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BUILDING THE CASE FOR KOSOVO'S APPLICATION FOR MEMBERSHIP IN THE EU

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I. BACKGROUND OF THE REPORT

This analytical report aims to answer the question: Can Kosovo apply for membership in the European Union having in mind that five member states of the EU do not recognize Kosovo as an independent state? In order to answer this question, we critically examine the legal bases and the political context for Kosovo to achieve this goal.

Kosovo is a potential candidate for membership in the European Union, as stipulated in the declaration of the EU-Western Balkans Summit held in Thessaloniki, Greece, on June 21, 2003.¹ The declaration, signed by Heads of State or Government of the Member States of the European Union and the aspiring countries for membership states that “The EU reiterates its unequivocal support to the European perspective of the Western Balkan countries”. Further to the Thessaloniki Agenda, the European perspective for Kosovo was confirmed through the European Council’s European Partnership for Kosovo in 2004 and the Commission’s Communication “A European Future for Kosovo” in 2005.²

Ten years after the Thessaloniki summit, in 2013 Croatia became the first member from the western Balkans to join the EU, sending a strong positive message to other Balkan countries on the potential of the European perspective. In 2012, Montenegro opened negotiations for accession in the EU, followed by Serbia in 2014. There are strong indications that Albania will open accession negotiations in 2017. Bosnia and Herzegovina applied for membership in the EU in February, 2016, whereas in September of the same year, the Council of the European Union accepted³ the application and in December⁴ EU Commissionaire for Enlargement Johannes Hahn

¹EU-Western Balkans Summit. Thessaloniki. 21.06.2003. Available at: http://europa.eu/rapid/press-release_PRES-03-163_en.htm

² European Partnership, Council Decision 2004/520/EC. Brussels. 14.06.2004; Communication from the Commission – A European Future for Kosovo, Com/2005/0156 final. Brussels. 20.04.2005.

³ Council of the European Union’s conclusions on the application of Bosnia and Herzegovina. Brussels. 20.09.2016. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/09/20-conclusions-bosnia/>

⁴ Bosnia and Herzegovina received the European Commission questionnaire. Sarajevo. 09.12.2016. Available at: <https://europeanwesternbalkans.com/2016/12/09/bosnia-and-herzegovina-received-the-european-commission-questionnaire/>

presented to Bosnia and Herzegovina government the Questionnaire, consisting of 3,242 questions of the European Commission in order to prepare the opinion on the application for membership of BiH in the European Union. The Council's conclusions on accepting the application of Bosnia and Herzegovina provide a unique opportunity for observations in order to understand the bases for such decision on the part of the EU, that are relevant for Kosovo:

1. Conclusions refer to previous Council conclusions of 15 December 2015, that entangle BiH's EU perspective as a single, united and sovereign country. The interpretation of this in the case of Kosovo may be twofold: first, Kosovo's progress towards the next step in the European integration process will depend also on establishing authority of the government in all of its territory, including the north and second, sovereign countries are considered for membership, and since Kosovo hasn't been recognized as such by five EU member states, this poses a serious challenge.
2. The Council refers to progress in the implementation of the Reform Agenda by BiH. Kosovo government recently approved the EU Reform Agenda. In negotiations leading up to this initiative, Kosovo side⁵ insisted that implementation of the Reform Agenda will lead to application for membership and the statement page of the Reform Agenda, refers indirectly to this opportunity.
3. Progress in implementation of the SAA.

Based on this observation, a similar formula may be applied on treating Kosovo's potential application for membership and achieving candidate status, which is to say that the necessary conditions for accepting Kosovo's application for membership are:

1. Become a single, unitary and sovereign country;
2. Progress in implementation of the EU Reform Agenda and
3. Progress in implementation of SAA.

Application for membership as an act in itself it is not linked with the respective criteria.

⁵ Interview with former members of the cabinet of Minister for European Integration of Kosovo.

Kosovo signed the Stabilization and Association agreement (SAA) in 2015 which entered into force in April, 2016. Having in mind the political turmoil which has encapsulated EU member states, following Brexit and immigration crises, these positive developments in the European integration process for the region, demonstrate that European perspective, despite growing skepticism against enlargement, remains realistic. However, Kosovo has a particular challenge to move forward that is unique compared to other countries of the region. Kosovo is not recognized as an independent state by five EU member states, so called non-recognizers. Despite this obstacle, there have been significant progress achieved in European integration process and the non-recognizers have supported European perspective for Kosovo as well. Besides Spain and to a certain degree Cyprus, Kosovo enjoys excellent diplomatic relations, with the remaining three non-recognizers who also have diplomatic representation in the country: Greece, Rumania, and Slovakia. Following the entry into force of the SAA, the next logical step in the European integration process for Kosovo is application for membership ⁶ and the question arises, can Kosovo apply for membership without being recognized by all member states?

The SAA between the EU and Kosovo foresees, among others, the creation of a free trade zone between the EU and Kosovo; approximation of Kosovo laws to the EU *Acquis*; fight against corruption and organized crime. The EU and Kosovo held the first meeting of the Stabilization and Association Council (SAC), which oversees the implementation of the SAA, on November 25th 2016.⁷ Just before the meeting of the SAC, Kosovo adopted the European Reform Agenda (ERA) – a short term reforms document in key priority areas, such as good governance and rule of law; competition and investment climate; labor and education.⁸ On November 25th 2016, the EU and Kosovo signed a Framework Agreement which enables Kosovo to participate in more than fifteen EU programs related to economic cooperation, justice, education and science.⁹ On December 1st, 2016, Kosovo's Parliament ratified the Financial Agreement between the EU and Kosovo as

⁶ Application for membership in the EU is not linked with entry into force or implementation of the SAA, but in the case of Kosovo it is seen as the next progressive step.

⁷ First meeting of the Stabilization and Association Council held in Brussels. 25.11.2016.

⁸ Kosovo Government. Prishtina. 2016. *European Reform Agenda*.

⁹ Framework Agreement between the European Union and Kosovo on the general principles for the participation of Kosovo in Union programmes. Brussels. 2016.

part of the Instrument for Pre Accession Assistance which will fund sixteen projects worth at 78 million Euros.¹⁰

Kosovo continues its EU facilitated dialogue with Serbia on practical issues of mutual interest. Good neighborly relations and regional cooperation are one of the key EU integration criteria applicable for the Western Balkan countries. Kosovo and Serbia have concluded numerous agreements on, among others, border management and control; free movement of people and goods; telecom; and the judiciary. The Successful implementation of agreements reached means both countries progress faster towards the EU.

As of December 2016, Kosovo does not yet enjoy visa free travel within the EU. Based on the last European Commission's Report on the visa liberalization dialogue, Kosovo needs to fulfill two remaining conditions before it is transferred to the visa free list of the Schengen Agreement. These two conditions are the ratification of the border demarcation agreement between Kosovo and Montenegro and building of a track record of investigations, court rulings and confiscation of assets in organized crime cases.¹¹

Successful implementation of the SAA accompanied with serious reforms is the first steps of Kosovo towards joining the EU. The next step is application and achieving the candidate status and opening bilateral negotiations for the accession treaty. Finally, Kosovo can join the EU once the accession treaty is ratified by each member states and by Kosovo pursuant to their respective internal procedures.

II. RESEARCH OBJECTIVE AND METHODOLOGY

This report examines the enlargement policy and accession criteria of EU towards Kosovo. The main objective of this report, however, is to examine whether Kosovo can apply for EU membership in light of the particular circumstances of its case. In

¹⁰ Kosovo Government. Ministry of European Integration. Prishtina. 01.12.2016. *Ratification of Financing Agreement for IPA 2015 between Kosovo and EU*. Available at: <http://www.mei-ks.net/sq/lajmet/ratifikohet-marrveshja-financiare-ipa-2015-ndrmjet-kosovs-dhe-be-s>

¹¹ European Commission, Fourth report on progress by Kosovo in fulfilling the requirements of the visa liberalisation roadmap, COM (2016) 276 final. Brussels. 04.05.2016.

particular, the report will examine the application process, the membership criteria, and the decision-making process following an application, the negotiation process and the final accession process. Most importantly, the Report will examine whether Kosovo is ready to submit an application for EU membership and what are some of the political considerations it should take into account before doing so. Finally, the report provides relevant recommendations for Kosovo institutions for preparation of a successful application for EU Membership.

The report relies on analysis of primary sources, such as, EU treaties and EU Law, Kosovo laws and policies, EU enlargement policy, EU Progress Reports, SAA and other agreements between the EU and Kosovo. In addition, the Report relies on secondary sources, such as, reports and studies of non-governmental organizations, scholarly and academic articles, media reports. Moreover, this report will draw lessons and experiences from Croatia's path towards joining the EU and what Kosovo could learn from this experience.

III. STRUCTURE OF THE REPORT

In the first part, this report provides the context in which Kosovo finds itself in its relations with the EU and in its integration process. The second part provides the research objective as well as the methodology of this report. Part four examines the EU Membership Criteria for the Western Balkan countries, with a particular focus on Kosovo and Serbia. Part five outlines the membership process. Part six examines whether Kosovo is ready to apply for EU Membership and the challenges it faces in the process. Further, this part looks at possible solutions to overcome these challenges. Finally, part seven looks at the experience of Croatia and what could Kosovo learn from this experience in its path towards the EU.

IV. EU MEMBERSHIP CRITERIA

The Treaty on European Union (TEU) as amended by the Treaty of Lisbon outlines the criteria for membership into the EU.¹² Article 2 of TEU, reads, “[t]he 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.”¹³ Article 49 of TEU, among others, reads, “[a]ny 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....” Article 2 of TEU served as the foundation for the Copenhagen Criteria, which translate the values and principles contained in TEU into more concrete criteria which need to be met before a state is ready to join the EU.

A. Copenhagen Criteria

The Copenhagen criteria originated from the European Council meeting held in Copenhagen in 1993. The member states categorized them into political criteria and economic criteria. These criteria have to be satisfied before a state is ready to join the EU. As we shall see below, the Copenhagen Criteria are not the only criteria Western Balkan countries, *i.e.*, Kosovo should meet. From experience drawn during the conflicts in the former Yugoslavia, the EU created the stabilization and association mechanism for Western Balkan countries. Recently, it has introduced additional criteria, such as the policy of fundamentals first and regional cooperation as key criteria which have to be met by Kosovo, Serbia and the rest of the Western Balkan countries before they are admitted to the EU.

1. Political Criteria

The political criteria requires Kosovo to achieve stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities

¹² Treaty on European Union. Official Journal of the European Union. 26.12.2012.

¹³ *Ibid*, article 2.

before it is ready to join the EU.¹⁴ The Progress Report which measures the achievement of the Copenhagen Criteria as well as other conditionality of EU's enlargement policy towards Kosovo notes that the backlashes between the government and the opposition parties over the demarcation and the dialogue with Serbia have seriously hampered the fulfillment of the political criteria.¹⁵ In 2015, the European Commission started piloting a new methodology of assessing the progress of potential and candidate countries for EU membership. It measures both the progress in some pilot areas as well as the state of play. Progress is measured in one of the five stages: *Backslide; No progress; Some progress; Good progress or Very good progress*. Whereas the state of play is measured through the following five indicators of preparedness on taking the obligations of EU membership: *Early stage; Some level of preparation; Moderately prepared; Good level of preparation; Well advanced*.¹⁶

The Progress Report for 2016 concludes Kosovo has some level of preparation in the field of public administration reform, whereas it is at an early stage in developing a well-functioning judicial system. Kosovo is praised for good progress achieved on constitutional amendments and completing the justice package, whereas, it is critiqued for a slow and inefficient administration of justice and insufficiency of accountability of judicial officials.¹⁷ The Progress Report for 2016 provides also that Kosovo is at an early stage/has some level of preparation in the fight against corruption.¹⁸ In this aspect, the recommendations provided in the Progress Report are all included in the European Reform Agenda to be addressed during 2016 and 2017. Thus, the next Progress Report will measure and tell on whether Kosovo has addressed and improved in meeting the political criteria of the Copenhagen criteria, which in turn means Kosovo advances toward EU membership based on its own merits.

2. *Economic and Institutional Criteria*

¹⁴ European Council in Copenhagen. *Conclusions of the Presidency* ('Copenhagen Criteria'). 21-22.06.2003.

¹⁵ European Commission. *Progress Report for Kosovo*. Brussels. 2016. Page 5.

¹⁶ New Methodology for measuring progress. Brussels. 10.11.2015. Available at: [http://europa.eu/rapid/press-release MEMO-15-6040_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6040_en.htm).

¹⁷ European Commission. *Progress Report for Kosovo*. Brussels. 2016. Page 13.

¹⁸ *Ibid*, page 16.

The Economic Criteria require Kosovo to establish a functioning market economy as well as capacities to cope with competitive pressure and market forces within the Union before it is ready to join the EU. The Institutional Criteria require Kosovo to be able to take on the obligations of membership including adherence to the aims of political, economic and monetary union. This includes approximation of Kosovo laws with the EU *Acquis* as well as full implementation and enforcement of EU *Acquis*. Related to Economic Criteria, the Progress Report provides that “Kosovo is at an early stage in developing a functioning market economy. Some progress was made, particularly on supporting export-oriented businesses, improving contract enforcement, especially within the financial sector, and access to finance.”¹⁹ Further, related to the capacity of Kosovo to cope with competitive pressure, the Progress Report notes, “Kosovo is at an early stage in building the capacity to cope with competitive pressures and market forces within the Union. No progress was made on improving the quality of education, which is a key driver for improving long-term growth and competitiveness.”²⁰

3. *Is EU Ready to Accept New Members*

EU Enlargement and acceptance of new member states is a two-way road. It is not sufficient if Kosovo fulfills all the necessary criteria for EU membership; the EU should as well be ready and willing to accept new members. This condition was first mentioned in the Copenhagen Criteria, which state, “[t]he Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.”²¹ This principle was reiterated in European Council's meeting of 14-15 December 2006 where it said:

The European Council stresses the importance of ensuring that the EU can maintain and deepen its own development. The pace of enlargement must take into account the capacity of the Union to absorb new members. The European Council invites the Commission to provide impact assessments on

¹⁹ *Ibid*, page 34.

²⁰ *Ibid*, page 38.

²¹ *Ibid*, page 13.

the key policy areas in the Commission's Opinion on a country's application for membership and in the course of accession negotiations. As the Union enlarges, successful European integration requires that EU institutions function effectively and that EU policies are further developed and financed in a sustainable manner.²²

B. Stabilization and Association Process and Its Impact

In May 1999 the then Commission of the European Communities launched the Stabilization and Association Process (SAP) which replaced the Regional Approach policy.²³ SAP was in large a response to the 90's crisis in the former Yugoslavia, culminating with the conflict in Kosovo. SAP shifted the regional approach into a bilateral approach whereby the EU would create contractual relations with individual states of Western Balkan through Stabilization and Association Agreements (SAA) taking into account the individual situation in each state. The SAP recognized the EU membership perspective for the states concerned once the Copenhagen criteria have been successfully met. SAP's aims would be to develop trade relations between the EU and Balkan states as well as among themselves. Further, the SAP foresaw increased assistance for democratization, civil society development and institution building. SAP's aim would also be to develop political dialogue between the state concerned and EU on the one hand and between the states of the region as a means to overcome the differences and former adversaries. The ultimate goal of the SAP and SAA's is to prepare and align as much as possible the individual states with the EU for an easier accession process.

Each Western Balkan country signed and is implementing SAA's. Kosovo was the last of the Western Balkan countries to sign and start implementation of the SAA. It did so on 27 October 2015 when it signed the SAA with the EU, following a process of negotiation which lasted from October 2013 until May 2014. The Council of the European Union agreed to sign the SAA with Kosovo on October 2015, whereas the European Parliament

²² European Council. Meeting Conclusions. 14-15.12.2006.

²³ Communication from the Commission to the Council and European Parliament. Brussels. 26.05.1999.

expressed consent on the signature. The SAA between the EU and Kosovo entered into force on 1 April 2016. It is the first contractual arrangement between the two parties which confirms Kosovo's EU perspective.

Pursuant to article 216 of the Treaty on the Functioning of the European Union (TFEU)²⁴, the SAA's are international agreements entered into between the EU and third countries.²⁵ Article 216 provides that international agreements concluded by the EU are binding on its institutions and the EU Member States.²⁶ The SAA concluded between the EU and Kosovo is thus binding on the European Union institutions as well as its Member States, including the five non-recognizers.

C. Fundamentals First

In October 2013, the European Commission communicated the EU Enlargement Strategy (Enlargement Strategy) for 2013-2014 to the European Parliament and other relevant EU bodies. The Enlargement Strategy introduced the Fundamentals First approach as part of its strict but fair conditionality policy. Before any Balkan country would aim to join the EU they need to address and meet the fundamental criteria first, such as rule of law, fight against corruption, fight against organized crime, freedom of expression, functioning of a market economy, institutional and public administration reforms. The fundamentals first policy is still active and based on which Western Balkan countries, Kosovo included, will be assessed for their progress towards EU Membership.

D. Regional Cooperation and Good Neighborly Relations

The Enlargement Strategy requires that Western Balkan countries to cooperate with one another and conduct good neighborly relations. Regional cooperation, in particular good neighborly relations with Serbia, is one of the key conditions contained in the SAA between EU and Kosovo as well as EU's enlargement policy towards Kosovo. On this

²⁴ Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) are the two treaties which regulate and govern the EU. They are of the same legal value.

²⁵ Treaty on the Functioning of the European Union. Official Journal of the European Union. 26.10.2012. Article 216.

²⁶ *Ibid.*

aspect, the Progress Report for Kosovo for 2016 notes that “[r]egional cooperation and good neighborly relations form an essential part of Kosovo’s process of moving towards the EU.”²⁷ The EU puts a special emphasis on the normalization of relations between Kosovo and Serbia. In this regard it facilitates the dialogue between the two countries as well as monitors the implementation of agreements reached.

V. EU MEMBERSHIP PROCESS

The EU membership process is a long and exhausting process of application, reforms, negotiations and final accession to EU. It starts with the submission of a formal application to join the EU pursuant to article 49 of TEU, which in turn activates the membership process. Following an opinion on the preparedness of the country to join the EU by the European Commission to the Council, the latter together with the European Parliament starts the formal negotiation process where the terms of accession and the full alignment of the candidate state with EU *Acquis* is required.

A. Formal Application

The EU membership process starts with the submission of a formal application for membership by Kosovo to the EU Council. Article 49 of the TEU provides that once an application is received the European Parliament and national Parliaments of EU member states shall be notified of the application. Following the submission of the application, pursuant to article 49 of TEU, the Council requests an opinion by the European Commission on the application of the state and whether it meets the requested criteria to start formal negotiation procedure. The Council must vote unanimously and take into account the opinion of the European Parliament on whether or not a country can start the negotiation process, thus becoming a candidate country. Pursuant to article 31 of TEU, an abstention does not mean negative vote of a Member State. Christophe Hillion writes that “[s]uch admissibility depends on the aspirant’s fulfilment of the condition of statehood, and on its European identity (‘Any European State’), as well as on its respect for and commitment to promote the EU values

²⁷ European Commission. *Progress Report for Kosovo*. Brussels. 2016. Page 30.

enshrined in Article 2 TEU”.²⁸ Kosovo thus, needs to prepare a strong application package which would address the legal issues related to its status vis-à-vis the five EU member states that do not recognize Kosovo as well to address its European identity, which should include more than the mere fact of Kosovo’s geographical location in Europe, but rather, how Kosovo enshrines the EU values. In arguing on the issue of statehood, Kosovo should highlight the fact that it has been recognized by the majority of EU member states as well as utilize the opinion by the International Court of Justice which concluded that Kosovo’s declaration of independence did not violate any applicable rule of international law.

B. Negotiation

Following the opinion issued by the European Commission which assesses the readiness of the country to negotiate and take on the obligations of EU membership, the Council decides unanimously after having received the consent of the European Parliament, pursuant to article 49 of TEU, to start the negotiation phase for accession to EU of the candidate country. In the case of Kosovo the Council needs to take an unanimous vote on accepting the formal application and deciding to start the negotiation phase. An unanimous vote means all countries must be in favor, however, an abstention shall not be counted as negative vote in the Council decisions.²⁹ Considering that Kosovo would be unlikely to achieve unanimous votes of all Council members due to the non-recognition by the five EU member states, it should focus and work on receiving an abstention during the voting process.

Following a positive vote by the Council, Kosovo would reach the candidate status. At this stage it would open formal accession negotiations. During the negotiation phase Kosovo and the EU would negotiate the terms of accession. They will negotiate 35 chapters of the EU *Acquis*. Once all chapters have been concluded and agreed upon, Kosovo would formally join the EU following the Accession procedure.

²⁸ Christophe Hillion, *Accession and Withdrawal in the Law of European Union* in *The Oxford Handbook of European Union Law*. Oxford University Press. London. 2015. Page 127.

²⁹ Treaty on European Union. Official Journal of the European Union. 26.12.2012. Article 31.

C. Accession

Accession to the EU is done through a treaty entered into between the member states of the EU and the acceding state. Pursuant to article 49 of TEU, this treaty shall be ratified by the member states and the acceding state in accordance with the respective constitutional requirements and domestic laws of the respective states. All member states must ratify the treaty to accept the new member. It is this stage which may be very difficult to pass for Kosovo, considering it has not yet been recognized by five EU member states. If one state would not ratify the accession treaty between the member states of EU and Kosovo, the treaty would not be concluded.

VI. BUILDING THE CASE FOR KOSOVO'S APPLICATION FOR EU MEMBERSHIP

Following the entry into force of the SAA in April 2016, Kosovo has a more defined relationship with the EU. The SAA is a positive first step on a long a difficult process which awaits Kosovo in its path towards full EU membership. By comparison, Croatia signed the SAA in 2003 whereas it became an EU member ten years later, in 2013. Kosovo will face legal as well as political obstacles in its EU integration process due to its independence not being recognized by the five non-recognizers. Nonetheless, Kosovo should utilize the SAP and undertake serious reforms in order to prepare a strong case for EU Membership in the upcoming years.

A. Redefined Relations Between Kosovo and the EU

The current relations between the EU and Kosovo are defined by the SAA. The SAA provides for the progressive association of Kosovo with the EU over a period of ten years from its entry into force in April 2016.³⁰ The SAA defines and enables economic exchange between the EU and Kosovo as well as political dialogue between the two parties. The SAA creates two main mechanisms between Kosovo and the EU which will oversee and ensure the implementation of the SAA as well as conduct political dialogue between the two parties. One mechanism, the Stabilization and Association Council

³⁰ Stabilization and Association Agreement Between the European Union and the European Atomic Energy Community and Kosovo (hereinafter, "SAA"). Brussels. 02.10.2015. Article 9.

(SAC), pursuant to article 9 of the SAA, “shall review, on an annual basis, the implementation of [SAA] and the adoption and implementation by Kosovo of legal, administrative, institutional and economic reforms.”³¹ Whereas, the Stabilization and Association Parliamentary Committee, “...shall be a forum for Members of the European Parliament and Members of the Parliament of Kosovo to meet and exchange views.”³² These mechanisms are composed of respective members from both contracting parties, *i.e.*, Kosovo and the EU. Kosovo, on the other hand has in place numerous other national mechanisms, which are at the forefront of European integration reforms and are in place to implement the SAA in the field. Such national mechanisms are, the Ministerial Council for Coordination of the European Integration Process, established in 2008³³; Working Committee for European Integration, established in 2008³⁴; Working Groups for European Integration; Task Force for European Integration established in 2012³⁵; Parliamentary Committee for European Integration.³⁶

1. Stabilization and Association Council

SAC shall supervise the application and implementation of the SAA. SAC is composed of representatives from the EU and Kosovo and shall have a decision making authority, concerning the implementation and issues which may arise in the course of the implementation of the SAA.³⁷ SAC will adopt its rules of procedure. In the performance of its duties, SAC will be assisted by the Stabilization and Association Committee.³⁸ The rules of procedure will provide the duties of the Stabilization and Association Committee. The SAA, further provides that the Stabilization and Association Committee may create subcommittees and special groups before the end of first year.³⁹ The

³¹ *Ibid.*

³² *Ibid.*, article 132.

³³ Kosovo Government. Decision on the Establishment of the Ministerial Council for Coordination of the European Integration Process. Prishtina. 2008. Available at: http://www.mei-ks.net/repository/docs/Vendim_per_themelimin_e_Keshillit_Ministror.pdf

³⁴ Kosovo Government. Decision on the Establishment of the Working Committee for European Integration. Prishtina. 2008. Available at: http://www.mei-ks.net/repository/docs/Vendimi_per_themelimin_e_Komitetit_Nderministror_per_Integrim_Evropian.pdf

³⁵ Kosovo Government. Terms of Reference for Task Force on European Integration. Prishtina. 2012. Available at: http://www.mei-ks.net/repository/docs/Terms_of_Reference_SQ.pdf

³⁶ Kosovo Assembly. Parliamentary Committee on European Integration. Available at: <http://www.assembly-kosova.org/?cid=1,110,122>

³⁷ SAA, article 128.

³⁸ *Ibid.*, article 129.

³⁹ *Ibid.*, article 130.

subcommittees and special groups shall be responsible for the adequate implementation of the SAA.⁴⁰ One obligatory subcommittee that will address migration issues needs to be established.

The first meeting of SAC took place on 25 November 2016 in Brussels. The meeting was chaired by EU's high representative for foreign affairs and security policy, Federica Mogherini.⁴¹ Kosovo was represented by a delegation headed by Prime Minister Isa Mustafa, Foreign Minister Enver Hoxhaj and Interior Minister Skender Hyseni.⁴² In the meeting the Kosovo delegation and the EU discussed various topics, such as, the visa liberalization process; the political situation in Kosovo; efforts of Kosovo and the EU to prevent radicalization and the progress of the EU facilitated dialogue between Kosovo and Serbia.⁴³

The EU and Kosovo need to adopt the Rules of Procedure of the SAC as well as create the Stabilization and Association Committee pursuant to article 129 of the SAA. The Stabilization and Association Committee shall assist the SAC in the performance of its duties as well as exercise such duties which may be delegated to it by SAC.⁴⁴ On this point, it can be noted that Kosovo is already behind, since almost a year has passed since the entry into force of the SAA, and the relevant institutional mechanisms for its implementation are not yet in place. The SAA, further, provides for the creation of subcommittees and special groups which will ensure the proper implementation of the SAA.⁴⁵ The SAA, provides that such subcommittees and special groups shall be created within the first year of SAA's implementation.⁴⁶ Less than four months from the elapse of this time, the parties to the SAA have not yet created the relevant mechanisms for the implementation of the SAA. Moreover, Kosovo has not yet appointed a new Minister of European Integration who would have a leading role on creating these mechanisms on the part of Kosovo.

⁴⁰ *Ibid.*

⁴¹ First Stabilization and Association Council meeting held. Brussels. 25.11.2016. Available at: https://eeas.europa.eu/delegations/kosovo/15933/federica-mogherini-chairs-historic-first-stabilisation-and-association-council-between-the-european-union-and-kosovo_en

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ SAA, article 129.

⁴⁵ *Ibid*, article 130.

⁴⁶ *Ibid.*

2. Stabilization and Association Parliamentary Committee

The SAA establishes also a Stabilization and Association Parliamentary Committee (Parliamentary Committee).⁴⁷ The Parliamentary Committee is composed of Members of the European Parliament and Members of Kosovo Parliament. The Parliamentary Committee meets at least once a year and serves as a forum for the political representatives of the parties to meet and exchange views on the implementation of the SAA and in general on the relations between Kosovo and the EU. To date, the Parliamentary Committee has met twice discussing issues ranging from political dialogue and functioning of democratic institutions to preventing radicalization and extremism. The Parliamentary Committee has adopted its Rules of Procedure.

3. National mechanisms

Since independence, Kosovo created numerous national mechanisms which are responsible to coordinate efforts and take actions on European Integration. In the absence of a contractual relationship between Kosovo and the EU, these mechanisms have been limited to internal coordination and dialogue for European Integration. In addition to the national mechanisms mentioned above in the beginning of this section, Kosovo has created Departments for EU Integration and Policy Coordination in every ministry of the Government.⁴⁸ These departments have a coordination role in the EU integration process. Even though these departments exist since 2011, Kosovo has not undertaken any review or assessment on the effectiveness and results of the EU Integration departments. Following the entry into force of the SAA, Kosovo needs to review its institutional structures dealing with the EU integration process and adapt or amend them pursuant to the new reality, where most efforts are needed to implement the SAA and reforms foreseen by the EU's Enlargement policy towards Kosovo.

4. EU in Kosovo

⁴⁷ *Ibid*, article 132.

⁴⁸ Kosovo Government. Regulation Nr. 01/2011 on Departments for European Integration and Policy Coordination in the Ministries. Prishtina. 2011.

EU in Kosovo is represented by the European Union Office in Kosovo and the European Union Special Representative (EUSR) in Kosovo. These EU institutions work under the authority of the High Representative of the Union for Foreign Affairs and Security Policy. The EU office in Kosovo and the EUSR present, explain and implement EU policy in Kosovo; they analyze and report on the policies and developments in Kosovo; they play a key role in the implementation of the EU's substantial financial assistance to Kosovo.

In addition, the European Mission for Rule of Law (EULEX) is present in Kosovo since 2009 pursuant to the Council's Joint Action 2008/124/CFSP of 4 February 2008. EULEX represents European Union's External Action. EULEX assists Kosovo's judicial system and law enforcement institutions in creating a sustainable, professional justice system free from political interference. EULEX's mandate is currently extended until 14 June 2018.

B. Can Kosovo Apply for EU Membership

Kosovo's position vis-à-vis the EU differs from that of the other Western Balkan countries. This is due to the non-recognition of Kosovo's independence by five EU member states. This position is reflected in the SAA between Kosovo and the EU. While all the Western Balkan countries' SAAs have been ratified by each member state of the EU as a treaty between the member states and the candidate country, pursuant with the procedure laid out in article 49 of TEU; Kosovo's SAA was entered into by the EU and the European Atomic Energy Community and Kosovo.⁴⁹ More importantly, the SAA entered into between Kosovo and the EU, spells out in article 2 that "[n]one of the terms, wording or definitions used in this Agreement, including the Annexes and Protocols thereto, constitute recognition of Kosovo by the EU as an independent State nor does it constitute recognition by individual Member States of Kosovo in that capacity where they have not taken such a step."⁵⁰ Further, throughout its content, the SAA never mentions that Kosovo may enjoy candidate status or become an EU member. Instead, it uses general and broadly-construed terms, such as stating that the SAP

⁴⁹ SAA, page 4.

⁵⁰ *Ibid*, article 2.

process “...will lead to progress in Kosovo’s European perspective and rapprochement with the EU, should objective circumstances so permit and Kosovo fulfils ...” the Copenhagen criteria as well as the SAP conditionalities.⁵¹ Despite not saying it openly, objective circumstances permitting must mean all EU member states recognize Kosovo.

Notwithstanding this, Kosovo can argue that the SAA is an international agreement entered into between the EU and Kosovo pursuant to article 216 of TFEU. This article states that “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”⁵² Professors Paul Craig and Grainne de Burca write that the European Court of Justice “...has consistently held since the *Haegeman* ruling that once an agreement enters into force, its provisions form an ‘integral part’ of Community law, now EU law.”⁵³ They further state that, “[t]he ECJ has also ruled that Member States are in violation of their obligations under EU law where they fail to adopt the measures necessary to implement an international agreement concluded by the EU.”⁵⁴ Kosovo can make the argument that the five EU non-recognizing states being bound to implement the SAA, they recognize that they cannot block Kosovo’s path towards EU integration as the SAA foresees Kosovo’s European perspective. In addition, Kosovo could make a strong legal argument that since the SAA foresees Kosovo’s European perspective, blocking Kosovo’s application either at the Council’s vote for candidate status or at the ratification phase of the Accession Treaty would amount to a violation of the SAA by the country voting against, thus a violation of EU Law.

Despite this position of Kosovo towards the EU, it is possible that Kosovo submits an application for EU Membership. Article 49 of TEU provides that “[a]ny 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.”⁵⁵ What does the term ‘European State’ mean? From the outset, it seems to suggest a state which is located in the European continent, so as to prevent states from other continents to apply for EU membership. While the SAA, in article 2, suggests that Kosovo is not a state in its relations with the

⁵¹ *Ibid*, preamble.

⁵² Treaty on the Functioning of the European Union. Official Journal of the European Union. 26.10.2012. Article 216, para. 2.

⁵³ Paul Craig, Grainne de Burca. *EU Law, Text, Cases and Materials*. 5th edition. 2011. Page 338.

⁵⁴ *Ibid*.

⁵⁵ Treaty on European Union. Official Journal of the European Union. 26.12.2012. Article 49.

EU, this cannot mean Kosovo is not a European State. As Kosovo is recognized by the majority of EU member states – twenty-three out of twenty-eight – thus it can make the argument in its application that, for the purpose of article 49 of TEU, Kosovo is a European State. What’s more important, however, is what happens after a formal application is submitted.

To date, both the EU and Kosovo have avoided the question of whether and when Kosovo will apply for EU membership. In the first meeting of SAC held on 25 November, Kosovo’s Prime Minister Isa Mustafa declared that “Kosovo is in Europe”, meaning geographically, thus it has its place in Europe, and that Kosovo will work with the five EU member states that do not recognize Kosovo to convince the same in doing so.⁵⁶ This position is taken also by the EU, which is focused on working with Kosovo so that Kosovo does not fall behind. In the first meeting of SAC, EU High Representative for Foreign Affairs and Security Policy Federica Mogherini when asked about how the non-recognition by five EU member states affects the implementation of the SAA, declared as follows, “I am sure I can talk on behalf of all the 28 Member States on their full determination to support Kosovo's European perspective. So, the status issue has never been and is not - especially in these years - preventing, has never been an issue, has never prevented the European Union from putting in place all its instruments to support Kosovo, to accompany Kosovo, in its European Union path. I am confident this will continue to be the case.”⁵⁷

As Kosovo moves forward closer to the EU, the status issue and the non-recognition by five EU member states will become an issue. Indeed, the status issue may present itself immediately following the submission of the application by Kosovo. As we saw earlier, pursuant to article 49 of TEU, following an application by a European State for membership, the Council which is composed of all EU member states’ representatives must vote unanimously after consulting the Commission and after consent of the European Parliament. This unanimous vote is required for Kosovo to achieve candidate

⁵⁶ Joint statement after first meeting of SAC. Brussels. 25.11.2016. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/11/25-eu-kosovo-stabilisation-association/>

⁵⁷ Remarks by Federica Mogherini. Brussels. 25.11.2016. Available at: https://eeas.europa.eu/headquarters/headquarters-homepage/15908/remarks-following-the-1st-meeting-of-the-stabilisation-and-association-council-between-the-european-union-and-kosovo_en

status. An abstention, however, is not considered a negative vote. Kosovo and the EU must work with the five member states that do not recognize Kosovo to not block Kosovo's path at the very beginning, by either voting in favor or abstaining from voting. Achieving candidate status is an important stage of the process, since it means Kosovo will implement the necessary reforms and negotiate with the member states the terms of its accession in the EU. However, taking into account that the implementation of reforms and the negotiation phase may last a couple of years, having achieved the candidate status will be a strong motivation for implementing reforms.

C. Key Obstacles to Achieving Candidate Status and Solutions

Despite the fact that the SAA entered into between the EU and Kosovo is an international agreement which binds the EU and its member states, there are legal and political obstacles for Kosovo to achieve the candidate status. As we saw earlier, once Kosovo files an application for membership pursuant to the procedure and conditions laid out in article 49 of TEU, the Council shall vote unanimously after having consulted the Commission and receiving the consent of the European Parliament.⁵⁸ Before a vote is taken in the Council, the latter requests an Opinion by the Commission on Kosovo's application for EU Membership. With this, the Council satisfies the obligation to consult the Commission before voting, as required by article 49 of TEU. In turn the Commission, undertakes an assessment and produces a detailed opinion which evaluates whether Kosovo meets the Copenhagen Criteria for EU membership and whether or not is capable of taking on the obligations of EU membership, that is, whether or not it is capable of implementing the EU *acquis*.

The Commission's Opinion is highly important as it will provide an assessment of the implementation of the SAA and the readiness of Kosovo to go ahead in its EU integration process. The Commission's Opinion is a technical opinion, evaluating the situation on the ground and the fulfillment of EU Membership Criteria and other EU conditionalities. The Opinion assesses the prospective fulfillment of EU Membership Criteria and full alignment with the EU *acquis* for a medium term of usually five years. It did so in the case of Croatia, where it provided that it should implement the *acquis* fully in the

⁵⁸ Treaty on European Union. Official Journal of the European Union. 26.12.2012. Article 49.

medium term of five years.⁵⁹ Similarly, in the case of Serbia, when recommending candidate status, the Commission in its Opinion provided that Serbia would be in the position to assume the obligations of EU Membership in the medium term.⁶⁰ In the case of Croatia, the Commission's Opinion recommended that negotiations be open for Croatia's accession to EU⁶¹; whereas, in the case of Serbia, it recommended that the Council votes for candidate status, but those negotiations for accession be open after it makes further steps in the dialogue for normalization of relations with Kosovo.⁶² The first, technical and political obstacle following Kosovo's application for EU Membership would be the Commission's Opinion on Kosovo's readiness to assume the obligations of EU Membership and in meeting the EU Membership Criteria.

Considering that Kosovo is not recognized by the five non-recognizing states and that the Council would be unlikely to vote affirmatively on the candidate status, it is likely that the Commission's Opinion would not recommend candidate status for Kosovo.

If, however, the Commission's Opinion is positive and recommends the Council to vote in favor of candidate status for Kosovo, the second and most important obstacle – a unanimous vote in the Council – would likely prevent Kosovo from achieving this end. Pursuant to article 49 of TEU, which among others states that the Council “...shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament...”, the Council shall vote unanimously for candidate status of Kosovo.⁶³ On the outset this legal obstacle seems insurmountable as five EU Member states do not recognize Kosovo, thus likely they would vote against. However, if we look at article 31 of the TEU, which regulates the voting procedure, there are possible legal options for Kosovo to achieve the candidate status, yet at the same time, for the non-recognizers to not change their position vis-à-vis Kosovo.

⁵⁹ Communication from the Commission – Opinion on Croatia's Application for Membership of the European Union. COM(2004). 257 final. Brussels. 20.4.2004.

⁶⁰ Communication from the Commission to the European Parliament and the Council – Commission Opinion on Serbia's Application for Membership of the European Union. COM(2011).668 final. Brussels. 12.10.2011.

⁶¹ Communication from the Commission – Opinion on Croatia's Application for Membership of the European Union. COM(2004). 257 final. Brussels. 20.4.2004.

⁶² Communication from the Commission to the European Parliament and the Council – Commission Opinion on Serbia's Application for Membership of the European Union. COM(2011).668 final. Brussels. 12.10.2011.

⁶³ Treaty on European Union. Official Journal of the European Union. 26.12.2012. Article 49.

Article 31 of TEU foresees that decisions within the European Council and the Council are taken with a unanimous vote.⁶⁴ When member states want to opt-out from implementing a decision of the Council, they can issue a qualified abstention with a formal declaration that they would not be bound by the decision taken. In that case, the abstention would not be considered as a negative vote, rather, the Council would still be able to vote unanimously if the rest of the member states vote in favor. In the case of a vote for candidate status, this procedure would help Kosovo, if the five non-recognizing states would issue qualified abstentions, through which they would maintain their position of not recognizing Kosovo while at the same time not block Kosovo's EU perspective. If any of the non-recognizing states would indicate that they will vote against, then a vote would not be taken, thus prolonging the candidate status for Kosovo.

1. What are the political or technical obstacles?

The most important political obstacle is the non-recognition by five EU member states of Kosovo's independence. It is the non-recognizing countries like Spain, Cyprus and Romania who are likely to block Kosovo's progression towards the EU in the Council. Kosovo should work together with its allies to convince the non-recognizing states not to vote against in the Council when voting for Kosovo's candidate status. As explained above, these countries could issue qualified abstentions through which they would maintain their position on Kosovo's status on the one hand, and would not block Kosovo's path towards the EU, pursuant to article 31, TEU. Kosovo should ensure before applying for EU Membership that the non-recognizers will not block its path in the EU integration process.

Kosovo should work more closely with the non-recognizing states in convincing them not to vote against but rather issue qualified abstentions. In doing so it should highlight that an abstention would be beneficial for both states, but most importantly for Kosovo as it would enable it to continue with its EU integration progress.

⁶⁴ *Ibid*, Article 31.

Another important political obstacle is the current negative climate in Europe for further enlargement of the EU, in light of the current context of rising nationalism and right wing extremisms. This political climate is likely to persist for a while or even become worse. Even if Kosovo would have the best legal and political arguments backed by the support of the majority of states, the current pessimistic climate would determine an unfavorable outcome.

2. What should Kosovo specifically do about overcoming the obstacles?

When applying for EU Membership, Kosovo should ensure it would get a positive Opinion by the Commission. In doing so it should analyze Croatia's and Serbia's experiences. In the case of Croatia, the Commission issued an extensive Opinion which assesses all the relevant fields and conditions. If Kosovo would satisfy similarly the accession criteria it should apply for membership and would likely receive a positive Opinion. In addition, Kosovo should use Serbia's experience in achieving the candidate status, by emphasizing Kosovo's constructive role in the dialogue with Serbia and the good neighborly relations with Serbia as additional criteria from the other membership criteria.

Kosovo does not have standing before the European Court of Justice, which means that it would have no legal recourse once a negative vote is taken in the Council. As such, Kosovo should be very careful in not undertaking any action which would hinder its position towards the EU.

As elaborated below, Kosovo should implement reforms and show concrete results in the implementation of the SAA and reform agenda. This, in turn, would mean the Commission's Opinion would take stock of the successful implementation of the SAA and thus likely recommend candidate status.

3. What is the experience of Western Balkans and what lessons could Kosovo learn?

Each Balkan country is at a different and unique stage of EU integration progress. Croatia is the first to join the EU as a full member, following a ten-year process of

deeply-rooted reforms, democratization, creating of a functioning market economy, rule of law and fight against corruption. Croatia's example and experience is the best to be followed and learn from. On the other hand, Kosovo could learn also from Albania's and Macedonia's experience up to achieving the candidate status. In particular, Kosovo could learn and benefit from Albania's progress thus far in Approximation of Laws with the *EU acquis*, as Albania has translated all or part of the *acquis* in Albanian. Kosovo thus would not need to translate for the second time the EU *acquis* in Albanian for purposes of Kosovo's EU integration progress. Finally, Kosovo should utilize the political dialogue with Serbia to gain benefits in the EU integration process, as Serbia did on its own – achieving candidate status and opening accession negotiations.

Other Balkan countries did not face the political and legal obstacles of the nature Kosovo faces, where five EU member states do not recognize Kosovo. As such, there is no experience on this end which Kosovo could benefit from. However, Kosovo could benefit from the experiences of other Western Balkan countries during the Commission's assessment of Kosovo's readiness on taking the EU membership obligations.

D. When Should Kosovo Apply for EU Membership – Reforms First Then Application

The main questions in Kosovo's path towards the EU is not whether it should apply for EU membership, but when it should do so. Kosovo should implement reforms first and then apply for membership. The successful implementation of the SAA on the one hand as well as reforms in key areas, will prepare Kosovo to apply for EU membership in the next five years. To this end, the SAA will undergo an implementation review process every year and one thorough review in five years.⁶⁵ Second, Kosovo and EU have just launched the European Reform Agenda which focuses on three key short term goals.⁶⁶

1. Successful implementation of SAA

⁶⁵ SAA, article 9.

⁶⁶ Kosovo Government. Prishtina. 2016. *European Reform Agenda*.

Successful implementation of SAA is an important indicator that Kosovo is ready to join the EU as well as a strong argument towards the countries that do not recognize Kosovo. Kosovo should undertake an assessment of the effectiveness and result of the various national mechanisms in place dealing with European Integration. If deemed non-successful and unnecessary Kosovo should repeal such institutions or transform them in bilateral mechanisms provided for in the SAA. As part of the SAA, Kosovo and the EU have established the Stabilization and Association Council which is the highest decision-making authority concerning the implementation of SAA. In addition, Kosovo and the EU will establish the Stabilization and Association Committee which shall assist SAC in the performance of its duties. Further, EU and Kosovo can establish subcommittees and working groups, which would be better placed to implement the SAA and undertake reforms. To date, the Stabilization and Association Committee as well as subcommittees and working groups have not been established, which in turn influence the successful implementation of the SAA.

The SAA provides the basis for cooperation between the EU and Kosovo in political, economic, and rule of law aspects between the two parties. The political dialogue will take place during SAC meetings and its main aim is to promote and enable “Kosovo’s participation in the international democratic community, should objective circumstances so permit”⁶⁷ and the “advancement of Kosovo’s European perspective and rapprochement with the EU, in line with the European perspective of the region, based on individual merits...”⁶⁸ One of the key conditionality in Kosovo’s path towards the EU is the improvement and normalization of relations with Serbia. The SAA puts a lot of emphasis in this issue.

SAA further provides that the EU and Kosovo will cooperate in the Approximation of Kosovo’s laws with the European Law or the *Acquis*.⁶⁹ This will be done progressively during the implementation of the SAA, with most important laws related to internal market, freedom, security and justice to be approximated first. Kosovo should ensure the proper implementation and enforcement of legislation.

⁶⁷ SAA, article 11.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, article 74.

SAA, in article 83 offers a strong emphasis in rule of law. This article of the SAA says that:

“In their cooperation in the field of freedom, security and justice, the Parties shall attach particular importance to the consolidation of the rule of law, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation shall notably aim at strengthening the independence, impartiality and accountability of the judiciary in Kosovo and improving its efficiency, developing adequate structures for the police, prosecutors and judges and other judicial and law enforcement bodies to adequately prepare them for cooperation in civil, commercial and criminal matters, and to enable them to effectively prevent, investigate, prosecute and adjudicate organized crime, corruption and terrorism.”⁷⁰

Kosovo’s judiciary and rule of law efforts remain very weak. The Progress Report for Kosovo for 2016 notes that “Kosovo is at an early stage of developing a well-functioning judicial system.”⁷¹ The Report further states that the “...administration of justice is slow and inefficient, and there is insufficient accountability of judicial officials. The judiciary is still vulnerable to undue political influence and rule of law institutions suffer from lack of funding and human resources.”⁷²

As stated above, irrespective of its contents, the SAA is an international agreement entered into between the EU and Kosovo. Pursuant to article 216 TFEU, this agreement binds all EU institutions and all Member States to implement.

2. *European Reform Agenda*

⁷⁰ *Ibid*, article 83.

⁷¹ European Commission. *Progress Report for Kosovo*. Brussels. 2016. Page 13.

⁷² *Ibid*.

In November 2016, Kosovo launched the European Reform Agenda (ERA) which focuses on reforms in three key areas agreed with the EU: a) good governance and rule of law; b) competitiveness and investment climate; c) employment and education.

ERA foresees concrete actions and reforms to be taken during 2016 and 2017 to address 22 key priorities for reforms in the areas covered by ERA. In the area of good governance and rule of law, ERA foresees the adoption or amendment of laws which would suspend or remove officials accused or convicted of corruption; ensure transparency and the auditing of financial statements of political parties; ensure the appointment of individuals in independent bodies, regulatory bodies and public companies based on transparent and merit; increase capacities with the commercial and administrative department of the Basic Court of Prishtina.⁷³

In the area of competitiveness and investment climate, ERA foresees seven key priorities, including among others, increase capacities of the Kosovo Investment and Enterprise Support Agency to better promote direct foreign investment; improvement of the business environment by focusing on areas covered by World Bank's Doing Business Report; support small to medium enterprises; improve the overall security of energy.⁷⁴

In the area of employment and education, ERA foresees six key priorities, including among others, improvement of employment opportunities; adoption of strategies; ensuring the implementation of the Law on Employment Agency to improve its role in the employment sector.⁷⁵ In the education sector, ERA foresees among others to undertake actions which would result in increased participation in early education opportunities; increase the quality of education and of professional education; and improve the employability of students following graduation.⁷⁶

⁷³ Kosovo Government. Prishtina. 2016. *European Reform Agenda*. Page 6.

⁷⁴ *Ibid.* Page 8.

⁷⁵ *Ibid.* Page 9.

⁷⁶ *Ibid.*

ERA contains the action plan for the implementation of the reforms and foresees that all of the key priority reforms addressed by ERA will be implemented and addressed by the end of 2017.

3. Application for EU Membership

Kosovo should prioritize the European integration agenda and prepare a strong application for EU Membership. The application shall be directed to the Council pursuant to article 49 of TEU. The application shall demonstrate Kosovo respects the values contained in article 2 of TEU as well as meets the relevant membership criteria as defined by the Copenhagen Criteria. The question related to Kosovo's statehood is the most important question that Kosovo needs to address in its application. In this regard it should use the fact that it is recognized by the majority of EU member states as well as the advisory opinion of the ICJ. The legal arguments related to Kosovo's statehood, in the absence of recognition by all EU member states, shall be carefully drafted and presented so as to prevent a possible vote against the application in the Council as well as not to create a precedent which may be relied upon as an argument for a vote against by the non-recognizing states, in particular by Spain.

Provided the SAA has just started implementation, Kosovo should demonstrate successful implementation and showcase reforms to convince the EU it is ready to apply for membership. Most importantly, Kosovo should focus its efforts in convincing the remaining five EU countries to recognize Kosovo's independence as well as implementing the necessary reforms in key priority areas, such as rule of law, economic development and regional cooperation before it submits an application for EU membership. Finally, Kosovo should draw lessons and conclusions from the regional countries, in particular Croatia to implement reforms and meet EU membership criteria.

E. Bumps on the Road – Non Recognition by Five EU Members and its Implications

Kosovo has at least one insurmountable obstacle towards joining the EU. Five member states do not recognize its independence. Cyprus, Greece, Romania, Slovakia and Spain

have not yet recognized Kosovo. So far, the non-recognition by these states has not blocked the road for Kosovo's progress towards the EU. A sui generis approach was used by which every document referring to Kosovo uses a designation to its name which states, "[t]his designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence."

Article 49 of TEU starts with the sentence "[a]ny 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."⁷⁷ This provision refers to a European state which brings the issue of Kosovo's statehood status into the discussion of whether or not Kosovo can submit an application. Since twenty-three out of twenty-eight member states recognize Kosovo, it meets the criteria to be called a 'European State'. Further, article 49 of TEU requires that negotiations are started with the candidate country for membership following a unanimous vote in the Council and consent in the European Parliament with a majority vote of the latter. Moreover, article 49 of TEU further states that "[t]he conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements."⁷⁸ It is explicitly provided in the TEU that all the member states must agree through a national ratification process for a new member to be admitted to the EU. It is unlikely that the five EU member states that do not recognize Kosovo would ratify the treaty for Kosovo's accession as long as their stance on the status question does not change. However, achieving the candidate status and start the negotiation phase which may last for years is a short term objective which Kosovo can achieve provided the five EU member states do not vote against in the Council when taking a unanimous vote on Kosovo's application.

F. Possible Solutions for Kosovo's Membership to EU

⁷⁷ Treaty on European Union. Official Journal of the European Union. 26.12.2012. Article 49.

⁷⁸ *Ibid.*

Kosovo should continue with its efforts of gaining recognition by the five EU member states as well as the international community as a means to avoid the obstacles on its way towards joining the EU. It seems unlikely that the five member states that do not recognize Kosovo would ratify Kosovo's accession to the EU as this would practically mean recognition. One solution, however, is that the member states ratify the treaty with the designation already in place, which would not prejudice their position vis-à-vis Kosovo but at the same time they would not block it in its path towards the EU.

During the negotiation phase of the Membership process, Kosovo will be negotiating the Accession Treaty to be entered into between Kosovo and EU Member States. At this stage, any Member State, the European Parliament, the Council or the Commission may request an opinion of the European Court of Justice as to whether the Accession Treaty is compatible with the Treaties [TEU and TFEU]. This procedure is laid down in article 218, para 11 of TFEU. This could be used as an argument by the non-recognizers to shift the burden of decision-making to the EU institutions. If ECJ's opinion would be in favor of Kosovo, it could be used to either vote in favor of Kosovo's membership or abstain from voting.

VII. WHAT SHOULD KOSOVO LEARN FROM CROATIA IN ITS EU PATH

Croatia is the newest EU member and an ally to Kosovo. Croatia submitted its formal application to join the EU in February 2003. It started negotiations two years later, in 2005. It signed the accession treaty in the end of 2011. Following the ratification of the accession treaty by all EU Member states and Croatia, it entered into force in July 2013. Croatia undertook systemic and deep reforms following its application for membership in the EU. In particular, Croatia focused on establishing rule of law, fight against corruption and fight against organized crime.

Kosovo can learn and benefit from Croatia's experience, in particular in this early process of preparing and submitting an application for EU membership and in undertaking reforms during the negotiation phase. Most importantly, Kosovo could utilize Croatia as a friend and ally to position itself better towards the EU and to

undertake reforms in key priority areas, such as rule of law, fight against corruption and fight against organized crime. Kosovo could benefit from Croatia's experience and utilize it in regional cooperation initiatives as well as in building better neighborly relations in the Balkans. Being the first country which has completed negotiations on the EU accession and which has become an EU member in difficult times, Croatia could transfer its knowledge and expertise to Kosovo through bilateral relations.

In establishing rule of law and fighting organized crime, Croatia arrested and convicted its prime-minister Ivo Sanader for a corruption case. Before that, Croatia implemented judicial reforms to strengthen the independence, accountability, impartiality, professionalism and efficiency of the judiciary. One of the key areas which need reform in Kosovo is the judicial system. On this aspect, Kosovo could learn from Croatia's experience as well as request Croatia's assistance in strengthening the judiciary to combat organized crime and corruption.

VIII. CONCLUSIONS

The entry into force of the SAA between the EU and Kosovo marks a new momentum for closer and more defined relationship between the EU and Kosovo. While the SAA between the EU and Kosovo differs from the SAA's entered by regional countries, still, it marks a very positive step as it does not leave Kosovo behind other countries in its path towards the EU. Most importantly, the SAA marks an international agreement entered between the EU and Kosovo, thus between the Member States and Kosovo.

The EU and Kosovo have started implementing the SAA and undertaking reforms to align Kosovo better with the EU and to address short term reform priorities. To this end, Kosovo and the EU have agreed with the European Reform Agenda which addresses key priorities for reforms and contains concrete and measurable results in addressing the key priorities.

A first meeting of the Stabilization and Association Council has been held between the EU and Kosovo discussing issues of mutual interest as well as coordinating efforts for the successful implementation of the SAA.

A second meeting has been held of the Stabilization and Association Parliamentary Committee between members of Kosovo Parliament and members of European Parliament to discuss topics of mutual interest and issues pertaining to Kosovo's path towards the EU.

Kosovo can formally apply for EU membership pursuant to article 49 of the Treaty on European Union, as there is no legal obstacle for this action, however in order for application to be successful, it is advised that Kosovo coordinates the application with key member states of the EU and work hard to find a sponsor member-state that would push forward Kosovo's application.

The best time for application for membership would be following the conclusion of the visa liberalization process and a certain degree of positive assessment of ERA and SAA implementation by the European Commission. Applying now for membership when Kosovo hasn't delivered fully in visa liberalization process will only harm the prospects of a successful bid.

Kosovo stands very well, compared to the region, in terms of transposition and alignment of national legislation with EU *Acquis*; hence Kosovo should embark on a campaign of transmitting to the EU member states the EU led reforms that have been implemented in the country. Also, before application for membership, it is essential that Kosovo, secures support from one or more sponsoring states of the bid, that would silently or publically support the application.

IX. RECOMMENDATIONS

1. Kosovo should assess and review the existing national mechanisms for EU Integration with a view to adapting and building capacities within these institutions to implement the SAA and other agreements entered into between the EU and Kosovo. Evidence-based policy making should be used to adapt or transform the existing mechanisms into new mechanisms which are better placed in implementing reforms, are better equipped with human resources and have working methods which enables the evaluation of their effectiveness.
2. Kosovo should immediately fulfill the two remaining conditions for visa liberalization, in particular ratify the agreement on the border demarcation between Kosovo and Montenegro as well as show a track record of investigations, adjudication and final convictions of high profile cases of corruption and organized crime.
3. Kosovo should undertake to implement successfully the SAA by creating all the relevant mechanisms for its implementation; creating the necessary legal infrastructure and policies. Most importantly, Kosovo needs to create bipartisan support as well as societal support for EU integration reforms.
4. Kosovo should implement successfully the European Reform Agenda as a first step to showcase reforms. Based on success and lessons learned from the implementation of ERA, Kosovo should plan and implement even more ambitious and far-reaching reforms.
5. Kosovo should undertake reforms in the rule of law sector, by aligning the Kosovo laws with the EU *Acquis*, by creating an independent and professional judicial system; by training existing and future judges on EU Law, who would be capable of implementing and interpreting EU Law.

- a. Kosovo Judicial Institute should provide trainings as part of the continuing legal education for judges and prosecutors on EU Law and the SAA.
 - b. Law Faculties across Kosovo need to have a strong emphasis in their curriculum of EU Law.
 - c. Kosovo should make use EU's financial assistance in the rule of law sector to build professional and sustainable institutions for the administration of justice.
6. Kosovo should undertake reforms in the education sector, including primary and secondary education as well as tertiary education and close the gap between school and employment.
- a. Kosovo should, in particular, make use of the results from the Organization for Economic Cooperation in Europe's Programme for International Student Assessment and undertake reforms to address the root causes of bad education quality.
 - b. At a secondary level, Kosovo should assess the existing programs and schools which aim at closing the gap between school and employment and look at opportunities to increase the number of schools providing such education. These schools should be linked with industry and employment opportunities.
 - c. At a tertiary level Kosovo needs to assess and review the public education sector and the universities it has created in the past five years with a view to assessing and increasing their capacities.
7. Kosovo should create a free and functioning economy which operates in a competitive market free from public interference. In particular, Kosovo should

focus on creating the necessary administrative capacities to ensure a competitive environment.

8. Kosovo should continue with diplomatic efforts to gain recognition by the five EU non-recognizing states as well as built support for its application among member states that recognize Kosovo, in particular with member states that play an important role in the EU, such as Germany and France and with members from which Kosovo could draw lessons, such as Croatia.
9. Kosovo should ensure it can achieve the candidate status before submitting the formal application to the Council, by engaging in political dialogue with EU and Member States that support Kosovo's integration to EU and with the non-recognizers to ensure they would not vote against.
10. Kosovo should prepare a strong application package and address it to the Council following the conclusion of the visa liberalization process and a certain degree of positive assessment of ERA and SAA implementation by the European Commission. In preparing the application, Kosovo should work closely with its allies and argue strongly on the critical legal issues of its statehood. In particular, Kosovo should argue and convince EU Member States that it is a European State pursuant to article 49 of TEU; that it is a state as a matter of international law; that it fulfills all relevant criteria for EU membership, such as the Copenhagen Criteria and that non-recognizers have committed through the SAA for Kosovo's European Perspective.
11. Kosovo should draw lessons and engage in dialogue with Croatia to benefit from its experience in the membership process. If not through bilateral exchanges, Kosovo should utilize former key individuals from Croatia in designing and implementing reforms similar to Croatia's, in particular in the field of rule of law.
12. Kosovo should draw lessons and utilize the Council's conclusions on Bosnia and Herzegovina's application for EU Membership in convincing the EU and Member States to accept Kosovo's application and decide in favor of candidate status.