

MORNING AFTER: Life Without Supervision

A critical review of progress against the Ahtisaari plan
to settle Kosovo's status and some unresolved issues



Kosovo Foundation for Open Society



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Forum 2015:
Prishtina, August 2012

This project was developed under the auspices of **FORUM 2015** by the **Group for Legal and Political Studies**.

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Acknowledgements

The Research Team of this project would like to thank all those who responded to the interviews and contributed to the case studies. This project would not have been possible without their willingness to share their experiences, insights and expertise.

List of Abbreviations

The following regularly-used abbreviations appear in the text. In many cases, the reader will find that the abbreviation is not defined in the text, but it was judged to be more convenient to the reader to list all here rather than over-pepper the text with brackets.

CBK	Central Bank of Kosovo
CSP	Comprehensive Proposal for the Settlement of Kosovo's status
ESDP	European Security and Defence Policy Mission
EU	European Union
EUSR	EU Special Representative
IBM	Integrated Border Management
ICO	International Civilian Office
ICR	International Civilian Representative
IMF	International Monetary Fund
IMP	International Military Presence
ISG	International Steering Group
JIC	Joint Implementation Commission
JTC	Joint Technical Commission
KEC	Kosovo Energy Corporation
KFOR	Kosovo NATO Force
KOSTT	Kosovo Electricity Transmission System and Market Operator
KPA	Kosovo Property Agency
KPST	Kosovo Pension and Saving Trust
KSF	Kosovo Security Force
KTA	Kosovo Trust Agency
MPT	Municipal Planning Team
MTA	Military Technical Agreement
OSCE	Organization for Security and Cooperation in Europe
POEs	Publicly Owned Enterprises
PTK	Post and Telecom of Kosovo
SOEs	Socially Owned Enterprises
SOFA	Status of Forces Agreement

Executive Summary

1. In 2008, Kosovo declared independence under the UN's 'Comprehensive Proposal for the Kosovo Status Settlement' (CSP), drafted by Martti Ahtisaari, UN Special Envoy for the political process in determining Kosovo's status.
2. A key provision in the CSP was a period of supervised independence, to be managed by an International Civilian Representative (ICR), reporting to an International Steering Group (ISG).
3. Acting on the advice of the ICR, the ISG was the authority which would decide on the end of the period of supervision.
4. In July 2012, the ISG decided (with *caveats*) that the terms of the Proposal had been met and that the 'End of Supervised Independence' (ESI) should take place in September 2012.
5. This report takes a critical look at the actual state of completion and considers the implications for Kosovo in the period following ESI.
6. The report features an introduction, which outlines the background to the work and sketches the approach taken in the research phase. The introduction is followed by five chapters:
 1. Legislation and Governance
 2. International Presence
 3. The Economy
 4. Communities
 5. Overview and Recommendations.
7. Each of Chapters 1 to 4 reviews progress against the provisions of the CSP, analyses difficulties of implementation, identifies key challenges and recommends possible actions that would provide a solid platform for development post-ESI.
8. The final chapter gives a brief overview of the findings and summarizes the recommendations given in each of the first four chapters.
9. The recommendations are modest and, if applied, would ensure that all key provisions of the CSP were complete and that future development was well grounded in the rule-of-law, to the benefit of all individuals, communities, institutions and the state.

Introduction

The significance of Magna Carta¹ lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important than the actuality ... The myth proved a rallying point for centuries to come – and still does.²

Background

In March 2007, Martti Ahtisaari, UN Special Envoy for the political process in determining Kosovo's future status, informed the UN Secretary General (UNSG) that he had reached the end of his tether with respect to reaching a negotiated settlement between Kosovo and Serbia, on Kosovo's future status. Accordingly, he submitted to the UNSG a report, accompanied by 12 annexes, which together made up the 'Comprehensive Proposal for the Kosovo Status Settlement' (CSP). The purpose of the document was to provide a road-map to guide Kosovo on its path towards full democratic independence and settle Kosovo's status. While the CSP was not accepted by the UN Security Council, it was formally accepted by Kosovo as a foundational legal platform for the state and as a reference for Kosovo's constitution.

Of particular importance in the CSP was the provision for an International Civilian Representative (ICR), supported by an International Civilian Office (ICO), and reporting to an International Steering Group (ISG). The ICR was to be responsible for supervising the implementation of the CSP, with a key provision being that the authority to interpret its provisions be vested in the ICR. Moreover, the ICR was to be responsible for recommending benchmarks (that would be formally established by the ISG) for a periodical review of the ICR's mandate to implement the provisions.³ This ICR mandate was to come to an end when the ISG determined that the terms of the CSP had been met.⁴

In February 2008, Kosovo officially declared independence and incorporated many aspects of the CSP in the new constitution. Shortly after, the ICR assumed his position as supervisor of Kosovo's independence and over the implementation of the CSP. The ICO constructed 111 benchmarks, from which was generated a matrix for evaluating the implementation of the provisions set forth in the CSP. However, with the ISG view now being that, generally, the supervisory work has successfully been completed,⁵ the ICR's mandate is scheduled to end in September 2012.

Having considered that it seems rather difficult to achieve all duties of the CSP, the ICO itself, in an effort to distinguish the unimplemented duties from the implemented ones, has evaluated the remaining tasks as falling into three broad categories:

1 http://en.wikipedia.org/wiki/Magna_Carta

2 Bingham, T. *The Rule of Law*. Pp. 12, 13; London: Penguin, 2010. (The late Lord Bingham was Lord Chief Justice of England.)

3 Comprehensive Proposal for Kosovo Status Settlement. Annex IX. Article 5.1.

4 Comprehensive Proposal for Kosovo Status Settlement. Annex IX. Article 5.2.

5 ICO: Internal Document, ICO Goals and Staff Review, March 2011.

- 1) those that have discrete, achievable outcomes;
- 2) those that represent a long-term end-state, which requires greater definition as a set of concrete tasks related to the establishment of Kosovo institutions that can pursue these long-term goals once the ICO closes; and
- 3) those which are dependent on external actors and beyond the control of the ICO or the Government of Kosovo.⁶

For those benchmarks that fall within the latter two categories, and are considered either long-term or rely on external cooperation, the ICO has internally-justified relinquishing its direct involvement in further to managing their implementation, by arguing that some CSP tasks either cannot be completed within any reasonable period of international supervision, or are subject to the cooperation of external actors on which they cannot be assured.⁷ For the 32 percent of ICO matrix benchmarks (see below) that were not completed by late 2010, many are listed in the following two categories:⁸

- (a) long-term end-states – goals on which the ICO recommends gradual disengagement; and
- (b) completion depends on external actors – goals on which the ICO considers as falling outside the scope of its mandate and recommends ceasing work.

Indeed, it is the ICO's perception that many tasks are representative of long-term end-state objectives that require both institutional capacity and political will, and will take much longer than the period expected for international supervision.⁹ However, categorizing benchmarks and their corresponding CSP provisions as either 'long-term' or 'reliant on external actors', and thus revoking their own mandate for addressing such benchmarks, is arguably a self-fulfilling prophecy based on circular logic that makes manifest the ICO's own lack of institutional capacity and political will to fulfill many of the CSP's very important benchmarks. In addition, from the ICO perspective, the lack of resources, as well as the tolerance of the Government of Kosovo and the people of Kosovo, renders the continuation of the ICO mandate untenable.¹⁰

In rendering an internal justification for revoking their own mandate in regard to the benchmarks that are long-term or reliant on external actors, the ICO's new objective seems to have been to ensure a clear definition of what Kosovo institutions need to accomplish to develop the wherewithal to implement the tasks over the next several years.¹¹ However, while the ICO intended to support the establishment of the appropriate framework before stepping back to leave space for Kosovo's institutions, NGOs, bilateral and multi-national actors, the critical question remains of who will deal with the unimplemented duties. Indeed, comments in the EC 2011 Kosovo Progress Report¹² raise serious questions about the capacity and competence of government institutions to implement (in its fullest sense – and see below) anything with the desired effect. Currently, there is no central

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ks_rapport_2011_en.pdf

coordinating institution that will be mandated to ensure long-term oversight or implementation of the remaining uncompleted benchmarks and their corresponding CSP provisions. The future competences and mandates relating to the further implementation of the CSP, as well as the structures of international presence in Kosovo, have yet to be addressed.

Approach to the Task

The aim of this report is to evaluate the ICO's success in overseeing the implementation of the CSP, and to point towards the many challenges that remain for the full and successful implementation of its provisions. Thus, the purpose is to identify key agenda items that are crucial for Kosovo's continued democratization and development, and to propose a number of mechanisms and steps that could enable institutions in Kosovo, both domestic and international, successfully to complete the outstanding provisions of the CSP (and corresponding ICO benchmarks) that remain to be implemented.

As a prescription for progress to independence, the clear concern of the CSP is in:

the rule of law;
communities;
developing the economy;
an effective international and civilian presence.

As the key element in the CSP, the ICR is authorized to:

monitor the implementation of the CSP;
be the authority on interpretation of the provisions of the CSP;
advise the ISG on the on-going and final completion of the CSP.

Furthermore, the CSP indicates that, as he¹³ relates to monitoring and full implementation of the CSP, the ICR is responsible for exercising the overall coordinating role over the activities of other international organizations in Kosovo¹⁴.

The ISG's decision of 2 July 2012, to declare that '*Kosovo has implemented the terms of the Comprehensive Settlement Proposal*'¹⁵ means it is timely to review the extent to which both the letter and the intent of the CSP have been met, and also what strategic threads might remain for future action.

Taking the above starting points, to create a manageable framework for analysis, for this report, Annexes I – XII of the CSP were separated into four components:

13 Pieter Feith

14 *Op cit*: see fn. 4 above: CSP: General Principles, Article 12

15 *loc cit*; italics in original

Component 1:	Legislation and Governance: Annexes I, IV, VIII, XII
Component 2:	Communities: Annexes II, III, V
Component 3:	The Economy: Annexes VI, VII
Component 4:	Internationals: Annexes IX, X, XI.

Second: at an early stage, the ICR identified some 111 ‘CSP Implementation Benchmarks’, which were used to define ‘progress cells’, in a matrix titled ‘Implementation of the Comprehensive Settlement Proposal – State of Implementation’¹⁶. In the matrix, the first column contains numerical references; the second, CSP Implementation Benchmarks (as descriptions); the third, CSP Reference (Article and Annex); the fourth and fifth, the Actors, International – Kosovo; the sixth, General Comments.

The ICO matrix, structured as described above, provided a simple, transparent device to show what the ICR considered essential to completing the CSP, with the benchmarks as clear points of reference for measurement of progress and a colour-coded display of progress.¹⁷ The matrix remains on the ICO website as *sine qua non* in marking and measuring progress to completion of the CSP. However, somewhat curiously, and without apparent public notice (for example, the website), the simple, transparent matrix approach was discontinued by the ICO, seemingly in favour of discursive reporting to the ISG. The only such report presently available to the public was that presented to the ISG at its January 2012 meeting, in Vienna¹⁸ (‘Vienna document’, below). The Vienna document is presented to the ISG as providing three sets of information:

- (i) an update on the progress of first-track (*sic*) End of Supervised Independence (ESI) government tasks;
- (ii) a re-capitulation of CSP achievements since the Fall (i.e., autumn) 2011; and
- (iii) ICR observations on useful next steps in the period after ESI.¹⁹

It must be noted that there is a one year information-gap, between the ICO ‘final’ matrix (December 2010), and the Vienna document reference to ‘Fall 2011’. However, given the key role of the ICR in interpretation, implementation and monitoring, the research team took the position that it was reasonable to accept the CSP Implementation Benchmarks, given in the ICO matrix, as necessary²⁰ conditions for progress to completion of the CSP.

For the purpose of this report, the CSP Implementation Benchmarks were re-aligned with one or other of the four Components given above. The Vienna document was used as a source of information on the period between the final ICO matrix and the present; that is, to make reasonable inferences across and within any evident gaps in progress over the intervening period. Also, it provided a useful source on the thinking of the ICR in anticipation of the post-ESI phase, and so for the strategic action-lines as part of the purpose of this research work (see (iii), above).

16 http://www.ico-kos.org/data/Image/15122010_Matrix_FINAL_-_Eng.pdf

17 However, it should be noted that the colour-code lacked a code, the author leaving it for the reader to decide the meanings of each colour used.

18 Annex to ISG Paper 21 June 2012

19 *Ibid.*

20 But not necessarily sufficient – which is equivalent to what is being questioned in this work

Third: for each of Components 1 – 4, a matrix similar to that generated by the ICR was constructed, to guide the collection, categorization and analysis of data. Each will present a summary of the results of deeper probing into some of the CSP Implementation Benchmarks. Also, it will show an estimate of the various states of real progress against those particular Implementation Benchmarks, and the method by which the researchers gathered evidence on which to base the estimate. These matrices and other supporting information-gathering will be reported in full, under separate cover.

The CSP consists in *words* and *intentions*. Thus, a significant part of the approach used in this paper is a review of documentation, terminology and meaning established by use. An interesting example of this is found in considering some key terms found in the original CSP and indications of meaning drawn empirically from use and as stated in the Vienna document.²¹

Annex IX makes the ICR the kernel of the CSP. It contains certain key terms, which are made subject to ICR interpretation.²² How, then, are these key terms used by the ICO; what meaning is detectable in the documentation, in particular, the Vienna document; how has interpretation worked?

In Annex IX, Article 1, the CSP states that the ICR shall ‘...supervise the implementation of this Settlement and support the relevant efforts of Kosovo’s authorities.’

In Annex IX, Article 2.1(b), the CSP states that the ICR shall ‘Ensure effective implementation... through the execution of specific tasks...’

Some key terms here are:

implementation
support
specific tasks.

Consider what has happened to these terms across time.

Implementation: the Oxford English Dictionary defines *implement* as ‘to carry into effect or to fulfill’, with *effect* defined as ‘the result produced...to make or become operational’. That is, *making something work*. However, the Vienna document demonstrates a rather more restricted meaning used by the ICO:

While Kosovo has made enormous progress in implementing the CSP, structural gaps and weaknesses remain that challenge the sustainability of CSP institutions and principles. These are largely of an administrative kind, having more to do with the operation of CSP institutions...than with the organizational and legislative structure²³.

This suggests that, far from seeing the responsibility of the ICR as being to ‘make something work’, the ICO sees its task of implementation as being to do with setting up the framework and

²¹ *Ibid.*

²² *Ibid*: IX, 2.1 (a)

²³ *Ibid.*

leaving the substance of *making it work* to Kosovo. This is curious when set against the 2011 EC Progress Report²⁴, which makes repeated reference to the lack of capacity and competence in the government administration and civil service. The author of the Progress Report sees this as being largely responsible for the poor implementation record in all aspects of government life. The implication is that, when the ICO has done its work, the people left responsible for making things work either will not have the motivation to make things work or will not know how to make things work, or both. There is little evidence of there being a sudden upsurge of such capacity and competence to meet the September 2012 transfer date and the immediate aftermath, which raises questions about the sustainability of the ICO-bequeathed institutions.²⁵ There is a nice example of this idiosyncratic interpretation in Chapter 4: *Communities*, below.

Support: the dictionary definition of this term is ‘to keep from failing’; the previous paragraph indicates where *support* might find serious meaning in the post-CSP phase. For example, as the Vienna document admits, ‘...the success of Dealing with the Past will require and on-going commitment of time and attention’²⁶. Given the above, the Ministry of Justice, which recently had handed over to it responsibility for making things work, will need much more than ‘time and attention’ from the ‘international community’.

Specific tasks: the benchmark statements in the original ICO matrix²⁷ gave hope that these specific tasks had been identified and that a simple, transparent mechanism had been developed to enable all to monitor progress. Unfortunately, that simple, transparent method was discontinued in favour of a relatively opaque discursive approach, which has tended to render understanding of the specific tasks and progress somewhat more difficult, as evidenced in the Vienna document²⁸.

Thus, the researcher is left with three key concepts interpreted by the ICO as to accord limited application, questionable value for the post-ESI future, and generalization rather than specificity. It cannot be helpful to Kosovo to allow such a state of affairs to persist.

24 http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ks_rapport_2011_en.pdf: *passim*

25 A nice example of this is given in Chapter 4: *Communities*.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

Chapter 1: Legislation and Governance

Of the 111 ICO benchmarks, 33 refer to legislation and governance. The CSP, set forth a number of provisions in Annex I (constitutional provisions), Annex IV (justice system), Annex VIII (security sector), and Annex XII (legislative provisions) that required Kosovo to remove, alter, or adopt legislation and governance structures to develop a functioning, multi-ethnic, democratic and free-market state and to move towards unsupervised independence.

Now, four and a half years after supervised independence began, it is intended that supervision will end and the ICO will exit Kosovo. On the one hand, this will give the impression of a status more consonant with fully-fledged independence. On the other hand, it will leave the Kosovo government and remaining international institutions to tackle the challenges and unimplemented elements of the CSP.

This chapter will scrutinize the overall normative prescriptions of Annexes I, IV, VIII and XII of the CSP; discuss the benchmarks deriving from the annexes concerned; and provide an in-depth examination of the most prevailing challenges in regard to the unimplemented elements of the CSP. Furthermore, this chapter will seek to shed light on the policy mechanisms that could help to overcome the current challenges, thereby ensuring that solutions addressing the unimplemented benchmarks of the CSP become embedded in a new policy strategy of the Government of Kosovo.

Key Duties from the CSP (Annexes I, IV, VIII, and XII)

This section sketches a general picture of provisions deriving from the CSP within the legislative and governance group of annexes, the purpose of which is to identify necessary elements of a functional democratic state and related benchmarks for ensuring proper citizenship and rights to all who reside within Kosovo. At the heart of these annexes, and relating to the constitution, the judiciary, security and legislation, is a common focus on the development of a state that can guarantee rule of law; the right to justice; security; the right to own property; functioning local governance and self-rule; and adequate representation.

Annex XII designates the legislative agenda for Kosovo. Many of the laws are related to governance provisions in the CSP and are listed below alongside the relevant provisions from Annexes I, IV, and VIII.²⁹

Annex I stipulates the constitutional provisions and the governmental structure to be adopted by Kosovo, including provisions for granting citizenship to all citizens of the former Federal Republic of Yugoslavia who reside in Kosovo;³⁰ for the facilitation of the return of refugees and recovering property and possessions;³¹ and for the recognition of international instruments and agreements

29 The laws from Annex XII (the legislative agenda) of the CSP are italicized within the text. The only piece of legislation from Annex XII not included in relation to Annexes I, IV, and VIII is legislation relation to health care (Article 2.6.2).

30 Annex 1. Article 1.6.

31 Annex 1. Article 1.5. In addition it should be noted that according to the legislative agenda (Annex XII) also ordered the Assembly to pass a Law on Kosovo Citizenship and a Law on Restitution during or shortly after the transition period, see for more Annex 12, Art. 2.11 and 2.13.

that ensure fundamental human rights and freedoms.³²

Annex I includes multiple provisions intended to protect the rights and representation of non-majority communities. Any constitutional amendment shall require the approval of two-thirds of the Assembly members as well as two-thirds of those members representing non-majority communities in Kosovo.³³ Furthermore, and perhaps in essence most critical, the non-majority representatives have collective veto power. The adoption, amendment or repeal of the following: laws changing municipal boundaries or powers; laws relating to the rights of Communities and their member; laws on the use of language; laws on local elections; laws on the protection of cultural heritage; laws relating to religious freedom; laws on education; laws on the use of national symbols, community symbols, or public holidays – requires not only majority confirmation from the parliament but specifically from a majority of the MPs representing non-majority communities.³⁴

Article 8 of Annex I establishes a municipal system of governance within Kosovo, wherein municipalities should enjoy a high degree of self-government; should secure their own legal boundaries and competencies; should have the right to local sources of revenue and central funding; and should engage in inter-municipal and cross-border cooperation.³⁵ In addition, municipalities who feel that their responsibilities or revenues have been infringed by a law or act of the Government may contest the constitutionality of the law before the (CSP) Constitutional Court.³⁶ The implementation provisions and benchmarks relating to municipal governance are the most critical for providing adequate representation and services to citizens in Kosovo. However, it is arguable that, for whatever reason, these provisions and benchmarks have not had the intended effect.

Annex IV stipulates the legislation and governance surrounding Kosovo's Justice System.

Article 4 of Annex IV sets forth provisions to establish the Kosovo Judicial Council (KJC) and Kosovo Prosecutorial Council (KPC), responsible for proposing the appointment, transfer, promotion, or dismissal of judges and prosecutors to the President.³⁷ The KJC is tasked with ensuring the accessibility, integration, professionalism, and multi-ethnic nature of Kosovo's justice system. Most crucially, if a new municipality, or a municipality with a majority of residents from a non-majority community, does not contain a basic court, the KJC should grant such requests unless the

32 These international instruments and agreements include the following: Universal Declaration of Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; International Covenant on Civil and Political Rights and its Protocols; Council of Europe Framework Convention for the Protection of National Minorities; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of all Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

33 Annex 1. Article 10.1.

34 Annex 1. Article 3.7.

35 It should be noted that, the legislative agenda directly ordered the Assembly to pass corresponding legislation including the Law on Local Self-Governance, the Law on Municipal Boundaries, and Legislation on Local Finances. These first two pieces of legislation were to be formally approved during the 120-day transition period. See: Annex 12. Article 1.2., Annex 12. Article 1.3., Annex 12. Article 2.5, and Official Gazette of Kosovo, Laws of Ahtisaari Package, available at: <http://www.gazetazyrtare.com/>.

36 Annex 1. Article 6.2 and 6.3.

37 Annex 1. Article 6.1 and Annex IV. Article 4.1

caseload would be insufficient to justify the establishment of a separate court.

Annex VIII addresses reforms for Kosovo's Security Sector.

Article 1 requires the establishment of a Kosovo Security Council (KSC) and corresponding legislative capacities (budget, parliamentary oversight committee).³⁸ According to Article 5, Kosovo was to develop a small, professional, minimally armed, and multi-ethnic Kosovo Security Force (KSF), under civilian control, which should be prepared for crisis response, explosive ordinance disposal, and civil protection. KPC, Kosovo's post-conflict recovery force, should be dissolved.³⁹ In addition, Annex VIII required the establishment of two additional security services. Article 4 requires the establishment of a domestic intelligence agency and Article 7 requires the establishment of a Civil Aviation Authority (CAA), to regulate civil aviation activities and designate a provider for air navigation services.

In addition, Kosovo's security requires domestic control over Kosovo's borders. As stipulated, Kosovo was to demarcate the border with Macedonia and responsibility for control of the border and its integrated management should be assumed by the Kosovo Police Service.⁴⁰ Kosovo should develop a unified chain of command for police services, which should be ethnically-diverse and should correspond with municipal boundaries, wherein Local Councils should facilitate cooperation between the police and municipal authorities.⁴¹ The direct provisions for the creation of legislation that corresponds with security sector provisions from Annex VIII are given in Article 12 of the legislative agenda (Annex XII) in the CSP.⁴²

Assessing the Benchmarks on CSP Implementation

General Discussion

Based on the recommendations of the ICR, the ISG established benchmarks to monitor and review the mandate of the ICR and progress in the implementation of provisions from the CSP.⁴³ According to the CSP, the ISG was periodically to review the powers and mandate of the ICR and to terminate the mandate when it was judged that the terms of the CSP had been substantially implemented.⁴⁴ The ICO identified over one hundred benchmarks which were intended to correspond with the provisions of the CSP and to allow for a clear assessment of progress regarding the ICR mandate and the implementation the provisions of the CSP.

In this section, these ICO benchmarks will be considered in relation to the provisions of the CSP discussed above. It is clear that many of these benchmarks, and the corresponding CSP provisions,

38 Annex 8, Article 1.3 and 1.4.

39 Annex 8, Article 6.

40 Annex 8, Article 3.

41 Annex 8, Article 2.

42 Article 12 of Annex XII ordered directly for many pieces of legislation relating to the Security Sector, including a Law on the Establishment of the Kosovo Security Council, Amendments to the Assembly Rules of Procedure for the Establishment of an Assembly Security Oversight Committee, a Law on the Kosovo Security Force, a Law on Service in the Kosovo Security Force, a Law on the Establishment of a Domestic Kosovo Intelligence Agency, Legislation to Establish a Civil Aviation Authority, and the Law on Service in the Kosovo Police.

43 Annex 9, Article 5.1.

44 Annex 9, Article 5.2.

have been achieved. For each of these, their relevance, implementation and implications are discussed below. However, despite the expected end (in September 2012) of the ICRs mandate, and thus supervised independence, it is apparent that many benchmarks either have not yet been implemented, have been implemented but unsuccessfully, or have not been properly/fully interpreted or aligned with the original CSP provisions.⁴⁵ An overview of the benchmarks, and their corresponding CSP provisions, is given, before moving to discuss the relevance and status of the ICO benchmarks.

The benchmarks developed to correspond to **Annex I** of the CSP included the constitutional provisions to be adopted, such as the inclusion of Annex 1 from the Comprehensive Proposal in Kosovo's constitution; the establishment of a Constitutional Court; the ICR appointment of three members to this CC; and a law on citizenship which offers citizenship to any citizen of the former Federal Republic of Yugoslavia residing in Kosovo's territory. All of these benchmarks were completed by September 2009.

The ICO benchmarks corresponding with **Annex IV** of the CSP included the performance of the Kosovo Judicial Council (KJC) and Kosovo Prosecutorial Council (KPC) in ensuring that 15 percent of judges on the Supreme Court and of each District Court be from non-majority communities. While Kosovo was successful in ensuring this minority representation on the Supreme Court, the District Courts have not entirely succeeded. The same is true in regard to the prosecutorial offices. The KJC and KPC were to have the additional duties of ensuring that the composition of the judiciary and prosecution service be ethnically diverse and have the capacity to represent all communities in Kosovo, and to ensure that the process of appointment of judges and prosecutors be continuously being implemented.⁴⁶

In addition, the KJC was to be established in compliance with CPP requirements, wherein three non-judge members and two international members appointed by the ICR also would have the responsibility of ensuring the implementation of a system for establishing municipal courts upon request by municipalities, another benchmark. To date, no municipalities have requested such a court, which has resulted in the KJC not yet implementing the proposed system.

The benchmarks corresponding with **Annex VIII** of the CSP shape the direction and development of the Kosovo Security Sector, principally through legislative means.⁴⁷ To establish corresponding pieces of legislation, the CSP provided for the Kosovo Assembly to establish the appropriate oversight committees to guide and oversee the enactment and implementation of such legislation. Alongside the development of the Kosovo Security Council, and new security structures, the ICR

45 As to the end of supervised independence see International Steering Group .Press COMMUNIQUE, Fifteenth meeting of the International Steering Group for Kosovo, 2nd July 2012, Vienna.

46 Kosovo Judicial Council and Kosovo Prosecutorial Council have developed a minority recruitment plan for all courts and prosecutors' offices, 'but identifying and recruiting suitable candidates from non-majority communities continues to be a challenge'. See International Civilian Office, Internal Document, 'Annex: ICR's Observations on CSP Achievements and Next Steps Post-ESI' June 2012, pg. 3.

47 The benchmarks corresponding with Annex 8 of the CSP include the Law on the Establishment of Kosovo Security Council, Law on Civil Aviation Authority, Law on the Ministry for the Kosovo Security Force, Law on the Kosovo Security Force, Law on Service in the KSF, Law on the Establishment of a Kosovo Intelligence Agency, Law on Integrated Management and Control of the State Border, Law on Dissolution of the Kosovo Protection Corps, and Law on pensions for KPC members.

and IMP were required to decide on the timing of the dissolution of the KPC. In addition to the many pieces of legislation needed to deconstruct and redevelop Kosovo's security sector, the CSP, and the corresponding ICO benchmarks, recognized the need for the government to create the necessary subsidiary laws and internal regulations to ensure implementation of the corresponding security sector laws. However, many sub-laws and regulations, which are necessary to ensure the institutionalization of the many new pieces of legislation relevant to the security sector, have not been adopted. This renders questionable the apparent success of the ICO in meeting security related benchmarks.

Two additional ICO security sector benchmarks relate to the Joint Technical Commission of Kosovo and Macedonia – the border must be physically demarcated and the ICO must be represented on this Joint Technical Commission. The benchmark clearly did not include the significant process of border demarcation with Serbia and Montenegro, both of which are prime issues for Kosovo's security within the context of the CSP intent. A further benchmark calls for the ICO to raise, ensure and safeguard ethnic diversity in the security sector.

Status, Implementation, and Implications of Benchmarks

Constitutional Benchmarks

All constitutional provisions were adopted successfully, with the ICR certifying that the constitution was in compliance with CSP in April 2008 (with the provision on the acquisition of citizenship applied therein). However, despite both the constitutional provisions ensuring citizenship for all former Yugoslav citizens residing within Kosovo's territory and the *Law on Citizenship*, citizenship, problems remain in the north. These problems can be related to two important points:

- (i) there is a lack of sovereignty in the north, owing to the remaining Serbian parallel structures and essential absence of Kosovo's authority in the region;
- (ii) there appears to be a lack of political will and financing (from both international organizations and the Kosovo government) that would support the implementation of new municipalities *via* decentralization processes; legitimate municipal governance *via* elections, municipal courts, and municipal institutions that could ensure legitimate representation, guarantee rights, enhance rule of law, collect taxes and offer services to those living in the north of Kosovo.

Citizenship for those residing in the north of Kosovo remains a key issue for the Kosovo government and international stakeholders. Further discussion regarding the issue of citizenship will be considered in depth in the section on Challenges and Key Issues.

Justice System Benchmarks

Now that the Assembly has adopted the new 2010 law on the KJC, to replace the 2009 transitory law, the long-term institutionalization of the judicially governing body should prompt greater oversight of the judicial and prosecutorial appointment process, with emphasis on gaining competent, de-politicized judicial authorities and ethnically diverse judges and prosecutors, where the situation remains very weak. It appears that the ICO has not applied adequate pressure

to improve the functioning of the judiciary or to strengthen judicial oversight.

Furthermore, the KJC has not yet implemented a system for the establishment of basic courts, but should do so within six months.⁴⁸ This benchmark is particularly important, as no basic courts exist in the north of Kosovo, and as the decentralization process established new municipalities in the south of Kosovo that would be left only with the basic court of the mother municipality. While this is a critical agenda item for all of Kosovo, mother municipalities that existed pre-decentralization already contained municipal courts (turned basic courts), which at least continue to provide relatively adequate judicial services for ensuring the rights of citizens living in or near these southern municipalities. The same cannot be said for the north of Kosovo, which is still left without a single basic court that could carry out the rule of law process and guarantee rights to those living north of the Ibar.

However, the KJC has not yet received such a request from any municipality that would prompt the KJC to put this issue on the agenda. In such a case, there remains no progress regarding the establishment of basic courts or the establishment of a system that could direct such a process. The complete absence of basic courts in the north remains a crucial problem and failure of the ICO and KJC. The implications of this failure will be discussed below, in the 'Challenges and Key Issues' section of this chapter.

Security Sector Benchmarks

All laws that were designated by the ICO as benchmarks for the Security Sector were adopted by the Assembly by the end of 2008. The CSP mandate to establish the appropriate oversight committees and parliamentary rules and procedures for new security structures was upheld in July 2009, when the Assembly established two parliamentary committees, one to oversee and push forward legislation relevant to the Kosovo Security Force and the other to oversee and push forward legislation relevant to the Kosovo Intelligence Agency. The Director of the Kosovo Intelligence Agency, and his Deputy Director and Inspector General, also were appointed in 2009. Alongside the establishment and development of these new security structures, the ICR and IMP dissolved the KPC in June 2009 and established a Demobilization and Reintegration process for former-KPC members. The CSP provided for the dissolution of the KPC, hence the need to enact legislation regarding the pensions of previous KPC members.

As is the case with the District Courts and the Kosovo Assembly, the ICO has been unable to advance appropriate and necessary representation of non-majority Communities. As of 2010, only eight percent of the KSF were from non-majority communities, zero percent of the Ministry for the KSF were from minority communities, 3.5 percent of the civilian staff were from minority communities, and 12.5 percent of the Security Council members with executive authority (the Minister of Communities and Returns) were from a minority community. The Police were slightly more diverse, with over 14 percent of staff belonging to a non-majority community.⁴⁹

⁴⁸ The new Law on Courts will establish a system of basic courts (rather than municipal or district courts) to be implemented by January 2013.

⁴⁹ International Civilian Office, CSP Matrix, December 2010.

However, where the police are tasked with border management, many of Kosovo's borders remain undefined. Both the ICO and JTC met actively to complete 98 percent of the physical border demarcation by the autumn of 2009. However, the ICO did not include a benchmark to oversee the demarcation of the borders with Serbia and Montenegro and correspondingly have still not established a system or strategy for demarcating the borders with Montenegro or Serbia. These borders still have not been demarcated, and the ICR has not played a role in pressing for this development. This remains a serious problem for Kosovo in regard to the absence of border demarcation with Serbia, as border disputes have already exacerbated political tensions between the two states and Kosovo authorities have no physical indicator that specifies the territorial boundaries of their authority.

Legislative Benchmarks

All legislation was adopted in 2008, except for the Law on Property Restitution. The government still has not established a working group relating to property restitution, which remains a significant problem in Kosovo. While property restitution for all properties nationalized during the communist regime remains a key issue for all of Kosovo, property restitution and guarantees to the right to private property are particularly problematic for those residing in the north of Kosovo. This key issue will be further discussion in the following section.

The benchmarks corresponding with **Article XII** of the CSP are the most straightforward as they directly relate to legislation required in Article 12 of the CSP.⁵⁰ A number of laws that were required by Annex XII include: a Law on Local Self-Governance; a Law on Municipal Boundaries; a Law on the Establishment of Protective Zones; a Law on Local Finance; Laws on Service in the Kosovo Police; and Laws related to Education and Health Care.

What is most alarming is the absence of an *implementation-based* ICO benchmark for (i) a Law on Local Self-Government and (ii) a Law on Municipal Boundaries. As the former is crucial for developing a system of self-rule, particularly for municipalities with a large number of non-majority community members in the northern Kosovo; and the latter is critical for ensuring systematic and successful decentralization, such omissions put in doubt the integrity of these two benchmarks. What makes the absence of these two *implementation-based* benchmarks troublesome is the crucial relevance that both self-rule and decentralization have for ensuring adequate rights and representation for non-majority community members in Kosovo, especially in northern Kosovo.

Challenges and Key Issues

The key challenges identified in this chapter reflect upon the provisions from the legislation and governance annexes in the CSP that have either not been suitably reflected in the ICO Matrix or have yet to be successfully implemented. In addition to identifying cases in which CSP provisions

50 The laws to be adopted were the security-sector related laws – the Law on the Establishment of Kosovo Security Council, Law on Civil Aviation Authority, Law on the Kosovo Security Force, Law on Service in the KSF, and Law on the Establishment of a Kosovo Intelligence Agency – laws on citizenship and symbolism—the Law on Kosovo Citizenship, the Law on State Symbols, the Law on Official Holidays – laws on elections – Law on General Elections and the Law on Local Elections – and the Law on Protection and Promotion of Rights of Communities and their Members and the Law on Property Restitution.

have not been implemented, the following section includes an explanation as to why these failures have inhibited development and are the most crucial of their kind, as well as analyses regarding the causes of such failures in implementation.

Decentralization and Effective Governance in the North of Kosovo

Decentralization has not been implemented in the north, as it has below the Ibar River. In the south of Kosovo, decentralization has seen success particularly in the established municipalities of Ranilug, Klllokot and Gracanica, which saw a 100 percent increase in their municipal elections turnout compared to local elections in their mother municipalities before the establishment of these municipalities.⁵¹ However, the three municipalities in the north have yet to be established. Also, although the practical difficulties of implementation may be recognized, “decentralization in the municipality of Mitrovica north remains the most difficult process in the post-conflict Kosovo, spreading the institutional authority and integration of ethnic minorities”.⁵²

This is an core failure of the ICO, since Annex I of the CSP clearly emphasized the need to establish a municipal system of governance within the northern Kosovo wherein municipalities could enjoy a high degree of self-governance, maintain their own legal boundaries and competencies, have the right to local sources of revenue and central funding, and engage in inter-municipal and cross-border cooperation. However, while passed early on by the Assembly of Kosovo, the *Law on Local Self-Governance* and the *Law on Municipal Boundaries and Legislation on Local Finance* have not been implemented effectively in the north. As the implementation of these pieces of legislation has not taken hold in the north, the people living within the northern territories have no direct Kosovo-based representation that can be held accountable for the political rights and prosperity of their constituents. Furthermore, the inability to enact legislation that can achieve legitimacy and traction throughout the entire territory of Kosovo (and not just below the Ibar) illuminates the diminished territorial integrity and sovereign authority of Kosovo.

Although long overdue, the Administrative Office for the north of Kosovo was recently established in the summer of 2012. However, currently, there is no administration in the north that provides public and local services to people living above the Ibar River. Effectively, there is no local government, especially in north Mitrovica. As such, while the ICO views the benchmark of a *Law on Local Self-Government* to be complete, the *implementation* of local government and self-rule has certainly not taken shape in the north. The failure to implement decentralization measures and municipal reforms, representation and services in the north is the result of a number of factors, including the absence of political will (and any unified strategy) from local and international stakeholders, lack of understanding from the local populations, and the prolongation of Serbian parallel structures.

51 Besnik Tahiri at Roundtable: “Implementation of decentralization process in north Kosovo – challenges and opportunities.” Humanitarian Law Center Kosovo. Retrieved from http://www.hlc-kosovo.org/index.php?option=com_content&view=article&id=127%3ARoundtable-implementation-of-decentralization-process-in-north-kosovo-challenges-and-opportunities&catid=36%3Ahome&Itemid=505&lang=en.

52 Betim Zllanoga at Roundtable: “Implementation of decentralization process in north Kosovo – challenges and opportunities.” Humanitarian Law Center Kosovo. Retrieved from http://www.hlc-kosovo.org/index.php?option=com_content&view=article&id=127%3ARoundtable-implementation-of-decentralization-process-in-north-kosovo-challenges-and-opportunities&catid=36%3Ahome&Itemid=505&lang=en.

First, the Administrative Office for the north of Kosovo was only created recently in the summer of 2012. To date, the only institutions in the north of Kosovo that could offer services to those living in the north were the ICO-based Municipal Preparation Teams who fortified water services and built city parks in Mitrovica and other internationally-funded aid organizations. Funding provided by the Kosovo government was minimal, not well-directed, and garnered little support from the ICO in directing and applying what little funding existed.⁵³

While the ICO established the office and MPTs in the north, as the actor responsible for coordinating international actors, they were largely unsuccessful and could not prompt the Kosovo government and international organizations to move forward with a unified strategy that could have advanced substantive improvement regarding the services offered to northern Kosovo citizens. The absence of institutions and governance structures in the north that provide adequate services to those living there could explain the low percentage of Kosovo Serbs (26 percent) and even Kosovo Albanians (42 percent) who reported paying taxes in 2011.⁵⁴ On the one hand, most Kosovo citizens in the north do not pay taxes both because there are no consequences (revealing the absence/ineffectiveness of rule-of-law in the region) and because they are not provided with adequate services and representation. On the other hand, without local funding *via* taxation it is difficult to provide local citizens with adequate services (as the central government can fund projects in the north but cannot support full and adequate development for the region). To find a way out of this problematic cycle, the north must be supported with additional funding that can help local services and institutions manage their start-up costs and rule-of-law must be strengthened to the point that tax evasion carries consequences.

Second, it is clear that the populations in the north lack an understanding of the concept of decentralization and the tangible benefits that will surely result from the process. An ICO survey of 2011 that sampled 800 people living in northern Kosovo (with 500 from Mitrovica) found that there was deep-seated misunderstanding regarding the principle and process of decentralization. When asked what they understood by 'decentralization,' 33 percent of Kosovo Serbs took decentralization to mean that 'Prishtina will take over' and 27 percent of Kosovo Serbs only understood decentralization as 'something to do with Ahtisaari'. In fact, only 12 percent of Kosovo Serbs who were sampled identified decentralization as meaning 'accountable local government.'⁵⁵ This deep misunderstanding of decentralization and the benefits it offers to Kosovo Serbs in the north undoubtedly is one of the major challenges for implementing such a process in the north. However, undoubtedly, there is also blame to be placed on Pristina and international organizations, such as the ICO, for not devising and implementing a *communication* strategy that could properly explain, and advocate a decentralization processes in northern Kosovo to those living there. While Serbs in the north may have been responsive to a Serbian-language television station like RTK-2, neither the government nor the ICO prompted a timely implementation of the CSP provision for a Serbian-language public broadcast channel and so left the media space wide open for Serbia-based parallel media outlets to influence public and political opinion-formation in the north. Further complicating the information available to citizens in the north regarding

53 For example during 2010 the Government of Kosovo allocated a 6 million euro to provide infrastructure for the new municipalities. An additional 1 million euro contingency fund is foreseen in 2011 budget. See International Civilian Office, Internal Document, ICO Goals and Staff Review, March 2011.

54 ICO Opinion Poll from Northern Kosovo. "Reciprocity and Roadblocks." September 2011.

55 *Ibid.*

decentralization, as well as increasing the political noise in the channels of communication, were the parallel political leaders, where the ICO failed to support or devise any mechanism to favor a more liberal political class of leadership as an alternative to parallel leadership structures in the north. This responsibility will remain as a key duty for the Kosovo government after the end of supervised independence.

Third, the continued presence of Serbian parallel structures and institutions has filled the space that could otherwise be occupied by Kosovo authorities and institutions. Of the 26 percent of Kosovo Serbs that did report paying taxes in the 2011 ICO survey, 63 percent reported paying taxes to Serbia. While these Kosovo citizens continue to pay taxes to Serbia (and in turn receive services from Serbia), it is unlikely that they will begin also to pay taxes to Kosovo authorities. It is clear that local tax revenue will not provide enough funding for adequate services in the north. Thus, it is crucial that central and additional sources of funding are granted to local authorities pre- and post-decentralization so as to improve the services offered in the north and as encouragement to those who do pay taxes to the Kosovo authorities.

Given the legal instability in the north, the citizens have spent many years in a marginal relation to the institutions of the law, particularly tax law. This institutional history now makes it very difficult to shift the social patterns in relation to rule of law. For example, because the Kosovo Serbs in the north consider tax law as representative of direct control from Prishtina, they choose not to follow the law. Allowing such socio-legal norms to continue without consequences increases the risk of ongoing and pervasive social disobedience. The ICO should have invested in a strategy to fight this social trend before it became a post-independence and post-CSP social norm.

The Judicial System in Northern Kosovo

The benchmark corresponding to CSP Annex IX, Article 4.4, required the ICR to establish a field office in Mitrovica, with a focus on security/rule of law (as well as freedom of movement/returns, property rights/housing, and economic development). For each of these duties, particularly security and rule of law, the ICO was required to enact reforms and development directly or prompt, support, and oversee the work of another actor in enacting rule of law and security reforms and developments. An additional benchmark illustrates the latter, where the KJC was to utilize a uniform system of justice with the political and technical support of the ICR. However, while the ICO Preparation Team established a Mitrovica Office in 2007, which opened in 2008, the north of Kosovo and Mitrovica have seen few substantive reforms or institutions equipped to manage the courts, prosecution, policing, or rule of law in the north.

Furthermore, the KJC and KPC has not devised a system for establishing basic municipal courts/prosecutorial offices nor have they fulfilled their responsibility to ensure that comprehensive judicial and prosecutorial appointment processes are carried out in the north. While appointments have been nominally made, the posts have not been established. A major rule of law failure in the north of Kosovo rests particularly with the absence of any municipal court in the north that could safeguard the rights of the citizens there and could carry out the final steps of prosecution in the rule of law process.

Citizenship as a Political Right

The ICO benchmark on Kosovo citizenship corresponds with (i) Annex I's provision to provide for the right of all citizens residing within Kosovo's territory, regardless of any other citizenship they may hold; and (ii) Annex XII's provision to pass the *Law on Kosovo Citizenship*. The concept of modern citizenship implies the possession of many political rights such as the right to a legitimate local government: the right to private property; and the benefits of local public services. However, this concept of citizenship has not been upheld for those in the north of Kosovo. It is beyond doubt that those residing in the north have not enjoyed their rights and political freedoms, as legal guarantees from the state, in an unrestrained political environment. In particular, those in northern Kosovo have been excluded from legal order and political rights, unable to exercise their rights to local self-governance and a number of other rights that derive from functioning and legitimate forms of governance, which clearly speaks for the weakened position of the people's right to citizenship. As mentioned above, only a small percentage of those living in the north of Kosovo pay taxes to Kosovo, as there is lack of oversight function to reprimand those who do not. On the other hand, reprimanding or punishing those citizens who do not pay taxes would be authoritarian and unconstitutional without first offering legitimate representation and services to those who do.

Property Restitution in entire Kosovo, and Property Possession and Ownership in North Kosovo

Property restitution has been problematic throughout Kosovo in relation to the denationalization of properties nationalized during the Yugoslavian communist regime. The enjoyment of property possession is also another key problem in Kosovo particularly in the north.

All ICO benchmarks corresponding with CSP requirements were adopted in 2008, except for the *Law on Property Restitution*.⁵⁶ The government still has not established a working group concerning the law.⁵⁷ While the ICR field office in Mitrovica was opened in 2008 with a primary focus for the north on freedom of movement/returns and property rights/housing (in addition to rule of law issues), these agenda items have not been adequately dealt with by the office or the ICR. To date, the ICO has not played a role in unifying the international missions to ensure freedom of movement/returns and the right to property possession of many citizens who are deprived of their possession in the North; nor has the ICO provided substantive policy mechanisms that could serve to address those hurdles. Indeed the legal system guarantees citizens in the north the right to private property. However, many northern citizens not only have been unable to re-acquire their former properties but also have been forced out of their homes. The internally displaced people from the north whose rights to property have been ostentatiously violated point to the fact that people in northern Kosovo lack a very basic right they were offered under the CSP.

⁵⁶ Benchmarks corresponding with Article 2.13 Annex XII.

⁵⁷ In a recent evaluation ICO acknowledges that property restitution continues to remain a challenge and the legislation on property restitution, as foreseen by the CSP Annex XII, article 2.6.13, has yet to be adopted, while the role of the ICO should be focused to assisting the Government of Kosovo in preparation of a framework for a law on restitution. See International Civilian Office, Internal Document, ICO Goals and Staff Review, March 2011, and International Civilian Office, Internal Document, 'Annex: ICR's Observations on CSP Achievements and Next Steps Post-ESI' June 2012.

Transfer of ICO Powers and Authority

While the four issues mentioned above should be addressed swiftly, so as to guarantee adequate representation, rights and services to all citizens, the transfer of ICO powers is the most time-sensitive issue for Kosovo.

The end of supervised independence and all ICO responsibilities and authority is expected to take place in September 2012. Thus, draft laws, or legislative amendments that transfer the ICO's authority and powers to domestic authorities and governmental branches, have already begun to pass through the Assembly.⁵⁸ However, in many cases the transfer of ICO powers has weakened the future of Kosovo's representative parliamentary democracy as well as the representation and rights in Kosovo. The transfer of authorities favors the government over the parliament and empowers the position of the government far beyond what was democratically and constitutionally envisaged.

The current proposed legal structures support the transfer of many ICO powers to the government rather than the parliament. The following amendments and pieces of legislation regarding the transfer of ICO powers appear problematic and often threaten the rights and representation of the citizenry.

The amendments relating to the *Law on Public Finances* allow the government to reduce funds for any publicly funded organization in the case of 'macro-economic turmoil' without legally codifying what might constitute as such. While initial power over the budget is vested with parliament, as is traditional in a parliamentary democracy like Kosovo, the language referring to 'macro-economic turmoil' is exceedingly vague and leaves much opportunity for the government to impede parliamentary procedure and the responsibilities of a representative parliament over the use and allocation of public funds. The authority and power to devise and redesign the budget should be the sole duty and constitutionally-codified responsibility of the parliament. Not only does this new amendment on public finance put representative parliamentary democracy in Kosovo at risk, by impeding the rights on parliament and transferring excessive power to the government, but it puts the independence of public organizations (RTK, for example) at risk, since the government will have the power to adjust their budgets in any case deemed as 'macro-economic turmoil.' Furthermore, vesting such power in the government, which will most likely be held by a party representing a majority-community (although there are at least three Ministers from non-majority communities), poses an additional threat to the funding offered to public institutions that provide services for non-majority communities. In Kosovo's strengthened but still young democracy, transferring such additional power to the government rather than the parliament could put the entire parliamentary political system at risk.

Another legislative amendment that vests additional (and arguably too much) power in the government rather than parliament relates to the seven-person Agency that manages the privatization processes in Kosovo. Three of the seven members on this Commission are currently held by members of the ICO. However, these three seats will be transferred to members of the

58 Karadaku, Linda. 26 January 2012. "Kosovo preparing for the end of supervised independence." SETimes.com. Retrieved from http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2012/01/26/feature-03

government rather than to elected members of the parliament (with requirements for ethnic diversity). As one seat already is held by a Minister from the government, this transfer of authority will grant three additional seats to the Government, allowing the Government to hold a majority of the seats on the Agency that dictates the privatization of public corporations and infrastructure in Kosovo. Again, as it is unlikely that the Government will be led by a party representing a commonly-held goal, there is serious risk that the privatization process will fail to benefit the general interest of the people, benefiting instead sectional and party interests.

It is critical that the parliament consults civil society closely before approving the legislation that will approve the transfer of ICO powers, so as to ensure that such powers and authorities are allocated in a way that strengthens parliamentary democracy and benefits all citizens in Kosovo rather than those who align with sectional and party interests.

The Way Forward

Decentralization and Governance in the North

The government must begin a decentralization processes in the north. This will entail comprehensive action and multiple institutions, both domestic and international.

First, it will be necessary to establish a channel of communication with citizens in the north through which the government and international institutions can communicate the true substance and benefits of decentralization as something far different from 'Prishtina will take over', which seems to be the current understanding of decentralization from the majority of northern citizens, particularly northern Kosovo ethnic Serbs.

The establishment and institutionalization of RTK-2, which seems likely to occur by the end of 2012, could go a long way in providing such a channel of communication in the longer-term.⁵⁹ However, to effect real change in the northern understanding of decentralization, the newly created Administrative Office for the North of Kosovo should conduct a comprehensive and extensive public awareness programme. At its heart should be the promotion of decentralization as a crucial mechanism through which citizens in the north, and particularly northern Kosovo ethnic Serbs, can achieve greater local representation that is accountable to their municipal constituencies, in ensuring rights and the provision of local services.

However, there is a risk that this communication of the true nature and value of decentralization will be completely ineffectual if the Administrative Office for the North of Kosovo, EULEX, and KFOR do not simultaneously push forward and support Kosovo institutions in institutionalizing a new Comprehensive Agenda for the North of Kosovo. This must include the drawing of new municipal boundaries that consider the geographical representation of ethnicities in the north. Also, funding and resources to support community organizations in the north (such as town halls, local political groups), so that future political and municipal leaders in the north have a political

⁵⁹ The ICO did play a major role and focused much of their energy in the last year on reconstructing the *Law on RTK* from the original and problematic *Draft Law on Public Broadcasting*. Indeed the new law, as compared to the draft law, has many improved mechanisms for ensuring the financial, managerial and editorial independence of RTK-2 and largely provides for a Serbian-language public broadcasting channel that will be representative of Kosovo Serbs and hopefully accepted as a medium for communication and media in the north.

space through which to gain traction and ultimately become representatives of the decentralized municipalities.

Finally, the decentralized municipal governments must have infrastructure wherein municipal governance can take place and representatives can be contacted and held accountable by their constituents and civil organizations.

Judicial System in the North

Rule of law institutions must be established in the north. The first and most concrete step that must be taken is the establishment of basic courts in the north, as none currently exist. Citizens in the north must be able to bring cases to court to safeguard their rights where local institutions and lack of representation has made this impossible.

Second, rule-of-law *via* policing has been largely ineffectual in the north, as there has been no court system that could judge and prosecute corruption and criminality. The immediate establishment of a court in the north will represent major progress towards safeguarding the rights of citizens there and ensuring that effective policing can be followed by prosecution where necessary. When a court is established in the north, the judiciary and prosecutors should be ethnically diverse, and this process should be supported and overseen by EULEX, with the possibility of EULEX judges initially serving in the courts.

Property Restitution and Protection of Property Rights

The government must proceed immediately with a financial assessment and devise a strategy to push forward the *Law on Property Restitution*. In regard to international involvement, EULEX and KFOR should be requested to help Kosovo institutions safeguard the right to private property, particularly for those people who held and hold property in the north. The issue of internally displaced persons (IDPs) must also be addressed.

Transfer of ICO Powers

The ICO has promised closely to oversee the transfer of ICR powers and authorities and the corresponding changes to Kosovo's constitution and existing legislation; to safeguard minority-community rights by voicing approval for new pieces of legislation and constitutional changes before the ICO exits Kosovo; and to ensure that the transfer of powers are in line with principles of parliamentary democracy and a multi-ethnic state.

If many of the draft laws as they stand are passed into law in the autumn, when parliamentary procedures resume, then the ICO will not have fulfilled its promise and, more importantly, its responsibility to ensure that, upon its exit from Kosovo, the state is fully equipped to carry out parliamentary democracy, the institutions are functional and depoliticized, and that the rights of non-majority communities are safeguarded. To move in this direction, the ICO should strongly recommend that most of its powers be left to the Assembly rather than under the control of the

Government. This is particularly important in regard to the budget and privatization processes.

The funding and privatization of public institutions should be controlled by the Assembly, which is an ethnically-diverse and representative body and accountable to their constituents.

Chapter 2: International Presence

The CSP sets forth a number of provisions in Annex IX (International Civilian Representative), Annex X (European Security and Defence Mission), and Annex XI (International Military Presence) that required the presence, structuring or restructuring of many international organizations and international forces in Kosovo.

This chapter analyzes the role of international organizations and missions in Kosovo; the collaboration between international missions, such as the ICO, ESDP, IMP, KFOR, EULEX, OSCE, and domestic authorities and institutions; and the successes and failures of these institutions to establish proper forms of governance throughout Kosovo: rule of law, security, a functioning judiciary, and mechanisms to guarantee the rights of citizens throughout Kosovo. It will scrutinize the overall normative prescriptions of Annex IX, X, and XI of the CSP; discuss the benchmarks deriving from the annexes concerned; and provide an in-depth examination of the most prevailing challenges in regards to the unimplemented duties from the CSP. Also, it will seek to shed light on the policy mechanisms that could help to overcome the current challenges, thereby ensuring that solutions addressing the unimplemented benchmarks of the CSP become embedded in a new policy strategy of the Government of Kosovo.

Key Provisions from the Comprehensive Proposal for Kosovo Status Settlement

Annex IX includes provisions for the establishment of an ICR, supported by an ICO, to supervise the implementation of the CSP and support the relevant efforts of Kosovo's authorities.⁶⁰ The ICR was responsible for ensuring and monitoring the effective implementation of the CSP and was the final authority regarding the *interpretation* of it.⁶¹ In cases where the Settlement was breached or unimplemented, the ICR had the authority to take corrective measures to realign Kosovo authorities and legal structures with the principles and provisions of the CSP. In extreme cases, this could have included annulling legislation or decisions of Kosovo authorities or even removing officials from office.⁶² The most specific institutional requirement for the ICO was the establishment of a field office in Mitrovica, where the ICO would have the ability to engage Kosovo authorities with the northern territory and have a relatively free hand to develop the ICO office.⁶³ This was seen as a benchmark that would indicate either the success or failure of the ICO in integrating Kosovo's north. However, after maintaining a minimal presence with the office, the ICO relied on the work of MPTs to fulfill their duties in the north or Kosovo, which was arguably ineffectual as for example, their work resulted in the building of parks rather than the institutionalization of long-term services for the citizens in the north.

⁶⁰ Annex 9. Article 1.1 and note: while the ICR originally served as the EU Special Representative as well, the posts have since been split due to restructuring of the EU Foreign Services and corresponding changes in the Lisbon Treaty.

⁶¹ Annex 9. Article 2.1

⁶² Annex 9. Article 2.1.

⁶³ Annex 9. Article 4.4.

Outside of overseeing the implementation of the CSP, the ICR had additional responsibilities, including appointment of the Auditor General; giving consent for the international judges and prosecutors selected by the ESDP Mission; and giving consent for the selected Director-General of Customs, the Director of Tax Administration, the Director of the Treasury, and the Managing Director of Central Banking Authority.⁶⁴

Of critical importance is the ICO's coordination with other international actors. The CSP required the establishment of mechanisms that allow for the coordination of international actors, meaning the ICO, the IMP, ESDP, and OSCE. Both the IMP and the ESDP have received their own Annexes in the CSP. While OSCE does not, it is required to maintain a comprehensive field presence in Kosovo to support democratization and the work of the ICR. Also, the ICR was required to chair a Coordination Committee, to consist in the Head of the IMP, the Head of the ESDP Mission, and the Head of the OSCE Mission, as well as other relevant actors necessary for the implementation of the CSP.⁶⁵ While OSCE did indeed maintain a comprehensive field presence and was successfully integrated into the Coordination Committee, it appears that the ICO had considerable difficulty in effecting the role of a unified center of international coordination for Kosovo's domestic issues, particularly in regards to the north of Kosovo.

Annex X includes provisions relating to the authority of the ESDP. The ESDP operates under the direction of the European Union Special Representative (who initially also served as the International Civilian Representative but now holds a separate post). The Head of the ESDP Mission, appointed by the Council of the EU, may establish whatever presence necessary, at a central and local level, so as to ensure full implementation of rule-of-law, public order and security. To maintain and promote the rule-of-law, the ESDP Mission held the authority to ensure that cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes, and other serious crimes, are properly investigated, properly adjudicated and prosecuted, and that decisions of these cases are properly enforced.⁶⁶ With a particular focus on the judiciary, police, border control, customs and correctional services, the ESDP Mission maintained the authority to have full access to and monitor, mentor, and advise these relevant authorities. In consultation with the ICR, the ESDP also maintained the authority to reverse operations decisions by Kosovo authorities.⁶⁷ The ESDP, therefore, served Kosovo's technical state-building efforts in the rule-of-law sector, also being charged with the responsibility to ensure the exercise of Kosovo's authority in those areas in the north of Kosovo where it had no control.

Annex XI identifies the objectives, power and authority of the international military presence in Kosovo. The IMP was to have a unified chain of command originating from the political control of NATO (which is responsible for supporting effective civilian control and management over the Kosovo Security Force). It was to be responsible for a number of specific tasks that would ensure a secure environment in Kosovo (until Kosovar institutions could assume responsibility).⁶⁸

64 Annex 9. Article 2.2.

65 Annex 9. Article 3.

66 Annex 9. Article 2.3 a-d

67 Annex 9. Article 2.3

68 These tasks, set forth in Article 1 of Annex XI of the CSP, included ensuring the freedom of movement, facilitating refugee return, protecting religious and cultural sites, performing border monitoring duties, establishing and training the KSF until it is self-sustainable, continuing with the Joint Implementation Commission with Serbia to address issues of common concern, and providing advice in the long-term aimed at integrating Kosovo's

The IMP was granted a significant amount of authority by the CSP, with the final authority regarding its interpretation in regard to the IMP, and with the authority to use all necessary force to carry out its responsibilities; to establish immediate and full military control of the airspace; and to approve and supervise (alongside the ICR) the establishment of all security-related forces in Kosovo.⁶⁹ However, the IMP was unable to supervise the missions of all security-related forces in Kosovo, at least to the extent that they successfully carry out their missions of ensuring freedom of movement, security, and rule of law throughout the entire territory. In fact, KFOR, which has the authority to use force to carry out its mission and also derives its power and authority directly from NATO, was arguably the most ineffectual in its ability to establish freedom of movement and security in the north of Kosovo (particularly as KFOR held the largest presence in the north). While the IMP maintained the authority to order the use of force and remove the barricades in the north, it has not done so. The lack of security, rule of law and freedom of movement in the north remains a critical failure of the IMP and remains as a key issue for Kosovo's territorial integrity and fight against state failure in the north.

Assessing the Benchmarks on the CSP's Implementation

General Overview

The ICR consented to the appointment of, or he himself appointed, a number of judges and prosecutors and a number of directors for independent agencies and institutions.⁷⁰ These appointments have been effected. In addition, the ICR was required to chair a Coordination Committee that incorporated all major international actors and to supervise the development of civilian oversight of security institutions, ensuring that there exists a coherent approach to security and rule-of-law among all international actors.

Finally, and perhaps most importantly, for the day-to-day functioning of Kosovo, is the ICO benchmark that requires the ICR to establish a Mitrovica field office, to support and enhance security, rule-of-law, freedom of movement, property rights, and economic development in the north of Kosovo.

Status, Implementation, and Implications

In their coordination role, the ICO appears to have been relatively successful. The ICO attended the monthly Working Group on Security, which facilitated information exchange, coordination, and advice-giving among international actors and between these actors, additional international stakeholders, local capacity builders and the Kosovo government. In addition, all international stakeholders have met once a month to ensure action and coordination regarding key policy areas and necessary reforms in Kosovo. However, very little has resulted from this coordination role of the ICO. The ICO was never successful in prompting a unified voice from the international actors in Kosovo, nor in promoting a unified strategy for integrating the north and reaffirming the territorial integrity of Kosovo.

security structures with Euro-Atlantic security structures.

69 Annex 11. Article 2.

70 These consents and appointments included consent for the appointment of international judges and prosecutors selected by the ESDP Mission, consent for the appointment of Director General of Customs, Director of Tax Administration, Director of treasury and Managing Director of CBAK, and the appointment of international KPST members and Auditor General.

The failures in coordinating a unified comprehensive agenda for the north, and institutionalizing the ICO's own comprehensive agenda for the north, can both be traced to the ICO's lack of presence in the north of Kosovo. Without an institutionalized presence in the north, the ICO was unable to promote and implement its own comprehensive agenda for the north, let alone coordinate others international actors in doing so. While the ICO Preparation Team established the Mitrovica Field Office in 2007, and opened the office in 2008, this office has not been successful in achieving any substantive reforms or benefits for the north. The international mechanism intended to lead the way in devising and pushing forward a comprehensive strategy for the north was not successful. However, the Administrative Office for the north of Kosovo has just been established (in the spring of 2012) and it will be interesting to see if the domestically-based Office will be more effective than the ICO Field office.

Challenges and Key Issues

Legal Basis of the ESDP after Supervision

EULEX is the largest mission of the ESDP and has set the precedent for increasing ESDP involvement across the globe. EULEX is both a police and civilian rule-of-law mission which includes civilian police, prosecutors, judges and customs officers.⁷¹ To date, EULEX has acted under the authority of the ICR. However, EULEX's deployment under UNSC Resolution 1244 (1999), rather than under the CSP 'has created a situation in which EULEX's exercise of its mandate is questionable under Kosovo constitutional law'⁷² and poses a looming challenge for determining what will happen to EULEX after the end of supervised independence and formal ICO presence in September, and whether EULEX's continued presence would be in line with Kosovo's constitution.

For two years, Peiter Feith served as both the ICR and the EUSR (under which EULEX functions). However, nearly a year and a half ago, this position was split into two, with the ICR only responsible to the International Steering Committee, and the EUSR acting as the EU *representative* in Kosovo. This change in the position of the ICR resulted from changes in the Treaty of Lisbon (and additional problems from the five EU non-recognizers of Kosovo), which requires the EC to redesign the foreign service of the EU and to maintain an EU foreign office representative in a given country.

Now that the EUSR holds a position that does not rely on the ICR, EULEX does not intend to terminate its mission upon the exit of the ICR. However, there is no domestic legal basis for EULEX after the ICR leaves. While Chapter 7 of the UN Charter gives international legitimacy to peace-building missions in Kosovo, EULEX is technically a state-building and rule-of-law mission that does not have international legal legitimacy under Chapter 7 of the UN Charter for its presence in Kosovo.⁷³ As such, Kosovo must establish domestic legislation which supports the continued but time-limited presence and domestic legitimacy of EULEX in Kosovo. As it currently stands, the

71 George, Alexandra. "Ten Years of ESDP Missions: The European Way for Attaining Global Peace and Security." November 2009. Retrieved from <http://www.eulex-kosovo.eu/en/features/0011.php>

72 Robert Muharremi (2010) 'The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law', *ZaöRV* 70 (2010), 357-379, pg. 357.

73 More on this issue see De Vet, Erica (2009) 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of Eulex'. *The American Journal of International Law*. Vol. 103, No. 1, pp. 83-84, and Matheson, M., J. (2001) 'United Nations Governance of Post-conflict Societies'. *The American Journal of International Law*. Vol. 95, No. 1, pp. 76-85.

EUSR's capacity to stand independently from the ICR and intention to do so, upon the ICR's exit in September, runs contrary to the CSP (as a domestic legal obligation) and therefore will no longer maintain domestic legal legitimacy after the ICR leaves Kosovo.

The Legality/Legitimacy of International Military Missions

A similar problem exists for KFOR: its legitimacy as an international military mission in Kosovo has derived from UNSC Resolution 1244. However, as Kosovo moves to the end of supervised independence, in September 2012, KFOR's presence on the basis Resolution 1244 poses a challenge to the sovereignty of the independent state. For some time now, Kosovo should have urged KFOR to sign a Status of Forces Agreement (SOFA), which would allow KFOR to act legitimately within a sovereign Kosovo. Currently, KFOR derives its international legal legitimacy from a Military Technical Agreement (MTA) and UNSC Resolution 1244. The MTA was signed one day before the passage of UNSC Resolution 1244 and was an agreement between KFOR and the Government of the Federal Republic of Yugoslavia. This document established KFOR's authority in Kosovo and ensured that Yugoslavia and Serbia recognized the legitimacy of KFOR and its presence in Kosovo.⁷⁴ Clearly, this could not now serve as a legal basis for KFOR in Kosovo, as legally, Kosovo is now an independent state, recognized by the vast majority of NATO members.

International law recognized both the MTA and UNSC Resolution 1244 as legitimizing KFOR's presence in Kosovo unless and until Kosovo's legal status became upgraded. The MTA set forth KFOR's mission as the establishment and maintenance of a secure environment for the citizens of Kosovo. The MTA originally called for the establishment of the Joint Implementation Commission (JIC) and acted as a temporary SOFA, which also provided protection for the KFOR soldiers against being liable for damages caused while performing their duties. While the MTA was intended to serve as a temporary SOFA, to be followed rapidly by an actual SOFA, such an agreement still does not exist. KFOR supposedly remains protected *via* the MTA, although this is highly questionable, as the agreement exists between Federal Republic of Yugoslavia, Serbia, and NATO whereas KFOR troops now remain in a post-secession independent and sovereign Kosovo.

KFOR claims to rely on both the MTA and Resolution 1244 for its international legitimacy, although looming non-supervised independence for Kosovo has prompted many to call for an official SOFA between the Government of Kosovo and the NATO, so as to provide domestic legal legitimacy for the presence of KFOR troops. The SOFA would make KFOR legitimate under Kosovo's constitutional law and would provide for a new legal reality in which KFOR would legitimately maintain its presence in Kosovo after the end of supervised independence. In a sovereign state, a foreign or international army/military force can maintain an active presence only under a SOFA agreement.

The United States has taken the first step. In February 2012, the USA signed a SOFA agreement, with the Kosovo government, to cover its troops that remain unilaterally in Kosovo. This agreement provides the legal foundation for the United States military and U.S. Department of Defense civilian personnel who are not part of KFOR and will continue to operate in Kosovo.⁷⁵

⁷⁴ Puleo, Louis J. (June 2003). "The Military Technical Agreement." Retrieved from http://www.nato.int/kfor/chronicle/2003/chronicle_05/16.htm

⁷⁵ Press Release by the Embassy of the United States in Kosovo. (18 February 2012). "Signing of Status of Forces Agreement between the United States of American and the Republic of Kosovo."

Freedom of Movement in the North of Kosovo – KFOR and the ICR Field Office

Both KFOR and the ICR were made responsible for establishing freedom of movement within northern Kosovo, but have yet to do so. Clearly, the barricades in the north, erected by northern Kosovo Serbs and backed by Belgrade, have largely prevented the freedom of movement there. However, for a number of reasons, KFOR has not applied adequate pressure, or force, to remove these barricades, although they have remained for nearly a year. First, KFOR does not want to use (armed) force against civilians in the north. Such force would likely be required to remove the barricades, as northern Kosovo Serbs have effectively used community organizing strategies to reinforce the barricades when KFOR has attempted to dismantle them. Second, KFOR does not want to appear *politically* allied with Kosovo relative to Serbia. Third, KFOR would prefer that the issue of northern Kosovo be solved by political means, ideally *via* an EU-facilitated dialogue between Kosovo and Serbia.

While the ICR was also made responsible for the creation of a field office in Mitrovica that could focus on security/rule of law; freedom of movement/returns; property rights/housing; and economic development, they have not successfully promoted the freedom of movement in the north. Nor have they encouraged KFOR to make additional efforts to remove the roadblocks and allow the citizens in the north to travel freely through the region. The roadblocks in the north not only inhibit the day-to-day movement of citizens, they also diminish Prishtina's ability to open a channel of communication and exchange with the north. Also, they seriously hinder any economic development that relies on the transport or shipment of people or goods within and through the north or Kosovo.

Border Control

While control of the borders ultimately will be assumed by the Kosovo Police Service and customs officials, both KFOR and EULEX currently engage with border monitoring. However, for the Kosovo Police Service successfully to perform integrated border management, as directed by the CSP and the ICO benchmark which oversaw the implementation of the *Law on Integrated Management and Control of the State Border*, the borders must be fully demarcated. The CSP required the Joint Technical Commission of Kosovo and Macedonia physically to demarcate the border between the two states. While they accomplished 98 percent of this border demarcation by the end of 2009, they have yet to complete the last two percent. However, this pales in comparison with the absence of border demarcation along the Kosovo borders with Serbia and Montenegro. The JTC and ICO still have not established a system for demarcation of Kosovo's borders with Serbia and Montenegro. The ICO has played no role in pressing for the timely completion of this process, which could now prove costly in terms of additional time and political conflict between Serbia and Kosovo.

With respect to the border between Serbia and Kosovo, demarcation is not the only challenge that remains. In the summer of 2011, violence and chaos erupted along Kosovo's northern border with Serbia when Kosovo sent border police and customs official to place an embargo on

Retrieved from http://pristina.usembassy.gov/sofa_eng_02_18_20122012.html

Serbian goods. Ultimately, with the help of EU facilitation, Kosovo and Serbia settled on a system of integrated border management (IBM), where one border exists that is manned by customs official from both states. The agreement which establishes one border rather than one for each state's territory makes border demarcation particularly important. Effective demarcation is particularly important given the political tensions between Serbian and Kosovo officials. In June 2012, the Serbian police force arrested two Kosovo police who were patrolling the border: this resulted in political tension. It is crucial that demarcation occurs in a timely and effective manner, so that police and international border monitoring forces on both sides understand the physical boundaries of their authority.

Kosovo Security Force

According to Article 5, Kosovo was to develop a small, professional, minimally armed, and multi-ethnic Kosovo Security Force (KSF), under civilian control, which should be prepared for crisis response, explosive ordinance disposal, and civil protection. While Kosovo's Security Force has been established, and is functional, three critical problems remain.

First, if KFOR ultimately plans to transfer authority to the KSF, as envisaged by the CSP, KFOR should establish a plan for lifting the ban of KSF medium-level armament. Currently, KSF has the authority to purchase only small, symbolic arms.

Second, to empower the KSF with legitimate defensive capabilities and the capacity to maintain Kosovo's security, it will be necessary for KFOR to continue overseeing the training and development of the KSF as well as lift the ban on the purchase of medium-level or heavy arms.

Third, KFOR should devise a strategy for the transfer of all security and defensive powers to the KSF, so as to enhance Kosovo's internal security capacities and to exit from Kosovo within an appropriate time frame. It is very important that the transfer of powers from KFOR to KSF be seen as a step towards decreasing the international military presence in Kosovo and also as a means to ensure that domestic capacities are being established to offer a peace-building security policy for all communities in Kosovo.

EULEX Involvement in the Courts

When supervised independence ends, it is likely that a conflict of competencies between EULEX and Kosovo authorities will appear, because both will be authorized to perform the same judicial and prosecutorial functions and adjudicate cases. In many cases, there will be EULEX prosecutors and Kosovo prosecutors having authority, or at least discretion on assuming a case, leaving room for infighting over who will have ultimate authority to make decisions regarding the final result of the case. After the supervised independence phase, Kosovo must devise a new legislative framework that better shapes the division of duties and distribution of burdens between EULEX judges and prosecutors and domestic judges and prosecutors. This framework should ensure that EULEX and Kosovo judges and prosecutors face no clash of authority and that the legislative framework provides for a smooth, incremental transition of EULEX competencies to the Kosovo judges and prosecutors. EULEX judges should provide for this transfer of powers not only by

investing unilaterally in justice issues but also by training and increasing the skills of Kosovan judges and prosecutors.

The Way Forward

Legal Basis of the ESDP after Supervision

Kosovo must establish domestic legislation which supports the continued but time-limited presence and domestic legitimacy of EULEX in Kosovo. The ISG already has encouraged Kosovo to 'support the continuation of EULEX's mandate, including its executive functions, on an appropriate legal basis.'⁷⁶ The legal basis for the continuation of EULEX's mandate should contain no reference to UN Resolution 1244. The legislation supporting the extension of EULEX's mandate should provide domestic legislative legitimacy for the ESDP in Kosovo, as well as diplomatic immunity for EULEX, but should contain a sunset clause so as to provide the aforementioned legitimacy and immunity within a set time frame.

The Legality of International Military Missions and Transfer of Powers to the KSF

Kosovo should lobby NATO to negotiate a SOFA, as the majority of NATO members recognize Kosovo's independence, and should provide international legal legitimacy for the NATO troops that operate within Kosovo's sovereign territory. This agreement, between Kosovo and NATO, should include a transitional clause that foresees the gradual transfer of powers from KFOR to the KSF and Kosovo Police within a certain time frame. This transfer of powers should address all security matters, with a particular focus on the north and on Kosovo's borders. As such, until the KSF can carry out its duties unilaterally, it should continue to be the duty of KFOR to support the training of KSF and promote greater ethnic diversity within the KSF. Also, to ensure that the KSF will be competent and capable to safeguard Kosovo's internal security and peace throughout the entire territory, the agreement should foresee the establishment of a strategy for transferring arms to the KSF. The latter achievement will require negotiations between Kosovo and NATO regarding a lift on the ban restricting the KSF from acquiring heavy arms.

Freedom of Movement in the North of Kosovo – KFOR and the ICR Field Office

Freedom of Movement in the north of Kosovo is linked with the establishment of effective governance structures in the north. As the ICR Field Office in the north will no longer be responsible for coordinating a Comprehensive Agenda for the north, or the international actors and domestic police forces that are tasked with ensuring freedom of movement, the Kosovo government must work with EULEX and KFOR to find a uniform approach to ensure freedom of movement in the north. International support is crucial for stability in the north, and the Kosovo government should work extensively with international actors to devise a uniform strategy.

⁷⁶ International Steering Group, Press *Communique*, Fifteenth meeting of the International Steering Group for Kosovo, 2nd July 2012, Vienna.

Border Control

Kosovo must set forth a strategy and timeline for demarcating the border with Montenegro and Serbia, with the assistance of the EU and EULEX. The EU should offer long term assistance to Kosovo authorities that support the capacity of Kosovo police and customs guards to control the border line. In addition, the Kosovo Government, in conjunction with KFOR and EULEX, should establish a long-term strategy for shifting authority of controversial border points to Kosovo police and customs guards. Currently, the heavily utilized border points 1 and 31 on the northern border between Kosovo and Serbia remain controlled by KFOR.

EULEX Involvement in the Courts

The Kosovo government should negotiate a working document that defines the share of burden and borders of competencies of the two authorities – EULEX and domestic – so that there is no overlap between the two. An additional training/coaching role for EULEX, as opposed to direct engagement function, should be substantiated in the new framework, as EULEX should play a significant role in increasing the professional capacities of Kosovo's judiciary and prosecution.

Chapter 3: The Economy

Background

The economic component of the CSP is found within two main annexes: (a) Annex VI, elaborated in three (3) articles and constituting issues around foreign debt; and (b) Annex VII, elaborated in seven (7) articles and framing general issues in regards to property and archive. However, several other economic topics are to be found in the other Annexes, covering and dealing mainly with financial topics and topics related to high profile public official appointments.

This chapter is organized as follows:

Section 1 elaborates on the topic of external debt, focusing on relationship between CSP defined framework and actions taken so far.

Section 2 relates to property and archive benchmarks as defined in CSP and ICO Matrix.

Section 3 sets out a general evaluation on various economic benchmarks that are part of other CSP annexes but are not related with CSP Annex VI and VII;

The final section is entitled 'Challenges and the Way Forward', which sets out conclusions and recommendations.

1. Foreign Debt

The first economic topic dealt with under the CSP concerns Kosovo's foreign debt. The three articles of Annex VI deal with the obligation of Kosovo to assume its share of the external debt under two principles: (a) that allocated debt shall become a liability of Kosovo only if the beneficiary of that debt is located in Kosovo; and (b) that non- allocated debt shall be apportioned to both parties according to a proportional key to be established in cooperation with the International Monetary Fund (IMF). In addition, Article 3.1 requires that if, six months after Settlement has entered into force, parties have failed to reach an agreement, the ISG shall nominate an international arbitrator.

In the ICO matrix, the implementation benchmark is given as:

Kosovo to assume its share, based on principle of territoriality, of external debt currently served by Serbia, possibly with facilitation by ISG-appointed international arbitrator.

Further, the ICO performance measure considers this benchmark to be fully incomplete.

Two key stakeholders in the field of foreign debt were interviewed: Muhamet Mustafa and Haki Shatri, former Minister of Finance. Both were members of the Kosovan delegation team at the Vienna negotiations and both consider that the task as defined by CSP to be largely incomplete; negotiations about external debt were never conducted, and the ISG failed to appoint an

international arbitrator, as required by the CSP.

To date, Kosovo has accepted its share of the debt for the period of existence of the ex-Yugoslavian Federation, amounting to some \$1 billion. At the London Conference of Donors in 2008, the US government agreed to pay off half this debt, and the government of Kosovo is making annual payments towards the remaining half. In the 2010 budget, the Government of Kosovo set aside €55 million for debt servicing purposes.

According to the interviewees, the non-allocated debt; that is, the debt incurred in the period 1990-1999, was never accepted by the Kosovan party, because of its inability to comply with the principle of beneficiary as given in the CSP. Kosovo and Serbia failed to bring forward the issue on technical dialogue sponsored by the EU during 2011 and 2012, but the issue of non-allocated debt will need to be addressed at some point. Now, towards End of Supervised Independence, it remains unclear who will appoint an international arbitrator and how progress might be made towards the resolution of this dispute.

2. Property and Archives

The Property and Archive Annex relates to topics that cover ownership rights of Publicly Owned Enterprises (POEs); trusteeship for Socially Owned Enterprises (SOEs); claims and adjudication of Kosovo Trust Agency (KTA); Kosovo Property Agency (KPA) and claims adjudication processes related to it; property restitution, including those related to Serbian Orthodox Church; and Archives including cadastral records and other document relating to Kosovo and its inhabitants.

The ICO Matrix further elaborated these Articles into ten CSP Implementation Benchmarks, five of which relate to the adoption of certain law. These benchmarks require the adoption of the following six laws:

1. Law on Public Finance Management and Accountability;
2. Law on POEs;
3. Law on the successor to the KTA;
4. Legal framework of the Special Chamber;
5. Law on the KPA; and
6. Law on Property Restitution.

According to the ICO Performance Measure, of these six laws, four are complete, one is pending and one is incomplete. Desk research and interviews with various stakeholders⁷⁷ confirmed the ICO's assessment. The following brief overview outlines what is meant by 'complete' as regards these particular laws.

The *Law on Public Finance Management and Accountability* was adopted by the Assembly of the Republic of Kosovo, on 13 March 2008.

⁷⁷ Representatives of political parties: Avdullah Hoti (LDK), Visar Ymeri (Vetevendosje), Haki Shatri (AAK); Other relevant stakeholders: Alban Hashani (Riinvest), Ilir Salihu (ex KTA Board Member), KTA spokesman.

In accordance with the *Law on POEs*, approved by the Parliament of Kosovo (03/L-087), the ownership of central POE's has been transferred to the Government of the Republic of Kosovo (Article 3, Paragraph 3.1). The POEs covered by this Law are: KEK, KOSTT, PTK, Airport, Railroad, Waste Management, Iber-Lepenci and Radio Television of Kosovo.

As required by the CSP, and benchmark for the *Law on the successor to the KTA*, the Kosovo Trust Agency (KTA) ceased its operation on 30 June 2008. The Privatization Agency of Kosovo (PAK) was established as the successor of the Kosovo Trust Agency, which had been regulated by UNMIK Regulation 2002/12 'On the establishment of the Kosovo Trust Agency'. As amended, all assets and liabilities of the KTA became assets and liabilities of the PAK. The PAK was established with the promulgation of the *Law on the Privatization Agency of Kosovo* (Law No. 03/L-067) that entered into force on 15 June 2008. This Law implements relevant provisions of the CSP (Annex VII, Article 2). The PAK is established as an independent public body that shall carry out its functions and responsibilities with full autonomy. The Agency has full legal personality and, in particular, has the capacity to enter into contracts, acquire, hold and dispose of property and has all implied powers to discharge fully the tasks and powers conferred upon it by the relevant law.

While the establishment of PAK is considered 'complete', there are concerns shared by the general public and independent experts that its operation is far from ideal. Ilir Salihu, an ex-KTA Board Member, argues that there was a much higher degree of transparency in the KTA relative to the PAK. He argues that "...the number of observers was much higher in every opening of bids" and that "...those who made deals for SOEs had much higher negotiating powers. Throughout the KTA period there were around 20 international lawyers, today PAK has none".

The general framework on the Special Chamber of Kosovo is considered 'pending'. The *Law on Special Chamber of Supreme Court*, amending a 2003 UNMIK regulation, was passed in August 2011. According to the EC Kosovo 2011 Progress Report⁷⁸, the implementation of the Law on the Special Chamber of the Supreme Court presents considerable challenges owing to the shortage of qualified local judges. The Law also limits the role of EULEX in the Chamber; this is of concern because it is EULEX's involvement which decreases the potential for controversies over the Chamber's decisions. The Special Chamber is composed of eight international and twelve local judges who handle disputes and claims related to privatization and economic restructuring. The Special Chamber has primary jurisdiction over appeals against the decision of the PAK as well as creditor, ownership and property claims brought against SOEs and POEs, and claims arising from the privatization and liquidation of SOEs.

However, over the years concerns have been raised regarding its efficiency and ability to deal with various contexts. Perhaps most prominent among these concerns has been the distribution of 20% for employees from privatized companies in Kosovo. According to Visar Ymeri from 'Levizja Vetevendosje', an opposition political party, the decisions taken by several legal institutions are being completely ignored by PAK today: "...the most specific case is that of employees from a tube factory in Ferizaj who won a case at their Municipal Court for €23 million compensation for their salaries. This verdict was confirmed by the Supreme Court and by the Constitutional Court; yet PAK has refused to implement the verdict".

78 http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ks_rapport_2011_en.pdf

In addition, creditors' claims brought against SOEs from the privatization process are yet incomplete, although procedures do exist and recently have been modified and simplified, according to Alban Hashani, an expert on privatization in Kosovo. He notes there is considerable lack of capacity in both KPA and Special Chamber to process these requests and that "it is extremely important for the sake of privatization funds, that these capacities increase as soon as possible". Broadly, the use of funds from privatizations by Kosovan institutions (around €600 million) is dependent on the settlement of all creditor claims.

While the privatization of SOEs has been generally completed in other parts of Kosovo, the north appears to be lagging behind in the process. There are several significant obstacles to the privatization process in the north, with Kosovan institutions being unable to control and privatize assets there. Only recently, the Serbian government issued a warning to the international community, regarding privatization activities, emphasizing that it would use all its legal powers to prevent such thing happening: the privatization of 'Trepca' and 'Gazivoda Hydrocentral' can be expected to be highly contentious matters for both parties.

The ICO also categorized as 'complete' the benchmarks requiring the ICR make certain international KPA appointments. Appointments by the ICO were made; however, appointments to the Liquidations Committees were subject to considerable delays which affected the liquidation process of SOEs.

The PAK Board of Directors was appointed by the Assembly of the Republic of Kosovo, and PAK international members were appointed by the ICR in accordance with the provisions of Law on establishment of PAK, and this Board has full jurisdiction over the PAK.

Three important benchmarks are remain 'incomplete', and are cause for concern.

First, the issue of property restitution remains outstanding as the Law on the Property Restitution was never adopted. According to KPA figures, 71% of total claims (41,000) have been resolved so far. The majority of these claims were made by non-Albanian ethnicities. A 2011 study by OSCE argues that the KPA faces considerable challenges in the implementation of its mandate, which leaves affected parties without access to an effective and timely remedy.⁷⁹ Lack of funding, as well as lack of efficient support from Kosovo institutions – whether executive, legislative, or judicial – are at the core of the problem. Deficiencies related to the legal gaps, the inadequate implementation of legislation, and lack of co-ordination between the KPA and other agencies including courts, are amongst main obstacles to the successful operation of the KPA. Only restitution of Serbian Orthodox Church has been completed fully, however according to several political representatives interviewed for the purpose of this study such process is considered as one sided and targeting solely religious aspects.

With regard to public properties of Kosovo in other countries, PAK has identified 172 properties in successor countries to ex-Yugoslavia: 104 of which are in Serbia, 42 in Montenegro, 15 in Bosnia and Herzegovina, four in Croatia, four in Macedonia and one in Slovenia. In 2012, PAK declared there to be considerable obstacles in gaining rights towards these properties, especially in Serbia

79 OSCE (2011) "Challenges in the Resolution of Conflict-Related Property Claims in Kosovo"

and Montenegro, and that PAK is has not been able to access its properties. The situation is further complicated as the Serbian Agency of Privatization has been selling some Kosovan public properties that are on Serbian territory, such as 'Jatex' from Peja which had several properties in Serbia. Montenegrin authorities refuse to acknowledge Kosovan ownership of these properties.

The second incomplete benchmark relates to the return, within six months of the date of the CSP, of Archives displaced from Kosovo to Serbia (Annex VII, Article 7). At the 2011 Brussels negotiations Kosovo agreed to accept copies of registers. Our interviewees were asked to evaluate the importance of copies as compared to CSP requirements, in a scale from 1 to 5, with 5 being completed as foreseen. All of them provided a mark of 1, suggesting that both ICO benchmark and specific requirement of the CSP are perceived to be incomplete.

The third incomplete benchmark relates to the management of POEs in compliance with international principles of corporate governance. According to a recent Riinvest study on Corporate Governance in POE's, there is a marked lack of basic corporate governance principles, and the management of POEs is largely influenced by political parties.⁸⁰ Article 2 of Annex VII, which addresses POEs, states explicitly that competent bodies should undertake appropriate measures to implement all the relevant international principles for corporate governance. The ICO included corporate governance as a benchmark in its matrix thus: "Management of POEs in compliance with international principles of corporate governance." According to the ICO's performance measure, this benchmark has been entirely achieved.

This assessment must be open to serious question on several fronts:

- a) there has been demonstrable political interference in the appointment of Directors to POE Boards. For example, in May 2012, owing to political interference, the ICO requested the Ministry of Economic Development cancelled the process of drafting in new board members for POEs, despite 1,700 candidates having been interviewed.
- b) although the Ministry of Economic Development has established a Policy and Monitoring Unit of Public Enterprises (under Article 37 of the Public Enterprise Law no. 03/L-087), it lacks the human resources, in number and capacities, properly to monitor these enterprises. As a consequence, this unit fails to provide external audit reports in a timely manner, delays recommendations to the government, and fails to prove whether POEs comply with the Law on Public Enterprises.
- c) the Boards of the POEs operating at a municipal level do not include representatives from the particular municipality. To tackle this problem, amendments to the Law for Public Enterprises have been introduced, but they have not yet entered into force.

These points a) to c) contravene international principles for corporate governance and suggest that the competent authorities should put more effort into reaching this benchmark.

80 Riinvest (2012). Corporate Governance and Transparency on POE's

3. General Appointments of Directors

Some other economic-related benchmarks are to be found in other parts of CSP and relate mainly to the appointments of Directors to independent bodies with substantial public interest (ensuring their independence), and consultations during the preparation of central budgets.

As foreseen by the CSP, the ICR has been given consent to the appointment of the Director of General Customs, the Director of the Tax Administration, the Director of the Treasury and Managing Director of CBK. The ICR also was involved in appointing international members to KPST members and the Auditor General. The CSP and ICO benchmark also foresee that Government needs to ensure the independence of the KPST. Although there is less overt evidence to suggest that the appointment of Board members has been politically motivated, the operation of the KPST has been influenced recently by budgetary factors. With the first issue of government bonds, the KPST was obliged to switch its money from international bonds to domestic ones; indeed, the issue of these government bonds appears to have been predicated on the belief that the KPST will invest its assets in these bonds.

Preparation of the Budget

Finally, ICO Matrix foresees consultations as part of the preparation of the Budget. There were no such consultations during the 2011 Budget Approval, when the Government of Kosovo unilaterally interrupted the Stand-by-Agreement with the IMF, with a surprising increase of public sector salaries. ICO thoughts on this appear not to have been taken into consideration at all.

4. Challenges and the Way Forward

The economic component of the CSP has been moderately well completed, but a significant number of the most important points remain unimplemented. The complete implementation of CSP benchmarks can best be seen in cases where international approval was required for the appointment of senior officials. While much of the necessary legal framework has in principle been adopted, laws regulating sensitive issues such as property restitution have been neglected. Adoption of these laws requires urgent attention.

Similarly, the restitution of public property and relations between Kosovo and ex-Yugoslavian countries needs to be resolved. The economic relations between Kosovo and these countries, in particular Serbia, need to be addressed in a set of new internationally-supervised economic negotiations. These negotiations must target, but not be limited to, the property rights of Kosovo to 172 public properties across ex-Yugoslavia; unconditional return of original cadastral registers as described in the CSP; and secession rights of Kosovo to ex-Yugoslavian property. Furthermore, international community should enforce CSP principles in dealing with these matters.

The international community should also appoint an arbitrator to decide on issues related to public debt for the period 1989-1999 (as defined in Annex VI of CSP).

A very sensitive, but powerful, tool for economic integration is the privatization of Kosovo's POE

and SOE assets in the north of Kosovo. This has been largely neglected. The inability of Kosovan institutions to control this part of the country has left the economic recovery at a desperate level. With the assistance of the international community, Kosovan institutions need to speed up the privatization of assets in this region, and work to include local inhabitants in the process. Privatization should be seen as a tool for the attraction of potential investments and the creation of new jobs for the local community.

With regard to the PAK, the liquidation process must be completed in a timely manner. Initially, all creditor claims must be addressed, so the usage of privatization funds finally is available for Kosovan institutions. To achieve this, an increase of capacities in the Special Chamber of Kosovo is essential. With the current rate of work, the amount of time lost could be very costly. In addition, the PAK should be made to respect and implement all pertinent court decisions.

Finally, as there has been a marked lack of independence in the POEs, strengthening the Monitoring Unit of Public Enterprises is essential. However, given the political influences in the latest elections for the Board of Directors for POEs, it is highly unlikely that these bodies will be independent in the very near future.

Chapter 4: Communities

The Communities component can be seen as the cornerstone of the CSP. Its intention appears to have been the recognition and consolidation of a multi-ethnic and democratic society in Kosovo, in which minority communities are protected from discrimination. Owing to recent political history, there were fears within and for the Kosovo Serb community of retaliatory violence or discrimination. This was of concern within Kosovo, and also to the government in Belgrade. To be tenable, any solution leading towards an independent Kosovo needed comprehensively to address the integration of communities in the new state.

Key Duties from the CSP

In the CSP, the majority of the Communities component is dealt with in three Annexes.

Annex II – The Rights of Communities and their Members.

This describes the obligations of the Kosovo government and other actors, in achieving a desired level of legislative guarantees for the rights of minorities.⁸¹

Annex III – Decentralization.

This Annex provides the basis for political autonomy of local governance in minority-[dominated] municipalities;⁸² and

Annex V – Religious and Cultural Heritage

This Annex addresses issues related to the Serbian Orthodox Church in Kosovo, as well as general historical and religious heritage in Kosovo.⁸³

However, it should be noted that other Annexes also contain dispositions relevant to the Communities component. Taken as a whole, the Annexes read as interlinked; the impression given is of an all-encompassing solution that functions as a package, to be implemented as a whole. Given this, there is a degree of artificiality in treating the Annexes individually, but to do so provides a firmer basis for an assessment of progress.

81 See The Comprehensive Proposal for a Status Settlement for Kosovo:
<http://www.ico-kos.org/d/Ahtisaari%20Comprehensive%20Proposal%20in%20English.pdf>

82 *Ibid.*

83 *Ibid.*

Assessing the Benchmarks on the CSP Implementation

General Discussion

The ICO, mandated to oversee the implementation of the CSP, developed a list of benchmarks that appears to have served both as a list of goals, and as an instrument to measure progress towards those goals (and, by extension, progress towards the implementation of the CSP). These benchmarks were recorded in a Matrix, in which progress against the benchmarks was also noted, and reported to the ISG.⁸⁴

Some of the monitoring and reporting documents were made public on the ICO website; others were not. The existence of non-public monitoring and reporting documents, and the selectivity of publication, was not noted or explained publicly on the website. This oversight has created a considerable barrier to transparency and accountability in the implementation of the CSP. Some of these unpublished documents shed light on, and provide some explanation about the implementation of the CSP.

As noted in the Introduction, the documents reveal that, at some point, outstanding benchmarks were separated into three categories:

1. those that have discrete, achievable outcomes;
2. those that represent a long-term end-state, which requires sharper definition as a set of concrete tasks related to establishing Kosovo institutions that can carry the task forward once the ICO closes; and
3. those that are dependent on external actors beyond the ICO's or the Government of Kosovo's control.⁸⁵

Of these three categories of remaining tasks, the key one seems to be the second, from which the ICO can disengage 'once Government of Kosovo institutions are prepared to assume responsibility for their fulfillment'. And, in the words of a former international official (who asked not to be named): 'ultimately, that is why the closure of ICO in September will not be problematic, even though the new municipality of Mitrovica North has not been established yet'.⁸⁶

As early as March 2011, the ICO seems to have assigned several benchmarks within the Communities component to the category of 'long-term end-states', which remain incomplete at the End of Supervised Independence. Benchmarks under 'Promotion of mutual trust' are to be found in this category, as are issues related to the implementation of the Law on Freedom of Religion, Property Restitution, and appropriate representation of communities in the security

84 The last publicly available matrix of state of implementation of CSP can be found on ICO website and is three years old (<http://www.ico-kos.org/d/CSP%20Matrix%202022-09-09.pdf>). However, further research provided us with later versions of Matrix, which seems to have been kept internally, as well as a March 2011 ICO document titled "ICO Goals and Staff Review"—provided by the researcher (see document 1 attached), that seems to have replaced the original matrix. Asked about this and two other ICO documents, an ICO spokesperson said that "not all documents and drafts are made public"

85 See document 1 "ICO Goals and Staff Review", attached

86 Interview with former international official who spoke on condition of anonymity.

sector.⁸⁷ Further, the category includes several benchmarks which are dependent on external factors, such as the return to Kosovo of archeological and ethnological exhibits.⁸⁸ Even after March 2011, other benchmarks seem to have been assigned to this category of ‘things to be done after the end of supervised independence’, such as holding elections and establishing the Mitrovica North municipality, as well as the creation of a Joint Board of Mitrovica North and Mitrovica South. The ‘most fruitful way forward’, after the ICO departs, was seen to be ‘bilateral diplomatic engagement over the next several years’.⁸⁹

The Rights of Communities

Annex II includes the obligation for Kosovo to “create appropriate conditions enabling Communities, and their members to preserve, protect and develop their identities”.⁹⁰ The CSP contains 111 benchmarks to be achieved; progress towards these benchmarks was tracked in the ICO’s matrix.⁹¹ The nature of the benchmarks related to the Rights of Communities Annex varies considerably. Some benchmarks are *decisions* to be adopted by relevant institutions, such as ‘Constitutional guarantees’, or ‘the establishment of a Community Consultative Council’. The actual state of progress with these ‘decision’ benchmarks is relatively easy to determine.

Other benchmarks are *processes*, such as:

1. the promotion of mutual trust in Kosovo;
2. promoting the spirit of tolerance, dialogue and reconciliation;
3. taking effective actions against anyone who undermines the enjoyment by community members of their rights; and
4. ensuring that members of communities are able to freely exercise their rights.

The state of progress against these ‘process’ benchmarks is more difficult to measure.⁹²

Equality in Kosovo is guaranteed by the Constitution and laws, and there have been many campaigns to promote notions of equality among communities and citizens.⁹³ But the practice of equality demands more than merely ‘promoting’ and ‘voting’. Perhaps the most visible case of laws being adopted, but not fully implemented, is the situation around the right of return to Kosovo. The legal basis for the right of return has been enacted and is in force, and the Kosovo Government has a Ministry for Communities and Return led by a Kosovo Serb minister.⁹⁴ In practice, however, return remains a difficult and fraught process; progress is slow and coupled with problematic incidents. There are still several villages and towns in which Albanian inhabitants are protesting against the

87 See document 1 “ICO Goals and Staff Review”, attached.

88 Benchmark 89, ICO matrix <http://www.ico-kos.org/d/CSP%20Matrix%202022-09-09.pdf>

89 See document 1 “ICO Goals and Staff Review”, attached.

90 The CSP, *Annex II, Article 2.1, p. 19*.

91 ICO matrix, <http://www.ico-kos.org/d/CSP%20Matrix%202022-09-09.pdf>

92 *Ibid.*

93 Constitution of the Republic of Kosovo, Assembly of Kosovo website: <http://www.kuvendikosoves.org/common/docs/Constitution1%20of%20the%20Republic%20of%20Kosovo.pdf>

94 Ministry for Community and Return, Government of the Republic of Kosovo: <http://www.mkk-ks.org>

return of Kosovo Serbs, and there are occasional reports of buses carrying Serb returnees being stoned.⁹⁵ This is a nice illustration of the narrow ICO interpretation of ‘implementation’.

The notion of a ‘minority’ is nuanced and context specific, and a citizen might belong to the majority population of the overall country, yet be in a minority within a specific region. In this regard, the Albanian community in the north is also under constant pressure from Serb radicals, and Kosovo Government institutions in the north are also occasionally targeted.⁹⁶

Annex II also makes specific provision for public broadcasting. Today, there is some minority language programming on the Public Broadcaster (RTK)⁹⁷, and the March 2012 Law on RTK foresees the creation of a second RTK channel in the Serbian language.⁹⁸ Superficially, this may appear to be progress, but there is evidence of distrust in the Serbian community regarding the Public Broadcaster, and they fear that Serbian language programming will be politically influenced by the Kosovo government.⁹⁹

Concern about political influence over the public broadcaster also can be seen in the Albanian community, and RTK often is seen as government controlled and effectively a state- rather than a public-broadcaster.¹⁰⁰

Steps have been taken towards the promotion of mutual trust. The Kosovo Government has established the ‘Language Policy Board’, as the first step towards establishing the Office of Language Commissioner.¹⁰¹ The Government also has established the ‘Inter-Ministerial Working Group on Dealing with the Past and Reconciliation’, which should address accountability for crimes committed and general issues around dealing with the past, as well as seeking reconciliation

95 The latest attack against a Serb occurred in Peja/Pec, on 15 August 2012. Kosovo Government reacted through its Ministry for Community and Return:

<http://www.mkk-ks.org/?page=2,12,447>

96 In recent months there have been several attacks against Kosovo Albanian community members in the northern part of Mitrovica. The Kosovo Government recently established an office there and its employees have been threatened and targeted by Serb extremists. The Government of Kosovo regularly issues statements condemning acts of violence there, but cannot do much more than that. <http://www.kryeministri-ks.net/?page=1,9,2780>

97 According to RTK, 26 % of news programming on television is on minority languages: Serbian, Turkish, Bosnian and Roma <http://www.rtklive.com/ro/?cid=3,1&page=broadcaster&mf>

98 The Law on RTK also foresees that the RTK Board should include 2 members from Serbian community and 1 non-Serb minority member. The new RTK Board is expected to be voted into office by the Kosovo Assembly in autumn 2012.

<http://www.assembly-kosova.org>

99 There appears to be some scepticism as to the independence of such a channel; Kosovo Serb journalist Živojin Rakočević of KiM radio recently stated that the “future Serb language channel of RTK will be a noisy channel of Prime Minister Hashim Thaçi”. “Koha Ditore”, 16 August 2012, p. 6: <http://www.koha.net/?page=1,13,111654>

100 The recent appointment of new Editor-in-Chief of RTK was met with public disapproval, including from one of the RTK unions:

<http://m.telegrafi.com/lajme/sindikata-e-rtk-se-kunder-mufail-limanit-2-21999.html>

101 The Government inaugurated the Language Policy Board on May 29th 2012:

<http://www.kryeministri-ks.net>

between communities in Kosovo.¹⁰² But these steps remain at a level of words, as decisions taken in offices and meetings. Much remains to be done on the ground, where *real* people live.

Decentralization

Annex III contains provisions about decentralization, as a tool to:

[A]ddress the legitimate concerns of Kosovo Serbs and other Communities that are not in the majority in Kosovo and their members, encourage and ensure their active participation in public life, and strengthen good governance and the effectiveness and efficiency of public services throughout Kosovo¹⁰³

The main feature of Annex III was the creation of new municipalities in Kosovo, and the transfer of certain responsibilities from central to local/municipal government.

Among the ICO benchmarks for this Annex, were:

1. the adoption of the:

- Law on Local Self-Government;
- Law on Municipal Boundaries;
- Law on Local Government Finances;
- Law on Local Education; and
- Law on Local Health;

2. the establishment of five new municipalities:

- Mitrovica North;
- Ranilug;
- Klokot-Vrbovac;
- Partesh;
- Gracanica; and

3. the extension of the existing municipality of Novo Brdo.¹⁰⁴

As noted above, adopting laws and taking administrative decisions is the relatively easy part of meeting the benchmarks; it is the full implementation – especially in the north – that has proven to be problematic and, in some cases, thus far, quite impossible.

At some point, it must have become clear that some benchmarks were not going to be achieved as expected, so adjustments were made: four new municipalities were established instead of five (Mitrovica North was never established); a census was called, but it could not be carried out in three municipalities in the north (Leposavic, Zvecan and Zubin Potok); and the Joint Board of Mitrovica was not established, which meant that the ICR could not appoint an international

¹⁰² The Government established the Inter-Ministerial Working Group on Dealing with the Past and Reconciliation on its regular Cabinet meeting, on 4 June 2012:

<http://www.kryeministri-ks.net>

¹⁰³ The CSP, Annex III, p. 23.

¹⁰⁴ ICO matrix: <http://www.ico-kos.org/d/CSP%20Matrix%202022-09-09.pdf>

representative to chair it.

In the newly established municipalities of Ranilug, Klokot-Vrbovac, Partesh and Gracanica, and the extended municipality of Novo Brdo, progress seems to be basic but substantial. All of them suffer the same social and economical problems as other Kosovo municipalities, with ongoing problems with budgets and resources, but they do function as integral parts of Kosovo's political and economical systems.

The failure to implement the CSP in the north was noted in the ICO's reports to the ISG. As early as February 2009, the ICO noted in its 'Report of the International Civilian Office' that: "Establishing a Mitrovica North municipality, as foreseen by the CSP, still remains a challenge for the overall perception of the decentralization process".¹⁰⁵

The problem with implementation is clear: Kosovo cannot exercise its sovereignty in the north, because of Serbia's rejection of that sovereignty and the resistance from within the Kosovo Serb community to accepting the authority of the Kosovo government. In effect, this has meant that it has not been possible fully to implement most of the provisions of the CSP in this part of Kosovo, even though these provisions would have been to the benefit of the Kosovo Serb community.

The main obstacles to full implementation of the CSP are institutions in the north commonly called 'parallel Serb institutions'. These parallel institutions are – as described in several Kosovo Government, UN and NATO reports – illegal institutions financed by the Government of Serbia and local organized crime networks.¹⁰⁶

This 'parallel' presence, which includes clandestine political and security apparatus, as well as public services under the control of parallel structures¹⁰⁷, blocks efforts – by the Kosovo Government or the international community – to install the rule of law in the north. Last year's attempt by the Government of Kosovo, on 25 July, to send police and customs officers to two northern border crossings with Serbia, was followed by local Serbs blocking roads, burning border posts, erecting concrete, earth and wood barricades on all roads and clashing with security forces, including NATO-led peacekeepers, and the EU policing force, EULEX. To date, the barricades remain in place and several attempts by international peacekeeping force to remove them have failed.¹⁰⁸

Political, diplomatic and strategic attempts have been made to resolve the deadlock in the north, one of which was a joint ICO/Kosovo Government 'Strategy for Northern Kosovo', which was a

¹⁰⁵ Report of the International Civilian Office, 27 February 2009:

<http://www.ico-kos.org/d/ISG%20report%20finalENG.pdf>

¹⁰⁶ See 2011 "Report on Parallel Institutions in North of Kosovo", by Kosovo Government Coordinator's Office for the Strategy in the North:

http://www.koha.net/repository/docs/Raporti_per_Veri_-_Anglisht_-_2011.pdf

¹⁰⁷ See International Crisis Group March 2011 report "North Kosovo: Dual Sovereignty in Practice": [http://www.crisisgroup.org/~media/Files/europe/balkans/kosovo/211%20North%20Kosovo%20---%20Dual%20Sovereignty%20in%20Practice](http://www.crisisgroup.org/~/media/Files/europe/balkans/kosovo/211%20North%20Kosovo%20---%20Dual%20Sovereignty%20in%20Practice)

¹⁰⁸ On 9 August 2012, in a press conference held in Mitrovica, KFOR commander, German General Erhard Drews, said that NATO peacekeepers can remove the barricades, but that would not solve the problem. This statement was interpreted by even the German-language press as "KFOR capitulation in front of Serbian barricades": <http://derstandard.at/1343744429355/KFOR-kapituliert-vor-serbischer-Barrikade>

document drafted by ICO in December 2009 as a non-paper, and then endorsed by Government as its strategy to deal with problems in the north. This Strategy was a practical document that should have served to achieve ‘coordinated policies and actions in northern Kosovo’.¹⁰⁹ It foresaw several steps with detailed action plan and timeline, including creation of North Mitrovica municipality and the holding of local elections there.¹¹⁰

Owing to lack of unity between the EU, UN, and NATO, the Strategy was never implemented.¹¹¹ However, it remains pertinent, as some of its features are being used today in the north by Kosovo Government (namely, the Establishment of an Government Office in Mitrovica north, cutting off the financing of UN Administration in Mitrovica – UAM)¹¹² and, more broadly, it provides a road map that could be fully implemented in the future.

In consequence of the re-categorization of benchmarks related to the north, the broader issue of relations with the north will remain unresolved at the End of Supervised Independence and will be left for the Kosovo Government to resolve independently. This poses a key question: how is the Government of Kosovo independently to achieve something which the international community has failed to deliver? And, by extension, what will be the consequences for Kosovo if resolution is not achieved? Media reports suggest that the international community hopes to find a solution to these questions through the new process of dialogue between Prishtina and Belgrade. This is reported to be planned for this autumn, and will be conducted with under EU mediation and US involvement¹¹³

Resolving the questions around the north is certainly of central importance to the full implementation of the CSP, but it is not the only significant challenge to be addressed. A former ICO official, speaking on condition of anonymity, noted:

It’s not actually true that most things have to do with the north, since Mitrovica is only mentioned briefly in the Ahtisaari Plan. Most of the pending items relate to contingencies that depend on cooperation with Serbia or with the Serbian Orthodox Church.¹¹⁴

Consultation also features as an Annex III benchmark, where the Government is obliged ‘to engage in consultations with non-majority communities that form 75 % or more of the population in concentrated areas regarding possible establishment of new municipalities’. An ICO evaluation

109 Document provided by researcher, see Document 2, attached

110 *Ibid.*

111 Interview with former international official in Kosovo, who spoke on conditions of anonymity

112 In May 2012, Kosovo Government established its Administrative Office in the North, deciding thus to stop funding of thus UN Office there, and transfer that money to the newly established office http://www.kryeministri-ks.net/repository/docs/Vendimet_e_Mbledhjes_se_75-te_te_Qeverise_se_Republikes_se_Kosoves_2012.pdf

113 The UK Ambassador to Kosovo, Ian Cliff, in a recent interview with Serbian radio Kontakt Plus, said that he expects the north of Kosovo to be the main topic of the dialogue between Kosovo and Serbia, and explained this by saying that “The north of Kosovo is an internal issue of Kosovo, but it is impossible to be solved without dialogue between Serbia and Kosovo”:

<http://www.m-magazine.org/en/Kosovo/Cliff-The-north-will-be-the-main-topic-of-dialogue-Kosovo-150-Serbia-2960>

114 Interview with a former ICO official for this paper, who spoke on conditions of anonymity

reveals that two such cases meet the criteria: Gora in the municipality of Dragash, and Recani in the municipality of Prizren. The Government is yet to start effective consultations with these two communities to address their expectations for more local governance.¹¹⁵

Religious and Cultural Heritage

Through the ‘Law on Establishment of Special Protective Zones’ and the ‘Law on Special protective Zone of Historic Centre of Prizren’, Annex V contains provisions which aim to protect the Serbian Orthodox Church in Kosovo, by setting protective zones around its sites, churches and monasteries. Further, the ‘Granting of customs duty and tax privileges to the Serbian Orthodox Church for economic activities specific to its financial self-sustainability’ aims to provide economic and other support to the Serbian Orthodox Church.¹¹⁶

The benchmark that expects ‘Kosovo law enforcement agencies to provide security for Serbian Orthodox Church sites’ still has not been fully achieved, although progress has been made. The Kosovo Police Force has assumed responsibility for the protection of the Gazimestan memorial Monument, and the Monasteries and churches in Gračanica, Zociste and Budisavci, but several sites, including the monastery in Decan, are still protected by KFOR. According to EU High Representative, Lady Ashton, EULEX will be “monitoring, mentoring and advising ... the Kosovo Police in their duties to protect religious and cultural heritage sites”.¹¹⁷

An interview conducted with an international official in Kosovo indicated that some provisions, including the establishment of an Implementation Monitoring Council and the appointment of its Chairperson, were dropped from the implementation plan owing to the “refusal of Serb Orthodox Church to be part of any kind of official organ of Kosovo... as well as obstructions/non-participation of Serbia in its part of obligations from Ahtisaari package”, with the result that the role and responsibilities of the Implementation Monitoring Council have been transferred to the Greek Ambassador in Prishtina.¹¹⁸

The Greek ambassador has been accepted by both parties as a mediator between the Serbian Orthodox Church and Kosovo institutions at local and central levels. Officially, he’s delegated by European Commission upon a request from Prime Minister through a letter that was sent at the beginning of ICO mandate. The Greek Ambassador continues to mediate between the Serbian Orthodox Church and Kosovo institutions, and this is not seen as an obligation of the ICO anymore.¹¹⁹

However, it should be noted that ‘mediating’ is not the same as ‘monitoring’. Annex V concludes with a benchmark assigned to the Government of Serbia: ‘Serbia to return archaeological and ethnological exhibits taken on loan from museums of Kosovo for temporary

115 See Document 1 attached, provided by researcher

116 The CSP:<http://www.ico-kos.org/d/Ahtisaari%20Comprehensive%20Proposal%20in%20English.pdf>

117 Answer given to a parliamentary question of the European Parliament by High Representative/Vice-President Ashton on behalf of EU Commission: <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-005401&language=EN>

118 Informal interview with an international official in Kosovo.

119 *Ibid.*

exhibitions in Belgrade 1998 – 1999, within 120 days from date of entry into force of Settlement'. Owing to the Government of Serbia's refusal to recognize or participate in the implementation of the CSP this benchmark has not been reached.¹²⁰

Challenges and Key Issues

The International Steering Group's communiqué of 2 July 2012, stated that 'In accordance with CSP Annex IX, Article 5.2, the International Steering Group determines that Kosovo has implemented the terms of the Comprehensive Settlement Proposal'.¹²¹

This chapter has shown that, with regard to the Communities component, significant and serious aspects of the CSP have been left incomplete for a variety of reasons.

However, this is not to say that now is not the time to end Supervised Independence. It is clear that there are tasks which cannot be closed now, as the new ICO position states: 'their completion depends on an external actor, principally Serbia' and 'Kosovo's graduation from international supervision should not be held hostage to such exogenous factors' (see above).

There is a need to look soberly at the situation: what was not achieved in four and a half years under international supervision is unlikely to be achievable in the short term by Kosovo institutions acting alone.

Thus, it seems unhelpful to see further progress of Kosovo against the benchmarks as part of other significant processes, such as the EU-mediated dialogue between Kosovo and Serbia. It might seem attractive to think that there are good chances of finding a new solution for problems such as northern part of Kosovo, within a framework of a broader political dialogue between Prishtina and Belgrade, under EU-mediation. But, this could only have sense if the EU agrees that it should facilitate further implementation of the CSP tasks that were left incomplete.

The Way Forward

It would be helpful if the Kosovo government, and international actors involved in Kosovo, most of all the EU and US, were to consider the following recommendations for the way forward regarding the Communities, after the ESI. A firm commitment should be made by all involved, especially the Kosovo Government and the EU, to complete what was left incomplete from the CSP, including explicitly the completion of the decentralization process in the north. No sustainable progress will be made in the relationships between Kosovo and Serbia, or between the Kosovo Government and Kosovo Serbs, if the EU remains curiously ambivalent about CSP implementation.

The CSP contains a solution for the north; this point has been maintained by Kosovo government, and the Western countries that have recognized Kosovo's independence. It is therefore unjustifiable and wrong to include this issue in the dialogue with Serbia. While there are many useful things that can be achieved for the north through an EU-mediated dialogue, such as ensuring proper

120 ICO matrix:

<http://www.ico-kos.org/d/CSP%20Matrix%202022-09-09.pdf>

121 ISG Communiqué from its 15th meeting, held in Vienna, 2 July 2012.

border control, fighting cross-border crime, and ensuring freedom of movement, there should be no political discussions with Serbia regarding the territory.

A dialogue between the Kosovo government and Serb representatives in the north should be started by Prishtina officials and facilitated by international actors. But, the parallel structures, such as illegal mayors, in northern municipalities should not be recognized or admitted as interlocutors.

The Kosovo government and the international community – in particular the EU and US – should not rush into trying to solve the issue of north and concentrate all their political attention and resources there. Kosovo has other problems, which affect all the country's communities; such as the state of the economy, institution building, the rule of law, and good governance. Ignoring these will disappoint the majority of Kosovo's people.

Chapter 5: Overview and a Summary of Recommendations

The general approach, of creating four manageable categories, based on what seemed the overriding concern of the CSP, followed by analysis of the ICO benchmarks and performance, shows that some real progress has been made in achieving all or part of the intention of the CSP. The ISG, with caveats, has decided that such a degree of progress justifies a formal end to the supervised independence phase. That is to be welcomed. However, each of the four chapters makes clear that, from a relatively detached point of view, there remains much to be done, and the bulk of that having been relatively intractable from the beginning of supervised independence. Some of the problems that Kosovo will be left to deal with stem from that intractability, yet others from the somewhat idiosyncratic interpretation by the ICO of the term implementation. Indeed, there are some arguments throughout the chapters that suggest that some of the intractability stems from cautious interpretation of key terms in the CSP, as noted in Chapter 4: Communities.

Each chapter makes recommendations for future action, recommendations that rest on consideration of discussions within the chapter. Some are particular to the topic under discussion; others form a thread throughout the whole document.

One particularly ubiquitous problem that will extend beyond ESI is that of competence and capacity to make things work. As the EC notes, there is little evidence of the competence and capacity in the fledgling civil service to drive things forward. This leaves bodies such as the NGOs to do what can be done from outside of government. However, there are severe limitations on what such external bodies might do in confidential environments, so it becomes essential for tightly-targeted and evaluated training programmes to be designed, developed and delivered to the civil service, and its cognates, with the outcomes continuously and critically monitored.

Chapter 1: Legislation and Governance, the recommendations are:

1. An effective, government-led, decentralization process must be begun in the north, entailing comprehensive action, with an effective communications strategy at its core.
2. Rule-of-Law institutions must be established in the north, with the first step being the establishment of basic courts.
3. The government must proceed immediately to implement fully property restitution and the protection of property rights.
4. Transfer of ICO powers should be to the Assembly rather than the government.

In Chapter 2: International Presence, the resulting recommendations are:

1. Kosovo must establish domestic legislation which supports a continued but time-limited presence, and the domestic legitimacy of EULEX.
2. Kosovo should lobby NATO to negotiate a SOFA, to provide international legitimacy for the NATO troops that remain in Kosovo.
3. The government, EULEX and KFOR must find a uniform approach to ensure freedom of

movement in the north.

4. With the assistance of the EU and EULEX, Kosovo must generate a strategy and timeline for demarcating the borders with Montenegro and Serbia.
5. The role and relation of EULEX in the courts should be clarified and an additional courts-related training role explored with EULEX.

In Chapter 3: The Economy, the recommendations included:

1. The adoption of laws relating to property restitution needs urgent attention.
2. The restitution of public property and relations between Kosovo and the ex-Yugoslavian countries needs to be resolved.
3. The economic relations between Kosovo and ex-Yugoslavian countries, especially Serbia need to be addressed through internationally-supervised negotiations.
4. An arbitrator to decide on issues related to public debt between the period 1989 to 1999 must be appointed.
5. Kosovan institutions need to accelerate the privatization of assets and render the process more accessible and understandable to the public.
6. The PAK liquidation process should be completed in a timely manner.
7. The Monitoring Unit of Public Enterprises must be strengthened.

In Chapter 4: Communities, the recommendations are:

1. There should be a firm and transparent commitment by all parties to complete those aspects of CSP left incomplete at ESI.
2. Completing the decentralization process in the north must be a priority, based on CSP provisions.
3. A dialogue must begin between the Kosovo government and Serbian representatives in the north; the dialogue should not include parallel structure representatives.
4. The government of Kosovo and its international partners must note that, although the north is a priority, it must not be at the expense of all communities throughout Kosovo who have legitimate concerns of their own.
5. It would be unjustifiable and wrong to include the issue of north in the Prishtina-Belgrade dialogue

These recommendations are modest and, given the will and the energy, they are achievable.

