

## Possible Options Relating to the Establishment of the Association/Community of Serb Majority Municipalities

### Executive Summary

The report reviews the main issues informing the stalemate around the Association/Community of Serb Majority Municipalities (A/CSMM) and presents options that take into account the 2013 Brussels Agreement, the 2015 Agreement on General Principles ('Principles' hereafter) and the ruling of the Constitutional Court ('Court' hereafter). This summary focuses on the main conclusions of the report.

Article 4 of the Principles sets out the A/CSMM's objectives and competencies. These are consistent with Article 17 of the Law on Local Self-Government (LLSG), which also, in Articles 20-23, provides for "enhanced competencies" for the larger Serb-majority municipalities over secondary health care and higher education, and for all Serb-majority municipalities in relation to cultural affairs and the selection of local police station commanders. The term "executive power" does not appear in the Brussels Agreement or the General Principles and is mentioned only once by the Court. The term has provoked dispute and it may not be necessary to use it. The Law on Inter-Municipal Cooperation (LIMC) permits municipalities to delegate the administration of their laws and it may be that the central authorities could make such delegations to the A/CSMM directly or through the municipalities. The LIMC also provides for different mechanisms for municipalities to cooperate, including joint administrative bodies and joint public institutions.

The General Principles set out an organizational structure for the A/CSMM that includes an Assembly, President and Vice-President, Council, Board, administration, and complaints office. The Court objected to the Principles' provision (6e) that the A/CSMM's administrative staff would enjoy the status of civil servants. One way to deal with this would be to have municipalities 'second' staff to the A/CSMM; the Law LIMC provides for municipalities to assign municipal civil servants to work in a joint administrative body (Article 11.7).

The Court found that the Principles do not take notice of constitutional provisions respecting diversity and that any statute establishing the A/CSMM would have to respect diversity within the participating municipalities. This could be addressed by having the regulations establishing the A/CSMM provide explicitly for an administration reflecting the diversity of the population; they could also extend constitutional protections that exist currently at the municipal level (Article 62) to the A/CSMM and require that the Vice-President be drawn from the non-majority communities. The complaints office envisaged could be mandated to monitor the A/CSMM's hiring and promotion policies to ensure they are equitable. Each member municipality could be required to nominate members to the ASSM in proportion to the representation of political parties in their respective assemblies. Finally, the Brussels Agreement called for the composition of the Kosovo police in the four largest Serb-majority municipalities in the North to reflect their ethnic composition; this provision was missing from the General Principles but its restoration would address the Court's concern.

The Brussels Agreement, the General Principles and the Court concur that the A/CSMM shall have a legal personality. Implicitly, its membership would include all Serb-majority municipalities, but this contrasts with the Law on Inter-Municipal Cooperation where each municipality is to decide on the subjects and forms of its cooperation. It should arguably be made clear that any Serb-majority municipality would have the right to determine its participation in the A/CSMM (by opting in or out). It may be useful to allow the ASSM's Assembly to approve the membership of any other, non-Serb majority municipality that wants to join.

Art. 6a of the Principles states: "all amendments to the Statute, rules of procedure and all necessary regulations and decisions adopted by the Assembly will be applicable to its members unless one of its members formally expresses a different decision". This needs clarification: it would be appropriate to permit individual municipalities to decide which cooperative activities they wished to participate in (either by opting in or out), but no one municipality should be able to veto decisions on the governing rules of the A/CSMM unless it would have a very loose, "confederal" form.

The General Principles state that the A/CSMM "will promote the interest of the Kosovo Serb community in its relations with the central authorities", including proposing amendments to legislation, initiating proceedings before the courts, and nominating representatives in the competent organs/bodies of the central government, including the Consultative Community Council. The Court objected to this on the grounds that it implies a 'partnership' between the A/CSMM and the central authorities, thereby contributing to partitionism. The Court found that the A/CSMM cannot be vested with "full and exclusive authority" to promote the interests of Kosovo Serbs, noting that other bodies, protected by the Constitution, also have this role. The Court left open to the A/CSMM a role in the legislative process, via the Consultative Council for Communities. The A/CSMM should also be able to comment on relevant legislation in the way that all interested parties provide input. The A/CSMM, as a legal entity, should have access to the courts to protect its rights and freedoms, including the right to legal remedies (Article 32 of the Constitution).

The Principles call for the A/CSMM to have its own budget, subject to audit by Kosovo's Auditor-General. The Court objected to fiscal transfers from the central authorities to bodies connected to municipal governments on the grounds that the Constitution is silent on such transfers beyond to local governments specifically (Article 124.5). The Court raised no explicit objection to funding for the A/CSMM from the Republic of Serbia, but its finding that Kosovo's central authorities cannot transfer to the A/CSMM appears to have closed off the possibility of Serbian funding passing through Prishtina. There is a larger question as to what constitutional constraints exist regarding the central authorities' spending power, given that in normal constitutional practice such power is unconstrained. The Court provided no interpretation of Article 120.1 of the Constitution, which appears to provide a wide spending power to the central government. Even if the central government could not make direct transfers to the

A/CSMM, there could be a requirement that Serbian funding to the A/CSMM be formally registered with the central authorities and be subject to audit.

## **Conclusion**

The report concludes that the Brussels Agreement, the General Principles Agreement, the Court's judgment, and Kosovo's laws on municipal self-government and on inter-municipal cooperation and provide significant potential shared ground for developing a statute for the A/CSMM. A resolution would require some creativity but also good will between the parties. A critical issue will be the retention by each municipality of its ultimate legal competence, so that cooperation will be voluntary. An A/CSMM constructed in this way could take on joint cooperative activities with many parallels with arrangements set out in Kosovo's Law on Inter-Municipal Cooperation. A Statute could ensure recognition of diversity and minority representation within the A/CSMM. Even without a statute, an association could be created within the framework of existing law.

**Express**

## Possible Options Relating to the Establishment of the Association of Serb Majority Municipalities

### Introduction

Plans to establish an Association of Serb Majority Municipalities (A/CSMM) in Kosovo, the subject of preliminary agreements in 2013 and 2015, are important to the EU-mediated dialogue on normalization between Serbia and Kosovo. The plans are currently stalemated. There has been little movement on the issue since the Constitutional Court issued a ruling in 2015 that assessed the compatibility of the more detailed 2015 document (hereafter, the “General Principles”) with the Constitution of the Republic of Kosovo.

A resolution to the issue of the A/CSMM will require political compromise but also more attention to technical solutions for issues that have arisen. There are existing legal precedents, notably in the Law on Inter-Municipal Cooperation, that should prove helpful. For the Albanian majority, and Kosovo’s Constitutional Court, a resolution will likely have to address fears that the A/CSMM would threaten Kosovo’s sovereignty and territorial integrity, and undermine important constitutional provisions and principles (e.g. regarding equality and non-discrimination). For the Serb minority, it will have to address its concerns for human security, including its aspirations for a limited collective form of self-government. Movement on each of these fronts will facilitate movement on the other.

The following report examines what appear to be the main issues informing the stalemate, according to the headings contained in the 2015 “General Principles”, which are also the headings used in the Court’s ruling. In each case, we describe the concerns raised by the Court, and then present options for addressing these concerns in a way that may be acceptable to the Albanian and Serb communities in Kosovo. Many of our proposed options would involve considerable elaboration beyond the 2013 Brussels Agreement and the 2015 Agreement on General Principles, which could ultimately be reflected in a draft Statute on the A/CSMM.

### **1. Objectives and Competences**

**The 2013 Brussels Agreement states that municipalities shall be entitled to cooperate in** exercising their powers through the A/CSMM, which would *have full overview* of the areas of economic development, education, health, urban and rural planning (Article 4), as well as additional competencies that may be delegated by the central authorities (Article 5)

The 2015 Agreement on General Principles (Article 4) gave as the A/CSMM’s objectives, the delivering of public functions and services to:

- strengthen local democracy;
- develop local economy, improve local primary and secondary health and social care, coordinate urban and rural planning and in the area of education;
- adopt measures to improve local living conditions for returnees to Kosovo;
- conduct, coordinate and facilitate research and development activities;

- promote, disseminate and advocate issues of common interest of its members and represent them, including to the central authorities;
- provide services to its members in accordance with Kosovo law;
- assess the delivery of public service to its member and their residents as to support the ASM in forming positions of common interests for participation in the work of the central authorities;
- conduct monitoring as require for the implementation of its activities, and;
- establish relations and enter into cooperation arrangements with other associations of municipalities , domestic and international.

In addition, the Agreement on General Principles states that the A/CSMM would “*exercise*” full overview of the areas of economic development, education, health, and urban and rural planning, instead of “*have*” full overview, as stated in the Brussels Agreement.

The competencies in the Agreement on General Principles are consistent with, if less detailed than, those in Article 17 of Kosovo’s Law on Local Self-Government. The Court decision made no reference to Articles 20-23 of that law, which provide for “enhanced competencies” for the Serb majority municipalities. Specifically, the law states that Mitrovica North, Gračanica and Štrpce shall have competency for the provision of secondary health care and for higher education, while all Serb-majority municipalities “shall have authority to exercise responsibility” for cultural affairs and “enhanced participatory rights” in the selection of local police station commanders.

The Constitutional Court found that the English “exercise full overview” is ambiguous and does not conform with either the Albanian text (“exercise of full view”, tantamount to simply observing), or the Serb text (“conduct a full review”, tantamount to conducting an audit). The Court states that the wording to be used in the statute needs to comply with the wording of the First Agreement, i.e., “have full overview” (Paragraph 143-147). It states further that the statute must not replace or undermine the status of participating municipalities as basic units of self-government; it should secure as an objective the responsibility of participating municipalities to respect the constitution and laws and should not circumvent or avoid administrative review by the central authorities (Paras 148-149).

A particular difficulty has arisen around whether or not the A/CSMM should have “executive power”, a concept that has become politicized and polarising. The only use of this term in the Court’s judgment is an italicized sentence that appears to restrict such power to the central authorities: “The Government of Kosovo exercises the executive power in compliance with the Constitution and the law” (Para 157). The term “executive power” does not appear at all in either the Brussels Agreement or the Agreement on General Principles. Thus it should be possible to avoid the use of this term in the Statute or any revised agreement. It should be possible, for example, to give the A/CSMM a role in “administering” regulations and by-laws and other responsibilities of the municipalities. *Delegation of the administration of laws* seems to be permitted by the Law on Inter-Municipal Cooperation. It may also be possible for the central authorities to delegate administrative responsibility for laws of the republic to the

A/CSMM (either directly or through the municipalities). Delegation of administration would avoid any inference that the A/CSMM has a law-making capacity.

Neither the Brussels Agreement nor the Agreement on General Principles elaborates the mechanisms for municipalities to cooperate via the A/CSMM. Articles 9 to 14 of the Law on Inter-Municipal Cooperation set out different forms that cooperation could take: a joint working body; a joint administrative body; a joint public enterprise; a joint public institution; or a joint public partnership. A Joint public enterprise can be established following the Law on Local Enterprises. The two options most likely to be of interest to the A/CSMM are a joint administrative body and a joint public institution. Both of these may carry out cooperative activities, but their forms differ.

- A joint administrative body may be established by two or more municipalities. It would be governed by the mayors of the cooperating municipalities and its head would report to the mayors. It may not be a legal institution and would be staffed by civil servants assigned by the municipalities.
- A joint public institution appears to be a more formal arrangement, and therefore may be more attractive to supporters of a reasonably substantive A/CSMM. A decision to establish such a body requires the consent of all (participating) municipal assemblies. It would be governed by a “leading body” and a “supervisory body” whose membership and terms would be established by agreement of the founding municipalities. The law is silent on the legal status of a joint public institution, but it would appear that a joint public institution, like a joint public enterprise, would be a legal institution. As for staffing, there could be arrangements to second public servants to a joint public institution.

Options:

- The competences of the A/CSMM could be further detailed to include all subject matter in the Law on Municipal Self-Government. In particular, the statute on the A/CSMM should reiterate the provisions for “enhanced competencies” for Serb majority municipalities that are included in the Law.*
- The competencies of the A/CSMM could include explicit authority to establish the five types of cooperative arrangement given in Articles 9 to 14 of the Law on Inter-Municipal Cooperation. There should be further examination of the option of a joint public institution as some form of this model may serve as the principal form of cooperation within the A/CSMM.*
- The choice between “having” and “exercising” full overview could be avoided by adopting a different construction. The A/CSMM might “exercise” full overview regarding the competences of its member municipalities for economic development, education, health and urban and rural planning (as well as for “cultural affairs as in the Law on Local Self-Government), while “having” full overview of the policies and activities of the central authorities and other municipalities regarding their policies and activities in these areas.*

## 2. Organizational Structure and Administration

The Agreement on “General Principles” lays out an organizational structure for the A/CSMM that includes an Assembly, President (and Vice-President), Council, Board, administration, and complaints office.

The Constitutional Court has two issues with this section of the Principles: the first and most significant issue concerns respect for ethnic diversity within the A/CSMM, and; the second issue relates to the claim in Principle 6(e) that the administrative staff of the A/CSMM will have the employment status of civil servants.

(i) The Court declares that the organizational structure of the Association laid out in the General Principles raises “concerns regarding respect for the diversity of communities resident within the participating municipalities, and the reflection of this diversity in the staffing and structures of the Association/Community as required by the Constitution of the Republic of Kosovo” (CC 153). It adds that any act or statute establishing the A/CSMM “shall secure respect for the diversity of communities resident in the participating municipalities, in accordance with Articles 3, 7, 57.1, 61 and 62 of the Constitution” (CC, 155). Art. 3 establishes that “the Republic of Kosovo is a multi-ethnic society...based upon the principles of equality of all individuals”, while Art. 7 upholds principles of “equality...non-discrimination...[and] pluralism”. Art. 61 establishes that Kosovo’s Communities and their members shall be entitled to “equitable representation in employment in public bodies...at all levels” (in addition, Art. 101 calls for the civil service to “reflect the diversity of the people of Kosovo”). Art. 62 contains a number of protections for minorities within existing municipalities, including the right of minorities above 10 per cent to have a “Vice-president of the Municipal Assembly for Communities” reserved to their members (the non-majority candidate for the Municipal Assembly with the highest number of votes). This official is responsible for addressing the interests and concerns of non-majority residents in meetings of the Municipal Assembly, and also for reviewing claims that acts or decisions of the Assembly contravene the constitutionally-guaranteed rights of non-majority members. The Vice-President is to be responsible for referring such matters to the Municipal Assembly for reconsideration, an important minority protection procedure that is colloquially known as an “alarm bell” and that also exists to protect minorities in Belgium and South Tyrol. Art. 62 also guarantees representation for non-majority Communities in the executive body of each municipality.

The problem, from the Court’s perspective, is that the “General Principles” do not take explicit notice of these core constitutional protections, and, therefore, potentially threatens them. The General Principles do not offer any explicit guarantees that a) the personnel in the A/CSMM’s administration will be comprised on the basis of “equitable representation”, or that b) the sorts of minority political protections established at the municipal level in Kosovo’s constitution (Art. 62) will be secured within the new structures proposed (The A/CSMM). As written, the General Principles allow in theory for the A/CSMM to have majoritarian structures across the board. There does not appear to be anything in them that would prevent both the President or Vice-president, or indeed, all of the ASSM’s Assembly, Council, Board, Chief Administrator, and so

on, being drawn exclusively from the A/CSMM's majority community. The danger here is that, to the extent that municipalities or the government of Kosovo assign competences or tasks to the A/CSMM, the minority protections that are available at the municipal level (e.g., Art. 62) of Kosovo's Constitution) may not be available within the A/CSMM.

Second, the Constitutional Court refers to Article 6(e) in the Agreement on General Principles that the staff of the "administration" of the A/CSMM "will benefit from an employment status in accordance with Kosovo Law including the Law on Labour and the Law on Civil Service". The Court argues that the status of civil service employees, under the Constitution, is restricted to employees of public bodies of administration established by the Government (including municipalities), and so the staff of the A/CSMM "shall not be considered part of the Civil Service *per se*" (CC 157). This, presumably, would deprive the staff of certain benefits, such as pension rights. It is also part of a general effort by the Constitutional Court to make clear that the A/CSMM is not a formal governing (public) institution.

#### Options:

*(i) The law and statute establishing the A/CSMM could explicitly provide for an administration workforce that would "reflect the diversity" of the population of the A/CSMM, and that would also explicitly uphold core constitutional principles of equality, non-discrimination, and pluralism (or would explicitly not derogate from current constitutional protections for minorities, including those provided in Art. 62).*

*(ii) The law or statute establishing the A/CSMM could also extend the constitutional protections that exist at the municipal level (Art. 62) to the A/CSMM itself. Thus, it could be stipulated that the Vice-president envisaged for the A/CSMM be drawn from the A/CSMM's non-majority population and be given the same responsibilities that the "Vice-president of Municipal Assembly for Communities" currently exercises in individual municipalities (see Art. 62, Constitution of the Republic of Kosovo).*

*(iii) The General Principles currently envisage the A/CSMM having a "complaints office with a mandate to examine complaints in relation to its objectives". In the law and statute, this office could be given an explicit mandate to investigate the complaints of minorities against actions of the A/CSMM, and to monitor the adherence of the A/CSMM's administration to an equitable hiring and promotion policy. A complaints office mandated to provide these functions could complement the work of an A/CSMM Vice-president established to protect minorities, or, albeit probably less usefully, serve as an alternative.*

*(iv) There are additional ways in which minorities could be accommodated within the ASSM, should this be seen as useful for allaying the concerns of the Albanian majority and the Constitutional Court. For example, the Agreement on General Principles states that the ASSM's Assembly is to be "appointed by each assembly of the participating municipalities, among their elected members". This is a process that could lead to the A/CSMM's Assembly being comprised exclusively of majority opinion in each participating municipality. An alternative way to proceed*



may be to draw the ASSM's Assembly from the political parties represented in participating municipal assemblies in proportion to those parties' share of municipal assembly seats. This alternative would guarantee a diverse ASSM Assembly that represents all of its population, and that is fully in keeping with the constitutional provision that Kosovo is a pluralist and "multi-ethnic society". At the same time this would assure Serbs that the A/CSMM Assembly would represent the Serb community as Serbs would be a majority of its members. Moreover, this alternative would guarantee pluralism without the need for any ethnic quotas, which are often seen as regressive in contemporary European jurisprudence (See *Sejdić and Finci vs Bosnia and Herzegovina*<sup>1</sup>).

(v) Another step that would accommodate the A/CSMM's local minorities would be to ensure that wherever a municipality in the ASSM has a Serb police chief, it would have a deputy-chief from the (non-Serb) minority. Currently, the "General Principles" (Principle 13) reiterates the part of the 2013 Brussels Agreement (para. 9) that calls for the four mayors of the northern municipalities to submit a list of (Serb) candidates for regional police commander, but the General Principles do not address the concerns of minorities in the ASSM re: policing. Indeed, Principle 13 omits the other part of para. 9 of the Brussels Agreement which states that the "composition of the KP in the north will reflect the ethnic composition of the four municipalities" (a guarantee of minority representation). It is not clear why the longer and more elaborate Agreement on General Principles should omit a key provision of the shorter 2013 Brussels Agreement. Reversing this omission would make sense and may help to allay any mistrust that has arisen because of the Agreement on General Principles.

These sorts of protections for minorities within the A/CSMM may go some way towards addressing the concerns of the Albanian majority in Kosovo, and the Constitutional Court. If this is so, it would reduce opposition to the establishment of the A/CSMM, and perhaps facilitate decentralisation from the central authorities to the A/CSMM. Additionally, the more protections the (Serb) majority in the ASSM offer to the minority there, the more protections it might legitimately seek for Serbs in Kosovo as a whole.

(v) To deal with the court's ruling that the administrative staff of the A/CSMM "shall not be considered part of the Civil Service per se" (CC 157), an option may be to "second" municipal civil servants from the participating municipalities to the A/CSMM or its associated bodies (e.g. joint administrations or joint public institutions). These staff would then be able to enjoy whatever benefits, including job protection rights or pension rights, accrue to municipal civil servants. The Law on Inter-Municipal Cooperation states that municipalities "shall assign civil municipal servants to work in the joint administrative body" (Article 11.7), but it is silent on staffing of joint public institutions. However, secondments are normally permitted from

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<sup>1</sup> In this case (2009), a Jewish and a Roma citizen of Bosnia and Herzegovina argued before the European Court of Human Rights that the provisions in the Dayton Peace Accords limiting eligibility to stand for election to the House of Peoples or the Presidency to three designated national groups (Bosniaks, Croats and Serbs) excluded fourteen other national minorities and constituted discrimination in breach of Article 14 taken in conjunction with Article 3 of Protocol 1 of the European Convention on Human Rights. The Court agreed.

*governments to all kinds of organizations. The General Principles document provides that “The members of the Association/Community [i.e., the individual municipalities] may decide to use a number of employees to support the Community/Association in the execution of its objectives (Principle 6 (e)).*

### **3. Legal Capacity and Membership**

Article 14 of the Agreement on General Principles states that the A/CSMM is to be endowed with the capacity necessary under law to perform its objectives, including the right to own moveable and immovable property, to co-own companies that provide local service, and to conclude contracts, including employment contracts.

Article 2 of the same document states that the A/CSMM shall be a legal entity defined by its statute. The Constitutional Court (para 132) found that the A/CSMM shall be an organization within the meaning of Article 44 of the Constitution and shall be an entity with a legal personality (para 172).

Membership of the A/CSMM is implicitly to include all Serb majority municipalities, with no mention of a right to resign. This is unlikely to pose any problems, but it contrasts with the Law on Inter-Municipal Cooperation where each municipality is to decide the subjects and forms of its cooperation. Membership of the A/CSMM is to be open to any other municipality, provided its members are in agreement.

#### Options

- (i) *The Statute could further clarify that the A/CSMM is an entity with a legal personality, which can form other bodies (as under the Law on Inter-Municipal Cooperation) some of which (e.g. joint public institutions, a joint public enterprise) might also have legal personality.*
- (ii) *The Statute should make it clear that any of the designated Serb majority municipalities shall by right be a member of the A/CSMM, unless the municipality had voted to withdraw. The Statute could indicate that a majority of the Assembly of the A/CSMM could approve the membership of any other, non-Serb majority municipality.*

### **4. Initiation of Cooperative Activities**

While the A/CSMM is to provide an organizational vehicle for cooperation among the Serb-majority municipalities, it cannot legally assume the competencies of individual municipalities, so it must operate on the basis of the consent of each municipality, at least at some level. Both the Brussels Agreement and the General Principles are silent on how individual cooperative activities will be initiated and governed. Article 6(a) of the General Principles states that “all amendments to the Statute, rules of procedure and all necessary regulations and decisions adopted by the Assembly will be applicable to its members unless one of its members formally

expresses a different decision”. This is ambiguous. One reading is that a member municipality is able to veto a collective decision or change in the rules of procedure etc. This would imply a loose body, akin to a confederation. Another is that a member might be able to veto the application of rules and decisions to it, which could result in a ‘asymmetric’ ASSM. The existence of this provision suggests that Serbs would support an A/CSMM in which each municipality retains some control over its participation. A central problem with this language is that it conflates different kinds of “decisions”: some decisions set the governing rules for the association or its emanations (such as joint public institutions); these can be vetoed, but it is difficult to see how they can be applied differently to different members. However, decisions on the designation of the cooperative activities of the A/CSMM could apply differently to different members—not all members need to participate in all cooperative activities. The meaning of the wording here needs to be clarified

The Law on Inter-Municipal Cooperation sets out elaborate procedures in terms of establishing cooperative activities e.g. who may initiate proposals, review by municipal assemblies, key points that agreements must cover, publication of agreements in the official gazette. The issue will be a recurring one for the A/CSMM every time a new cooperative activity is considered. The Statute could clarify procedures in this regard in a way that is consistent with the ultimate legal competence of each member municipality.

### Options

*The participation of a municipality in a cooperative activity of the A/CSMM could proceed by either an opting out or an opting in procedure.*

- (i) *In an opting-out procedure, the ASSM’s Assembly would be mandated to approve cooperative activities (including potentially through the establishment of joint administrations or joint public institutions) by some level of voting support (perhaps two-thirds). A member municipality would then be engaged in the cooperative activity unless it opted out according to set procedures.*
- (ii) *In an opting-in procedure, the Assembly of the A/CSMM would be mandated to approve cooperative activities, but each member municipality would be required to opt in to each activity in which it wished to participate.*

*Either of these approaches would facilitate collective decision-making while preserving the ultimate competence of each member municipality, in line with the Court’s expectations.*

## **5. Relations with the central authorities**

In one interpretation (favoured by Serbs), the General Principles aim at giving the A/CSMM a formal institutional relationship with Kosovo’s central authorities. The document states, *inter alia*, that the A/CSMM will “promote the interests of the Kosovo Serb community in its relations with the central authorities”; will be “entitled to propose, in accordance with Kosovo law, amendments to legislation or regulations relevant to the performance of its objectives”; and will have the “right to initiate or participate in proceedings before the competent Courts,

including to the Constitutional Court, against any acts or decisions” that affect the exercise by the Association of its powers “in accordance with its Statute”. The General Principles also state that the Association will have the “right to nominate representatives in the competent organs/bodies of the central government, including the Consultative Community Council (sic)”.

The Constitutional Court, and the Albanian majority, are reluctant to concede such a formal status to the A/CSMM, especially a substantive one. They appear to fear that such a status may create the impression that the A/CSMM is a “partner” of the central authorities, and may contribute to partitionism (i.e., detract from the unitary nature of the Republic). They may also have some concern that with such a status the A/CSMM would have international standing and be able to block actions of the Government of Kosovo. Consequently, the Court seems determined in its ruling to emphasize that the A/CSMM is merely a “community” or association, comparable to a non-governmental organization, and that it would be only one of several communities or associations in Kosovo that have rights of cultural protection, albeit rights that are limited and non-territorial (outlined in Art. 59 of the Constitution). Any questions about the extent of the A/CSMM’s rights or powers could be clarified in the Statute.

This general thinking is reflected throughout the Court’s ruling on “relations with the central authorities”. It rules that the A/CSMM cannot be vested with “full and exclusive authority” to promote the interests of the Kosovo Serb community before the central authorities, because the Constitution extends this right to other agencies, primarily the Consultative Council for Communities (Art. 60.2), and presumably also because there are Serbs who live outside the A/CSMM. On the role of the A/CSMM in proposing amendments to legislation and regulations, the Court rules that the Association “cannot be entitled to propose amendments to legislation”, as envisaged in the Principles. This is because the right of “legislative initiative” is restricted under the Constitution to certain officials (e.g. the President, or deputies in the Assembly of Kosovo) or at least 10,000 citizens. The Court also notes that the ability to bring referrals to the Constitutional Court is constitutionally regulated (Art. 113) and, therefore, that the Association may only bring proceedings where, as a legal person, its individual rights and freedoms guaranteed by the Constitution have been violated (Art. 113.7).

To underline that the A/CSMM will be only one community or association among others, the Court seeks throughout to remind us that there are other bodies, protected by the constitution, that represent Serbs - including the municipalities and the Consultative Committee for Communities. It rules that any legal act or Statute establishing the Association must not “replace or undermine the authority of any associations of communities established within the meaning of Articles 57, 59 (14) and 60.2 of the Constitution”, and must comply with Chapter III of the Constitution.

A final, but important, issue in terms of relations with the central authorities, is whether the parties to the Agreements will have a mechanism to monitor implementation. Normally, the participants in such a mechanism would be those who concluded the agreements, but an alternative would be for a mechanism between the central government and the A/CSMM.

## Options

*One way to think about the Court's ruling and the way ahead is to note that the ruling does not prevent the A/CSMM from representing Serbs, or from playing a role in legislative initiatives, or in court proceedings, including those of the Constitutional Court. Thus, the Court merely states that the A/CSMM cannot have "full and exclusive" authority to promote the interests of Serbs before the central authorities, as there are other individuals and agencies that can also do this (e.g. the Consultative Council for Communities, Serb MPs in the Assembly of Kosovo, and individual Serb majority municipalities). The Court leaves open to the A/CSMM (CC para. 171) a role in the legislative process via the Consultative Council for Communities, a body which, under Art. 60.3 (2) of the Constitution, is able to "comment at an early stage on legislative or policy initiatives that may be prepared by the Government, to suggest such initiatives, and to seek to have their views incorporated in the relevant projects and programs". Beyond this, it should also be possible to allow the A/CSMM to comment on legislation relevant to it through the legislative proceedings of the Assembly of Kosovo (legislative assemblies routinely permit such input from interested parties and one might expect Serb MPs in particular to encourage input from the A/CSMM).*

*Similarly, while the Court seeks to limit (regulate) the Association's access to the Courts, including to the Constitutional Court, it notes that the Association will, like other bodies and individuals, have access to the courts to protect its constitutional "rights and freedoms". These rights and freedoms include a "right to legal remedies". Art. 32 of the Constitution of Kosovo stipulates that "[e]very person has the right to pursue legal remedies against judicial and administrative decisions which infringe on his/her rights or interests, in the manner provided by law". Art. 54 further offers legal protection against the violations of a legal act, such as an act establishing the Association and spelling out its powers. It states that "Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated" (our underlining).*

*The difficulty is that these various ways in which the A/CSMM will be able to interact with the central authorities may fall short of what Serb leaders want. Politically, they may see these constraints on the A/CSMM as delivering less than what was agreed to in the General Principles, which, from the Serb perspective, recognized the A/CSMM as in some ways a partner of the Government's, with its own formal governing body and legal personality, including what some would call executive powers. Beyond this, Serbs would likely want to see the status and powers of the A/CSMM protected against unilateral changes by the central authorities, which could mean entrenching the Statute in the constitution, with any revision requiring the consent of a majority of the Serb-majority municipalities. A stronger and more formal relationship between the A/CSMM and the central authorities may, however, require offsetting steps from the Serb side (including from Serbia) that would allay Albanian concerns about the threat posed by the A/CSMM to Kosovo's sovereignty and territorial integrity.*

*Finally, there should be consideration to a possible mechanism to review the implementation of the Agreements.*

## **6. Budget and Financial Support**

The General Principles call for the A/CSMM to have its own budget, to be administered in line with principles of transparency and accountability. Its expenditures are to be subject to audits, including by Kosovo's Auditor-General and are to be comprised of: a) contributions from its members (municipalities); b) income and revenue from the services provided by the Association, and its assets; c) transfers from the central authorities; d) contributions, grants etc from domestic and international sources, including the Republic of Serbia.

The Constitutional Court objects to item c), namely transfers from the central authorities to the A/CSMM. It notes that Article 124.5 provides for financial transfers from the central government to municipalities, but is silent on transfers to other bodies connected with local governments, which the Court has interpreted as meaning that the right to receive such transfers belongs "exclusively to the municipalities". (Para. 180). The Court's judgment that the central government's authority to make transfers is limited by the Constitution's silence is comparatively unusual. The only general provision regarding public expenditures is Article 120.1, which states that these shall be "based on the principles of accountability, effectiveness, efficiency, and transparency" and the Court has provided no interpretation of its significance. A broad spending power is consistent with most constitutions, for which it is effectively unlimited, at least in terms of objects. Thus the Court's judgment on this issue may be subject to further review.

As with relations with the central authorities, the Court here seems concerned with depriving the A/CSMM of the "symbolism" of receiving direct transfers from central authorities, perhaps because of fears that this would elevate the status of the A/CSMM to that of a formal governing institution (like a region in a federation or devolved unitary state). But as a practical matter, there would be little to prevent the A/CSMM from receiving funding from the central authorities, indirectly, via the municipalities, and the court does not object to this. And given that the A/CSMM would largely be engaged in cooperative activities mandated by the municipalities, the municipalities would logically be a primary funding source. One of the principles of the European Charter of Local Self-government, which Kosovo seeks to uphold, is that states should not impose conditions on local government funding as long as these funds are spent within the framework of local government powers (European Charter Art. 9.1.). The spending discretion of municipalities is also protected by Art. 124.5 of Kosovo's Constitution: "Municipalities have the right to decide, collect and spend municipal revenues and receive appropriate funding from the central government in accordance with the law". Kosovo's Law on Inter-Municipal Cooperation would justify municipalities funding the A/CSMM, including with money they receive from the central authorities.

Interestingly, the Court raises no explicit objection to the A/CSMM receiving funding from the Republic of Serbia, possibly because it considers the A/CSMM as lacking the status of a formal

public institution, and as akin to a voluntary association or NGO. If this is not an oversight, it would mean that the A/CSMM could become dependent on Serbian funding, especially for its core expenses. If the Court's finding that the central government cannot make transfers to the A/CSMM also means that Prishtina cannot be a conduit for funding from Serbia, this would deprive Kosovo of influence over how such funding is spent, something that Kosovo's Albanians are unlikely to support. Even if it is the case that funding from Serbia to the A/CSMM could not pass through the central government, there could still be a requirement that such funding be formally registered with the central authorities and subjected to certain substantive conditions.

(It is worth noting that there are issues associated with the financing of the Serb majority municipalities, notably by Serbia but also by the central authorities in relation to other municipalities, but these fall outside the scope on any Statute on the A/CSMM.)

#### Option

*The sources of funding for the A/CSMM could be as set out in Article 17 of the 2015 Agreement on General Principles, subject to (a) a review of the right of the central authorities to make transfers to associations and (b) language to ensure transparency of Serbian funding to the A/CSMM.*

#### **7. International Municipal Cooperation**

The Brussels Agreement and the General Principles are silent on the issue of international municipal cooperation. Article 18 of the Law on Inter-Municipal Cooperation set out conditions for such cooperation within the competencies of municipalities. This cooperation is to be administrative and technical in nature and cannot involve delegation to foreign municipalities. Art. 10 (3) of the European Charter on Local Self-Government also states that "Local authorities shall be entitled, under such conditions as may be provided for by the law, to co-operate with their counterparts in other States".

#### Option

*The Statute on the A/CSMM could include provisions on International Cooperation similar to those in the Law on Inter-Municipal Cooperation and in line with the European Charter on Local Self-Government.*

#### **8. General and Final Provisions**

The General Principles provide for a review of the implementation of the Statute of the A/CSMM within a year of its adoption, including consideration of additional competences from the central authorities (Article 22). It also provides that "The Statute will be endorsed by decree upon agreement in the Dialogue. Any amendments will be presented by the Association/Community, will be endorsed by decree and will be reviewed by the Constitutional Court" (Article 21). The sentence on amendments has no provision for agreements with the

central authorities, which is an omission. Article 20 provides that the A/CSMM will be entitled to a coat of arms and flag “in accordance with Kosovo law”.

### **Conclusion**

This review of the relevant documents, including existing Kosovo law, suggests there could be much shared ground between the parties in developing a Statute for the Association of Serb Majority Municipalities. A critical issue would be the retention by each municipality of its ultimate legal competence, which means that cooperation, possibly on each cooperative activity, would need to be voluntary on the part of each municipality. This concept seems consistent with the General Principles. An A/CSMM constructed in this way would be capable of taking on many joint cooperative activities amongst the member municipalities. Such an approach would have many parallels with the arrangements for cooperation set out in the Law on Inter-Municipal Cooperation, which are consistent with the European Charter on Local Self-Government. The Statute could also ensure appropriate recognition of minority representation within the A/CSMM within the spirit of the Constitution.

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