessed in order to identify appropriate supporting measures.⁴⁰ This assessment is carried out through a political dialogue—which addresses various issues including the fight against corruption, illegal migration and human trafficking—intended to ensure that these principles are upheld.

The emphasis on promoting the rule of law can be found also in other documents concerning measures for implementing the development cooperation policy. In these documents one may find useful elements for identifying the contents of the concept of rule of law promoted in third countries by the EU.

For example, Regulation 1889/2006⁴¹—which establishes a financing instrument for the promotion of democracy and human rights worldwide (the so-called “European Instrument for Democracy and Human Rights”), aimed at supporting the achievement of the “European Consensus” objectives—confirms that the effective protection of human rights is the most prominent expression of the principle of the rule of law. In fact, this regulation affirms that “democracy and human rights are inextricably linked” and clarifies that “the fundamental freedoms of expression and association are preconditions for political pluralism and democratic process, whereas democratic control and separation of powers are essential to sustain an independent judiciary and the rule of law which in turn are required for effective protection of human rights.”⁴² Moreover, the same regulation establishes that Community assistance shall relate primarily to the promotion and enhancement of democracy to be achieved, *inter alia*, by “strengthening the rule of law, promoting the independence of the judiciary, encouraging and evaluating legal and institutional reforms, and promoting access to justice.”⁴³

³⁸ Joint statement by the Council and the representatives of the governments of the member States meeting within the Council, the European Parliament and the Commission, *European Union Development Policy: the “European Consensus,”* 2006 O.J. (C 46) 1 [hereinafter “European Consensus”].

³⁹ The other values covered are: respect for human rights, fundamental freedoms, peace, democracy, good governance, gender equality, solidarity and justice; see “European Consensus” at para. 13.

⁴⁰ See “European Consensus,” at paras. 17 and 20.

⁴¹ EC Regulation 1889/2006, 2006 O.J. (L 386) 1.

⁴² *Id.* at preamble, para. 8.

⁴³ *Id.* at art. 2. This regulation endorses, albeit in a less detailed way, what formerly provided in two others regulations—*i.e.* EC Regulation 975/1999, 1999 O.J. (L 120) 1 and EC Regulation 976/1999, 1999 O.J. (L 120) 8—

Furthermore, and most interestingly, the respect for the rule of law is almost always included in democratic conditionality clauses incorporated in various instruments—in particular, programs of financial, economic and technical assistance, as well as trade, cooperation and association agreements, and among these latter, the Stabilization and Association Agreements with the Western Balkan Countries, as it will be explained below—mainly employed in the framework of the EU’s relations with developing, candidate and potential candidate countries. As it is well-known, by means of conditionality clauses, the EU makes financial or other political incentives conditional on meeting certain political requirements—primarily concerning the promotion of democratic principles and the rule of law, and respect for human rights and fundamental freedoms—by the recipient States. The requirement of respecting the rule of law was first encompassed in the conditionality clause contained in the fourth Lomé Convention as revised in 1995.⁴⁴ This clause stipulated that respect for human rights, democratic principles and the rule of law is an essential element of the agreement (“essential-element clause”⁴⁵) and that, in the event of their violation, appropriate measures, including the partial or total suspension of the application of the Convention, could be taken (“non-compliance clause”⁴⁶). This clause has

concerning development and other Community operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries. According to these regulations, the Community shall provide technical and financial aid for operations aimed, *inter alia*, to support the processes of democratization, especially by means of “promoting and strengthening the rule of law, in particular upholding the independence of the judiciary and strengthening it; support for a humane prison system; support for constitutional and legislative reform; support for initiatives to abolish the death penalty”; see EC Regulation 975/1999 art. 2, and EC Regulation 976/1999 art. 3. With reference to supporting the process of democratization, these regulations make reference also to other actions including the promotion of: the separation of powers, particularly the independence of the judiciary and the legislature from the executive; pluralism, also by promoting the independence of media, a free press, and respect for freedom of association and assembly; good governance, particularly by supporting administrative accountability and the prevention and fight against corruption; participation of people in civil society and economic life and politics; and separation among civilian and military functions.

⁴⁴ See the Fourth ACP-EC Convention signed at Lomé on 15 December 1989, as amended by the Agreement signed in Mauritius on 4 November 1995, 1998 O.J. (L 156) 3 [hereinafter Revised Fourth Lomé Convention].

⁴⁵ See Revised Fourth Lomé Convention art. 5: “1. . . . Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this Convention”

⁴⁶ See *id.* at art. 366a:

If one Party considers that another Party has failed to fulfill an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it. . . . [I]f in spite of all efforts no solution has been found, or immediately in the case of urgency or refusal of consultations, the Party which invoked the failure to fulfill an obligation may take appropriate steps, including, where

been reproduced, with some modifications, in the subsequent Cotonou Agreement.⁴⁷ The conditionality clause provided by the latter also includes a brief description of the essential elements of the agreement. Thus it is particularly useful to clarify the meaning of the principle of the rule of law. In fact, with regard to this principle, the Cotonou Agreement states that “the structure of government and the prerogatives of the different powers shall be founded on the rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.”⁴⁸ It seems appropriate to recall that this definition is based on studies carried out by the Commission⁴⁹ and, in particular, on the Communication of 1998⁵⁰ on “Democratization, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the African, Caribbean and Pacific (ACP) States.” In this document, the basic elements of the concept of rule of law are identified as follows:

The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights. The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example: a legislature respecting and giving full effect to human rights and fundamental freedoms; an independent judiciary; effective and accessible means of legal recourse; a legal system guaranteeing equality before the law; a prison system respecting the human

necessary, the partial or full suspension of application of this Convention to the Party concerned.

⁴⁷ Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, 2000 O.J. (L 317) 3 [hereinafter Cotonou Agreement].

⁴⁸ Cotonou Agreement art. 9(2), para. 3. On the mandatory nature of this definition, since it is contained in a treaty, see ELENA FIERRO, *THE EU'S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE* 122 (2003).

⁴⁹ See The Green Paper on Relations Between the European Union and the ACP Countries on the Eve of the 21st Century—Challenges and Options for a New Partnership, COM (1996) 570 final (20 Nov. 1996); see also Communication, Guidelines for the Negotiation of New Cooperation Agreements with the ACP Countries, COM (1997) 537 final (29 Oct. 1997).

⁵⁰ COM (1998) 146 final (12 Mar. 1998).

person; a police force at the service of the law; an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.⁵¹

In another perspective, still related to the EU's conditionality, the respect for the rule of law, as it is well-known, is among the preconditions that the EU requires for accession of new member States. While this requirement, together with others and in particular the existence of democratic institutions, has always been considered, albeit implicitly, a *sine qua non* for membership—as demonstrated by the EC practice concerning in particular the admission of Spain, Portugal and Greece—the EU formally established the conditions for membership⁵² only in 1993 with the adoption of the so-called Copenhagen criteria.⁵³ In particular, according to the Copenhagen political criterion, “membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”⁵⁴

The concise formulation of this criterion, however, does not offer useful indications for identifying the content of the concept of rule of law. In addition, the TEU rules on the admission of new member States do not offer significant help in interpreting the rule of law criterion because, as already referred to above, art. 49 merely recalls, through the reference to art. 2, that the rule of law is a “value”—a “principle,” in the formulation of the former art. 6 of the version preceding the amendments introduced by the Treaty of Lisbon—on which the EU is founded and which is common to the member States. In the context of the enlargement policy, therefore, the absence of an exact definition and of a formal and uniform interpretation of the principle of the rule of law, makes it difficult to evaluate the fulfillment of that criterion by the candidate countries. However, the periodic reports of the Commission disclose those elements which, case-by-case, are considered

⁵¹ *Id.* at 4.

⁵² With regard to this issue, see Tanja Cerruti, *I political criteria e l'allargamento dell'Unione europea tra esperienze passate e prospettive future*, in I BALCANI OCCIDENTALI. LE COSTITUZIONI DELLA TRANSIZIONE 93 (Marina Calamo Specchia et. al., eds., 2008). With reference to the political criterion of the rule of law in the framework of the EU's enlargement to Central-eastern European Countries (CEEC), see also Dale Mineshima, *The Rule of Law and EU Expansion*, 24 LIVERPOOL L. REV. 73 (2002); Tanja Marktler, *The Power Of The Copenhagen Criteria*, 2 CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY (CYELP) 343 (2006); Dimitry Kochenov, *Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law*, 8 EUROPEAN INTEGRATION ONLINE PAPERS (EIOP) (2004), available at <http://eiop.or.at/eiop/pdf/2004-010.pdf>.

⁵³ See Presidency Conclusions, Copenhagen European Council (21-22 June 1993) § 7(A)(iii).

⁵⁴ *Id.* According to the Copenhagen criteria, membership also requires “the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union” (economic criterion) and presupposes “the candidate's ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union” (legal criterion concerning the *acquis communautaire*).

fundamental benchmarks that have to be satisfied. As a whole, for example, these reports show that, at the constitutional level, the separation of powers and periodic elections are two constant and essential elements which the Commission assesses and monitors together with the progress, at the institutional level, in strengthening the impartiality and independence of the judiciary.⁵⁵

Lastly, another specific context of the EU' external relations, in which the EU is actively involved in promoting the rule of law is the CFSP. In this context, the promotion of the principle of the rule of law has initially been encompassed by political and diplomatic instruments and typical acts of the Second Pillar. In this regard, a Common Position of 1998⁵⁶ concerning human rights, democratic principles, the rule of law and good governance in Africa, is particularly interesting. It committed the EU to encourage and support the process of democratization in Africa based on respect of certain principles such as protection of human rights, respect for democratic principles, the rule of law, and good governance. For each of these principles, the aforementioned document provides a summary of the content and particularly, with regard to the rule of law, it states that this principle " . . . permits citizens to defend their rights and . . . implies a legislative and judicial power giving full effect to human rights and fundamental freedoms and a fair, accessible and independent judicial system."⁵⁷

According to that Common Position, the rule of law and the other mentioned principles are benchmarks to which the EU shall give high priority when determining the intensity of EU support. This support could be increased for those countries in which positive changes have taken place and where the governments concerned are actively engaged in promoting positive change; conversely, where changes are negative the EU "shall consider the appropriate responses that could help reverse those developments."⁵⁸

The most recent practice in the context of the CFSP shows that promoting the rule of law and strengthening democratic principles are considered essential to the security and stabilization of certain countries. Indeed, the assessment by the Commission of the causes of conflict or risk factors, nowadays generally includes some indicators relating to the rule of law.⁵⁹ These indicators include, above all, certain aspects of the judicial system: in particular, its independence and efficiency, the equality of citizens before the law, effective judicial protection of rights, enforcement of judgments. Other indicators include aspects

⁵⁵ See Cerruti, *supra* note 52, at 100.

⁵⁶ Common position 98/350/CFSP of 25 May 1998, 1998 O.J. (L 158) 1.

⁵⁷ *Id.* at art. 2(c).

⁵⁸ *Id.* at art. 3.

⁵⁹ See Marise Cremona, *The European Neighbourhood Policy: Partnership, Security and the Rule of Law*, Wider Europe Policy Papers 17 (2005), available at www.wider-europe.org/files/UkraineandENPCremona.pdf.

concerning the level of conflict and violence in a country: among the others, the involvement of security forces in illegal activities, judicial protection against abuses of human rights committed by security forces and police, compliance with minimum standards of protection of human rights in the context of the activities of the armed forces, and the conditions of the prison system. Further indicators include aspects concerning the relationship between civilian and military institutions: particularly, the degree of influence of the security forces on political power, the role of Parliament in the control of military forces and police, and transparency in the security sector. Moreover, aspects concerning organized crime are also taken into consideration. Strengthening the rule of law, thus, has gradually been established as one of the essential components of the EU's security policy, particularly in the context of specific programs for assistance and cooperation,⁶⁰ and above all in the context of European Security and Defense Policy (ESDP) operations. In fact, the EU has established various operations for crisis management and conflict prevention, whose mandate, in some cases, has mostly military objectives—in particular the training of police forces,⁶¹—in other cases expressly focuses on the promotion of the rule of law, through the stabilization and strengthening of institutions.⁶² In the framework of such operations, the link between the rule of law and security—which are considered mutually reinforcing—is reflected in the highly preeminent consideration of issues such as combating corruption and organized crime, and the relationship between political and military institutions and police forces.

In conclusion, in light of the various activities conducted by the EU in the context of external relations, it is possible to trace many dimensions—political, economic and security—in which the rule of law is a leading concept. Each dimension emphasizes some specific aspects for the promotion of this principle. As a whole, promoting the rule of law appears closely related to the objective of supporting democratization and good

⁶⁰ For example, the Initiative for the Rule of Law in Central Asia, established in 2008, aims to promote the implementation of institutional reforms, particularly the creation and development of an independent judiciary, in order to strengthen the rule of law and compliance with international human rights standards. In this regard, see *The EU and Central Asia: Strategy for a New Partnership* (2007), available at www.consilium.europa.eu, and *EC Regional Strategy Paper for Assistance to Central Asia (2007-2013)*, available at <http://ec.europa.eu>.

⁶¹ Among these operations, it is appropriate to make reference to some missions carried out in the Western Balkans, such as the police mission in Bosnia-and-Herzegovina (EUPM), the police mission in the former Yugoslav Republic of Macedonia (EUPOL Proxima), and the mission EUFOR Althea in Bosnia-and-Herzegovina.

⁶² The first example of such operations is represented by the EU Rule of Law Mission in Georgia (EUJUST THEMIS)—see Council Joint Action 2004/523/CFSP of 28 June 2004, 2004 O.J. (L 228) 21—aimed to assist the Georgian government in implementing a strategy for the reform of the justice sector that would include specific judicial reform, combating corruption, and adopting a new code of criminal procedure. Other significant examples are the EU Integrated Rule of Law Mission for Iraq (EUJUST LEX)—see Council Joint Action 2005/190/CFSP of 7 March 2005, O.J. (L 62) 37—and the mission EULEX KOSOVO which will be further discussed in *infra* Parts C and D and accompanying text.

governance as a precondition for the political, economic and institutional development.⁶³ This necessitates the implementation of activities to ensure the separation of powers, judicial independence, the principle of legality, legal certainty, the right to fair trial, equality before the law, the existence of a public administration and efficient police, independent media, the existence of a legal system in which institutions participate in the consolidation of a market economy, transparency, combating corruption and organized crime, subordination of military and security institutions to the civilian authorities.⁶⁴

C. The European Union's Instruments for Promoting the Rule of Law in the Western Balkans

Since the 1990s, the EU has been steadily involved in a complex activity for the stabilization and the progressive integration of the Western Balkans. In the relations with these countries, the promotion of the rule of law undoubtedly is a key objective. To this end, the EU employs various instruments linked to all the aforementioned areas of external relations, that is: the policy of development cooperation, the enlargement policy, and the CFSP. Given this complex and multidimensional activity, promotion of the rule of law in the Western Balkans is particularly pervasive.

First of all, the promotion of the rule of law is evident in the context of the Stabilization and Association Process (hereinafter SAP), *i.e.* the EU's political strategy for the Western Balkans, inaugurated by the Zagreb Summit in 2000. This strategy, as it is known, combines the creation of privileged political and economic relations with the countries at issue and a massive intervention of financial assistance. Furthermore, although the SAP is not formally a pre-accession strategy, it constitutes the framework within which the perspective of a possible future EU enlargement to the Western Balkans has been progressively outlined.

The gradual integration of these countries is conditional upon progress in their political and economic transition. The EU, as it is known, strictly applies the principle of democratic conditionality *vis-à-vis* these countries. According to this principle, economic or political incentives are granted and maintained, provided that certain conditions are met. On the whole, progress made by the Balkan States in meeting the conditions required by the EU is crucial not only in view of the increasing or possible suspension of preferential trade measures and financial aid, but also for the purpose of concluding the Stabilization and Association Agreements (hereinafter SAAs), for their entry into force and application or

⁶³ For an analysis of the EU's activities for promoting the rule of law in third countries, see Elena Baracani, *EU democratic rule of law promotion*, in INTERNATIONAL ACTORS, DEMOCRATIZATION AND THE RULE OF LAW. ANCHORING DEMOCRACY? 53 (Amichai Magen & Leonardo Morlino eds., 2009).

⁶⁴ See Cremona, *supra* note 59, at 11.

their possible suspension, as well as for granting the status of candidate country, and for the subsequent commencement or postponement of the accession negotiations.

The conditionality clauses contained in the SAAs and in other unilateral instruments provided for in the framework of the SAP—in particular, the financial assistance programs—expressly include respect for the rule of law.

The Regulation establishing the Instrument for Pre-Accession Assistance (IPA)—the financial assistance program currently used to support the candidate and potential candidate countries of the Western Balkans—not only provides that assistance should primarily support the recipient countries' efforts to strengthen democratic institutions and the rule of law, but it also stipulates that respect for the rule of law—and for democratic principles, human rights and minority rights, and fundamental freedoms—is an essential element for the application of the regulation and the granting of financial aid. In fact, in the event of violation of this principle—as well as in case of non-compliance with any of the other principles on which the Union is founded, or in case of failure to meet other conditions required by the EU, in particular those specified in the Partnerships⁶⁵ and, in general, the accession criteria, including the aforementioned Copenhagen criteria—the Council may take appropriate measures.⁶⁶

The SAAs concluded with all the Western Balkan States⁶⁷ recall, in their preambles, the parties' commitment to respect the rule of law and generally include its consolidation

⁶⁵ See *infra* notes 70–71 and accompanying text.

⁶⁶ See EC Regulation 1085/2006 of 17 July 2006, 2006 O.J. (L 210) 82, art. 21:

Respect for the principles of democracy, the rule of law and for human rights and minority rights and fundamental freedoms is an essential element for the application of this Regulation and the granting of assistance under it. Community assistance for Albania, Bosnia-and-Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Montenegro and Serbia, including Kosovo, shall also be subject to the conditions defined by the Council in its Conclusions of 29 April 1997, in particular as regards the recipients' undertaking to carry out democratic, economic and institutional reforms. 2. Where a beneficiary country fails to respect these principles or the commitments contained in the relevant Partnership with the EU, or where progress toward fulfilment of the accession criteria is insufficient, the Council, acting by qualified majority on a proposal from the Commission, may take appropriate steps with regard to any assistance granted under this Regulation.

⁶⁷ See Stabilisation and Association Agreement between the European Communities and Their Member States, of the one part, and the Former Yugoslav Republic of Macedonia, of the other part, 2004 O.J. (L 84) 13 [hereinafter SAA FYROM]; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, 2005 O.J. (L 26) 3 [hereinafter SAA Croatia]; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, 2009 O.J. (L 107) 166 [hereinafter SAA Albania];

among the aims of the association relationship. Moreover, they contain conditionality clauses according to which the respect for the rule of law—as well as respect for democratic principles, human rights, international law, and market economy—constitutes an essential element of the agreement.⁶⁸ In the case of non-compliance with an essential element, the SAAs provide for the possibility of taking appropriate measures, even the suspension of the application of the agreement.⁶⁹

The reforms that SAP-participant States are required to implement with regard to the rule of law are identified case-by-case, on the basis of the situation of each country, and then specified in the respective Partnership.⁷⁰ The Partnerships set a list of interventions to be implemented with the support of EU financial assistance in relation to different areas which cover not only democracy and the rule of law, but also human rights and the

Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, 2010 O.J. (L 108) 3 [hereinafter SAA Montenegro]; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, not yet published in the O.J. pending the entry into force, available at http://ec.europa.eu/enlargement/pdf/serbia/key_document/saa_en.pdf [hereinafter SAA Serbia]; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia-and-Herzegovina, of the other part, not yet published in the O.J. pending the entry into force, available at www.europa.ba/files/docs/publications/en/SAP_eng.pdf [hereinafter SAA BiH].

⁶⁸ The so-called “essential-element clause” is contained in art. 2 of each of the abovementioned SAAs with the Western Balkan Countries, *supra* note 67.

⁶⁹ The so-called “non-compliance clauses” contained in the SAAs with the Western Balkan States lay down—albeit with a drafting technique which differ in the various agreements at issue—the possibility of taking appropriate steps, even the suspension of the agreement, should a violation of one of the essential elements occur. With regard to “non-compliance clauses” see SAA FYROM, art. 118; SAA Croatia, art. 120 and Joint Declaration concerning art. 120; SAA Albania, art. 126 and Joint Declaration concerning art. 126; SAA Montenegro, art. 133 and art. 129, para. 4; SAA Serbia, art. 133 and art. 129, para. 4; SAA BiH, art. 129 and art. 125, para. 4. With regard to Serbia and Bosnia-and-Herzegovina—pending the entry into force of the relevant SAAs—see also the interim agreements which allow certain provisions of the SAAs to be applied before the ratification process has been finalized: Interim agreement on trade and trade-related matters between the European Community, of the one part, and Serbia, of the other part, 2010 O.J. (L 28) 2, art. 54, and Interim agreement on trade and trade-related matters between the European Community, of the one part, and Bosnia-and-Herzegovina, of the other part, 2008 O.J. (L 169) 13, art. 48.

⁷⁰ The European Partnerships established in 2004—see EC Regulation 533/2004 of 22 March 2004, 2004 O.J. (L 86) 1—have been subsequently specified by means of specific decisions adopted by the Council with reference to each Western Balkan Country. The principles, priorities, and conditions of the Partnerships have been periodically reviewed in light of the progresses achieved by the Western Balkans and, at present, they are encompassed in the following decisions: Council Decision 2008/210/EC of 18 February 2008, O.J. 2008 (L 80) 1 (Albania); Council Decision 2008/211/EC of 18 February 2008, 2008 O.J. (L 80) 18 (Bosnia-and-Herzegovina); Council Decision 2008/212/EC of 18 February 2008, 2008 O.J. (L 80) 32 (former Yugoslav Republic of Macedonia); Council Decision 2008/213/EC of 18 February 2008, 2008 O.J. (L 80) 46 (Serbia, including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999); Council Decision 2008/119/EC of 12 February 2008, 2008 O.J. (L 42) 51 (Croatia); Council Decision 2007/49/EC of 22 January 2007, 2007 O.J. (L 20) 16 (Montenegro).

protection of minorities, regional issues and international obligations, the fulfillment of economic criteria and the progressive development of the capacity to assume the obligations of membership, with particular reference to harmonization with the *acquis communautaire*. The inadequacy of progress in implementing the measures identified in the Partnerships may, by express provision of the acts establishing the same Partnerships, cause the suspension of financial assistance programs.⁷¹

Furthermore, respect for the rule of law is one of the preconditions for accession into the EU. Hence, the gradual development of an actual perspective of membership for the Western Balkans is strictly linked to the fulfillment of political criteria, including respect for and strengthening the rule of law. This latter requirement is certainly a major yardstick in the deepening of relations with the EU, as it is clearly shown in the most recent document on the EU's enlargement strategy.⁷² With reference to Croatia—the Western Balkan Country with which relations with the EU have reached the most advanced level—this is confirmed by the fact that the pace of accession negotiations, as stated in the “negotiating framework,”⁷³ is determined by the fulfillment of, *inter alia*, the conditions on the rule of law, which are those scheduled by the Copenhagen criteria, as well as those laid down in the framework of the SAP, and in particular in the relevant SAA and Partnership. The same negotiating framework also envisages that in the event of serious and persistent breach by Croatia of the principles of liberty, democracy, human rights and fundamental freedoms and the rule of law, the Commission may recommend the suspension of negotiations and propose the conditions for their resumption.

⁷¹ Decisions establishing the Partnerships envisage a mechanism of conditionality by which “[a]ssistance to the Western Balkan Countries is conditional on progress on satisfying the Copenhagen criteria and on meeting the specific priorities of [the] European Partnership. Failure to respect these conditions could lead the Council to take appropriate measures on the basis of Article 21 of Regulation (EC) No. 1085/2006 or, in the case of pre-2007 programmes, on the basis of Article 5 of Regulation (EC) No. 2666/2000. The assistance is also subject to the conditions defined by the Council in its conclusions of 29 April 1997, in particular as regards the recipients’ undertaking to carry out democratic, economic and institutional reforms. Specific conditions are also included in individual annual programmes.” See the aforementioned Council decisions, *supra* note 70.

It is useful to remind that EC Regulation 1085/2006, *supra* note 66, establishes the IPA, while EC Regulation 2666/2000 of 5 December 2000, 2000 O.J. (L 306) 1, established the CARDS (Community Assistance for Reconstruction Development and Stabilisation)—*i.e.* the financial assistance programme addressed to Albania, Bosnia-and-Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia—which has been subsequently replaced by the IPA. Also the regulation establishing the CARDS envisaged an equivalent mechanism of conditionality; see EC Regulation 2666/2000 art. 5.

⁷² See Communication from the Commission to the European Parliament and the Council—Enlargement Strategy and Main Challenges 2009-2010, COM (2009) 533 final (14 Oct. 2009).

⁷³ See Negotiating Framework, 3 October 2005, available at http://ec.europa.eu/enlargement/pdf/croatia/st20004_05_hr_framedoc_en.pdf.

Lastly, it should be noticed that the promotion of the rule of law in these countries is also carried out by the EU through other instruments, in particular those provided for by the CFSP-ESDP. In fact, strengthening the rule of law in the Western Balkans is among the objectives pursued by some ESDP operations, mainly aimed at the training of police forces,⁷⁴ and, in particular, by the civilian mission EULEX in Kosovo. The latter, established in February 2008,⁷⁵ specifically aims to support—through monitoring, mentoring and advising, while retaining certain executive responsibilities—the development of democratic institutions based on the rule of law.⁷⁶

D. The Meaning of the Principle of the Rule of Law Promoted by the European Union in the Western Balkans

In light of what is explained above, it is clear that the application of the principle of democratic conditionality *vis-à-vis* the Western Balkans—which has been and continues to be particularly rigorous—is the EU's main instrument for promoting the rule of law in these countries. Therefore, assuming the application of conditionality as the starting point of reference, we will undertake to propose an appraisal of the content of the principle of the rule of law as promoted by the EU in the Western Balkans.

In order to provide an overview of the practice concerning the application of the principle of democratic conditionality *vis-à-vis* the Western Balkans, with specific reference to the promotion of the rule of law, a preliminary reference to some relevant documents on which the relations between the EU and these countries have been based is appropriate. In this regard, reference can be made, first of all, to the Declaration on Yugoslavia and to the Guidelines on the Recognition of new States in Eastern Europe and the Soviet Union.⁷⁷ In particular, in these guidelines, the principle of democratic conditionality finds its first expression in regard to the Western Balkans.⁷⁸ In this document, the Council determined

⁷⁴ See *supra* note 61 (discussing the missions). For a brief analysis on these operations, see Guy le Borgne, *L'Union Européenne et l'état de droit dans les Balkans. Instruments et moyens d'action*, 7 ANNUAIRE FRANÇAIS DE RELATIONS INTERNATIONALES (AFRI) 156 (2006). In relation to ESDP operations undertaken by the EU in the Western Balkans, see also Ugo Villani, *Le responsabilità dell'Unione europea nell'area mediterranea*, 4 STUDI SULL'INTEGRAZIONE EUROPEA 551 (2009).

⁷⁵ See Council Joint Action 2008/124/CFSP of 4 February 2008, 2008 O.J. (L 42) 92.

⁷⁶ With regard to the situation in Kosovo and, especially, to the coexistence of UNMIK and EU mission EULEX, see Ivan Ingravallo, *Il Kosovo tra l'amministrazione delle Nazioni Unite e le prospettive di ammissione all'Unione europea*, 5 STUDI SULL'INTEGRAZIONE EUROPEA 528 (2010).

⁷⁷ See Declaration on Yugoslavia, and Declaration on the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, adopted by the Extraordinary European Political Cooperation Ministerial Meeting, Brussels, 16 December 1991, in BULLETIN EC 12-1991.

⁷⁸ With the Declaration on Yugoslavia, the European Community and its member States agreed to recognize the independence of all the Yugoslav Republics provided that they had met some conditions, including the endorsement of the requirements set in the *Guidelines on the Recognition of New States in Eastern Europe and in*

that the recognition of Yugoslav Republics⁷⁹ was dependent, *inter alia*, on the commitment by the new States to respect—especially regarding the rule of law, democracy and human rights—the provisions of the United Nations Charter, the Helsinki Final Act and the Paris Charter.

In addition, further essential points of reference are contained in the 1997 Council Conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of Southeastern Europe,⁸⁰ which lay down the basic discipline concerning the application of this principle in the context of relations with the Western Balkans, and identify specifically the promotion of the rule of law as one of the key objectives pursued by the EU. These conclusions clarify the standards for the verification of compliance with the conditionality criteria, and with respect to the rule of law they identify the following elements: freedom of expression, including independent media, the right of assembly and demonstration, the right of association, the right to privacy, the right to property, effective means of redress against administrative decisions, access to courts and the right to fair trial, equality before the law and equal protection by the law, freedom from inhuman or degrading treatment and arbitrary arrest.

According to the framework established by these documents, the EU has subsequently enacted the instruments of the SAP that, despite often including merely generic references to the principle of the rule of law, allow to some extent an explanation of the meaning and scope of this principle.

First of all, in the SAAs the concept of the rule of law is invoked not only in the conditionality clauses, but also in other provisions. For instance, in those provisions concerning cooperation on justice, freedom and security, the consolidation of the rule of law is closely linked to the strengthening of institutions, in particular the executive and the judiciary. In this respect, the independence of the judiciary, the improvement of its efficiency and institutional capacity, access to justice, the efficiency of the police, the fight

the Soviet Union. According to these guidelines, the Community and its member States would have recognized new States which “have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.” Moreover, recognition was made conditional on the “respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights.” Other conditions included the respect for the rights of ethnic and national groups and minorities, respect for the inviolability of all frontiers, the acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation, and commitment to settle by agreement all questions concerning State succession and regional disputes.

⁷⁹ With regard to this subject, see in particular RICHARD CAPLAN, *EUROPE AND THE RECOGNITION OF NEW STATES IN YUGOSLAVIA* (2005).

⁸⁰ Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain Countries of South-Eastern Europe, 29 April 1997, in *BULLETIN EU 4-1997*.

against corruption and organized crime are among the standards to which reference is usually made.⁸¹

Further elements can also be found in the Partnerships. By indicating the measures that the States concerned are called to implement in order to comply with conditionality, the Partnerships link the concept of the rule of law to democracy and make reference mainly to institutional reforms of Parliaments, governments, public administration, judicial systems, as well as to the enactment of anti-corruption policies.

It seems worthwhile to note the relevance of the requirements concerning the independence of the judiciary. This is indeed the most prominent feature of the meaning of the rule of law advocated by the EU in its relations with the Western Balkans, and generally with third countries. This aspect is underlined also in other instruments for promoting the rule of law and, in particular, in the EULEX KOSOVO whose Mission Statement expressly states that this mission shall:

[A]ssist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices.⁸²

E. Concluding Remarks

In light of the analysis here submitted it is confirmed that, as already stated in the introduction, the principle of the rule of law has gained paramount relevance in the EU legal system, both in its internal dimension and in its external relations.

In the internal dimension, the concept of “Community based on the rule of law,” derived from the theoretical background arising from the legal (mostly constitutional) experience of member States has been progressively defined. Far from being a static concept, this notion proves to be subject to a continuous clarification and evolution by means of EU law

⁸¹ See, e.g., SAA FYROM, art. 74; SAA Croatia, art. 75; SAA Albania, art. 78; SAA Montenegro, art. 80; SAA Serbia, art. 80; SAA BiH, art. 78).

⁸² See Council Joint Action 2008/124/CFSP, *supra* note 75, at art. 2; see also EULEX Programmatic Approach and EULEX Programme Report (July 2009), both available at www.eulex-kosovo.eu.

and its impact on the States' domestic law, through a process of mutual influence among legal systems.⁸³

Under a different perspective, as it has been shown, the practice of external relations—analyzed here with regard to relations with the Western Balkans—and in particular the application of the principle of democratic conditionality⁸⁴ offer further opportunities for identifying the meaning of the concept of rule of law subsumed and promoted by the EU.

In the external dimension various factors merge: in addition to the legal experience of member States—and through them the different traditions of common law and civil law—and that of the Community—as elaborated mainly by the Court of Justice—one should also take into consideration the contributions stemming from international law, and particularly the contributions offered by some relevant documents adopted by international organizations. Among these documents, the Charter of Paris, to which the EU constantly makes reference, seems particularly meaningful. Indeed, the activity of promoting the rule of law conducted by the Union, and specifically that carried out in the Western Balkans, clearly shows that the EU endorses a concept of rule of law broadly consistent with that derived from the Charter of Paris. Without doubt, this notion is deeply permeated by the legal experiences developed and consolidated by the European constitutionalism,⁸⁵ but at the same time it provides a broader perspective, since the rule of law—together with pluralist democracy and respect for human rights and fundamental freedoms—is considered necessary for the construction of an order of peace, security and justice.

Therefore, considering the merging of these different perspectives corresponding to the different meanings of the rule of law developed in the practice of States, of the EU, and of other international organizations, the EU's interpretation of the principle of the rule of law clearly encompasses various elements, included those relevant to the organization of

⁸³ With regard to the role of the rule of law in the EU's legal system as a tool for integration, see FERNANDEZ ESTEBAN, *supra* note 30, at 179.

⁸⁴ For a detailed analysis of EU conditionality on democracy and rule of law, see in particular DIMITRY KOCHENOV, EU ENLARGEMENT AND THE FAILURE OF CONDITIONALITY: PRE-ACCESSION CONDITIONALITY IN THE FIELDS OF DEMOCRACY AND THE RULE OF LAW (2008).

⁸⁵ See Charter of Paris, *supra* note 6. In this document, the concept of the rule of law is closely connected to the constituent elements of democratic governance and human rights. In addition, the same document makes reference to some fundamental principles, such as the obligation of public authorities to comply with law, the impartial administration of justice, the equal submission of all to the law, the right to fair trial, the existence of effective legal remedies, national or international, against any violation of rights. The content of the rule of law is further specified in the Copenhagen Document, *supra* note 6, to which the Charter of Paris expressly makes reference. This latter document particularly emphasizes some core principles pertaining to the rule of law including: the supremacy of law, equality of persons before the law, the existence of effective mechanisms for judicial protection of individual rights, judicial independence, the principle of legality, the civil power's control over the armed forces and the police, the right to fair trial.

public powers. Thus, it goes beyond the classical, even essential, notion of the rule of law as developed in the Anglo-Saxon legal tradition, which essentially corresponds to the judicial protection of rights. In sum, both the common law notion of the rule of law, and those developed in the civil law systems (*Rechtsstaat*, *Etat de droit*) seem to merge in the concept of that principle subsumed by the EU.

This broad meaning of the principle of the rule of law is also reflected in the new Constitutions of the Western Balkans States, which explicitly endorse this principle⁸⁶ recognizing a number of key precepts which are typical of the European constitutional traditions: in particular, the constitutional guarantee of rights and fundamental freedoms, which entails their direct application and a system of guarantees established at the constitutional level, the separation of powers, the independence of the judiciary, the rule that the Constitution and the law are the only foundation and limits of public authority. This approach is well summarized, for example, in the Serbian Constitution adopted in 2006, which in art. 3 states that “[r]ule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights. The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities.”

Besides, the analysis here carried out with reference to the Western Balkans seems to clarify that the EU’s activity for promoting the rule of law is oriented to take on a substantial, and not merely formal, meaning of the principle of the rule of law. This is confirmed by the fact that the EU does not limit its activity to encouraging the adoption of legal reforms which are intended to promote the rule of law, but it constantly monitors—particularly through the application of the principle of democratic conditionality—the performance in regard to democracy, the rule of law, and human rights in order to ensure that these fundamental principles are actually and fully realized. In this sense, the EU’s activities for promoting the rule of law are in line with the Copenhagen Document, expressly recalled by the Charter of Paris, and particularly with the idea that:

[R]ule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human

⁸⁶ The principle of the rule of law is mostly included in the constitutional provisions devoted to fundamental principles, and therefore closely associated with the enshrinement of human rights. See, e.g., CONSTITUTION OF THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA OF 1991, preamble and art. 8; CONSTITUTION OF CROATIA OF 1990, AS AMENDED IN 2000, art. 3 and 5; CONSTITUTION OF BOSNIA-AND-HERZEGOVINA OF 1995, art. 2; CONSTITUTION OF ALBANIA OF 1998, preamble and art. 4.

personality and guaranteed by institutions providing a framework for its fullest expression.⁸⁷

This approach is also consistent with a common trend in the pro-democratic activities of major international organizations which consider the principle of the rule of law as a standard for measuring the “democratic quality” of a State. In other words, the rule of law becomes an essential requirement for the consolidation of governments genuinely democratic and respectful of human rights. From a more general point of view, this is evidence of the shifting from international cooperation aimed to promote “electoral democracy”—which in practice has often given rise to the emergence of merely formal democracies—to the promotion of governments meeting with the institutional and regulatory requisites which are necessary for the full realization of democratic principles.

From a different standpoint, it seems clear that the importance of the promotion of the rule of law in EU relations with third countries—and above all, with the candidate and potential candidate countries such as those in the Western Balkans area—is also instrumental in ensuring the proper functioning of the Union. Under this view, it seems that the significance of the notion of “Community based on the rule of law” should not be underestimated in the ascertainment of the meaning of the principle of the rule of law that the EU promotes in third countries. In fact, the importance bestowed to the progressive harmonization with the *acquis communautaire*—which is among the conditions required to States taking part to the SAP—shows the EU’s intention to promote the gradual assumption of responsibility by those States with respect to the EU law—in other words their endorsement of the supremacy of EU law—, especially in view of their possible future membership.

On the whole, the present study seems to confirm the existence of a process of re-definition that the principle of the rule of law—a structural principle typical of Western legal systems—is undergoing on a global scale. This process is nourished by the mutual influences of different legal traditions and practices at national, regional and universal level, which through a kind of legal “osmosis” allows the diffusion, to some extent the “export” of the principle of the rule of law beyond the boundaries of the Western legal tradition. Indeed, the strict correlation between the rule of law, democracy, and respect for human rights, has made the principle at issue a global legal concept, one of those core “values” internationally protected and promoted. In fact, the promotion of the rule of law is now receiving almost unanimous consensus, precisely because it is perceived as a means to promote efficiency and support the legitimacy of governments. Nevertheless, the rule of law is not exempt from a steady process of change, both in time and space. In particular, the concept of rule of law is deeply affected by the ongoing crisis experienced by the nation-state and democracy as a result of the growing pressures stemming from the

⁸⁷ Copenhagen Document, *supra* note 6, at I(2).

globalization process.⁸⁸ The principle of the rule of law can thus be seen as a “living” principle, both in the political and legal contexts in which it originates and in those where it is promoted.

⁸⁸ For an analysis of the relationship between globalization and democracy, see ANTONIO BALDASSARRE, *GLOBALIZZAZIONE CONTRO DEMOCRAZIA* (2002). With regard to the role of the European integration process as a factor contributing to the crisis of the constitutional State, see in particular Ferrajoli, *supra* note 2, at 365. For a study on issues concerning the relationship between globalization and the rule of law, see SPENCER ZIFCAK, *GLOBALISATION AND THE RULE OF LAW* (2005).