

# KOSOVO AND THE COUNCIL OF EUROPE: THE ACCESSION ROADMAP



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## **ABBREVIATIONS**

**BEREC** – Body of European Regulators for Electronic Communications

**CEB** – The Council of Europe Development Bank

**CEPEJ** – European Commission for the Efficiency of Justice

**CJEU** – Court of Justice of the European Union

**CoE** – Council of Europe

**COP198** – Conference of the Parties to the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

**CPT** – European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

**ECHR** – European Convention on Human Rights

**ECtHR/Strasbourg Court** – European Court of Human Rights

**EU** – European Union

**GCEU** – General Court of the European Union

**GRECO** – The Group of States against Corruption

**GRETA** – Group of Experts on Action against Trafficking in Human Beings

**GREVIO** – Group of Experts on Action against Violence against Women and Domestic Violence

**MONEYVAL** – Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism

**ICJ** – International Court of Justice

**INTERPOL** – The International Criminal Police Organisation

**PACE** – Parliamentary Assembly of the Council of Europe

**SAA** – Stabilisation and Association Agreement

**SCSC** – Special Chamber of the Supreme Court of Kosovo

**UNESCO** – The United Nations Educational, Scientific and Cultural Organisation

**UNSC** – United Nations Security Council

**UNSCR** – United Nations Security Council Resolution

**UNMIK** – United Nations Mission in Kosovo

## EXECUTIVE SUMMARY

Kosovo's application to join the Council of Europe (CoE) is an important step in the path toward membership. It represents the long-awaited efforts to integrate into the European community and it highlights the country's progress in important areas. Kosovo is poised to join the CoE sooner rather than later and enjoy the advantages of having access to the Strasbourg Court and other mechanisms to protect human rights, promote democracy, and strengthen the rule of law. Figuratively, the ball now is in CoE's yard to acknowledge Kosovo's ability and willingness to become a member of the organisation.

The CoE membership criteria are broad and specific requirements are difficult to predict. Kosovo's constitutional framework has no gaps that would need to be addressed before membership. The Constitution provides for the direct applicability of a number of CoE conventions and the Constitutional Court (in over 95 percent of cases), refers to the European Convention on Human Rights (ECHR) or the case law of the Strasbourg Court. International reports also note progress in democracy, rule of law, and other key CoE principles. The implementation of constitutional guarantees can however prove challenging. Institutions should consider and address the issues raised by experts and international reports, including the protection of community rights, property rights, gender issues, and the enjoyment of human rights in practice.

There are no legal challenges to Kosovo's aspirations to join the CoE. The membership battle will mostly lie in the domain of politics instead, with a particular focus on the normalisation of relations with Serbia, and the (lack of) political will to implement binding court decisions and international agreements, particularly those deriving from the EU-led dialogue. A number of CoE members do not recognise Kosovo which further complicates things. The polarising views within CoE on Kosovo's statehood and it being a "European State" or not, is therefore the most controversial issue for Kosovo.

The CoE does not aim for unanimity of opinions among its members and it can take decisions without prejudice to their positions. Accessions to other international and regional organisations and initiatives also show that Kosovo can be a reliable and constructive partner, despite the debates over its statehood. The recent agreement between Kosovo and Serbia on the EU plan on the normalisation of relations marks a positive step. The implementation of the obligations stemming from this agreement will bring Kosovo closer to meeting the criteria for CoE membership. The CoE should welcome the agreement and quickly process Kosovo's application. Institutions should continue to demonstrate Kosovo's ability and willingness to join the CoE and they should prioritize their obligations to improve Kosovo's records in protecting human rights.

Potential challenges that Kosovo faces may translate into pre-accession conditions or post-accession requirements, once the Parliamentary Assembly of the Council of Europe (PACE) adopts an Opinion on Kosovo. The implementation of the Constitutional Court Case on the Visoki Decani Monastery and the Association of the Serb-Majority Municipalities may be specific post-accession requirements. Kosovo will also have to improve the efficiency of the judiciary, advance the domestic application of the ECHR and other CoE conventions, and take care of specific issues in the areas of human rights, anti-corruption, transitional justice, and gender equality. The CoE could also set these as formal or informal pre-accession conditions, which could delay the accession process. Kosovo has demonstrated over the years that it can and is willing to improve in these areas and that it deserves to have access to mechanisms that would allow Kosovo's citizens to fully enjoy their fundamental rights and freedoms.

Upon accession, Kosovo officials will sit in the Committee of Ministers and the PACE, accede more than 200 CoE instruments and join several CoE monitoring mechanisms. CoE membership will help Kosovo meet the criteria and pave its way toward EU membership, too. It will also add to the already diverse portrait of the CoE, and it will serve its purpose of establishment – that is to help interested states to improve their record in human rights, democracy, and the rule of law. With the inclusion of Kosovo within its realm, the CoE will, for the first time in its history, cover the whole Western Balkans (WB) region and the continental Europe.

The decision to invite Kosovo is ultimately a political one, and it will after all depend on the willingness of the required majority of the CoE members to support Kosovo's bid. Yet, institutions can take concrete actions to prove that Kosovo meets the key criteria to join the organisation. The benefits of accession, and

the temporal jurisdiction of the Strasbourg Court, shall serve as an incentive for institutions to prioritize CoE membership in their agendas. They shall create adequate programs and responsive plans to address all current gaps and potential future requirements.

## RECOMMENDATIONS

- Establish a **“CoE Expert Group”** to prepare and assist for all phases of the accession process, by **reviewing all membership issues and finding possible solutions.**
- Perform a **comprehensive compatibility check** (a detailed full screening) of the existing legislation with ECHR standards, CoE standards and the case-law of the ECtHR, to identify areas for legal interventions and improvements.
- Develop an **Action Plan** to address findings and recommendations and CoE standards deriving from international reports, i.e., of the CoE’s High Commissioners, GREVIO, and CPT.
- Create **mechanisms, incentives, and specific programs** for all domestic courts to apply the ECtHR case-law.
- Similar with the EU acquis, establish a **formal law-making mechanism** to provide obligatory review on the compatibility of future legislation with the ECHR standards, the CoE standards and the case-law of the ECtHR.
- **Identify the CoE conventions** to which Kosovo will accede once it becomes a member and prepare for the integration of such instruments in the domestic legal order.
- **Raise awareness** on the CoE membership process and prepare the public authorities about duties, obligations and benefits from CoE membership.

## INTRODUCTION

Kosovo applied for membership in the Council of Europe (CoE) in May 2022. It was a historical momentum for Kosovo to assume a seat in the CoE as a member state. Upon receiving Kosovo's application letter, the Secretary of CoE forwarded it to the Chair of the Committee of Ministers, which is now expected to refer the matter to PACE for an opinion. Once PACE adopts an opinion and recommends accession to the CoE, the matter goes back to the Committee of Ministers for a final vote.

To become a member state, the CoE requires that the candidate country accepts the principle of the rule of law, accepts the enjoyment of human rights and fundamental freedoms, contributes to the realization of the aim of the CoE, proves the ability and willingness to fulfil membership requirements, and be considered a "European State". The CoE bodies decide on the fulfilment of the criteria in three important voting rounds that take place throughout the accession steps.

Since its independence, Kosovo has advanced in aligning the legal framework with international human rights instruments and respecting CoE principles. It ranks higher in respecting the rule of law and other important CoE principles than several other CoE member states. While the Constitution of the Republic of Kosovo ("the Constitution") needs improvement of provisions related to the system of laws, the well-functioning of institutions, and the jurisdiction of the Constitutional Court, it establishes unambiguous provisions on human rights.<sup>1</sup> All domestic courts are bound to apply the Strasbourg Court case law, though the lack of expertise and capacities makes it difficult for the regular courts to abide by such obligation.

Despite the progress, Kosovo remains the only Western Balkans country outside the CoE and the jurisdiction of the Strasbourg Court. Twelve (12) out of forty-six (46) CoE members do not recognise Kosovo's independence, which continues to complicate Kosovo's international relations and its path to joining international organisations. The difficult process of the normalisation of relations with Serbia has highly affected the position of the non-recognisers on Kosovo's statehood. Other CoE members have also expressed their hesitation in supporting Kosovo's bid without a final agreement between the two countries.

The proper application of constitutional guarantees in practice has been challenging. Kosovo struggles with the implementation of court decisions and international agreements, particularly related to the protection of community rights. The lack of political will to enforce the Constitutional Court judgment on the Decan Monastery and implement the Association of Serb-Majority Municipalities, generated tensions among citizens and criticism from the international community. The enjoyment of language rights has also been a difficult task, especially in the field of public education, as a result of Serbia's efforts in maintaining separate education systems and the lack of cooperation to find a solution. The property rights of landless returnees have been another longstanding issue that left many returnees without access to their land and unable to fully reintegrate into their communities.

The particularities of Kosovo's case and the uncertain CoE requirements indicate that the pathway toward membership will be unpredictable and complex, despite Kosovo's proven readiness to join the CoE. An overview of Kosovo's constitutional and legal framework, the forthcoming procedural steps, and an analysis of other countries' accession stories are critical to better understand and prepare for what awaits before and after CoE membership.

## CONSTITUTIONAL GUARANTEES AND THEIR IMPLEMENTATION

The Constitution of the Republic of Kosovo ("the Constitution") promotes and protects the fundamental values of human rights, democracy, and the rule of law, in line with international and European standards.<sup>2</sup> It establishes Kosovo as a **"multi-ethnic society"** which is **"governed democratically"** in line with the **"rule of law"**, with **"full respect for internationally recognized fundamental human rights and freedoms"** and protection of the rights of **"all Communities and their members."**<sup>3</sup>

1 Balkans Group report, Constitution of Kosovo: A Comprehensive Review & Legal Analysis, September 2022.

2 Constitution of Kosovo, Article 7. This article establishes the values of the constitutional order including freedom, peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of environment, social justice, pluralism, separation of state powers, a market economy, and gender equality.

3 Ibid., Article 3.

The basis of Kosovo's legal order is enshrined in Chapters II and III of the Constitution, which guarantee the human rights and fundamental freedoms, and the rights of non-majority communities.<sup>4</sup> Case law established that any proposed constitutional amendment should be considered in light of Chapter II, along with the provisions of Chapter III since “the specific rights set forth therein are an extension of the human rights and freedoms provided in Chapter II”.<sup>5</sup>

### Chapter II (Fundamental Rights and Freedoms)

Chapter II is composed of 36 articles. Articles 21, 22, and 53 establish (i) the general principles on human rights and freedoms; (ii) the direct applicability of international instruments and agreements; and (iii) the rules of interpretation of human rights provisions guaranteed by the Constitution.

The Constitution provides an all-inclusive and extensive protection that surpasses the minimum standards set by the ECHR.

Article 21 provides that, “the basis of the legal order of the Republic of Kosovo” are “human rights and fundamental freedoms”, which are “indivisible, inalienable and inviolable”.<sup>6</sup>

Article 22 incorporates nine (9) international instruments within the domestic legal order, without a formal ratification process.<sup>7</sup> It provides for the direct applicability of several important CoE instruments including (i) the European Convention on Human Rights (ECHR); and (ii) the Council of Europe Framework Convention for the Protection of National Minorities.<sup>8</sup> The constitutional amendment of 2020, further enriched the coverage of CoE instruments.<sup>9</sup> It added the so-called “Istanbul Convention” (The Convention on Preventing and Combating Violence against Women and Domestic Violence) as the ninth (9) directly applicable international instrument.<sup>10</sup>

In case of conflict, the international instruments listed in Article 22 of the Constitution take precedence over the domestic law and other acts of public authorities in Kosovo. The Constitutional Court confirmed this order of precedence by underlining that the rights and freedoms guaranteed in these international instruments “have the status of norms of constitutional rank and are an integral part of the Constitution.”<sup>11</sup>

Article 53 is the most ground-breaking provision of the Constitution when it comes to the domestic application of ECHR standards. It obliges domestic courts and other public authorities to interpret human rights and freedoms guaranteed by the Constitution “consistent with the court decisions of the European Court of Human Rights.”<sup>12</sup> The Constitutional Court ruled that, “[...] the courts of the Republic of Kosovo, all without exception, have the obligation to interpret” human rights and freedoms guaranteed by the Constitution in line with the case-law of the Strasbourg Court.

“[...] in all instances when the Constitutional Court or the regular courts of the Republic of Kosovo interpret human rights and freedoms guaranteed by the Constitution, the human rights standards set out in the case-law of the ECtHR, should apply to these rights and freedoms when applicable. In the event of conflict between the two, the standards set by the ECtHR in interpreting the ECHR will prevail.”<sup>13</sup>

The judicial practice of the Strasbourg Court represents a “source from which rights derive [...] according to the concept that the ECHR is a living document under development”.<sup>14</sup> This way, the Constitutional Court gives additional power and prominence to the ECHR and the case-law of the Strasbourg Court.

4 Constitutional Court, Case K029/12 and K048/12, Judgment on the Proposed Amendments of the Constitution submitted by the President of the Assembly of the Republic of Kosovo on 23 March 2012 and 4 May 2012, July 2012.

5 Ibid. For a more detailed analysis on this, see Balkans Group, Constitution of Kosovo: A Comprehensive Review & Legal Analysis, September 2022.

6 Constitution of Kosovo., Article 21.

7 Ibid. Article 22; While this Article is unique, it has some resemblance with the Constitution of Bosnia and Herzegovina which was also drafted with the assistance of international experts.

8 Article 22 of the Constitution also provides for the direct applicability of a number of international human rights agreements and instruments, namely: the Universal Declaration of Human Rights, the European Convention on Human Rights and Freedoms and its Protocols, the International Covenant on Civil and Political Rights and its Protocols, the Council of Europe Framework Convention for the Protection of National Minorities, and the UN Conventions on the Elimination of All Forms of Racial Discrimination, the Elimination of All Forms of Discrimination against Women, the Rights of the Child, and against Torture.

9 Constitutional Court of Kosovo, Case No. K0162/18, Confirmation of the proposed constitutional amendment, submitted by the President of the Assembly of the Republic of Kosovo, February 2019.

10 Council of Europe Portal, Key facts about the Istanbul Convention, at <https://www.coe.int/en/web/istanbul-convention/key-facts>;

11 Constitutional Court of Kosovo, Case No. K1207/19, Constitutional Review of Judgments of the Supreme Court of the Republic of Kosovo, November 2016, § 111.

12 Ibid., para. 12.

13 Case No. K1207/19..

14 Ibid., para. 110. The ECtHR in case *Loizidou v. Turkey*, no. 15318/89, March 1995 noted that the ECHR is a living instrument which must be interpreted in the light of the present-day conditions.

15 Case No. K1207/19, § 110.



“[...] in addition to the fact that the citizens of the Republic of Kosovo may invoke specific articles of international instruments guaranteed by Article 22 of the Constitution, they may also invoke specific cases dealt by the ECtHR, in order to substantiate their requests for the protection of freedoms and human rights provided by the Constitution.”<sup>15</sup>

The following thirty-three (33) articles of Chapter II of the Constitution guarantee specific human rights and freedoms, which mirror the rights protected by ECHR, such as the right to life; prohibition of torture, cruel, inhuman, and degrading treatment; prohibition of slavery, and forced labour; right to liberty and security; right to fair and impartial trial; right to legal remedies; freedom of belief, conscience, and religion; freedom of expression; protection of property, etc.<sup>16</sup> These articles are not identical copies of the rights protected by ECHR, but they have a great resemblance and are inspired by the convention.

Several other rights are particular for Kosovo. For example, Article 39 of the Constitution regulates religious denominations and obliges the state authorities to ensure and protect religious autonomy and religious monuments in its territory.<sup>17</sup> Some other rights go further than the ECHR in the protection that they provide. For example, Kosovo’s Constitution specifically guarantees the country’s responsibility for the environment, health, and social protection, rights of children, right to work and exercise profession, etc.<sup>18</sup>

Yet, the Constitutional Court and the regular courts in Kosovo should not be confined by the rights protected by the ECHR as this convention only provides minimum protection;<sup>19</sup> “Nothing stops Kosovo authorities to go even further and provide greater protection than the ECHR and the Strasbourg Court”.<sup>20</sup>

**Chapter III (Rights of Communities and Their Members)** proclaims specific rights of the non-majority communities. Its provisions establish, among others;

- (i) the general principles of protecting the rights of communities and their members;<sup>21</sup>
- (ii) the responsibilities of institutions to ensure appropriate conditions and support for all members of communities.<sup>22</sup>
- (iii) a list of specific rights of communities and their members related to identity, education, language, religion, culture, symbols, access and representation in public life, media, etc.;<sup>23</sup>
- (iv) the establishment of a Consultative Council for Communities which acts under the authority of the President of Kosovo, to provide the communities the opportunity to comment at an early stage on legislative or policy initiatives, and have any other responsibilities and functions;<sup>24</sup> and
- (v) representation in public institutions (central and local) and quotas on employment.<sup>25</sup>

Article 57 protects the rights of all inhabitants belonging to the same national or ethnic, linguistic, or religious group, including “the right to freely choose to be treated or not to be treated as such [as a member of a community]” and provides that “no discrimination shall result from this choice or from the exercise of the rights that are connected to that choice”.<sup>26</sup> Members of communities “shall have the right to freely express, foster and develop their identity and community attributes” in accordance with the laws and without violating the rights of others.<sup>27</sup>

Article 58 obliges the Government to “particularly support cultural initiatives from communities and their members, including through financial assistance”.<sup>28</sup> It specifically requires the institutions to “respect the standards set forth in the Council of Europe Framework Convention for the Protection of National

16 Constitution of Kosovo, Articles 25, 27, 28, 29, 31, 32, 38, 40, and 46.

17 Ibid., Article 39.

18 Ibid., Articles 47, 49, 50, 51, 52.

19 Balkans Group interview with former ECtHR judge in respect of North Macedonia, October 2022.

20 Ibid.

21 Constitution of Kosovo, Article 57.

22 Ibid., Article 58.

23 Ibid., Article 59.

24 Ibid., Article 60.

25 Ibid., Articles 57-62.

26 Ibid., Articles 57.1 and 57.2.

27 Ibid., Articles 57.3 and 57.4.

28 Ibid., Article 58.1.

Minorities and the European Charter for Regional or Minority Languages”, and take all necessary measures to protect members of communities from discrimination, hostility or violence based on their national, ethnic, cultural, linguistic, or religious identity.<sup>29</sup> The government shall promote “full and effective equality” among members of communities, protect their cultural and religious heritage, act against any action aimed at their assimilation, and ensure that they exercise their constitutional rights “on a non-discriminatory basis”.<sup>30</sup>

The specific rights of communities and their members include -among others- the right to “express, maintain and develop their culture”, receive public education in one of the official languages of their choice, use and display community symbols in line with the law and international standards, have guaranteed access to media in their language, create and use their own media, participate without discrimination in the activities of local, regional and international non-governmental organisations, as well as to establish associations for culture, art, science and education.<sup>31</sup> All communities and their members shall also be entitled to “equitable representation in employment in public bodies and publicly owned enterprises at all levels” as well as representation in the institutions of local government.<sup>32</sup>

The effective implementation of these constitutional guarantees can be challenging. The victims of a violation of their constitutional rights cannot submit a complaint to the Strasbourg Court or to other CoE mechanisms.<sup>33</sup> The furthest they can go to hold the state liable is the Constitutional Court. Within its jurisdiction, the Constitutional Court plays an immensely positive role in protecting constitutional rights guaranteed by the ECHR and other international instruments.

- The vast majority of cases decided by the Constitutional Court contain specific and detailed references to the ECHR and the case-law of the Strasbourg Court.
- The Constitutional Court utilizes the ECHR standards and the ECtHR case-law in its judgments with or without violation and in its decisions on inadmissibility.
- Only less than 5% of published cases of the Constitutional Court do not refer to the ECHR standards and the ECtHR case-law, and over time the reliance on these standards has improved significantly.
- There is a considerable number of judgments and decisions where the Constitutional Court refers to reports, documents and analyses made by the different CoE bodies, including specific opinions of the Venice Commission.

But even the Constitutional Court is an ineffective remedy in some cases. For instance, “(...) the Court does not have an authorization to award “just satisfaction” or “compensation”<sup>34</sup> and it has no legal authorization “for assigning any type or method of compensation for cases where it finds a violation.”<sup>35</sup> Regular courts fall quite behind in following the ECHR standards and the case law of the Strasbourg Court, as they have very limited expertise to do so. Eventual references to the ECHR are incomplete and merely descriptive without any substantial analysis.<sup>36</sup>

Yet, numerous credible international and CoE reports show Kosovo’s progress in implementing constitutional guarantees and ECHR standards in practice. They also examine a range of issues related to human rights, democracy and the rule of law, which can help to identify areas that need further action.

29 Ibid., Article 58.2.

30 Ibid., Articles 58.3 - 58.7

31 Ibid., Article 59.

32 Ibid., Articles 61 and 62. In municipalities where at 10% of the residents belong to non-majority communities in those municipalities, a post of Vice-President of the Municipal Assembly for Communities shall be reserved for a representative of these communities.

33 The Monitoring and Evaluation Mechanisms of the CoE are: The Group of States Against Corruption (GRECO), The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), The European Committee of Social Rights, the European Commission for the Efficiency of Justice (CEPEJ), the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), the Group of Experts on Action Against Trafficking in Human Beings (GRETA), The Advisory Committee on the Framework Convention for the Protection of National Minorities, The European Commission Against Racism and Intolerance (ECRI), The Committee of Experts of the European Charter for Regional or Minority Languages, Department for the Execution of Judgments of the European Court of Human Rights For more, see <https://www.coe.int/en/web/human-rights-rule-of-law/monitoring-mechanism>, and Annex II.

34 Constitutional Court of Kosovo, Case No. K1108/18, Resolution on Inadmissibility of the Request for Constitutional Review of Decision No. 64/04 of the Civil Registration Agency, September 2019.

35 Constitutional Court of Kosovo, Case No. K119/21, Constitutional review of Judgment Rev. No. 239/2019 of 26 November 2020 of the Supreme Court of Kosovo, August 2022.

36 See for example, Basic Court in Prishtina, Case PKR. No. 70/18, February 2023. The court merely refers to article 6.2 of the ECHR and states that it issues its judgment based on such article (and other legal provisions) and upon administration of the evidence.

The 2022 EU Progress Report & the Report of the CoE's High Commissioner for Human Rights note that Kosovo continued to align its legislation with international human rights instruments directly applicable in Kosovo, and made some progress in implementing the Rule of Law Strategy and Action Plan 2021-2026 (the "Rule of Law Strategy").<sup>37</sup> They also highlight a diverse and vibrant media landscape supported by a comprehensive legal framework.

Kosovo made significant process in key focus areas of the CoE.

The reports note some deficiencies and issues as well. The EU Progress Report underlines that, "human rights do not feature high enough on the government's political agenda and that, additional efforts are needed to effectively enforce human rights in Kosovo".<sup>38</sup> The domestic mechanisms should improve to fully protect human rights, gender equality and non-majority communities at both central and local level.<sup>39</sup> The report recommends that Kosovo undertakes specific actions in the field of judiciary and fundamental rights considering that it is still at an early stage of applying European standards.<sup>40</sup>

The CoE's High Commissioner Report focused on transitional justice and social cohesion, media freedom and issues related to women's rights and gender equality.<sup>41</sup> It notes that Kosovo needs to address the following:

- **Transitional justice** issues including impunity for war-related crimes, displacements, missing persons, ethnic divisions, and other human rights violations.
- **Lack of implementation of the Law on the Use of Languages**, namely problems with availability of Serbian versions of laws and judicial documents, lack of use of Serbian language in the Assembly, etc.
- **Divisions along ethnic lines** with two parallel education systems persisting, which is considered harmful for social cohesion, durable peace, and reconciliation.
- Significant **gaps** between the legislation on **gender equality** and the actual situation on the ground.
- **Domestic violence and violence against women** which signify a serious human rights issue.<sup>42</sup>

In November 2022, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) published an important report on the alignment of measures on violence against women in Kosovo with the Istanbul Convention.<sup>43</sup> The report identifies some positive developments in the legal framework to tackle violence against women and domestic violence, and it welcomes Kosovo's efforts and commitment to advance the implementation of the Istanbul Convention.<sup>44</sup> It also notes the progress in access to justice for victims of domestic violence, and in building mechanisms and policies to prevent and combat violence against women.<sup>45</sup> In addition, the report highlights several issues that call for prompt actions by the domestic authorities.<sup>46</sup> It notes the lack of comprehensive actions to tackle sexual violence, forced marriage, sexual harassment, or violence in the digital sphere.<sup>47</sup> Kosovo needs a coordinated gender-sensitive and victim-centred approach to support, protection, and access to justice. "Victim-blaming attitudes", and women's low access to property and inheritance rights also need to be addressed.<sup>48</sup>

The CPT report considered the situation in Kosovo as satisfactory.

In 2021, the European Committee for the Prevention of Torture (CPT) reported on its findings from a monitoring visit in Kosovo.<sup>49</sup> The CPT examined the treatment and

37 Government of Kosovo, Ministry of Justice, Rule of Law Strategy Action Plan (2021-2026), July 2021.

38 European Commission, Kosovo Country Progress Report, October 2022, page 29.

39 EU Progress Report on Kosovo.

40 Ibid., Chapter 23.

41 Council of Europe, Report of the Commissioner for Human Rights, 2022.

42 Ibid.

43 Council of Europe - GREVIO, Assessment of the alignment of Kosovo's laws, policies, and other measures with the standards of the Istanbul Convention, November 2022.

44 Ibid. See also Constitutional Court Case No. KI 129/21, Constitutional review of "actions and inactions" of the Basic Court in Gjilan, the Basic Prosecutor's Office in Gjilan, the Police Station in Gračanica and the Basic Prosecutor's Office in Prishtina, March 2023. The Court referred to ECHR case law and found a violation of the Istanbul Convention due to the failure of institutions to prevent the murder of a wife by her husband in 2021.

45 GREVIO Report, 2022.

46 Ibid.

47 Ibid.

48 Ibid.

49 Council of Europe, Report to the United Nations Interim Administration Mission in Kosovo (UNMIK) on the visit to Kosovo carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 6 to 16 October 2020, September 2021.

safeguards afforded to persons kept in police custody, prisons, psychiatric establishments, and social welfare institutions, in line with the standards of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.<sup>50</sup> The report acknowledged the positive developments since 2015, especially in prison establishments, including the provision of health care and the increase in human capacities.<sup>51</sup> It also welcomed the efforts in providing occupational therapy and other psycho-social activities to the residents in the Special Institute for persons with learning disabilities and the general improvement of material conditions in terms of repair and hygiene.<sup>52</sup> Yet, CPT recommends that Kosovo authorities take certain actions for further improvement, including the establishment of formal disciplinary procedures, appropriate training and supervision of staff in psychiatric establishments, as well as a clear and comprehensive legal framework for the implementation of safeguards.<sup>53</sup>

The findings in these reports leave no space for major surprises in what the CoE will highlight when deciding on Kosovo's membership, unless new issues appear along the way which would require immediate attention. The effective implementation of constitutional guarantees and ECHR standards requires institutional reforms, as well as cooperation with international organisations and other countries to share best practices and expertise.

## THE ACCESSION PATH

The path to join the CoE entails both membership criteria and procedural steps. The Statute of the CoE sets the criteria. Article 1 echoes the aim of the CoE.<sup>54</sup> Article 3 sets the standards that a candidate state must fulfil to become a member.<sup>55</sup> Article 4 sets the “ability and willing” formula to fulfil the necessary CoE standards.<sup>56</sup>

The Committee of Ministers, assisted by the PACE, decides on a case-by-case basis whether a candidate State fulfils the criteria. Once a candidate state applies for membership, the Secretary of the CoE forwards the application to the Chair of the Committee of Ministers. The following procedural steps consist of three important voting rounds. The Committee of Ministers first takes a vote to consult the PACE on the candidate state's application. The PACE then votes on issuing an opinion on the candidate state. If the PACE opinion is positive, the Committee of Ministers takes a final vote to invite the candidate state to become a member of the CoE.

### A. MEMBERSHIP CRITERIA

Kosovo will have to meet five (5) criteria to accede the CoE:

I. Accept the **principle of the rule of law**.

II. Accept the **enjoyment of human rights and fundamental freedoms** to every person within its jurisdiction.

III. Collaborate sincerely and effectively in **realising the aim of the CoE**, namely **contribute** to achieving a **greater unity between member states**.

IV. Be deemed as **“able and willing”** to accept the criteria (1-3) above, and

V. Be considered a **“European State”** (at least by those that will vote pro-accession).

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50 Ibid.

51 Ibid.

52 Ibid.

53 Ibid.

54 “a. The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress; b. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms. c. (...) d. (...)”

55 “Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I”;

56 “Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a Member of the Council of Europe by the Committee of Ministers. Any State so invited shall become a Member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute”;

## I. Rule of Law

The CoE defines the rule of law as a “multi-dimensional concept” in which “all public acts are within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts”.<sup>57</sup> Although the CoE Statute does not determine the exact level of adherence for candidate states, it does require that they accept and respect the principle of the rule of law.



Figure 1 Kosovo's RoL Score over time (2020-2022) - WJP Index

Kosovo is a newly established democracy and multi-ethnic State governed by the rule of law as a leading value of its constitutional legal order. It has risen

three positions from 2020 to 2022 in respecting the rule of law, with key improvements in three indicators, namely absence of corruption, open government, and constraints on government powers.<sup>58</sup> Worldwide, Kosovo ranks number 57 out of 140 countries and jurisdictions, and 2nd out of 14 countries and jurisdictions in Eastern Europe and Central Asia.<sup>59</sup> It stands better than many other current CoE members including Moldova, Ukraine, Turkey, Bulgaria, Hungary, North Macedonia, Serbia, Albania and Bosnia and Herzegovina (BiH).<sup>60</sup>

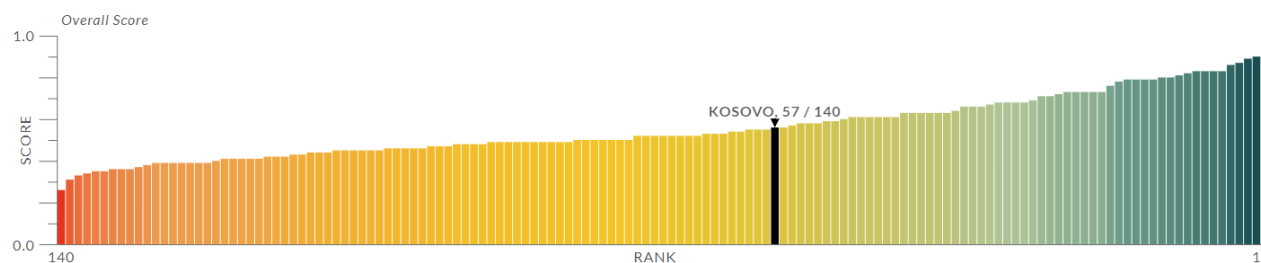


Figure 2 2022 Kosovo's worldwide ranking in RoL - WJP Index

The CoE bodies will analyse the domestic constitutional and legislative framework and the implementation of the rule of law in practice. They may raise difficulties in respecting the rule of law at the desired level, especially when it comes to the implementation of binding court decisions. But these issues cannot block CoE membership as Kosovo has continuously proven committed to accepting the rule of law as its governing principle. In the EU reporting period (June 2021 - June 2022), Kosovo increased the integrity and performance of anti-corruption mechanisms in Kosovo, further strengthened the judiciary and prosecution, and improved access to justice for all, protection of human rights, and gender equality.<sup>61</sup> The Rule of Law Strategy establishes specific objectives to increase -among others- the efficiency of the judicial and prosecutorial system, and strengthen the fight against corruption.<sup>62</sup> Though challenges remain, Kosovo took concrete steps by completing the Case Management Information System across all courts and prosecution offices, implementing the Law on Mediation through a protocol adopted by the Kosovo Judicial Council, and working on the concept document for the vetting of judges and the prosecutors.<sup>63</sup>

## II. Enjoyment of Human Rights & Freedoms

The CoE requires that a candidate state accepts the enjoyment of human rights and fundamental freedoms to every person within its jurisdiction. To determine the fulfilment of this criterion, the CoE analyses the domestic constitutional and legislative framework of each candidate state, jointly with its implementation in practice.

57 European Court of Auditors, EU Support for the rule of law in the Western Balkans: despite efforts, fundamental problems persist, 2022, at [https://www.eca.europa.eu/Lists/ECADocuments/SR22\\_01/SR\\_ROL-Balkans\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR22_01/SR_ROL-Balkans_EN.pdf)

58 World Justice Project, Rule of Law Index, 2022. The WJP calculates scores and rankings for 8 factors (along with 44 sub-factors) including Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice. See also graph below.

59 Ibid.

60 Ibid.

61 EU Progress Report, 2022.

62 Rule of Law Strategy and Action Plan, 2021-2026.

63 Ibid.



Kosovo has voluntarily articulated an independent pro-European strategic ambition.<sup>64</sup> Its Constitution recognizes human rights and fundamental freedoms for all communities and every person residing within its jurisdiction. It lays the ground for an amicable relationship with international law, considering the direct applicability (and precedence over the national law) of key international instruments. The Ombudsperson's Institution continues to play an important role in the protection and promotion of human rights at the central and local levels, and has strengthened its capacity to review cases.<sup>65</sup> The Rule of Law Strategy sets out specific measures to protect human rights and a Council for Democracy and Human Rights was set up in 2022 to support the implementation of the strategy.<sup>66</sup> The legislation on freedom of expression and media freedom are also in line with the standards of the CoE and the case law of the ECtHR.<sup>67</sup>

At the same time, implementing legislation on human rights remains a critical task, especially on domestic violence, property rights and inheritance, women's access to employment, and violence against journalists.<sup>68</sup> The mechanisms in protecting human rights need to advance and the government should prioritise fundamental rights issues.<sup>69</sup> The CoE will most likely address unresolved human rights concerns in Kosovo, with a focus on the rights of non-majority communities.<sup>70</sup>

Despite the needs for improvement, the application of the ECtHR case law before domestic courts and their obligation to assess the validity of such claims, show Kosovo's predisposition and eagerness to follow the CoE standards.<sup>71</sup> Access to the Strasbourg Court will enable Kosovo's citizens to fully enjoy their human rights and fundamental freedoms in practice.

### III. Collaboration within the CoE in Reaching the Aim of the Organisation

The CoE aims to achieve a greater unity among its members to realise joint ideals and principles related to social and economic progress.<sup>72</sup> It requires that a candidate state accepts to collaborate in an effective and sincere manner with all other members to realize the aim of the organisation.

The aim of the CoE is to move towards a "greater" unity rather than a unanimous unity.

Kosovo has built, over time, some sound evidence to demonstrate its constructivism within international organisations and bodies.<sup>73</sup> The only potential debatable issue is whether Kosovo's accession may breach the "unity" among the CoE members and cause enduring 'division' among them. Serbia fervently pushes this argument and suggests that the disagreements that member states could have on Kosovo's membership would diminish that unity.<sup>74</sup>

Kosovo's CoE membership does not have the capacity to create an enduring division between its members nor to stop the organisation from moving towards greater unity.

Only 12 out of 46 CoE member states (17% of its members) do not recognize Kosovo's independence. The question then becomes whether the unity belongs to the vast majority or a few specific members. The argument that Kosovo's membership would breach the unity in the

CoE would therefore be a legally incorrect argument and a far-fetched one for at least two reasons.

First, the aim of the CoE as per its Statute is not to create "unity" among its members in the form of uniformity of opinions on difficult issues or lack of any possible disagreement over such issues. That would be an unsustainable solution (even an undemocratic one) for such a diverse organisation. The purpose of greater unity between members is to safeguard and realise the CoE ideals and principles, rather

64 Balkans Group Interview with former CoE Staff in Kosovo and Strasbourg, October 2022.

65 EU Progress Report, 2022.

66 Government of the Republic of Kosovo, The Council for Democracy and Human Rights inauguration, April 2022, at <https://kryeministri.rks-gov.net/blog/u-inaugurua-keshilli-per-demokraci-dhe-te-drejta-te-njeriut/>

67 EU Progress Report, 2022.

68 Memorandum following the Commissioner's mission to Kosovo, June 2022.

69 EU Progress Report, 2022.

70 Balkans Group interviews with experts, October 2022.

71 Case No. K1207/19.

72 Statute of the CoE, Article 1.

73 See Kosovo's membership journeys at the Venice Commission, CoE Development Bank, World Bank Group, International Monetary Fund, European Bank for Reconstruction and Development, Organisation Internationale de la Francophonie, International Olympic Committee, Energy Community, Central European Free Trade Agreement, Regional Cooperation Council, South-East European Cooperation Process, Permanent Court of Arbitration, World Customs Organisation, etc.

74 See Serbia's official reaction following Kosovo's application for CoE membership, at <https://www.mfa.gov.rs/en/press-service/news/selakovic-serbia-will-use-all-diplomatic-and-political-means-fight-against-application-so-called-kosovo-membership-council-europe>

than to stop potential new members from joining.

Second, all CoE members accepted the Statute based rule which provides that, certain decisions (including the admission of a new member) are adopted by a qualified majority vote of 2/3 of the CoE members. The member states have therefore already acknowledged that their unity does not equate to a unanimous opinion on contentious issues. The qualified majority rule discloses the agreement to disagree between the member states for the sake of moving forward with a non-consensual question.<sup>75</sup>

The CoE has extensive experience in dealing with extremely sensitive matters such as disputes between Georgia-Russia, Azerbaijan-Armenia, Turkey-Cyprus, Russia-Ukraine, etc, and guiding them in finding a middle ground and communicating.<sup>76</sup> For example, after the armed conflict between Georgia and Russia started in 2008, the PACE issued a Resolution urging Georgia and Russia to take concrete actions toward dialogue and peace.<sup>77</sup> The ECtHR has accepted over 30 inter-State cases concerning situations of crisis or conflict.<sup>78</sup> Thus, the CoE has sufficient tools to tackle sensitive matters without damaging or breaching the unity of its members.

Once CoE votes on Kosovo's membership, business as usual may continue within the organisation.

#### IV. The “Ability” and “Willing” Formula

Known as the “capacity criterion”, it requires a candidate state to have not just willingness but also the ability to accept the principles of the rule of law and enjoyment of human rights and fundamental freedoms to every person within its jurisdiction and to collaborate sincerely and effectively in realising the aim of the CoE.<sup>79</sup>

There is no guideline showing what is the exact required level of *ability* and *willingness*.

The CoE Committee of Ministers and PACE interpret the ‘ability’ and ‘willing’ formula for each accession individually.<sup>80</sup> The same will apply to Kosovo. The CoE,

by its nature, is an organisation that aims to gather as many nations as it can within its compass. Its interest is not to exclude any State that is willing and able to be part of it and that respects the values of the CoE.

The aim of the organisation is to eventually include within its realm “all European peoples whose society and way of life are not in disaccord with a charter on human rights and the sincere expression of free democracy.”<sup>85</sup>

The history of past accessions shows that the CoE welcomes and keeps within its realm even States that were not ‘excelling’ in human rights, democracy, and the rule of law. The CoE forty-six (46) members to this day do not reflect the same level of ability and willingness to adhere to the principles of the organisation. The CoE consists of member states with consolidated democratic governance, as well as those with a transitional or hybrid regimes.<sup>82</sup> While some of them rank very high in respecting human rights and the rule of law, others have serious problems in key indicators including corruption, constraints on government powers, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.<sup>83</sup> CoE member states have also different scores in electoral process, independent media, and judicial independence.<sup>84</sup> Kosovo stands better than several CoE members in these areas.<sup>85</sup> National Democratic Governance and Judicial Framework and Independence ratings improved in Kosovo due to the stabilisation of Kosovo’s leadership, snap parliamentary and presidential elections, the

75 Statute of the CoE, Article 20(c).

76 See the list of concluded and open inter-state applications at the ECtHR which reflect some of the disagreements among CoE member states, at [https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c#n15930881868597245986205\\_pointer](https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c#n15930881868597245986205_pointer)

77 PACE Resolution 1633 (2008) on the Consequences of the War between Georgia and Russia, at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17681>.

78 European Court of Human Rights, Press Unit - Q&A on Inter-State Cases, February 2023, at [https://www.echr.coe.int/Documents/Press\\_Q\\_A\\_Inter-State\\_cases\\_ENG.pdf](https://www.echr.coe.int/Documents/Press_Q_A_Inter-State_cases_ENG.pdf)

79 Kushtrim Istrefi, August 2018.

80 Ibid.

81 Council of Europe, Documents, Records, and Archives, Winston Churchill and the Council of Europe, September 1946, at: <https://www.coe.int/en/web/documents-records-archives-information/winston-churchill-and-the-ce>.

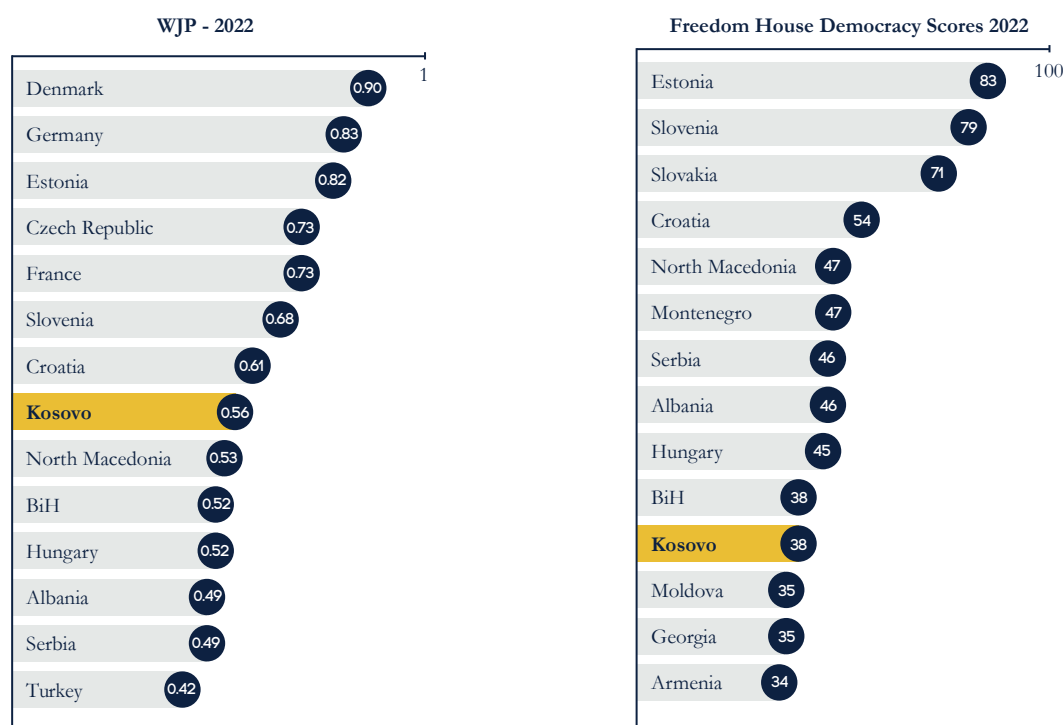
82 Freedom House, Democracy Scores, 2022. The CoE member states with transitional or hybrid regime according to Freedom House are Albania, Armenia, Bosnia and Herzegovina, Georgia, Hungary, Moldova, Montenegro, North Macedonia, Serbia, and Ukraine. The democracy score incorporates separate ratings on national and local governance, electoral process, independent media, civil society, judicial framework and independence, and corruption.

83 WJP, Rule of Law Index, 2022.

84 Freedom House, Democracy Scores, 2022.

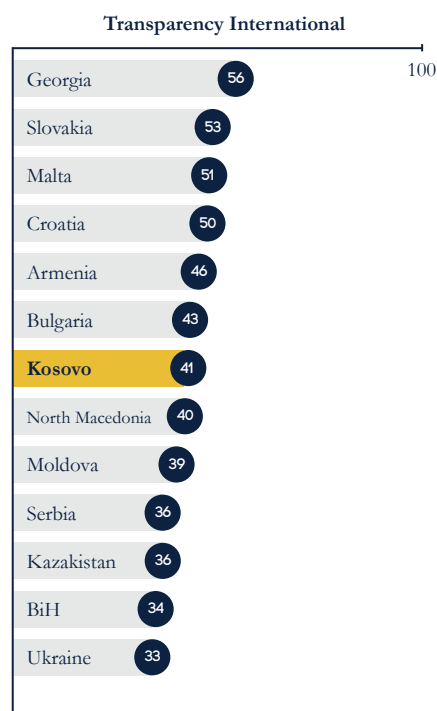
85 Ibid.

renewed efforts to reform the judiciary and operational improvements across the justice sector.<sup>86</sup>



The fight against corruption has also become a difficult task for all countries around the world, including many members of the CoE.<sup>87</sup> Most countries have made no progress in their fight against corruption in the public sector, since 2012, and “[s]ome of them have fallen to their lowest scores yet”.<sup>88</sup> The Group of States against Corruption (GRECO) reports show that many of the CoE member states fall behind in successfully implementing GRECO’s recommendations for preventing corruption and promoting integrity.<sup>89</sup> GRECO constantly calls for proper anti-corruption and integrity policies, adequate institutional frameworks, transparency and oversight of the government, declaration of assets, accountability and enforcement mechanisms.<sup>90</sup>

The lenient application of membership criteria in some cases reflects the prevailing opinion that -by having these states under its umbrella- the CoE can assist them to enhance the application of its standards at the domestic level.<sup>91</sup> The PACE and other CoE bodies conduct regular visits, ongoing dialogue with the authorities and periodic assessments to evaluate if a member state is honouring its obligations and commitments. In October 2022, PACE voted on the monitoring of Hungary over rule of law and democracy issues, due to the widespread use of cardinal laws that require 2/3 majorities which would “severely restrict political pluralism”.<sup>92</sup> Similarly, in 2020, PACE voted on the monitoring of Poland over the rule of law, after reforms that would “cumulatively undermine and severely damage the independence of the judiciary



86

Ibid.

87

Transparency International, Corruption Perceptions Index (CPI), 2022. CPI Score measures Bribery, Diversion of public funds, Officials using their public office for private gain without facing consequences, Ability of governments to contain corruption in the public sector, Excessive red tape in the public sector which may increase opportunities for corruption, Nepotistic appointments in the civil service, Laws ensuring that public officials must disclose their finances and potential conflicts of interest, Legal protection for people who report cases of bribery and corruption, State capture by narrow vested interests, and Access to information on public affairs/government activities. The data is collected by a variety of reputable institutions, including the World Bank and the World Economic Forum.

88

Ibid.

89

Council of Europe, Group of States against Corruption (GRECO), Evaluations, at <https://www.coe.int/en/web/greco/evaluations>

90

GRECO, 22<sup>nd</sup> General Activity Report, Anti-corruption trends, challenges and good practices in Europe & the United States of America, March 2022.

91

Balkans Group interview with Kushtrim Istrefi, October 2022.

92

PACE votes to begin monitoring of Hungary over rule of law and democracy issues, October 2022, at <https://pace.coe.int/en/news/8848/pace-votes-to-begin-monitoring-of-hungary-over-rule-of-law-and-democracy-issues>



and the rule of law”.<sup>93</sup>

While Kosovo’s records in the rule of law and human rights could improve, that does not mean that it cannot be deemed as “able and willing” to be part of the CoE, and institutions should continue to demonstrate that. They should use this time to address some of the pressing issues referred to in the CoE and other international reports.

The CoE shall recognize Kosovo’s ability and willingness to adhere to the aim of the organisation, and to join the CoE family as an active and constructive member.

## V. Is Kosovo a European State?

The “European State” criterion remains ‘the elephant in the room’, as the most contentious issue for Kosovo’s particular circumstances.<sup>94</sup> The Statute does not define what constitutes a “European State”. The PACE establishes that any state “whose national territory lies wholly or partly in Europe” is in principle eligible to apply for CoE membership.<sup>95</sup>

The existing CoE member states have different viewpoints on the “European State” criterion, which could affect Kosovo’s membership aspiration. Kosovo is a “European State” for at least 34 out of 46 member states that recognise Kosovo’s independence (more than 2/3 of the majority).<sup>96</sup> A few of the member states may suggest that Kosovo should join the CoE only after it becomes a member of the United Nations.<sup>97</sup>

These issues were addressed in the Legal Opinion on Kosovo prepared by the Legal Department of the Secretariat of the CoE, in September 2022.<sup>98</sup> The opinion

There are no legal challenges for Kosovo to join the CoE.

confirms that if there is a sufficient political will to back up Kosovo’s membership aspiration at the level of the Committee of Ministers and the PACE – there is no legal barrier that can legitimately prevent the realization of such political will.<sup>99</sup> Kosovo is already part of two partial agreements of the organisation, the CoE Development Bank (CEB) and the Enlarged agreement establishing the European Commission for Democracy Through Law (“Venice Commission”).<sup>100</sup> In both cases, the CoE decided without prejudice to the positions of individual CoE member states on Kosovo’s status.<sup>101</sup> This shows that the CoE is neutral and does not hold sides on the statehood issue.<sup>102</sup>

Prior admission to the United Nations is **not a legal requirement** for Kosovo’s accession to the CoE.

The Legal Opinion confirms that the Statute of the CoE does not require UN membership for accession to the CoE. Conditioning CoE membership with UN membership would even go against the CoE practice as

several countries had joined the CoE when they were not yet members of the UN (Ireland, Germany,

93 PACE decides to open monitoring of Poland over rule of law, January 2020, at <https://pace.coe.int/en/news/7766/pace-decides-to-open-monitoring-of-poland-over-rule-of-law/>

94 Andrew Forde, Setting the Cat amongst Pigeons: Kosovo’s Application for Membership of the Council of Europe, Blog of the European Journal of International Law, European Society of International Law, May 2022, at <https://www.ejiltalk.org/setting-the-cat-amongst-pigeons-kosovos-application-for-membership-of-the-council-of-europe/>.

95 PACE Recommendation 1247 on Enlargement of the Council of Europe, October 1994, at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15281&lang=en>;

96 There are 12 remaining member States of the CoE that have not recognized Kosovo, namely Greece, Cyprus, Spain, Serbia, Azerbaijan, Armenia, Romania, Slovakia, Ukraine, Bosnia and Herzegovina, Georgia, and Moldova.

97 Balkans Group interviews with international experts, October 2022.

98 The Balkans Group had access to the Legal Opinion of the CoE Secretariat issued in September 2022. Upon receiving Kosovo’s application, the Irish Chair of the Committee of Ministers sought guidance from the Secretariat of the CoE on the legal questions surrounding the application, which resulted in the Secretariat’s Legal Opinion.

99 The Legal Opinion on Kosovo.

100 Partial Agreements are not international treaties. They are merely a particular form of co-operation within CoE which allow member States to abstain from participating in a certain activity advocated by other member States. The working methods of a partial agreement are determined solely by the members of the agreement. For more, see Council of Europe Portal - Treaty Office, About Partial Agreements, at <https://www.coe.int/en/web/conventions/about-partial-agreements>

101 CEB - Kosovo to become member of the CEB, June 2013, at <https://coebank.org/en/news-and-publications/news/kosovo-become-member-ceb/>; Kosovo becomes 60th member of Venice Commission, June 2014, at <https://www.venice.coe.int/webforms/events/?country=243#:~:text=12%20September%202014%20Kosovo%20has,and%20a%20substitute%20member%20respectively.>

102 The Council of Europe uses an Asterix (\*) after the name Kosovo which reads: “All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nations’ Security Council Resolution 1244 and without prejudice to the status of Kosovo.” For more, see the webpage on Kosovo and Council of Europe, at <https://www.coe.int/en/web/programmes/kosovo>.

Switzerland, and Liechtenstein).<sup>103</sup> The Legal Opinion referred to another CoE legal opinion of 2008 on Kosovo, which had suggested that Kosovo's CoE membership may be suspended until UN accession, and noted that this was more of a political preference at the time, rather than a legal requirement. The Legal Opinion also noted that the opinion of 2008 was rendered in a different legal and factual context, before the International Court of Justice (ICJ) advisory opinion of 2010 which confirmed that Kosovo's declaration of independence in 2008 did not violate any rules of international law.<sup>104</sup>

The Court of Justice of the European Union (CJEU) referred to the ICJ ruling and noted that the "treatment of Kosovo as a third country does not affect the individual positions of the member states as to whether Kosovo has the status of an independent State".<sup>105</sup> This judgment came after Spain's appeal against the judgment of the General Court of the European Union (GCEU) on the validity of a decision of the European Commission to the CJEU providing for Kosovo's participation in the Body of European Regulators for Electronic Communications (BEREC). Spain had alleged that Kosovo is not legally a "third country" and that concluding a Stabilisation and Association Agreement (SAA) with the EU does not make it a country.

The General Court of the European Union (GCEU) ruled that the concept of a "third country" has a broader scope "which goes beyond sovereign States alone, with the result that Kosovo is capable of falling within it, without prejudice to the position of the European Union or its Member States as regards the status of Kosovo as an independent State".<sup>106</sup> The CJEU however noted that the terms "third country" and "third State" are used interchangeably, without any particular justification for the use of either term.<sup>107</sup> In many language versions of treaties the term "third country" does not appear at all, but "third State" is used as an equivalent term instead.<sup>108</sup> Also, "where both terms are used in a single language version, their use is not always aligned with that of the other language versions", which is why "the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions".<sup>109</sup> The CJEU also acknowledged that the SAA between Kosovo and the EU demonstrates Kosovo's capacity to conclude such agreements".<sup>110</sup>

Legally speaking, the CJEU judgment applies only to the EU bodies, but it may provide a strong argument for Kosovo's case, that issues of admission of new States to international mechanisms may be separate from the act of recognition.<sup>111</sup> Kosovo's participation in numerous international organisations demonstrates that Kosovo may join an organisation without it affecting the bilateral relations with non-recognisers.<sup>112</sup>

Kosovo **actively participates** in numerous regional organisations and initiatives.<sup>114</sup>

Participation in regional initiatives further strengthens Kosovo's international profile and proves its commitment to international cooperation and integration.<sup>114</sup> Kosovo

is already a member of and participates in more than 20 regional organisations.<sup>115</sup> This is important for Kosovo's aspirations to join the CoE and the EU, where regional cooperation and good relations with neighbours are important criteria for membership.

Yet, CoE members states will likely hold different views on the compliance of Kosovo's bid with the CoE's statutory rules. Even if the five (5) EU non-recognisers decide to recognise Kosovo's independence

103 Switzerland joined the United Nations in 2002, 29 years after having joined the CoE. The Federal Republic of Germany and the German Democratic Republic joined the United Nations in 1973, 23 years after having joined the Council of Europe. Ireland joined the United Nations in 1973, 23 years after having joined the CoE. Liechtenstein joined the United Nations in 1990, 12 years after having joined the CoE.

104 International Court of Justice, Advisory Opinion, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, July 2010, at <https://www.icj-cij.org/en/case/141>.

105 CJEU Case C-632/20 P, Kingdom of Spain v. European Commission, January 2023, para. 51-52.

106 GCEU Case T-370-19, Kingdom of Spain v. European Commission, September 2020, para. 36.

107 CJEU Case C-632/20 P, para. 39.

108 Ibid, para. 46.

109 Ibid, para. 40, 41, 46.

110 Ibid, para. 55.

111 Kushtrim Istrefi., Kosovo is a Country, and a Country Means a State, Rules the Court of Justice of the European Union, January 2023, at <https://www.ejiltalk.org/kosovo-is-a-country-and-a-country-means-a-state-rules-the-court-of-justice-of-the-european-union/>

112 Ibid. See also, Balkans Group Policy Report, The Brussels Dialogue between Kosovo and Serbia - Achievements and Challenges, Appendix 2: Integration of Kosovo in Regional and International Organisations, September 2020.

113 Regional Cooperation Council, Central European Free Trade Agreement, the Transport Community Treaty Secretariat, the Energy Community, the Migration, Asylum and Refugees Regional Initiative, the Regional Youth Cooperation Organisation, the Western Balkans Fund, Energy Community Secretariat, Regional Arms Control Verification and Implementation Assistance Centre, South-East European Cooperation Process, South-Eastern Europe Defense Ministerial, Brod-Brijuni Initiative.

114 Balkans Group Policy Report, Kosovo's Participation and Representation in Regional Organisations - Mapping the gaps and opportunities, October 2021.

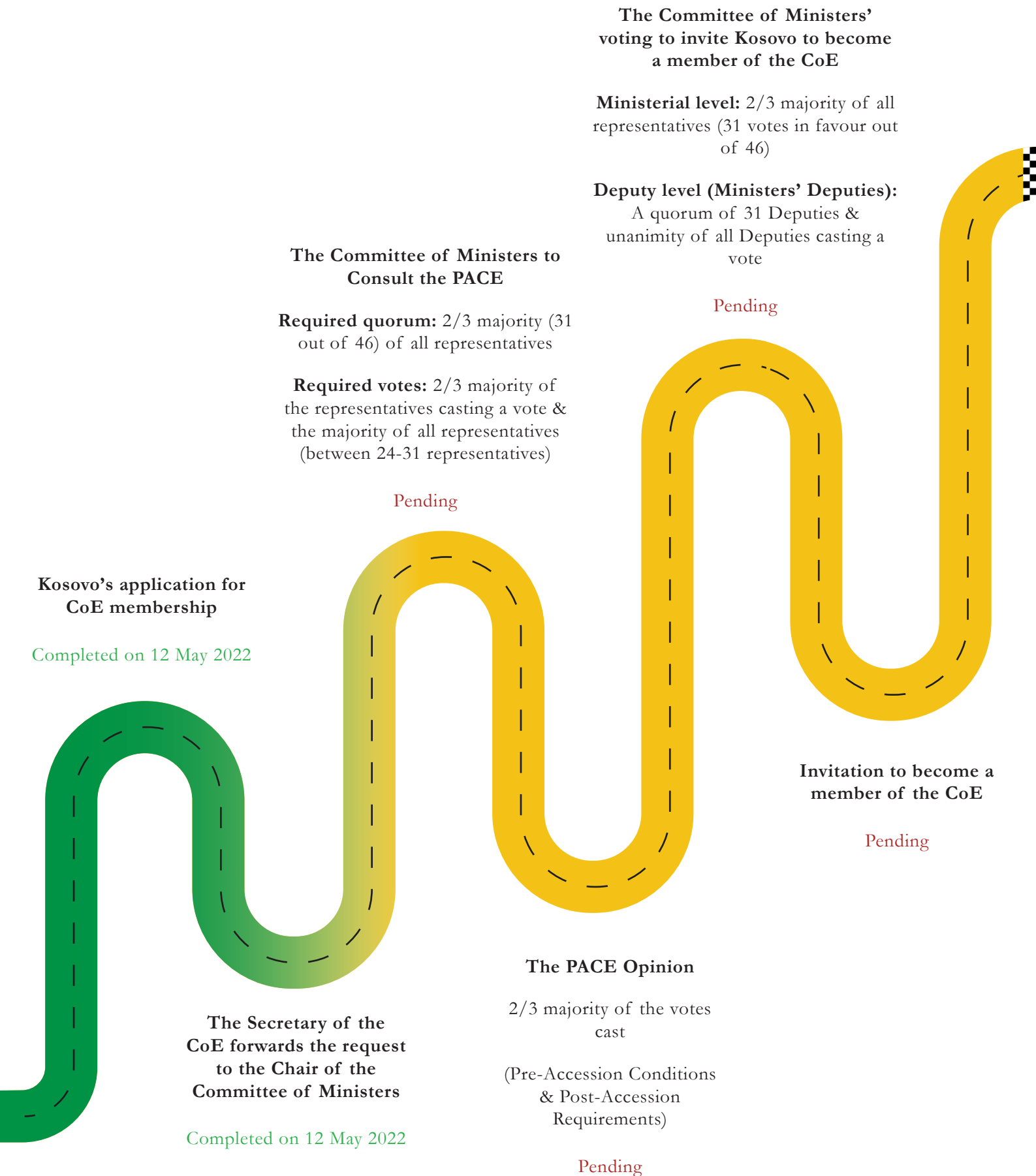
115 Ibid. See also, Balkans Group Policy Report, The Brussels Dialogue between Kosovo and Serbia - Achievements and Challenges, Appendix 2: Integration of Kosovo in Regional and International Organisations, September 2020.

following a normalisation agreement between Kosovo and Serbia, there will certainly be other CoE members who will likely not do so, until Kosovo joins the United Nations. In these cases when consensus is clearly out of reach, the solution for the CoE bodies is to turn to voting as a means of resolving possible disagreements.

Member states can hold to their opinion, but they are not entitled to block new members from joining in case the necessary majority in favour prevails. If PACE invites Kosovo to join the organisation and if the Committee of Ministers votes in favour of membership, the debate over its statehood may remain in the records, but it will not be an issue. Theoretically speaking, Kosovo should have the necessary votes to overrule those who are against its CoE accession and obtain the necessary majorities in both CoE bodies (despite the expected opposition and heated debate).

The member states that do not recognize Kosovo as an independent State may very well continue to hold their individual stance on the statehood issue after Kosovo's CoE accession.

But accession to the CoE is not purely arithmetical. Several possible scenarios of voting could take place in the Committee of Ministers and the PACE. The fact that more than 2/3 of the current CoE member states recognize Kosovo does not automatically mean that they support its aspiration to join the organisation. Good examples of that are the failure to accede to United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the International Criminal Police Organisation (INTERPOL). Some member states that do not recognise Kosovo could potentially, with certain disclaimers, join in supporting its bid or at least be neutral and not obstruct the accession process. The second guesses and the possible hesitation of the CoE members could impact Kosovo's journey towards membership.



## B. PROCEDURAL ACCESSION STEPS

Each CoE member state has its own accession story.<sup>116</sup> The procedure and the duration of the accession process are not predefined and are difficult to estimate.<sup>117</sup> For some member states the accession took less than one year (Montenegro); while for some others it took two years (North Macedonia); three years (Albania and Former Yugoslav Republic succeeded then by Serbia), four years (Croatia); five years (Armenia and Azerbaijan); or even seven years (Bosnia and Herzegovina). Kosovo's process is expected to last for at least 3-4 years and consist of specific post-accession requirements, as well as potential additional layers of pre-accession conditions.<sup>118</sup>

Once it received Kosovo's application, the Secretary of the CoE forwarded it to the Chair of the Committee of Ministers.<sup>119</sup> There are now four remaining steps that Kosovo will go through and three important votes to secure.

### The Committee of Ministers to Consult the PACE

Kosovo's application still sits with the Committee of Ministers, pending a decision to refer it to the PACE for an Opinion. The CoE Statutory Resolution (51)30 A establishes that the Committee of Ministers will "first consult" the PACE "in conformity with the established practice", before inviting a State to become a member of the CoE.<sup>120</sup> The Committee of Ministers has full discretion to decide when it forwards a case to the PACE. So far, the Committee of Ministers has not decided to put Kosovo's application on the agenda, and the reasons for that remain unknown.

There is no deadline or timeline as to when the Committee of Ministers should consult the PACE.

The Committee of Ministers comprised of Ministers of Foreign Affairs who represent 46 CoE member states, meets once a year for a plenary session.<sup>121</sup> This is called the **Ministerial Level**. The Committee of Ministers at the **Deputy level** (the Ministers' Deputies) is composed of permanent representatives of the member states. It organises three (3) meetings per month, and the Chair can convene extraordinary meetings on urgent matters.<sup>122</sup> The Committee of Ministers could therefore take a decision to consult the PACE, either at the Ministerial level or at the Deputy level.

The Committee of Ministers decision on consulting PACE, requires the quorum of two-thirds (2/3) of the representatives of the CoE members (31 out of 46).<sup>123</sup> The required majority of votes in both Ministerial and Deputy level would be 2/3 majority of the representatives casting a vote and the majority of the representatives entitled to sit on the Committee of Ministers.<sup>124</sup> Thus, the required majority of votes for Kosovo would be between 24 to 31 representatives, depending on the number of representatives casting a vote.

In the past, the Committee of Ministers consulted the PACE in all instances for each accession process for new members. The content of the Committee of Ministers' resolution to consult the PACE varies based on the complexity of issues that a candidate country deals with. For some candidates, the Committee of Ministers merely requests an opinion in accordance with the existing rules and practice.<sup>125</sup> For example, in the case of Montenegro, the Committee of Ministers simply stated the request for an opinion by PACE.

116 See, for example, accessions to the CoE of Albania (1995), North Macedonia (1995), Armenia and Azerbaijan (2001), Bosnia and Herzegovina (2002), Serbia (2003), Monaco (2004) and Montenegro (2007), at <https://www.coe.int/en/web/portal/46-members-states>

117 Legal Opinion on Kosovo.

118 Balkans Group interviews with experts, October 2022.

119 The application for membership was submitted by Kosovo's Minister of Foreign Affairs, Donika Gërvalla-Schwarz, who stated that this is a "new chapter" and that Kosovo deserves to become a member of the CoE; Evropa e Lire, D. Balii, Kosovo applies for CoE Membership, May 2022, at <https://www.evropaelire.org/a/nisma-per-anetaresimin-e-kosoves-ne-keshillin-e-evropes-/31845998.html>

120 Council of Europe, Committee of Ministers, Statutory Resolution (51) 30 A of the Committee of Ministers, May 1951.

121 See for example the 132nd Session held in Turin, Italy on 20 May 2022, in the framework of the Italian Presidency 2022 Session of the Committee of Ministers, at <https://www.coe.int/en/web/cm/ministerial-level>

122 For more, see Deputies level webpage information, at <https://www.coe.int/en/web/cm/deputy-level>.

123 Rules of Procedure of the Council of Europe's Committee of Ministers, consolidated version, Article 11, 1954.

124 Article 20 (d) of the Statute of the CoE reads: "All other Resolutions of the Committee, (...) require a two-thirds majority of the representatives casting a vote and of a majority of representative entitled to sit on the Committee."

125 Resolution of the Committee of Ministers requesting an opinion from the PACE in the case of Montenegro, June 2006, at <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11405&lang=EN>

“[i]n accordance with the Committee of Ministers’ decision expressed at the 8th Session in May 1951, to consult the Parliamentary Assembly before inviting a State to become a member or an associated member of the Council of Europe in accordance with the provisions of the Statute, I have the honour to transmit to you the decision adopted by the Ministers Deputies at their 967th meeting on 14 June 2006, concerning the Republic of Montenegro’s application for membership of the Council of Europe”<sup>130</sup>.

An early Resolution to consult the PACE for the accession of the Principality of Monaco, also shows that the Committee of Ministers is less specific for candidate states who have fewer complex issues with human rights.

*The Committee of Ministers,*

**Recalling** its decision, expressed at its 8th Session in May 1951, to consult the PACE before inviting a State to become a member or associate member of the Council of Europe in conformity with the provisions of the Statute;

**Considering** that the Government of the Principality of Monaco, in its letter of 15 October 1998 addressed to the Secretary General of the Council of Europe, expressed the wish to be invited to become a Member of the Council of Europe and declared its readiness to respect the principles stated in Article 3 of the Statute, as well as the intention to sign the European Convention on Human Rights, as amended by its Protocol No. 11;

**Having noted** with satisfaction the interest shown by the Principality of Monaco in acceding to the Organisation,

**Recalling** that such accession presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law, and respect for human rights,

**Invites the PACE to express its opinion on the matter.**<sup>127</sup>

For candidates that had more serious human rights and other issues related to the CoE principles, the text of the Resolution of the Committee of Ministers contained additional specific requirements for the PACE.<sup>128</sup> For example, in the case of Bosnia and Herzegovina, the Committee of Ministers pointed out to the PACE that the country needs to “**respect strictly the commitments undertaken (...) in the framework of the Peace Agreements**”.<sup>129</sup> In the case of Federal Republic of Yugoslavia, the Committee of Ministers invited the PACE to express its opinion while bringing up numerous important issues, such as cooperation with the International Criminal Tribunal for the Former Yugoslavia, rights of national minorities, etc.<sup>130</sup> In its letter directed to the PACE for Azerbaijan, the Committee of Minister mentioned the necessity to meet requirements related to pluralist democracy, legislative and judicial system, etc.<sup>131</sup>

In Kosovo’s case, the Resolution of the Committee of Ministers to consult the PACE could potentially contain some elements of the Resolution on Principality of Monaco and some other additional elements that will be specific to Kosovo.<sup>132</sup>

Once the Committee of Ministers forwards Kosovo’s application to the PACE for an Opinion, the membership perspective is a “done deal”.<sup>133</sup> The conclusion of this step means that:

Referring the matter to the PACE for an Opinion is the most fundamental step, aside from the final vote on accession.

126

Ibid.

127 PACE, Resolution on the Principality of Monaco, November 1998, at <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8419&lang=EN>.

128 Resolutions of the Committee of Ministers referring the matter for an Opinion to PACE in the case of Bosnia and Herzegovina, at <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8457&lang=EN> and in the case of other member States, at <http://semantic-pace.net/?search=KjoafGNhdGVnb3J5X3N0c9l9ljbjoQWRvchRIZCB0ZXB0Ilg==&lang=en>.

129 Committee of Ministers, Bosnia and Herzegovina’s request to become a member state of the Council of Europe, January 1999, at <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=8457&lang=EN>

130 Committee of Ministers, Resolution on the Federal Republic of Yugoslavia, December 2000, at <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9128&lang=EN>

131 Committee of Ministers, Azerbaijan Request for an opinion, September 1996, at <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7534&lang=EN>

132 Balkans Group interviews with experts, October 2022.

133 Balkans Group interview with international experts, October 2022.



- (i) the membership perspective becomes real;
- (ii) Kosovo officially becomes a candidate for membership;
- (iii) There is no plausible scenario under which the PACE would opine that the Committee of Ministers should not invite Kosovo to join the organization; and
- (iv) Accession to the CoE will be just a matter of time and politics.<sup>134</sup>

The Presidency of the Committee of Ministers is headed by Iceland until May 2023. This is a particularly significant Presidency as it will host the 4<sup>th</sup> Summit of Heads of States in Reykjavik on May 2023.<sup>135</sup> It is uncertain whether the Committee of Ministers will decide to consult the PACE on Kosovo's application during the Icelandic Presidency

Latvia	May – November 2023
Liechtenstein	November – May 2024
Lithuania	May – November 2024

or in subsequent presidencies. Until the Committee of Ministers decides to consult the PACE, Kosovo's application will be on hold, and will not be substantially assessed against the CoE standards.

## The PACE Opinion

The proceedings before the PACE will commence as soon as the Committee of Ministers refers Kosovo's application for an Opinion. The PACE will prepare its Opinion assisted by the Political Affairs Committee, the Committee on Legal Affairs and Human Rights, and two eminent jurists appointed by its Bureau. The PACE might also consult other internal committees if it deems it necessary.

The Political Affairs Committee will assign a Rapporteur among its members to prepare a Report on Kosovo.<sup>136</sup> The focus of this Report will be to prepare a recommendation on whether Kosovo should be invited to join the CoE and a Draft Opinion for the PACE to discuss and vote on. This Draft Opinion typically becomes the adopted Final Opinion with the amendments proposed in the deliberative process before the PACE. The Report will also contain an explanatory memorandum that will elaborate on all issues in more extensive detail.

The Committee on Legal Affairs and Human Rights will also assign a rapporteur to prepare an Opinion on Kosovo.<sup>137</sup> The focus of this Opinion will be to analyse all issues related to human rights standards and to assist the Political Affairs Committee in preparing the draft Opinion.

With a decision taken by its Bureau, PACE will also seek advice from eminent jurists (either judges of the EctHR or members of the Venice Commission) to prepare a report on Kosovo. They will assess the conformity of Kosovo's legal order with the fundamental CoE principles. Both PACE committees will use the experts' report to complete the dossier on membership eligibility. In the case of Montenegro (2007), the Bureau asked two eminent legal experts from the Venice Commission "to assess the conformity of the legal order in the Republic of Montenegro with the fundamental principles of the Council of Europe".<sup>138</sup> In the case of Principality of Monaco (2004), the PACE Bureau requested from two judges of the Strasbourg Court "to assess the conformity of the legal structure in Monaco with the Council of Europe fundamental principles."<sup>139</sup>

The rapporteurs and experts will screen and thoroughly analyse Kosovo's entire constitutional and legislative framework vis-à-vis the core CoE values and standards. The experts will pay special attention to the implementation of the CoE standards in practice and will point out areas that need more implementation efforts.

This step is substantive to the accession process.

134

ibid.

135 Summit of Heads of State and Government of the Council of Europe, to be held on 16-17 May 2023 in Reykjavik, Iceland, at <https://www.coe.int/en/web/portal/-/summit-in-reykjavik-to-renew-the-conscience-of-europe>. This summit is held with the purpose to "renew the 'Conscience of Europe'".

136 See for example the Reports of the Political Affairs Committee prepared in the case of accessions from 1995 and onwards, at <http://semantic-pace.net/?search=KjoafGNhdGVnb3J5X3N0cl9lbjoiQWRvchRIZCB0ZXh0Ilg==&lang=en>.

137 See for example the Opinions of the Committee on Legal Affairs and Human Rights for accessions from 1995 and onwards, at <http://semantic-pace.net/?search=KjoafGNhdGVnb3J5X3N0cl9lbjoiQWRvchRIZCB0ZXh0Ilg==&lang=en>.

138 PACE Opinion 261 (2007), on Accession of the Republic of Montenegro to the Council of Europe, April 2007.

139 PACE Opinion 250 (2004), on The Principality of Monaco's application for membership of the Council of Europe, at <https://pace.coe.int/en/files/17206/html>.

Once the two PACE committees complete their Report and Draft Opinion, they will table it to the PACE Plenary for discussion and vote. In accordance with Article 29 of the Statute of the CoE and Article 41.1.a of the Rules of Procedure of the PACE, the draft Opinion on Kosovo would be adopted with a **2/3 majority of the votes cast**.<sup>140</sup> Among many other factors, PACE's positive recommendation will help to convince the members of the Committee of Ministers to conclude the accession journey in a successful manner.

Up to date, the PACE always issued positive opinions recommending that the candidate States are invited to join the organisation. The opinion can potentially contain pre-accession conditions or post-accession requirements.<sup>141</sup> The type of either pre-accession conditions or post-accession requirements for Kosovo will greatly depend on the report of the eminent experts who will assist the PACE in drafting the final Opinion on Kosovo.

Past accession practices reveal that the CoE bodies rarely set pre-accession conditions.

The PACE rarely established specific pre-accession conditions in the past. For Monaco, PACE recommended to the Committee of Ministers to issue a membership invitation only after a Joint Committee confirms with the progress in protecting the rights of the Monegasque citizens, as per the CoE's requirements.<sup>142</sup>

“(…) **invite Monaco** to become a member of the Council of Europe as soon as the Assembly and the Committee of Ministers have noted in their Joint Committee that the consultations between Monaco and France on the revision of the 1930 convention have opened the possibility for implementing, in the near future, the principle of non-discrimination, **by allowing Monégasque citizens to be appointed to the senior Monégasque governmental and public posts that are currently reserved for French nationals.**”<sup>143</sup>

Kosovo's particular situation may give space to the CoE bodies to set formal pre-accession conditions, including the implementation of the Constitutional Court on the Visoki Decani Monastery, the Association of Serb Municipalities, and other political matters specifically related to the effective protection of minority rights, or other informal conditions related to any of the pressing issues that the CoE bodies may identify.<sup>144</sup>

In most cases, the PACE sets specific post-accession requirements. It required several candidates in the past to amend their constitutions or enact a new one within a certain time after accession. The Former Federal Republic of Yugoslavia was asked to adopt a new constitutional charter, which required the amendment of the constitutions of Serbia and Montenegro.<sup>145</sup> Montenegro was also required to “(…) adopt a new constitution within one year at the most [after accession], in close co-operation with the Venice Commission and in full compliance with international standards”.<sup>146</sup> PACE recommended that the Committee of Ministers “invite(s) Montenegro to become a member of the Council of Europe” on the “basis of the undertakings set out above.” This means that Montenegro undertook to follow its post-accession commitments to the CoE as the PACE did not condition its accession with a confirmation by a Joint Committee of the main CoE bodies. The PACE's Opinion on Montenegro contained, among many others, requirements such as:

▸ **Signing and ratification of several conventions of the CoE** within one (or two) year(s) of accession, including the ECHR, and a considerable number of other CoE conventions.<sup>147</sup>

▸ **Completing a constitutional reform** in cooperation with the Venice Commission and in compliance with international standards.

140 Article 41.1.a of the Rules of Procedure of the PACE provides that: “for the adoption of a draft recommendation or a draft opinion to the Committee of Ministers, for the adoption of urgent procedure, for an alteration to the agenda, for the setting up of a committee, for the fixing of the date for the opening or resumption of ordinary sessions and a decision to dismiss the holder of an elective office, a majority of two-thirds of the votes cast” at [http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp?id=ENToc\\_N0A29C3B0N0A332AB8#Format-It](http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp?id=ENToc_N0A29C3B0N0A332AB8#Format-It) (note: only affirmative and negative votes count in calculating the number of votes cast)

141 In numerous cases, the PACE recommended that post-accession requirements are set as a means to ensure proper alignment with CoE standards. Officially, the PACE sets specific pre-accession conditions very rarely. Pre-accession conditions are mandatory before becoming a member state of the CoE. Post-accession requirements are specific undertakings and commitments that a member state must address after accession.

142 PACE Opinion 250 (2004) on the Principality of Monaco.

143 Ibid.

144 Balkans Group interviews with experts, 2022.

145 Opinion of the PACE on the Federal Republic of Yugoslavia no. 239(2002), September 2002.

146 Opinion of the PACE on Montenegro no. 261(2007), April 2007.

147 For a full list of CoE treaties see Council of Europe, see <https://www.coe.int/en/web/conventions/full-list>



- **Adopting a new constitution** within one year of accession in line with specific requirements set in the PACE Opinion regarding the provisions which must be included in the Constitution.
- **Taking specific measures in the domestic legal system:** (i) adopting specific new laws; (ii) amending current legislation that was not considered compatible with the CoE standards; (iii) speeding up reforms in the judicial sector aimed at increasing the independence and professionalism of judges and prosecutors; (iv) creating sustainable tools for the implementation of ECHR and CoE standards at the domestic level, etc.
- **Taking specific measures in the area of human rights:** (i) respecting the independence of the Ombudsperson; (ii) ensuring that laws regarding human and minority rights are rapidly implemented; (iii) ensuring safe and sustainable return of refugees and displaced persons; (iv) implementing asylum legislation; (v) implementing the strategy and action plan for the integration of Roma; (vi) improving prison conditions regarding vulnerable groups; (vii) ensuring prompt investigation into allegations of torture or ill-treatment; (viii) combating human trafficking; (ix) collaborating with the International Criminal Tribunal for the Former Yugoslavia, etc.<sup>148</sup>

The PACE also had set very specific post-accession requirements for Russia, Georgia, Armenia, Moldova, Azerbaijan, Bosnia and Herzegovina, Former Republic of Yugoslavia, Croatia, etc.<sup>149</sup> The CoE bodies did not set any post-accession requirements, nor pre-accession conditions only for candidates considered advanced democracies. For example, PACE merely recognized for Finland that it “[...] is an old-established parliamentary democracy and respects the principle of the rule of law, as well as the human rights and fundamental freedoms embodied in the E(CHR).”<sup>150</sup>

The PACE will most likely not require Kosovo to amend its Constitution nor adopt a new one upon accession. Constitutional provisions show that the leading values of Kosovo’s contemporary constitutional order are in line with the CoE values and standards.<sup>151</sup> The CoE bodies, however, might have specific recommendations for new reforms and mechanisms in certain areas related to the principles of ECHR and other CoE conventions. Similarly to Montenegro, the CoE will likely list a number of conventions that Kosovo will need to accede combined with very specific requirements in the field of human rights, minority rights, democracy, rule of law, transitional justice, gender issues, women’s rights, domestic violence and violence against women, LGBTIQ+ rights, functioning of the judiciary, the effectiveness of domestic courts and legal remedies to address ECHR violations, functioning of the public administration, fight against corruption, money-laundering etc.<sup>152</sup>

The application of the ECtHR case law will also be a major test for the domestic courts. PACE may refer in its Opinion to the discrepancy in the application of the ECHR and the ECtHR case law by the Constitutional Court and domestic courts. Up until accession, the Constitutional Court will continue to be the sole arbiter as to whether the regular courts are fulfilling their constitutional duty. After accession, the ECtHR itself will be entitled to award pecuniary and non-pecuniary damages for violations of ECHR standards by the domestic courts, including the Constitutional Court. The domestic courts will therefore have to adequately apply the ECtHR case law and ECHR standards. CoE bodies could require new mechanisms, incentives, and specific programs to ensure that all domestic courts refer to the case law of the ECtHR.<sup>153</sup>

## The Committee of Ministers’ voting to invite Kosovo to join the CoE

Once the PACE adopts its Opinion on Kosovo the matter will be back again with the Committee of Ministers. Assuming that PACE recommends Kosovo’s membership, the Committee of Ministers will take the final vote to adopt a resolution inviting Kosovo to become a member of the CoE. Two possible scenarios of voting could arise in this step.<sup>154</sup>

148 PACE, Opinion 261 on Accession of the Republic of Montenegro to the Council of Europe, April 2007.

149 For more, see the list of all accessions and PACE opinions, at <http://semantic-pace.net/?search=Kjoqf6NhdGVnb3J5X3N0cD9lbnJoiQWRvcHRlZCBOZXh0Ilg=&lang=en>

150 PACE Opinion 144 (1989) on Application by Finland for membership of the Council of Europe, February 1989, at <https://pace.coe.int/en/files/13883/html>

151 Constitution of Kosovo, Article 7.

152 Balkans Group interviews with experts, 2022.

153 Ibid.

154 The Legal Opinion on Kosovo.

1) If the Committee of Ministers meets at the **Ministerial level**, Kosovo would need 2/3 majority of all the representatives entitled to sit on the Committee (**31 votes in favour out of 46 representatives**)<sup>155</sup>

2) If the Committee of Ministers meets at the **Deputy Level**, Kosovo would need a **quorum of 31 of the Deputies and unanimity of all Deputies casting a vote**.<sup>156</sup> Abstentions which may be accompanied by an explanatory statement do not prevent the adoption by unanimity.<sup>157</sup>

The Committee of Ministers will most probably table a vote on Kosovo's membership only when there is sufficient evidence to believe that the vote will succeed. While the support of the recognizing member states will be crucial, it is equally important for Kosovo's institutions to obtain assurances that the non-recognizers will not obstruct the process.

## Invitation to Become a Member of the CoE

Any State invited by the Committee of Ministers to join the CoE “shall become a member on the deposit on its behalf with the Secretary General of an instrument of accession to the present Statute.”<sup>158</sup> After the Committee of Ministers' invitation to join the organisation, Kosovo will need to deposit the instrument of accession to the Secretary General of the CoE. Once it becomes a CoE member state, Kosovo will need to formally sign and ratify the ECHR and all other suggested CoE conventions within one year from accession (or two years for some conventions). Kosovo will also need to show progress in all areas as required by the PACE and the Committee of Ministers. The CoE bodies and Kosovo authorities will also agree on a post-accession cooperation program to manage the fulfilment of commitments.<sup>159</sup>

The Committee of Ministers and the PACE will continue to monitor Kosovo's fulfilment of its post-accession commitments and undertakings.

Upon accession, Kosovo will finally be able to benefit from the protection mechanisms of the oldest European human rights organisation. The ECHR will be officially applicable in Kosovo only upon its ratification and entry into force, and only from then on interested parties may sue Kosovo before the Strasbourg Court.<sup>160</sup> This is due to the temporal jurisdiction of the Strasbourg Court which means that the ECHR provisions will not bind Kosovo concerning any acts, facts, and omissions that occurred before the entry into force of the ECHR.<sup>161</sup> This is in accordance with the principle of non-retroactivity of treaties as a general rule of international law.<sup>162</sup>

The ECtHR rejects around 90% of all applications received as inadmissible for not meeting admissibility requirements including the temporal jurisdiction of the Court.<sup>163</sup> The “critical date” to determine the jurisdiction of ECtHR is the date of entry into force of the ECHR and Protocols.<sup>164</sup> The Strasbourg Court established the test and criteria to determine its jurisdiction in case **Blečić v. Croatia** where it held that it is essential to identify, in each specific case, the exact time of the alleged interference.<sup>165</sup> For this, the Court takes into account both the facts of which the applicant complains and the scope of the Convention right alleged to have been violated.<sup>166</sup>

“[...] the Court's temporal jurisdiction is to be determined in relation to the facts constitutive of the alleged interference. The subsequent failure of remedies aimed at redressing that interference cannot bring it within the Court's temporal jurisdiction.”<sup>171</sup>

155 Article 20(c) of the Statute of the CoE: “Resolutions of the Committee under Articles 4 and 5 require a two thirds majority of all representatives entitled to sit on the Committee”.

156 Article 7 of the Rules of Procedure for the Meetings of the Ministers' Deputies; Article 9 (1) (f) of the Rules of Procedure for the Meetings of the Ministers' Deputies.

157 Article 10 (2) (d) of the Rules of Procedure for the Meetings of the Minister's Deputies.

158 Statute of the CoE, Article 4.

159 Balkans Group interviews with experts, October 2022.

160 ECtHR, Almeida Garrett, Mascarenhas Falcão and Others v. Portugal, January 2000, § 43.

161 ECtHR, Šilih v Slovenia (Grand Chamber), April 2009, § 140; ECtHR, Blečić v. Croatia (Grand Chamber), March 2006, § 70.

162 ECtHR, Practical Guide on Admissibility Criteria, August 2022, at [https://www.echr.coe.int/documents/admissibility\\_guide\\_eng.pdf](https://www.echr.coe.int/documents/admissibility_guide_eng.pdf)

163 Ibid.

164 ECtHR, Silh v Slovenia.

165 ECtHR, Blečić v. Croatia, § 82.

166 Ibid.

167 Ibid., § 77.

An applicant who considers that a State violated his/her rights guaranteed under the ECHR is usually expected to first seek redress from the domestic courts.<sup>168</sup> For example, the applicant shall appeal a decision of a domestic first instance court to a domestic higher court. If they fail to provide for remedies, and the applicant then turns to the ECtHR, the latter will consider that the right was violated when the interference itself happened (i.e. the decision of the first instance court), and not by the refusal of the higher courts to remedy the interference.<sup>169</sup> This means that if the interference happened before the ECHR ratification then the Strasbourg Court will reject the application as inadmissible due to the lack of jurisdiction, even if the failure of the higher domestic court to provide for a remedy happened after the ratification of the Convention.<sup>170</sup> That is because the ECHR does not impose a specific obligation on the Contracting States to provide redress for wrongs caused before the “critical date”.<sup>171</sup>

The Strasbourg Court will consider the facts before the ratification of ECHR only if they created a situation extending beyond the ECHR’s ratification, or that may be relevant for the understanding of the facts that happened after ratification.<sup>172</sup> It will also take into consideration the special nature of certain rights protected by ECHR, when it applies the general criteria established in *Blečić v. Croatia*. The temporal jurisdiction of the court and the impact that it has on the rights of the people/businesses affected by the ECHR violations makes membership to the CoE a matter of urgency.<sup>173</sup>

Accession to the CoE would bring major benefits for Kosovo, beyond the supervision of the Strasbourg court.

- **Kosovo would have a seat and a vote at the Committee of Ministers**, where it would be represented by its Foreign Minister at the ministerial level and by its Permanent Representative in Strasbourg at the deputies’ level.
- **Deputies of the Assembly of Kosovo would be represented in the PACE** with full rights (3 or 4 seats would be allocated based on the population and on the recommendation by the PACE in its Opinion on Kosovo).
- Kosovo would be entitled to officially **accede to more than 200 treaties/conventions/instruments of the CoE** and thus substantially enrich the applicability of the CoE standards domestically.
- In addition to a few guaranteed posts, professionals from all communities in Kosovo would be able to **apply for employment in the CoE**, an opportunity that is currently not available to those holding only Kosovo citizenship.
- **Kosovo would be part of the CoE monitoring mechanisms** which would help to improve Kosovo’s record in many areas of focus for the CoE, namely efficiency of the justice system, anti-corruption, money laundering, domestic violence, and violence against women, etc.<sup>174</sup>
- Highest domestic courts (Supreme Court and the Constitutional Court) would be able to **seek advisory opinions from the Strasbourg Court** on questions of principle related to the interpretation or application of the ECHR, as soon as Kosovo ratifies Protocol No. 16 to the ECHR on Advisory Opinions.<sup>175</sup>
- The highest domestic courts (Supreme Court and the Constitutional Court) could **become part of the Superior Courts Network** established by the Strasbourg Court to enrich judicial dialogue among courts and implement the ECHR.<sup>176</sup>
- Kosovo would be able to **appoint a judge at the Strasbourg Court** and it will also be able to **file Inter-State applications** if there will be a need to do so.

168 Ibid., § 78.

169 Ibid.

170 Ibid.; ECtHR, *Mrkic v Croatia*, June 2006.

171 ECtHR, *Mrkic v Croatia*, § 81.

172 ECtHR, *Hoti v. Croatia*, April 2018, § 85.

173 For more, see Venera Kabashi, ‘Special’ Supervision for the Special Court, Kosovo 2.0, November 2020, at, <https://kosovotwopointzero.com/en/special-supervision-for-the-special-court/>

174 For a full list of CoE mechanisms, see <https://www.coe.int/en/web/human-rights-rule-of-law/monitoring-mechanism>

175 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 16, October 2013.

176 Superior Courts Network of the Strasbourg Court, at <https://www.echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/network&c>. Currently, there are 103 court members from 44 member States of the CoE represented in the Superior Courts Network.

- Kosovo’s delegation would be able to be **represented at the Congress of Local and Regional Authorities** where it would help promote, strengthen, and defend local and regional democracy in Europe.<sup>177</sup>
- NGOs from Kosovo would be able to acquire **participatory status at the Conference of International Non-Governmental Organisation of the CoE**.<sup>178</sup>
- Kosovo’s Consulate General in Strasbourg would be turned into a Permanent Mission before the CoE, etc.

CoE membership will help Kosovo with its much-distanced EU membership.

Although the CoE and the EU are two separate entities with their own membership criteria and decision-making processes, CoE membership will directly impact Kosovo’s EU

perspective. The CoE and the EU have closely related mandates that share values of democracy, freedom, and rule of law.<sup>179</sup> Among the famous Copenhagen criteria for accession to the EU is also the requirement that a candidate country achieves “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (...)”<sup>180</sup> In this vein, membership to the CoE will help Kosovo to improve its democratic institutions and human rights record, fully align its legal framework with the EU standards in important areas and build its capacities to meet the EU accession criteria. CoE membership will also help Kosovo in implementing the Stabilisation and Association Agreement (SAA) between Kosovo and the EU.<sup>181</sup> The SAA obliges Kosovo to work on the rule of law adherence and the justice system, and CoE mechanisms would be the best support for Kosovo to meet these obligations and implement international human rights conventions.

Kosovo’s accession would also serve CoE’s mission to “develop throughout Europe common and democratic principles”.<sup>182</sup> The soundest way for the CoE “to help consolidate democratic stability in Europe by backing political, legislative and constitutional reform,” or “seek solutions to problems facing European society, such as discrimination against minorities, xenophobia, intolerance, terrorism, human trafficking, organized crime, and corruption”, is by providing all European states, including Kosovo, full access to tools, mechanisms, and support for such progress.<sup>183</sup> Europe’s human rights protection system can only work effectively, and relevant authorities can only be held accountable for human rights standards in a meaningful way via membership.<sup>184</sup>

With Kosovo’s accession, CoE’s monitoring mechanisms will cover the whole Western Balkans region.

## POTENTIAL CHALLENGES

Kosovo’s membership bid has already met numerous drawbacks. In practice, it faces some political challenges which could condition the beginning of the procedure. Some of them relate to Kosovo’s failures in implementing court decisions and international agreements, and others are fully intertwined with political agendas which further complicate Kosovo’s bumpy road to becoming a member of CoE. But these difficulties may not have the capacity to halt the accession process altogether. Along with advocacy and lobbying, Kosovo should work hard to implement the criteria and the possible pre-accession requirements, including those related to the dialogue with Serbia, and the protection of minority rights.

### Dialogue with Serbia

The EU-led dialogue for the normalization of relations between Kosovo and Serbia commenced in 2011 as a factor for peace, security, and stability in the region and aims to improve the lives of the people.<sup>185</sup> Despite over 30 reached agreements, the process experienced setbacks and occasional tensions on both

177 The European Assembly of local and regional elected representatives, at [https://www.coe.int/en/web/congress/overview#\(1%2263899274%22:\[1\]\)](https://www.coe.int/en/web/congress/overview#(1%2263899274%22:[1])).

178 The Conference of International Non-Governmental Organisations (NGOs) of the Council of Europe, at: <https://www.coe.int/en/web/ingo>.

179 The Council of Europe – An Overview: Upholding human rights, democracy and the rule of law.

180 European Commission, European Council in Copenhagen 21-22 June 1993, Conclusions of the Presidency, Doc/93/3, at [https://ec.europa.eu/commission/presscorner/detail/en/DOC\\_93\\_3](https://ec.europa.eu/commission/presscorner/detail/en/DOC_93_3)

181 Stabilisation and Association Agreement between the EU and Kosovo (SAA), October 2015.

182 For more, see Council of Europe, Objective and Mission, at <https://www.coe.int/en/web/sarajevo/objectives-mission>.

183 Council of Europe, Objectives and Mission, at <https://www.coe.int/en/web/sarajevo/objectives-mission>

184 Andrew Forde (2022).

185 UN General Assembly, Resolution A/RES/64/298, October 2010.

sides.<sup>186</sup>

Since 2020, the EU has been more vocal in terms of their expectations from the dialogue, highlighting that the mandate of EUSR Miroslav Lajcak is ‘to work on the comprehensive normalisation of relations between Serbia and Kosovo through the conclusion of a legally binding agreement that addresses all outstanding issues between the parties in accordance with international law and contributes to regional stability’.<sup>187</sup> With the legally binding element entering the picture, the EU member states and the US have referred to it in many other instances, providing hints as to what kind of normalisation they aim to achieve between Kosovo and Serbia.<sup>188</sup>

Following the invasion of Ukraine, a so-called “French-German proposal” came into play, which later developed into the EU plan on the “path toward normalisation of relations”. The EU plan indicates a normalization of relations short of formal recognition, where Serbia agrees not to object Kosovo’s membership in any international organisation, in exchange for a fast-track accession to the EU and substantial financial support.<sup>189</sup> The EU, U.S., and UK fully support the plan and have stepped their efforts to help Kosovo and Serbia reach an agreement.<sup>190</sup> The U.S. welcomed the accord that Kosovo and Serbia reached on the EU plan and noted that an agreement “will secure significant opportunities for the people of both countries and accelerate their paths to EU membership”.<sup>191</sup> German Chancellor Scholz also noted the expectations of “good and constructive results” out of this process and the impact of normalisation of relations in the peace and development of both parties.<sup>192</sup>

Kosovo and Serbia publicly endorsed the EU plan on 27 February 2023, which came with some open questions on whether it meets the expectations of both sides and those of the international community for a legally binding agreement on the normalisation of relations.<sup>193</sup> On 19 March 2023, both parties agreed in implementing the Annex of Agreement on the Path to Normalisation of Relations, whereas they commit to honour all the articles of the Agreement “expediently and in good faith”.<sup>194</sup> Chapter 35 of Serbia’s EU Negotiation Framework, and the agenda of Kosovo’s Special Group on Normalisation will be amended accordingly.<sup>195</sup> This way, “both parties will be bound by the Agreement which will be part of their EU path”.<sup>196</sup> Now, the EU will have to formalise this agreement as a legally binding one upon implementation by both parties.

Kosovo’s membership prospects in the EU, CoE, NATO and even the UN, remain entangled to the normalisation of relations with Serbia. In addition, the EU-led dialogue seems as the most viable channel for Kosovo and Serbia to reach a mutually agreed settlement that could change the position of the five EU non-recognisers on Kosovo’s statehood.<sup>197</sup> Germany, France, Britain and Italy have also indicated a reluctance to support Kosovo’s bid to join the CoE, until it reaches an agreement with Serbia.<sup>198</sup>

186 For more, see Balkans Group report, *The Brussels Dialogue between Kosovo and Serbia: Achievements and Challenges*, October 2020.

187 Council Decision (CFSP) 2020/489 of 2 April 2020 appointing the European Union Special Representative for the Belgrade-Pristina Dialogue and other Western Balkan regional issues, Art.3(a).

188 European Western Balkans, Lajčák and Escobar: All agreed between Belgrade and Pristina must be implemented, February 2022, at <https://europeanwesternbalkans.com/2022/02/03/lajcak-and-escobar-all-agreed-between-belgrade-and-pristina-must-be-implemented/>; US Embassy in Kosovo, Joint Statement by the Governments of France, Germany, Italy, the United Kingdom and the United States, August 2019, at <https://xkusembassy.gov/joint-statement-by-the-governments-of-france-germany-italy-the-united-kingdom-and-the-united-states/>.

189 Belgrade-Pristina Dialogue: EU Proposal – Agreement on the path to normalization between Kosovo and Serbia, February 2023, at [https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-eu-proposal-agreement-path-normalisation-between-kosovo-and-serbia\\_en](https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-eu-proposal-agreement-path-normalisation-between-kosovo-and-serbia_en)

190 Balkans Group Policy Analysis, *Kosovo: Unlocking its Euro-Atlantic Path: The EU, Dialogue on Normalisation of Relations with Serbia, and the Prospects for Recognition by the Five Non-Recognisers*, March 2023.

191 U.S. Department of State, *United States Support of the EU-facilitated Kosovo-Serbia Dialogue*, Press Statement, Antony J. Blinken, Secretary of State, March 2023, at <https://www.state.gov/united-states-support-of-the-eu-facilitated-kosovo-serbia-dialogue/>

192 Reuters, *Germany’s Scholz expects ‘constructive results’ from EU’s Serbia-Kosovo pact*, March 2023, at <https://www.reuters.com/world/europe/germanys-scholz-expects-constructive-results-eus-serbia-kosovo-pact-2023-03-07/>

193 Belgrade-Pristina Dialogue: Press remarks by High Representative Josep Borrell after High-Level Meeting with President Vučić and Prime Minister Kurti, February 2023, at [https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-press-remarks-high-representative-josep-borrell-after-high-level\\_en](https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-press-remarks-high-representative-josep-borrell-after-high-level_en).

194 Belgrade-Pristina Dialogue: Implementation Annex to the Agreement on the Path to Normalisation of Relations between Kosovo and Serbia, March 2023, at [https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-implementation-annex-agreement-path-normalisation-relations-between\\_en](https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-implementation-annex-agreement-path-normalisation-relations-between_en)

195 Belgrade-Pristina Dialogue: Press remarks by High Representative Josep Borrell after the Ohrid meeting with President Vučić and Prime Minister Kurti, March 2023, at [https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-press-remarks-high-representative-josep-borrell-after-ohrid-meeting\\_en](https://www.eeas.europa.eu/eeas/belgrade-pristina-dialogue-press-remarks-high-representative-josep-borrell-after-ohrid-meeting_en)

196 Ibid.

197 Council of the EU, *Council Conclusions on Kosovo*, February 2008, at [http://www.eu2008.si/en/News\\_and\\_Documents/Council\\_Conclusions/February/0218\\_GAERC5.pdf](http://www.eu2008.si/en/News_and_Documents/Council_Conclusions/February/0218_GAERC5.pdf); Interviews with Cypriot, Slovak, Romanian, Greek and Spanish officials and diplomats, 2022.

198 RadioFreeEurope, *Italy, France, Germany, and Britain are not supportive of Kosovo’s application for membership in the Council of Europe*, January 2023, <https://www.radiokosovaelire.com/italia-franca-gjermania-dhe-anglia-jane-shprehur-kunder-aplikimit-te-kosoves-per-anetaresim-ne-keshillin-e-evropes/>.



The CoE accession process could serve to assist Kosovo and Serbia in finding sustainable solutions to their long-lasting issues.

The CoE membership, in reality, can only strengthen cooperation between states, so the existence of an open and ongoing dialogue between the two countries should not be seen as an impediment but as a means to help them both in solving issues related to human rights, which if unaddressed, could lead to further tensions.<sup>199</sup> The collateral damage of

a ‘conditioning approach’ would be Kosovo citizens (including Kosovo Serbs and other non-majority communities), businesses, NGOs and public authorities which would continue to be isolated from the CoE as the only **grey zone** in the Western Balkans’ map.

In the past, the CoE used membership accession processes “to enhance dialogue between States that had different political or territorial disagreements, rather than prevent them from joining the organisation.”<sup>200</sup> The mere existence of a conflict does not prohibit accession to the CoE.<sup>201</sup> For example, the PACE believed that the accession of both Armenia and Azerbaijan, “could help to establish the climate of trust necessary for a solution to the conflict in Nagorno-Karabakh”.<sup>202</sup> The same approach should apply in Kosovo’s case. The process of considering Kosovo’s status in the CoE could present an opportunity for mediators to reframe talks and refocus the parties toward the achievement of a mutually agreed and sustainable outcome.<sup>203</sup>

It is neither advantageous nor suitable from a human rights perspective to condition Kosovo’s membership to the CoE with the conclusion of the dialogue with Serbia.

However, knowing that accession to the CoE will most likely be linked to the dialogue process, the EU proposal could be a major breakthrough for Kosovo to move towards the CoE. In addition, by implementing the obligations stemming from this agreement about community rights, Kosovo would overcome all potential political challenges in joining the CoE.

## Enforcement of Decan Monastery Case

The implementation of the Constitutional Court case of 2016 on the Decan Monastery will likely be a pre-accession condition or a post-accession requirement for Kosovo.<sup>204</sup> More than 6 years have passed since the court issued its decision and Kosovo’s authorities have not yet implemented it. Back then, the Constitutional Court ruled that earlier decisions of the Appellate Panel of the Special Chamber of the Supreme Court (SCSC) that were in favour of the property rights of the Decan Monastery have become *res judicata* (a decided matter) and, as a result, could not reopen.<sup>205</sup>

The gist of the case on which the Constitutional Court had to decide was whether the Appellate Panel of the SCSC was authorised to admit the appeals submitted by the Privatisation Agency of Kosovo and two socially owned enterprises known as Iliria and APIKO.

“(…) the Appellate Panel of the SCSC had previously determined in final instance who were authorised parties to the case, and yet the Appellate Panel admitted an appeal from those same parties that it had previously declared to be not-authorised. At the same time, the Appellate Panel refused to the Applicant (Decani Monastery) the status of an authorised party, which it had previously confirmed in final instance.”<sup>210</sup>

Based on these facts, the Constitutional Court concluded that “the Judgments of the Ownership Panel of 27 December 2012 (No. SCC-08-0226 and No. SCC-08-0227) had become *res judicata* based on of the earlier final and binding decision of the Appellate Panel of 24 July 2010 regarding the authorized parties.”<sup>207</sup> It is these two particular judgments of the Ownership Panel of 2012 which must now be implemented by the Kosovo authorities.

199

Ibid.

200

Andrew Forde, May 2022.

201

Ibid.

202

PACE Opinion 221 (2000) on Armenia’s application for membership of the Council of Europe, at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16815&lang=en>.

203

Andrew Forde, May 2022.

204

Case No. K1132/15.

205

Ibid.

206

Ibid., para. 74.

207

Ibid., see the operative part.

The Constitutional Court referred to the ECtHR judgment on *Sovtransavto Holding v. Ukraine*, which established that state authorities must establish an enforcement system of decisions that is effective in legal and practical terms, and which ensures the enforcement of judicial decisions without delay.<sup>208</sup> The execution of a judgment rendered by a court should be deemed as a constituent part of the right to a fair trial and the Decani Monastery “should not have been denied a benefit from the decision, which had taken the final *res judicata* form in his favour.”<sup>209</sup>

Kosovo’s authorities have not responded to the calls for the implementation of this case.<sup>210</sup> In 2021, the Constitutional Court issued a Decision on the Non-Enforcement of its Judgment and notified the Chief State Prosecutor on the non-implementation of its decision.<sup>211</sup> Kosovo considers that the Constitutional Court’s decision on the Decan Monastery is based on the “discriminatory politics” of Serbia’s government of 1997.<sup>212</sup> But in its judgment of 2016, the Constitutional Court specifically points out that its conclusion in the Decan Monastery case “exclusively concerns the challenged Decision of the Appellate Panel of 12 June 2015, and does not in any way, either favourably or unfavourably, reflect upon the legality of the many and varied proceedings which took place before the challenged Decisions, because that is outside the scope of jurisdiction of this Court.”<sup>213</sup>

Institutions shall implement the Decan Monastery Case to ensure Kosovo’s progression through the CoE accession steps.

Several international reports and the diplomatic entourage in Kosovo call for an urgent and swift implementation of this judgment.<sup>214</sup> The enduring lack of implementation of the Decan Monastery case “poses important questions to the CoE regarding respect for the rule of law”.<sup>215</sup> Additionally, the joint statement of the Quint states on the Decan Monastery case

reflects the importance of this case:

“On 22 March, a new Government was appointed with a strong mandate of reform and respect for the rule of law. One key test of its resolve will be the implementation of the May 2016 Kosovo Constitutional Court decision on registering the Decani Monastery’s land. Respecting the rule of law is an obligation for all governments. The Heads of Mission of France, Germany, Italy, the United Kingdom, and the United States strongly encourage the Government of Kosovo to proceed without further delay with the lawful registration in line with the Constitutional Court decision.”<sup>220</sup>

It is important that Kosovo’s institutions address these raised concerns by implementing the case, to show that it is able and willing to comply with the judgments of the ECtHR as a supranational court, upon accession.

## Implementation of the “Association of Serb Majority Municipalities in Kosovo” (the Association)

The Agreement on the Association marks the cornerstone of the EU-facilitated dialogue between Kosovo and Serbia and it brought a lot of controversies and unprecedented crises in Kosovo.<sup>217</sup> The matter became even more complicated given the different conflicting legal and political points of view on the establishment of the Association. Kosovo willingly undertook the international obligation of establishing the Association and it must obey such obligation.<sup>218</sup>

Accession to the CoE requires Kosovo to obey its international obligations.

208 Ibid. See also the ECtHR judgments cited by the Constitutional Court in relation to the *res judicata* principle, namely ECtHR, *Sovtransavto Holding v. Ukraine*, no. 48553/99, July 2002; ECtHR, *Ryabykh v. Russia*, no. 52854/99, July 2003.

209 Case No. K1132/15, para 79.

210 Balkan Transitional Justice, *Kosovo Ignores Call to Enforce Monastery’s Land Claim*, April 2017, at <https://balkaninsight.com/2017/04/21/kosovo-govt-stays-silent-over-eu-calls-on-monastery-land-04-21-2017/>

211 Case No. K1132/15, Decision on Non-Enforcement of the Constitutional Court, September 2021.

212 Cvetkovic, S. *Decan Monastery between the judicial and executive power*, Radio “Evropa e Lire”, February 2022, at <https://www.evropaelire.org/a/prona-e-manastirit-te-decanit-/31703242.html>.

213 Case No. K1132/15, Decision on Non-Enforcement, para. 93.

214 EU Progress Report on Kosovo, 2022.

215 Council of Europe, *Memorandum following the Commissioner’s mission to Kosovo*, 2022.

216 Statement from the Quint States, May 2021.

217 Balkans Group Report, *The Association of Serb Municipalities, Understanding Conflicting Views of Albanian and Serbs*, January 2017.

218 Stabilisation and Association Agreement (SAA) between the European Union and Kosovo, October 2015.

The agreement foresees the establishment of an Association/Community of Serb majority municipalities in Kosovo, by a Statute, and it defines the structure of the Association.<sup>219</sup> In December 2015, the Constitutional Court issued a judgment on the assessment of the compatibility of the principles contained in the document of the Association with the spirit of the Constitution. It confirmed that the establishment of the Association “has become part of the internal legal system” when the First Agreement signed in Brussels in 2013 was ratified in the Assembly and promulgated by the President.<sup>220</sup> Yet, it ruled that the principles and main elements based on which the Association was to be formed “are not entirely in compliance with the spirit of the Constitution,” and Chapters II and III of the Constitution.<sup>221</sup> Respectively, the objectives, structural organisation, budget, support and general provisions of the Association go beyond the constitutional standards of local self-governance; the right of legislative initiative is exclusively provided by the President, the Government, the deputies of the Assembly or to at least ten thousand citizens; and, the Association/Community cannot be vested with full and exclusive authority to promote the interests of the Kosovo-Serb community in its relations with the central authorities.<sup>222</sup>

The exact structure and setup of the Association are yet to be determined. The Constitutional Court must review (or ‘clear out’) the legal act and the Statute for the establishment *a priori* to ensure their constitutionality.<sup>223</sup> Kosovo has therefore a strong guarantee that the prerogatives of the Association will not represent a danger to the existing constitutional framework and values. The Constitutional Court already eliminated the most ‘harmful’ prerogatives of the agreement on the Association by declaring them unconstitutional. Kosovo should start the discussion process to prepare the legal documents that would establish the Association, to demonstrate its willingness to honour its international obligations.

Under the new Agreement on the Path towards Normalisation of Relations, Kosovo has agreed to launch the “[...] negotiations within the EU-facilitated Dialogue on establishing specific arrangements and guarantees **to ensure an appropriate level of self-management for the Serbian community in Kosovo**”.<sup>224</sup> Kosovo could also explore options to invite CoE or other ECHR experts to provide technical assistance and expertise in drafting the statute of the Association. The implementation of this agreement will further enhance the rights of the communities and improve the relations between Kosovo and Serbia, thus meeting the vital criteria for CoE membership.

## Community Rights

The CoE will likely place a strong emphasis on community rights, with particular focus on the rights of Kosovo Serbs. Kosovo has an adequate legal and constitutional framework on non-majority communities. The Constitution protects “[...] the rights of and participation by all Communities and their members”.<sup>225</sup>

Kosovo Serbs and other non-majority communities will be the main beneficiaries of Kosovo’s accession to the CoE.

Constitutional provisions also demonstrate Kosovo’s commitment to abide by the CoE principles by requiring the country to “[...] promote a spirit of tolerance, dialogue and support reconciliation among communities and respect the standards set forth in the Council of Europe Framework Convention for the Protection of National Minorities [...]”<sup>226</sup> Kosovo can properly implement this Convention and ensure the legal protection of minorities only by having access to CoE mechanisms.

The Comprehensive Proposal for the Kosovo Status Settlement, also known as the Ahtisaari Plan played a vital role in designing the provisions for the protection of human and minority rights, which are now

219 First Agreement of Principles Governing the Normalisation of Relations, April 2013.

220 Constitutional Court of Kosovo, Case No. K0130/15, Judgment Concerning the assessment of the compatibility of the principles contained in the document entitled “Association/Community of Serb majority municipalities in Kosovo – general principles/main elements” with the spirit of the Constitution, December 2015.

221 Ibid., operative part.

222 See, The Dialogue platform, Association/Community of Serb – Majority Municipalities, at <https://dialogue-info.com/association-community-of-serb-majority-municipalities/>

223 Ibid., conclusions, and operative part.

224 Belgrade-Prishtina Dialogue: Press remarks by High Representative Josep Borrell after the Ohrid meeting with President Vučić and Prime Minister Kurti, March 2023.

225 Constitution of Kosovo, Article 3.2.

226 Ibid., Article 58.2



embedded in Kosovo's Constitution.<sup>227</sup> It laid the foundation for Kosovo's independence and it created six new Serb majority municipalities, for the local governments to cooperate “for the protection and promotion of their common interests”.<sup>228</sup> The Constitution provides the obligation to enforce and guarantee fulfilment of all provisions, rights, and competencies in the Ahtisaari Plan.<sup>229</sup> The very “Values” of the Constitution derive from the Ahtisaari Plan, enumerating the core elements of the newly established constitutional order, including peace, democracy, equality, respect for human rights and freedoms and the rule of law, non-discrimination, the right to property, the protection of the environment, social justice, pluralism, separation of state powers, and a market economy.<sup>230</sup>

The blueprint of Ahtisaari plan was fully transplanted into Kosovo's new democratic order by providing exact constitutional provisions for governance that guaranteed minority representation, and power and rights, both at the central and local levels. Based on the Ahtisaari Plan, the minorities in Kosovo are granted a wide set of constitutional rules that encourage integration and guarantee institutional inclusion. Kosovo's dedication to the protection of minorities and the extensive list of rights and freedoms in Chapters II and III of the Constitution reflects the Ahtisaari plan principles.<sup>231</sup>

The Constitution further reflects Annex III of the Ahtisaari Plan on setting up and guaranteeing local representation for the Serbs and other minorities in the system of decentralized local government, with self-autonomy and authority in matters of education, healthcare, and economics, including the right to communicate and cooperate even with “government agencies, in the Republic of Serbia.”<sup>232</sup>

Yet, the conditions “for a truly multi-ethnic and integrated society throughout Kosovo are not fully in place”.<sup>233</sup> There are gaps that must be addressed “in ensuring a secure environment for all non-majority communities – especially in areas where returnees live – and in ensuring access to the property, personal documentation, language rights, quality education, employment, and social welfare.”<sup>234</sup> The CoE bodies will most likely try to pave the road for concrete solutions to the issues that Kosovo Serbs face.

After CoE membership, Kosovo-Serbs will be able to address before the ECtHR the ‘violations’ of their rights (including community rights) guaranteed in the Convention by the state of Kosovo or any other member state of the CoE. Despite its proven willingness to protect the rights of non-majority communities, Kosovo will be able to fully implement its constitutional provisions, only by being part of the CoE and its mechanisms.

## Language Rights for Non-majority Communities

The High Commissioner of the CoE in its recent Report noted several issues related to language rights, namely (i) divisions along ethnic lines in the field of public education; and (ii) lack of implementation of the 2006 Law No. 02/L-37 on the Use of Languages (“Law on the Use of Languages”) i.e. the lack of availability of Serbian version of laws and judicial documents and lack of use of the Serbian language in the Parliament.<sup>235</sup>

Despite strong constitutional and legal guarantees, the language rights of non-majority communities are not fully respected in Kosovo.

For these challenges, she suggested that there is a need to (i) develop a single education system, respectful of all communities' cultural and linguistic differences; (ii) undertake more decisive, short-term action to ensure the protection and promotion of language rights of non-majority communities; and (iii) step up the implementation of the Law on the Use of Languages to protect and promote the language rights of non-majority communities.<sup>236</sup>

227 The Comprehensive Proposal for the Kosovo Status Settlement proposed by the UN Special Envoy Martti Ahtisaari and endorsed by the UN Secretary-General in 2007 (“Ahtisaari Plan”).

228 Ahtisaari Plan, op. cit., Annex III, § 9.2.

229 Constitution of Kosovo, Article 148.

230 Ibid. Article 7.

231 Ahtisaari Plan, Annex II, Article 2.2.

232 Ibid., Annex III, Article 10.

233 EU Progress Report on Kosovo, 2022, page 40

234 Ibid.

235 Council of Europe, Memorandum following the Commissioner's mission to Kosovo, 2022.

236 Ibid.

The EU Progress Report also highlighted the necessity to ensure (i) more consistent implementation of the Law on the Use of Languages across all institutions in Kosovo; (ii) consolidation of language policies and creation of programs for curricular and extracurricular learning of languages; (iii) assessment of judicial proceedings in all official languages across Kosovo; and that (iv) court decisions are accessible and searchable within 60 days in all official languages.<sup>237</sup>

The integration of the Serbian education system in Kosovo is important for promoting inclusivity and respect for minority rights in Kosovo. The CoE may set the implementation of the existing legislation on language rights as official post-accession requirements for Kosovo, which is why institutions should swiftly address the current shortcomings.

Yet, these are complex issues that have been the subject of ongoing negotiations between Kosovo and Serbia. Despite efforts, progress has been slow. The Serbian government has not accepted the Ahtisaari plan provisions, and has actively obstructed the integration of the Serb community into the Kosovo legal and government system, by providing financial and logistical support to Serb-majority areas in Kosovo to help maintain separate education systems.<sup>238</sup> This has created parallel education structures and systems for the Serb community which undermine Kosovo's efforts to integrate the education system and promote social cohesion.<sup>239</sup> In 2016, Kosovo and Serbia reaffirmed their commitment to the implementation of mutual recognition of professional and academic diplomas, but Kosovo did not recognize diplomas from universities that operate illegally and represent parallel institutions, such as the University of North Mitrovica.<sup>240</sup> Ultimately, the integration of the Serbian education system in Kosovo will require an agreement, cooperation, and political will from both governments in Kosovo and Serbia.

## Property Rights and Return of Displaced Persons

EU and CoE reports note that “despite a solid legal and policy framework providing for special rights for displaced persons”, there are considerable obstacles which persist when it comes to “the enjoyment by displaced persons of their property rights.”<sup>241</sup>

Despite improvements to the applicable legislative framework, there is a need to address crimes which “undermine potential returnees’ sense of safety to the enjoyment of property rights.”<sup>246</sup>

The enjoyment of these rights is undermined “by a lack of effective response to illegal occupation, including non-enforcement of decisions upholding displaced persons’ property rights, a slow justice system, as well as non-payment of compensation for destroyed or damaged property and lack of sustainable solutions for landless returnees.”<sup>243</sup>

Funding and cooperation between domestic authorities at the local and central levels are crucial in “creating adequate conditions for sustainable return, including improved security and full access to social and economic rights for returnees.”<sup>244</sup> The Roma returnees are in a particularly vulnerable situation.<sup>245</sup>

Kosovo's institutions need to employ a fresh approach on this matter. Displaced persons should have access to impartial and effective judicial and administrative mechanisms to assert their property rights. The government needs to provide fair and adequate compensation for loss of property where property restitution is not possible, and it should build community reconciliation programs and mediation services to resolve disputes between displaced persons and current occupants of their property. To prevent disputes in the first place, the government should strengthen property registration and cadaster systems to ensure accurate and transparent records of property ownership. Financial assistance, social support services, and infrastructure development would also help and facilitate the return and reintegration process.

237 EU Progress Report on Kosovo, 2022, page 11.

238 Radio Evropa e Lirë – Parallel structures continue to receive millions from Serbia, February 2022, at <https://www.evropalire.org/a/strukturat-paralele-serbe-ne-kosove/31704547.html>

239 Balkans Group Policy Report, The Brussels Dialogue between Kosovo and Serbia: Achievements and Challenges, September 2020, pg. 59.

240 Ibid.

241 Ibid.

242 Council of Europe, Memorandum following the Commissioner's mission to Kosovo, 2022.

243 Ibid.

244 Ibid.

245 Ibid.

## CONCLUSION

Kosovo does not face any legal barriers in its path toward CoE accession. The significant progress in meeting the criteria for membership show Kosovo's ability to uphold the CoE values and principles. The existing constitutional and legal framework meets the necessary standards to join the organisation without any necessary constitutional amendments. Yet, the partial implementation of constitutional guarantees in practice and the uniqueness of Kosovo's case will most likely result in specific post-accession requirements, or possibly even pre-accession conditions. Institutions should start to address these issues from early on and stay ahead of the curve.

The accession process will depend on many intertwined factors which relate to politics, international relations, and geostrategic developments. Ensuring a supporting climate within the CoE will be a difficult task with some CoE member states opposing Kosovo's accession. In the end, it will all boil down to the political will within the CoE to back up Kosovo's membership bid. While Kosovo is unable to predict political developments at the CoE level, it should continue to show the country's commitment and willingness to improve human rights standards. A smooth and straightforward accession path requires full screening of the existing constitutional and legal framework and detailed planning of the next steps in the accession path.

While the current shortcomings in implementing CoE standards call for constant institutional measures, they should not prevent accession. The CoE is bound to deal with Kosovo's application in line with the Statute and the existing accession practice, and acknowledge Kosovo's keenness to join the organisation.

## ANNEX

## CoE Monitoring Mechanisms

### **The Group of States Against Corruption (GRECO)**

GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with the CoE anti-corruption standards. It monitors all its members on an equal basis, through a dynamic process of mutual evaluation and peer pressure.

### **The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL)**

MONEYVAL assesses compliance with the principal international standards to counter money laundering and the financing of terrorism and the effectiveness of their implementation and recommends to national authorities necessary improvements to their systems.

### **The European Committee of Social Rights, the European Commission for the Efficiency of Justice (CEPEJ)**

CEPEJ aims to improve the efficiency and functioning of justice in the member states of the CoE, and the development of the implementation of the instruments adopted by the CoE to this end. It analyses the results of judicial systems, identifies the difficulties they meet, provides assistance to member states at their requests, defines ways for improvement, and proposes desirable new legal instruments.

### **The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT)**

CPT visits places of detention such as prisons, juvenile detention centers, police stations, holding centers for immigration detainees, psychiatric hospitals, social care homes, etc., in order to assess how persons deprived of their liberty are treated there. It then outlines its findings in a report addressed to the Member State in question and adds recommendations on how to improve the situation.

### **The Group of Experts on Action Against Trafficking in Human Beings (GRETA)**

GRETA evaluates the implementation of the CoE Convention on Action against Trafficking in Human Beings by the Parties. It meets in plenary sessions three times a year, and it carries out visits and publishes country reports evaluating legislative and other measures taken by Parties to give effect to the provisions of the Convention.

### **The Advisory Committee on the Framework Convention for the Protection of National Minorities**

The Advisory Committee is responsible for evaluating the implementation of the Framework Convention in state parties and advising the Committee of Ministers. The results of this evaluation consist of detailed country-specific opinions adopted following a monitoring procedure.

### **The European Commission Against Racism and Intolerance (ECRI)**

ECRI monitors the fight against racism, discrimination (on grounds of "race", ethnic/national origin, colour, citizenship, religion, language, sexual orientation, gender identity, and sex characteristics), xenophobia, antisemitism, and intolerance in Europe.

### **The Committee of Experts of the European Charter for Regional or Minority Languages**

The Committee of Experts examines the real situation of the regional or minority language in each State, to report to the Committee of Ministers on its evaluation of a Party's compliance with its undertakings and, where appropriate, to encourage the Party to gradually reach a higher level of commitment.

## CASES

### Constitutional Court of Kosovo

- **Case No. KO162/18** – Confirmation of the proposed constitutional amendment submitted by the President of the Assembly of the Republic of Kosovo on 24 October 2018, February 2019.
- **Case KI207/19** - Constitutional Review of Judgments of the Supreme Court of the Republic of Kosovo, November 2016
- **Case No. KI108/18** - Resolution on Inadmissibility of the Request for Constitutional Review of Decision No. 64/04 of the Civil Registration Agency of 13 June 2018, September 2019
- **Case No. KI19/21** - Constitutional review of Judgment Rev. No. 239/2019 of 26 November 2020 of the Supreme Court of Kosovo, August 2022
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We engage in high-level advocacy, domestically, regionally and internationally, impacting policy discussions and options with regard to the home affairs and European policies toward the Western Balkans.

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