Constitutional Court of the Republic of Kosovo
Perandori Justinian Street n.n.
10000 Prishtinë

PALLASKA & ASSOCIATES

Dastid Pallaska, Attorney at Law
Pallaska&Associates L.L.C.
Bulevardi Nëna Terezë 47/5
10000 Prishtinë

Tel: + 381 38 244 888
Fax: + 381 38 244 887
info@pallaska-associates.org
www.pallaska-associates.org

***Amicus Curiae* Brief**

in relation to

Referral KO 130/15

referred to

The Constitutional Court of the Republic of Kosovo

by

The President of the Republic of Kosovo

1 December 2015

1. Introduction

1.1 On 13 November 2015 I have been invited by the Constitutional Court of the Republic of Kosovo, hereinafter referred to as the "**Court**," to submit an *Amicus Curiae* Brief, hereinafter referred to as the "**Invitation**," in relation to Referral KO 130/15, submitted before the Court by H.E. Atifete Jahjaga, President of the Republic of Kosovo, hereinafter referred to as the "**Referral**." According to the Referral, the President of the Republic of Kosovo has requested from the Court "Interpretation of the compatibility of the General Principles/Main Elements of the Association/Community of Serb majority municipalities with the spirit of the Constitution, Article 3, paragraph 1, Chapter II and Chapter III of the Constitution of the Republic of Kosovo."

1.2 Pursuant to Rule 53 of the Rules of Procedures of the Court and Section 5, paragraph (b), of the Practice Direction No. 01/2012 of the Court, the present *Amcius Curiae* Brief is limited to the questions specified in the Invitation. Although under Section 5, paragraph (g), of the Practice Direction 01/2012 of the Court, I have the right to request reimbursement of reasonable expenses for serving as *Amicus Curiae* for the Court, I would like to inform the Court that this *Amicus Curiae* Brief is submitted to the Court on *pro bono* basis, as part of my firm's public interest practice that is aimed at strengthening the rule of law in Kosovo.

1.3 This *Amicus Curiae* Brief is based solely on the review of the following constitutional and legal instruments:

(a) Constitution of the Republic of Kosovo, hereinafter referred to as the "**Constitution;**"

(b) Association/Community of Serb majority municipalities – General Principles/Main Elements in English language, hereinafter referred to as the "**General Principles;**"

(c) Law No. 03/L-121 on the "Constitutional Court of the Republic of Kosovo," hereinafter referred to as the "**Law on the Constitutional Court;**"

(d) Rules of Procedure of the Constitutional Court of the Republic of Kosovo, hereinafter referred to as the "**Rules of Procedure;**"

(e) Law No. 04/L-199 on the "Ratification of the First International Agreement of Principles Governing the Normalization of Relations between the Republic of Kosovo and the Republic of Serbia, hereinafter referred to as the " **Law on the Ratification of the International Agreement for the Normalization of Relations;**"

(f) European Charter of Local Self-Government, adopted by the Council of Europe, hereinafter referred to as the "**European Charter of Local Self-Government;**"

(g) Law No. 03/L-040 on "Local Self-Government," hereinafter referred to as the "**Law on Local Self-Government;**"

(h) Law No. 04/L-057 on the "Freedom of Association in Non-Governmental Organizations," hereinafter referred to as the "**Law on the Freedom of Association**;"

(i) Law No. 03/L-149 on the "Civil Service of the Republic of Kosovo," hereinafter referred to as the "**Law on Civil Service**;"

(j) Law No. 03/L-087 on "Publically Owned Enterprises," hereinafter referred to as the "**Law on Publically Owned Enterprises**;"

(k) Regulation No. 02/2011 on the "Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries," as amended, hereinafter referred to as the "**Regulation on the Administrative Responsibility of the Office of the Prime Minister and Ministries**;"

(l) Charter No. 237/2015 of the Association of Kosovo Municipalities, hereinafter referred to as the "**Charter of the Association of Kosovo Municipalities**;"

1.4 This *Amicus Curiae* Brief has been prepared in English and for the convenience of the Court may be subsequently translated into Albanian. Having said this, in case of any discrepancy between the English and the Albanian versions of this *Amicus Curiae* Brief, the English version shall prevail.

2. Admissibility

Jurisdictional basis of the Referral

2.1 The Referral presents competing arguments with respect to its admissibility and the jurisdiction of the Court to adjudicate on its merits. Namely, the Referral initially contends that Article 84, paragraph 9, of the Constitution confers upon the President – in its capacity as the Head of State – broad and unlimited authority to refer to the Court any and all "constitutional questions," well beyond the basis stipulated under Article 113 of the Constitution. In order to support this position, the Referral states that Article 84, paragraph 9, of the Constitution vests the President with the mandate to bring before the Court any and all "constitutional questions" that have not yet acquired the form of a law, decree, regulation or a Charter of a Municipality that can make them eligible to be challenged before the Court pursuant to Article 113, paragraph 2 and/or 3, of the Constitution. In essence, the aforementioned proposition suggests that the Referral considers the General Principles as a "constitutional question" that has not yet acquired a specific legal form.

2.2 Notwithstanding the above, the Referral concurrently refers to the General Principles as a "**legal act approved by the Prime Minister of the Republic of Kosovo**" or "**implementing legislation of an international agreement**." [*Emphasis added*]. Indeed, Section 7 of the Referral – while delineating the scope of the General Principles – provides that the General Principles, "**in the form of a legal act approved by the Prime Minister** govern matters that are stipulated under Article 3, paragraph 1, Chapter II and Chapter III [of the Constitution]." [*Emphasis added*]. The reference to the General Principles as a "legal act approved by the Prime Minister" suggests that – even according to the Referral – the General Principles

have acquired a form under which this act can be challenged before the Court under Article 113, paragraphs 2 and/or 3, of the Constitution. The fact that the Referral considers that the General Principles have acquired a legal form is also corroborated by Section 10 of the Referral, which provides that the General Principles are "**implementing legislation of an international agreement**." [*Emphasis added*].

2.3 The classification of the General Principles as a legal act is also evident in Section 7 of the Referral, which clearly states that the General Principles "**produce legal effects in the constitutional system of the Republic of Kosovo**." [*Emphasis added*]. This statement indicates that the Referral treats the General Principles as a constitutional and legal instrument that produces constitutional and legal effects. Indeed, this line of argumentation is also evident in Section 10 of the Referral, which claims that the General Principles may also be deemed as a legal instrument, within the meaning of Article 113, paragraph 10, of the Constitution, on the basis of which the supplementary jurisdiction of the Court may be established. As it can be attested from the above, the aforementioned jurisdictional propositions are not only based on competing legal arguments but they also represent very broad interpretation of the legal basis on which these arguments claim to be based. In light of this, the present *Amicus Curiae* Brief will examine both jurisdictional arguments on individual basis.

Authority of the President to refer "constitutional questions" before the Court pursuant to Article 84, paragraph 9, of the Constitution

2.4 Notwithstanding the important function of the President to guarantee the constitutional functioning of the institutions established by the Constitution, the President does not have a broad and unlimited authority to refer matters before the Court, as it is argued in the Referral. The limits of the authority of the President to refer questions/matters to the Court under Article 84, paragraph 9, of the Constitution should be assessed based on the purpose of constitutional action initiated by the President. In this respect, the purpose of the constitutional action initiated by the President under Article 84, paragraph 9, of the Constitution can be divided into two general categories, as follows:

(i) constitutional action aimed at challenging a particular legal and/or an actual act in terms of its compatibility with the Constitution; and

(ii) constitutional action aimed at clarifying or seeking an interpretation of a particular constitutional provision that is closely associated to the exercise of the constitutionally mandated competences of the President.

The constitutional basis pursuant to which the President can initiate a constitutional action challenging a particular legal and/or an actual act in terms of its compatibility with the Constitution are provided under Article 113, paragraphs 2 and 3, of the Constitution. Article 29 of the Law on the Constitutional Court regulates the form and substance of the referral that can be submitted under these constitutional provisions. In this respect, it is important to note that – when submitting a referral under the aforementioned constitutional basis – the President acts in its capacity as the Head of State – representing the unity of the people of the Republic and guaranteeing the constitutional functioning of the constitutionally mandated institutions. In light of this, the President acts under Article 113, paragraphs 2 and 3,

of the Constitution only when the President considers that a particular legal and/or an actual act is not compatible with the Constitution. Having said this, it should be noted that a referral of the President pursuant to Article 113, paragraphs 2 and 3, of the Constitution, does not require the President to take a firm position with respect to the compatibility of the challenged act with the Constitution. On the contrary, in order to submit a referral under Article 113, paragraphs 2 and/or 3, of the Constitution, the President is only required to pose a question on whether the challenged act is compatible with the Constitution. Indeed, according to Article 29 of the Law on the Constitutional Court, a referral submitted under Article 113, paragraph 2, of the Constitution needs only to (i) specify whether the question on compatibility applies to the act as a whole or a part of it; and (ii) to identify the provisions of the Constitution with which the challenged act may be incompatible. Consequently, it can be deduced that the President – even when acting pursuant to Article 113, paragraph 2 and/or 3, of the Constitution – can challenge an act solely by posing a question on the compatibility of the challenged act with the Constitution and by identifying the constitutional provisions with which the challenged act may not be compatible with.

2.5 In addition to the above, based on Article 84, paragraphs 2 and 9, in relation to Article 83 and Article 112 of the Constitution, the President is also vested with the authority to raise questions before the Court that are closely associated with the exercise of the President's constitutional powers. This additional authority to refer "constitutional questions" before the Court is sensible as it enables the President to exercise due care in ensuring that the President does not violate the Constitution during the exercise of its constitutionally mandated powers. This authority is unique to the President as – under the Constitution – only the President can be impeached for serious violations of the Constitution. It is important to note that according to Article 113, paragraph 6, of the Constitution, the President can be impeached only for a "serious violation" of the Constitution. This means that the President cannot be impeached for any violation of the Constitution. In this respect, it can be argued that one of the main elements of the term "serious violation" – as used under Article 113, paragraph 6, of the Constitution – is that the President violated the Constitution knowingly and/or willfully.

2.6 In light of above, Article 84, paragraph 9, in relation to Article 82 and Article 112 of the Constitution, has vested the President with the authority to raise "constitutional questions" before the Court with the aim of ensuring that the actions of the President, in the exercise of its constitutionally mandated powers, are compatible, and in line, with the Constitution. By seeking guidance on "constitutional questions" under the aforementioned constitutional provisions, the President is not only able to prevent any violation of the Constitution during the exercise of its powers but also to demonstrate that any unwitting violation of the Constitution does not amount to a "serious violation," within the meaning of Article 113, paragraph 6, of the Constitution.

Definition of the term "constitutional questions" under Article 84, paragraph 9, of the Constitution

2.7 As explained above, while the form and substance of the constitutional action when challenging a legal and/or an actual act in terms of its compatibility with the Constitution are provided under Article 113, paragraphs 2 and 3, of the Constitution, the form and substance of the "constitutional questions" that can be posed by the

President to the Court, under Article 84, paragraph 9, in relation to Article 82 and Article 112 of the Constitution, are not specifically regulated by the Constitution. This is why the definition of the term "constitutional questions," as used in the Referral, is necessary in order to assess whether the General Principles represent a "constitutional question," within the meaning of Article 84, paragraph 9, in relation to Article 82 and Article 112 of the Constitution. On the basis of the analysis provided in the preceding section, in order for a question to be considered a "constitutional question," under Article 84, paragraph 9, of the Constitution, the following criteria must be satisfied in a cumulative manner:

(i) the question must be of a constitutional nature, that is the question must deal with a particular matter that is specifically provided for and/or stipulated in the Constitution;

(ii) the question must be closely associated with at least one of the powers of the President under Article 84 of the Constitution; and

(iii) the question must be aimed at ensuring that the exercise of the constitutionally mandated powers of the President is compatible, and in line, with the Constitution.

The aforementioned three-prong test has been established by the Court in its Judgment KO 103/14, in which the Court assessed the compatibility of Article 84, paragraph 14, with Article 95 of the Constitution. In this case, the Court held that since the referral has raised constitutional questions with respect to two particular constitutional provisions (Article 84, paragraph 14, and Article 95 of the Constitution) the questions submitted by the President "**are of constitutional nature**." [*Emphasis added*]. It is important to note that in the aforementioned case the President sought the interpretation of two seemingly conflicting provisions within the Constitution (Article 84, paragraph 14, and Article 95 of the Constitution). This means that Judgment KO 103/14 constituted an interpretation of the Constitution by the Court, that is the order of precedence of two conflicting provision, in the exercise of its function under Article 112 of the Constitution. As it will be elaborated below, Judgment KO 103/14 cannot serve as a precedent for the Referral as, in the present case, the President has not sought an "interpretation" of the Constitution, as it did in Referral KO 103/14, but has requested an assessment of the compatibility of the General Principles, as a specific and standalone act, with the Constitution. On the basis of the above, it can be deduced that the Referral cannot be declared as admissible pursuant to Article 84, paragraph 9, in relation to Article 82 and Article 112 of the Constitution. This is due to the fact that while the General Principles certainly have constitutional implications, the General Principles are neither closely associated with the constitutionally mandated powers of the President, as provided under Article 84 of the Constitution, nor does the Referral serve as a mechanism to ensure that the President's exercise of its constitutionally mandated powers is compatible, and in line, with the Constitution.

The Referral is admissible under Article 113, paragraph 2.1, of the Constitution

2.8 Notwithstanding the above – for the reasons stated below – the Referral is admissible under Article 113, paragraph 2.1, of the Constitution in conjunction with Article 29 and Article 30 of the Law on Constitutional Court. According to Article

113, paragraph 2.1, of the Constitution, the President is authorized to refer to the Court a question of the compatibility with the Constitution of, *inter alia*, decrees of the Prime Minister and of regulations of the Government. As noted above, the General Principles represent an act that has been signed by the Prime Minister. In its preamble, which provides the legal framework under which the General Principles have been concluded, it is stated that the General Principles have been signed by the signatories on the basis of the Law on the Ratification of the International Agreement for the Normalization of Relations, which – by virtue of its ratification by the Assembly – has become part of Kosovo's legal system. In light of this, and in order to assess whether the General Principles have the requisite form to be challenged under Article 113, paragraph 2.1, of the Constitution, it is necessary to assess the form of the General Principles under Kosovo law.

2.9 Article 93, paragraph 4, of the Constitution provides that the Government "**makes decisions and issues legal acts or regulations necessary for the implementation of laws**." [*Emphasis added*]. This function of the Government, coupled with the authority of the Prime Minister to represent and lead the Government and ensure the implementation of laws and policies determined by the Government, indicates that the General Principles represent an act of the Government and/or the Prime Minister in furtherance and/or implementation of the Law on the Ratification of the International Agreement for the Normalization of Relations. This conclusion is based on Article 6, paragraph 4.1, of the Regulation on the Administrative Responsibility of the Office of the Prime Minister and Ministries, which provides that the Prime Minister – in the exercise of its constitutional powers – can "**issue decisions, orders, regulations and can conclude agreements of understanding/cooperation**." [*Emphasis added*].

2.10 The aforementioned provision means that the Prime Minister can execute agreements of understanding/cooperation in furtherance of its constitutionally mandated competence to "ensure the implementation of laws [...]." Given the fact that the General Principles have been signed by the parties on the basis of the Law on the Ratification of the International Agreement on the Normalization of Relations, it can be concluded that the General Principles represent an executive act of the Prime Minister within the meaning of Article 6, paragraph 4.1, of the Regulation on the Administrative Responsibility of the Office of the Prime Minister and Ministries. Consequently, it can be deduced that the General Principles represent an executive act of the Prime Minister, within the meaning of Article 113, paragraph 2.1, of the Constitution.

2.11 In addition to the above, it should be noted that from the very language of the Referral it transpires that the purpose of the Referral is to seek the compatibility of the General Principles, as a specific and standalone act, with the Constitution. This means that the Referral requests from the Court to declare if the General Principles are compatible with the Constitution. This function of the Court cannot be performed solely under Article 112 of the Constitution, which provides that the Court shall be the final authority for the interpretation of the Constitution. Namely, the interpretation of the Constitution is a process that is confined to the spirit and the letter of the Constitution. As it is evident from the Referral, in the present case the Court has been explicitly requested to assess the compatibility with the Constitution of an act of the Prime Minister, which is separate from, and independent of, the Constitution. In this respect, it is important to underline that the

Referral has even specified the provisions of the Constitution with which the General Principles may not be compatible. Consequently, it is clear that the constitutional action initiated by the President amounts to assessment of compatibility with the Constitution of an act of the Prime Minister, within the meaning of Article 113, paragraph 2.1, of the Constitution, in conjunction with Article 29 and Article 30 of the Law on Constitutional Court.

2.12 Given that the *ratione materiae* and *ratione personae* for the Court to declare the Referral admissible, according to Article 113, paragraph 2.1, of the Constitution, have been established above, it is now necessary to examine whether the Referral is *ratione temporis* based on Article 30 of the Law on the Constitutional Court. According to Article 30 of the Law on Constitutional Court, an application under Article 113, paragraph 2.1, of the Constitution may be filed within the period of six (6) months from the moment when the challenged act entered into effect. In this respect, it should be noted that the General Principles were signed by the parties on 25 August 2015. Consequently, it is clear that this Referral is also admissible based on *ratione temporis* criterion, as specified by Article 30 of the Law on the Constitutional Court. On the basis of the above, it can be concluded that the Referral is admissible pursuant to Article 113, paragraph 2.1, of the Constitution in terms of *ratione materiae, ratione personae* and *ratione temporis.*

3. Merits

Legal Nature of the Association/ Community according to the General Principles

(a) The right of municipalities to establish associations and its constitutional and legal restrictions

3.1 First and foremost it is important to underline that the right of the municipalities to have inter-municipal and cross-border cooperation, in accordance with the law, is guaranteed under Article 124, paragraph 4, of the Constitution. Having said this, such an inter-municipal and cross-border cooperation is based on the common interests of the municipalities that are related to their powers mandated by Constitution and the law. The right of the municipalities to engage in inter-municipal and cross-border cooperation is also recognized by the European Charter of Local Self-Government, which is applicable to Kosovo on the basis of Article 123, paragraph 3, of the Constitution. Namely, Article 10, paragraph 1, of the European Charter of Local Self-Government provides that "[l]ocal authorities shall be entitled, **in exercising their powers**, to co-operate and, **within the framework of the law**, to form consortia with other local authorities in order to carry out tasks of common interest." [*Emphasis added*]. This means that – under the aforementioned legal basis – the right of the municipalities to form and join an association is recognized as long the exercise of such a right is related to municipal powers and, more importantly, the exercise of this right is within the framework of the law. Consequently, the elements of the General Principles that seek to further the right of the municipalities to engage in inter-municipal and cross-border cooperation are, in principle, compatible with Article 124, paragraph 4, of the Constitution and Article 10, paragraph 1, of the European Charter of Local Self-Government. In spite of this, as it will be elaborated below, the General Principles go well beyond the limitations set forth under Article 124, paragraph 4, of the Constitution and Article 10, paragraph 1, of the European Charter of Local Self-Government.

3.2 The text of the General Principles indicates that the "common interest" on the basis of which the Association/Community will be established is the ethnicity of the majority of the residents of the associated municipalities. The fact that "ethnicity" is the "common interest" of the Association/Community is evident in the very name of the General Principles, which defines the Association/Community as an organization of "**Serb majority municipalities in Kosovo**." [*Emphasis added*]. As it is evident from the above, ethnicity is not and cannot serve as a "common interest" for inter-municipal and cross-border cooperation between municipalities. This is due to the fact that "ethnicity" does not fall within the realm of municipal power or function on the basis of which municipalities can seek inter-municipal and cross-border cooperation according to Article 124, paragraph 4, of the Constitution, and Article 10, paragraph 1, of the European Charter of Local Self-Government. On the contrary, it is the opinion of this *Amicus Curiae* that the establishment of an association having as a sole criteria the ethnicity of its members or, as it is the case with the Association/Community, the ethnicity of the majority of the residents of its members, represents a direct violation of Article 3, paragraph 1, of the Constitution, which defines Kosovo as a "**multi-ethnic society consisting of Albanians and other Communities** [...]." [*Emphasis added*]. Therefore, this Amicus Curiae considers that the use of the phrase "Serbian majority municipalities" in the title and the text of the General Principles should be declared as incompatible with Article 3, paragraph 1, and Article 124, paragraph 4, of the Constitution as well as Article 10, paragraph 1, of the European Charter of Local Self-Government.

(b) The Association/Community can be established on the "common interest" of the municipalities with enhanced competences

3.3 Notwithstanding the above, it should be noted that the Constitution and the applicable law offers sufficient basis for the establishment of an association of municipalities that have a set of competences that distinguish them from the other municipalities. In this respect, it should be noted that Article 16 of the Law on Local Self-Government recognizes three types of competences for municipalities, as follows: (i) own municipal competences; (ii) competences delegated from central authorities; and (iii) enhanced municipal competences. According to Article 17 of the Law on Local Self-Government, "own municipal competences" represent traditional municipal responsibilities, including but not limited to local economic development, urban planning, primary public health care, local infrastructure development and maintenance etc. On the other side, under Article 18 of the Law on Local Self-Government, "delegated competences" represent those competences that are normally exercised by central authorities but which have been delegated to municipalities to ease citizens' access to public services. As such, Article 18 of the Law on Local Self-Government provides that "delegated competences" include but are not limited to cadastral records, civil registries, voter registration, business registration etc. It is important to underline that under the Law on Local Self-Government, own municipal competences and delegated competences can, in principle, be exercised by any and all municipalities of Kosovo.

3.4 In addition to the aforementioned municipal competences, the Law on Local Self-Government vests certain municipalities with enhanced competences. By way of example only, according to Article 20 of the Law on Local Self-Government, the municipalities of Mitrovicë North, Graçanicë, and Shtërpcë have the competence for

provision of secondary health care, including registration and licensing of health care institutions, recruitment, payment of salaries and training of health care personnel and administrators. Also, the municipality of Mitrovicë North has the competence for the provision of higher education. In addition to the above, according to Articles 22 and 23 of the Law on Local Self-Government, all municipalities in which the Serb Community is in the majority shall have authority to exercise responsibility for cultural affairs as well as enhanced participatory rights in the selection of the local station police commanders in accordance with law. On the basis of the above, an association of municipalities with enhanced competences could be established according to the Law on Local Self-Government and the European Charter of Local Self-Government. Unlike the Association/Community, as established by the General Principles, an association of municipalities with enhanced competences would not have ethnicity of the residents of its members as the sole "common interest" on the basis of which it is established. Therefore, an association of municipalities that is established based on the enhanced competences of the municipalities is compatible with the Constitution and the European Charter of Local Self-Government, provided that the objectives of such an association are in line with the restrictions specified under Article 124, paragraph 4, of the Constitution and Article 10, paragraph 1, of the European Charter of Local Self-Government.

Executive character of the powers and competences of the Association/Community

(a) Delivering public functions and services to municipalities and their residents

3.5 Article 4 of the General Principles – prior to specifying the areas in which the Association/Community will realize its objectives – provides in clear and unequivocal terms that the "Association/Community will have as its main objectives **in delivering public functions and services to** [...]." [*Emphasis added*]. Since this phrase precedes the specification of the areas in which the Association/Community will realize its actual objectives, the character of the specific objectives specified under Article 4 of the General Principles should be assessed in light of the phrase "**delivering public functions and services**." [*Emphasis added*]. The use of this phrase prior to the specification of the actual competences indicates that the Association/Community will effect the fulfillment of its objectives stipulated under Article 4, paragraphs (a) – (m) of the General Principles by "delivering public functions and services" to its members and, more importantly, to the residents of its members. The fact that, according to the General Principles, the Association/Community will also be delivering public functions and services to the residents of its members is established by Article 4, paragraph (k), of the General Principles, which provides that the Association/Community shall "assess the delivery of public services to its members **and their residents** [...]." [*Emphasis added*]. The reference of this provision to the delivery of public services to the "residents" of the members of the Association/Community proves that the General Principles empower the Association to exercise executive powers, which under the Constitution are exclusively vested with the municipalities. The conclusion that the General Principles vest the Association/Community with executive powers is also strengthened when bearing in mind that Article 6, paragraph (f), of the General Principles foresees that the Association/Community shall have "a complaints office with a mandate to examine complaints in relation **to its objectives**." [*Emphasis added*]. This suggests that the complaints office may hear grievances not only of the

members of the Association/Community but also of the residents of the members of the Association/Community to whom public services are delivered under Article 4, paragraph (k), of the General Principles.

3.6 The Association/Community's delivery of public functions and services, as provided for under Article 4 of the General Principles, represents a direct violation of Article 123 of the Constitution, which provides that "local self-government is exercised by representative bodies elected through general, equal, free, direct and secret ballot elections." Furthermore, Article 4 of the General Principles is incompatible with Article 124, paragraph 1, of the Constitution as it establishes the Association/Community as an additional unit of local self-government, above the municipalities. It should also be noted that the establishment of the complaints office, under Article 7, paragraph (f), of the General Principles exceeds the scope of review that central authorities can exercise over municipal acts, acting in their domain, provided for under Article 124, paragraph 7, of the Constitution. In this respect, it is important to underline that – under Article 79 of the Law on Local Self-Government – the review over the operation of the municipalities with respect to own municipal competences or enhanced competences is confined only to the review of legality, whereas for delegated competences the central authorities can also perform a review of conformity. By enabling the complaint's office of the Association/Community to receive and decide on any and all complaints from the residents of the municipalities, Article 7, paragraph (k), of the General Principles violates Article 124, paragraph 7, of the Constitution in relation to Article 79 of the Law on Local Self-Government.

(b) Non-recognition of the right of the municipalities to leave the Association/Community

3.7 Another element that gives the Association/Community the nature of an executive and mandatory organization is the failure of the General Principles to specify the circumstances under which a member of the Association/Community can leave the organization. Although the General Principles do not represent the Charter of the Association/Community, the non inclusion of this provision is surprising given that the General Principles govern the procedure for the joining of new members. According to Article 3, paragraph 2, of the Law on the Freedom of Association, which implements Article 44 of the Constitution, "**no person shall be required to associate involuntarily and no person shall be discriminated against in any way because of any decision to associate or not to associate**." [*Emphasis added*].

3.8 By not recognizing the right of its members to leave the Association/Community, the General Principles represent a violation of Article 44 of the Constitution, as it is implemented by Article 3, paragraph 2, of the Law on the Freedom of Association. Furthermore, the failure of the General Principles to explicitly give its members the right to leave the Association/Community suggests that this organization is a mandatory executive body and, as such, represents an additional layer of self-government in Kosovo, above the municipalities.

(c) The right of the Association to exercise executive competences/public functions delegated to it by the central authorities

3.9 Article 5 of the General Principles provides that the Association/Community will "**exercise other additional competences as may be delegated by the central authorities**." [*Emphasis added*]. Article 3 of the Law on Local Self-Government defines "delegated competences" as "competences of the central government and other central institutions the execution of which is temporarily assigned by law to municipalities." As the aforementioned legal provisions clearly establish, the delegated competences can only be exercised by the municipalities and only when this is provided by law. Given that the main purpose of the notion of delegated competences is to ease citizens' access to public services, it is logical that the aim of the central authorities is to delegate certain competences to municipalities, as the basic unit of self-government, which is closest to the citizens as the ultimate beneficiaries of such public services. Consequently, the right of the Association/Community to obtain additional competences from the central authorities not only infringes the competences of the municipalities to execute delegated competences, established under Article 123 and 124 of the Constitution and Article 18 of the Law on Self-Government, but also distorts the concept of delegated competences as defined above, that is to bring public services closer to the to the beneficiaries.

(d) The right of the Association/Community to undertake legislative initiative and to have standing before the Court

3.10 The executive character of the competences of the Association/Community is also evident by the fact that, under Section 10 of the General Principles, the Association/Community has been vested with the power to propose amendments to the legislation and other regulation relevant for the performance of its objectives. Although this competence has been qualified with the phrase "in accordance with Kosovo law," such a qualification has no legal effect as this competence is in direct violation with Article 79 of the Constitution. Namely, as it can be attested, Article 79 of the Constitution does not recognize the Association/Community as one of the parties that can undertake a legislative initiative. Consequently, it can be concluded that Section 10 of the General Principles does not only represent a direct violation of Article 79 of the Constitution but its application would, in effect, require an amendment to the Constitution.

3.11 The authority of the Association/Community to undertake legislative initiative is accompanied by Section 11 of the General Principles, which grants the Association/Community the right to seek protection of its competences in any court of law, including the Court. Providing the Association/Community with standing before the Court confirms the fact that – under the General Principles – the Association/Community is established as a constitutionally mandated organization. This is due to the fact that the Constitution recognizes as authorized parties before the Court only those authorities that have constitutionally mandated powers and competences. Needless to say, the Constitution, in general, and Article 113 of the Constitution, specifically, does not recognize the Association/Community as an authorized party to bring constitutional/legal action before the Court. Consequently, it is clear that Section 11 of the General Principles is not only incompatible with the

Constitution but also its application would, in effect, require an amendment to the Constitution.

(e) The right of the Association/Community to own companies that provide local services

3.12 Section 14 of the General Principles provides that the Association/Community shall be endowed with the legal capacity to, *inter alia*, "**own movable and immovable property, co-own companies that provide local services [...]**." [*Emphasis added*]. The aforementioned provision of the General Principles suggests that the Association/Community shall have the legal capacity and the right to co-own enterprises that offer public services. Ownership of enterprises that offer public services is governed by Law on Publically Owned Enterprises. Article 3 of the Law on Publically Owned Enterprises distinguishes two categories of publically owned enterprises. In this respect, according to Article 3 of the Law on Publically Owned Enterprises, the Republic of Kosovo owns all enterprises at the central level, all of which are specified under Schedule 1 of the Law on Publically Owned Enterprises. On the other side, paragraph 2 of Article 3 of the Law on Publically Owned Enterprises provides that the enterprises specified under Schedule 2 of the Law on Publically Owned Enterprises are owned by a municipality or municipalities. It should be noted that according to Article 3, paragraph 3, of the Law on Publically Owned Enterprises, an enterprise in which the Republic of Kosovo holds an aggregate ownership interest of 50% or more shall be considered a central publically owned enterprise, unless such an enterprise provides services either to less than three (3) municipalities or in the field of waste collection.

3.13 The right of the Association/Community to establish and own publically owned enterprises at the local level or central level takes another important competence of the municipalities to offer their residents services through these legal entities. It should be noted that publically owned enterprises are very important as through them the central and/or local authorities provide their residents with public services at low prices. As it is evident from the above, there is absolutely no need for the Association to be vested with this authority as, under Article 3 of the Law on Publically Owned Enterprises, several municipalities can establish either a publically owned enterprise at the local level or one at the central level. By diminishing the right of the municipalities to establish and own publically owned enterprises or share their ownership interest with the Association/Community, Section 14 of the General Principles undermines the ability of the municipalities to serve their residents effectively.

3.14 In light of the above and in spite of the fact that the declared aim of the Association/Community is to offer its members a better platform of cooperation that strengthens their overall position – in fact – the aforementioned provisions of the General Principles take away from the municipalities or diminish core municipal competences with which municipalities are vested under the Constitution. Indeed, the fact that the General Principles seek to transfer or share certain core municipal functions of the municipalities with the Association/Community proves – better than any other argument – that the Association/Community represents an organization with executive powers that is an additional unit of local-self-government, above the municipalities. Consequently, based on the aforementioned analysis, it can be concluded that the Association/Community will diminish the

constitutionally mandated powers and competences of the municipalities that will join it. As such, the provisions of the General Principles specified above, are not compatible with, and represent a violation of, Articles 44, 79, 113, 123 and 124 of the Constitution as well as Articles 3 and 18 of the Law on Local Self-Government, Article 3, paragraph 2, of the Law on the Freedom of Association and Article 3 of the Law on Publically Owned Enterprises.

Scope of work of the governing instruments of Associations of municipalities under Kosovo law

3.15 As it was elaborated above, the objectives of the Association/Community and, more importantly, the manner in which these objectives are exercised, vest the Association/Community with the character of a distinct and additional unit of local-self government with executive powers. This conclusion is further strengthened when assessing the objectives of the Association/Community against the objectives of the Association of Kosovo Municipalities. Article 31 of the Law on Self-Government provides the municipalities with the right to form and join associations for the protection and promotion of their "common interests." According to paragraph 3 of Article 32 of the Law on Local Self-Government, an association of municipalities can offer to its members a "**number of services, including training, capacity building, technical assistance as well as research on municipal competences and policy recommendation in accordance with law**." [*Emphasis added*]. As it is evident from the above, Article 32, paragraph 3, of the Law on Local Self-Government delineates in a clear and unequivocal manner the scope of the objectives that an association of municipalities can have when established under Article 31 of the Law on Local Self-Government. In this respect, the aforementioned provision establishes that an association of municipalities can offer services only to its members, that is municipalities. This means that an association of municipalities cannot offer services to the residents of its members, as the Association/Community purports to do under the General Principles.

3.16 The legal restrictions with respect to the scope of the services/objectives that an association of municipalities can offer to its members under Article 32, paragraph 2, of the Law on Local Self-Government, is best demonstrated by the Charter of the Association of Kosovo Municipalities. Namely, Article 3, paragraph 1, of the Charter of the Association of Kosovo Municipalities provides that the Association of Kosovo Municipalities is engaged in the implementation of the rules of the European Charter of Self-Government. According to Article 3, paragraph 2, of the Charter of the Association of Kosovo Municipalities, the Association of Kosovo Municipalities is mandated with the following duties and responsibilities: (i) initiating, organizing and proposing inter-municipal cooperation; (ii) exchanging ideas and proposals with respect to draft laws, laws and other subsidiary legal instruments that govern municipal governance; (iii) providing of organizational and legal assistance to its members; (iv) representing the members in their interaction with third parties, such as international organizations and foreign partners; (v) organizing training programs for its members; (vi) facilitating the exchange of information between the members etc.

3.17 Notably, the Charter of the Association of Kosovo Municipalities does not provide any basis for the Association of Kosovo Municipalities to provide services to the residents of its members or to, in any way, replace, supplement or supervise its members in the exercise of their constitutionally mandated powers. The content of

the Article 3 of the Charter of the Association of Kosovo Municipalities underscores the fact that the Association/Community that is envisaged to be established under the General Principles is an additional unit of self-government, which is empowered not only to exercise supervision over the municipalities in the exercise of their constitutionally mandated powers but may also offer public functions and services to the residents of the municipalities that have joined it. Consequently, it is clear that the Article 4 and Article 7, paragraph (f), of the Association are not compatible with Articles 123 and 124 of the Constitution in conjunction with Articles 31 and 32 of the Law on Local Self-Government.

Legal/constitutional status of the employees of the Association/Community

3.18 The executive character of the Association is also confirmed by the fact that Article 6, paragraph (e), of the General Principles provides that the employment status of the personnel of the Association/Community shall be in accordance with, *inter alia*, the Law on Civil Service. In this respect, it should be noted that the "civil service" is a constitutional category mandated by Article 101 of the Constitution. It should be emphasized that Article 101 is part of Chapter IV of the Constitution, which regulates the "Government of the Republic of Kosovo." This means that, according to Article 101 of the Constitution, "civil service" is an executive/administrative arm of the Government of the Republic of Kosovo through which the Government exercises "**the executive power in compliance with the Constitution and the law**," as it is provided under Article 92, paragraph 2, of the Constitution. [*Emphasis added*].

3.19 That the "civil service" is an executive/administrative arm for the exercise of executive/administrative authority is also corroborated by the definition of this term under the Law on Civil Service. Namely, Article 2, paragraph 1.1, of the Law on Civil Service defines "civil service" as "**the entire body of employed administrative personnel, in institutions of central and municipal administration foreseen by this law, which apply policies and ensure respectability of certain rules and procedures**." [*Emphasis added*]. The conclusion that the status of civil servants is only provided to the employees of the central and/or local public authorities is also confirmed by the definition of the term "civil servant," provided under paragraph 2.2 of Article 2 of the Law on Civil Service. According to this provision, a "civil servant" is defined as a "**person employed to exercise public administrative authority** based on ability and capacity, who participates in making and implementation of policies, monitoring the implementation of administrative rules and procedures, ensuring their execution and provision of overall administrative support for their implementation." [*Emphasis added*].

3.20 By granting to the employees of the Association/Community the status of "civil servants," as provided under Article 2, paragraph 2.2, of the Law on Civil Service, the General Principles have confirmed that the Association/Community – and its employees – shall be vested with the right to exercise public administrative authority. This element establishes in conclusive terms the executive character of the objectives and the competences of the Association, elaborated above. Indeed, if the objectives and the competences of the Association/Community were of non-executive nature, these objectives and competences would have been carried out by persons who are not vested with the status of the civil servant. However, since under Article 4 of the General Principles the Association/Community is vested with the authority to

deliver "public functions and services," its mandate can be implemented only by civil servants who – according to paragraph 2.2 of Article 2 of the Law on Civil Service – are employed with the specific mandate to exercise public administrative authority. Consequently, for this reason alone, it can be concluded that the Association/Community represents an organization with executive powers, which exercises administrative oversight over its members in its capacity as an additional unit of self-government.

Relations of the Association/Community with central authorities

3.21 Article 8 of the General Principles provides that the "**Association/Community will work with central authorities on the basis of mutual cooperation and information sharing**." [*Emphasis added*]. The wording of the aforementioned provision of the General Principles suggests that the Association/Community has horizontal relations with the central authorities, including the Government of Kosovo. As a result of this, the wording used under Article 8 of the General Principles leaves the impression that the Association/Community is an organization that is equal in standing to the central authorities of Kosovo. In addition to this, the fact that – according to Section 8 of the General Principles – the Association only "cooperates" with central authorities could also be interpreted that the Association/Community is not subject to the control of the central authorities of Kosovo. Since the term "central authorities" – used in Section 8 of the General Principles – is very broad, such a term could be interpreted to encompass any and all central authorities established by the Constitution, including regular courts as well as the Court. Consequently, Section 8 of the General Principles creates the impression that the Association/Community is an organization that is outside of the constitutional order of Kosovo.

3.22 The fact that Section 8 of the General Principles gives the Association/Community the character of an organization outside the constitutional order of Kosovo is also corroborated by Section 9 of the General Principles, according to which, the Association/Community will promote the interests of the Kosovo Serb community in its relations with the central authorities. Namely, under Section 9 of the General Principles, the Association/Community assumes the role of a representative and political body of the Kosovo Serb community, which interacts with the central authorities – at an equal footing – for and on behalf the Kosovo Serb community. This form of representation of a community is not foreseen under the Constitution. Consequently, Sections 8 and 9 of the General Principles are not compatible with the Constitution.

Procedure for the establishment of the Association/Community

3.23 Section 2 of the General Principles provides that the Association/Community shall be established by a decree of the Government of Kosovo, which "will be reviewed by the Constitutional Court." Also, Section 21 of the General Principles stipulates that any and all amendments to the Charter of Association/Community shall be reviewed by the Court. In essence, the aforementioned provisions of the General Principles provide that the Court shall be responsible for assessing the Charter of the Association/Community, and any of its amendments, for compliance with the Constitution. Although such a preventative control of the constitutionality of the

Charter of the Association/Community, and any of its amendments, may be aimed at ensuring that these documents are in compliance with the Constitution, the fact that a considerable number of the provisions of General Principles are incompatible with the Constitution suggests that this preventative control of the constitutionality may have been envisaged because the General Principles – in fact – require amendments to a number of provisions of the Constitution.

3.24 The aforementioned conclusion is based on the fact that, according to Article 113, paragraph 9 of the Constitution, the only instance when an act is submitted to the Court for preventative assessment for compliance with the Constitution is when such an act amounts to an amendment to the Constitution. Therefore, it can be concluded that either the preventative constitutional control of the Charter of the Association, and any of its amendments – envisaged by Sections 2 and 21 of the General Principles – is not compatible with the Constitution or that such a constitutional assessment is envisaged to be performed by the Court in accordance with Article 113, paragraph 9, of the Constitution.

Other concerns with the General Principles

3.25 Last but not least, while this *Amicus Curiae* Brief has been prepared solely based on the English version of the General Principles, it should be noted that the Serbian translation of the term "constituent assembly," in Section 3 of the General Principles, is inaccurate and misleading. Namely, in the Serbian version of the General Principles the term "constituent assembly" has been translated as "constitutional assembly" or in literate translation "constitution-making assembly." Since the governing instrument that is expected to be adopted at the founding assembly of the Association/Community is a charter and not a constitution, the use of the term "constitutional assembly" or "constitution-making assembly" in Section 3 of the Serbian version of the General Principles is inaccurate and misleading. In the opinion of this *Amicus Curiae*, the term "constitutional assembly" or "constitution-making assembly" in Section 3 of the General Principles in Serbian language should replaced with the term "**osnivačka skupština,**" which in English translates as the "founding assembly." This correction is required as the use of the term "constitutional assembly" or "constitution-making assembly" in Section 3 of the General Principles in Serbian language is not compatible with the Articles 1 and 2 of the Constitution.

* * *

I remain at the disposal of the Court for any questions it may have regarding this *Amicus Curiae* Brief.

Respectfully,

Dastid Pallaska,
Attorney at Law

Avokat - Attorney at Law
Dastid Pallaska
Nr. Regj. 1110/2010 - Bulevardi Nëna Terezë 47/5, 10000 Prishtinë, Kosovë