

The Rambouillet conference on Kosovo*

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Background to the talks

If you want peace, you must prepare for war. As this article is written, this maxim is being applied in relation to the crisis in Kosovo, a substantial military strike having been authorized by NATO in order to achieve acceptance of the Interim Agreement for Peace and Self-Government that was negotiated at Rambouillet near Paris in February 1999. This article first sets out the overall context of the negotiations at Rambouillet and of the threat and use of force associated with it. Then, it will address the Rambouillet process itself, before turning to an initial analysis of the political elements of the agreement. A final section concerns its military and civilian implementation.

The dissolution of the Socialist Federal Republic of Yugoslavia and an international system in transition

The management of the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) is a process of unending complexity. While it may be tempting to ascribe the ever-present difficulties and frustrations connected with the Yugoslav crisis to the political culture of the Balkan region, in reality the situation reflects a far broader process of change in the international constitutional system as a whole. In this sense, the Rambouillet conference represents a theatre in which many of the tensions underlying this continuing post-Cold War transformation were played out. However noble the intentions of many of the individuals who had been assigned roles in this play, the fate of the people of Kosovo appeared to be somehow incidental to the proceedings, which were instead focused on a number of meta-questions. These meta-questions concerned three principal issue areas:

* *Editorial note:* The alternative spellings Kosovo and Kosova are used in different contexts, for example the former in Security Council resolutions, the latter by the delegation of Kosova. For simplicity and consistency, the spelling Kosovo has been used throughout this article.

- a fundamental change in the roles of international actors;
- a struggle about core values of the international system; and
- the legitimacy of the threat or use of force in international relations.

The fundamental change in the roles of international actors The change in the roles of international actors in a system in transition was made evident in several respects. Most obviously, the realignment of relative state power was felt within the walls of Château Rambouillet. A stand was made against the emergence of a unipolar system dominated by the United States in at least three ways. Russia more or less openly attempted to frustrate the very concept of a settlement which might appear to have been imposed upon the Federal Republic of Yugoslavia (FRY) and which would be enforced by NATO. Should that turn out to be impossible, Russia at least sought to preserve a controlling role for itself in the further administration of the crisis. This was to be achieved by retaining the involvement in the crisis of collective bodies in which it was represented, and where it could block decisions requiring consensus. These bodies are the Contact Group itself, composed of the United States, the United Kingdom, France, Italy, Germany and Russia; the OSCE, which furnishes a further layer of institutional authority and which still acts principally under the consensus principle, despite its membership of over fifty; and, finally, the UN Security Council, where Russia enjoys veto powers.

France too was seeking to preserve its role as a leading international power and attempted to undermine the US attempt to locate further decision-making in relation to Kosovo away from the Security Council and towards NATO, which it dominates. Slightly more surprisingly, Italy assumed a somewhat similar role, also seeking to protect its influence on events through the Contact Group.

Matters were made even more difficult by the fact that the EU and its member states had determined that compensation had to be made for their failure in relation to Bosnia and Herzegovina by way of a strong European role in relation to Kosovo. The choice of a French château for the talks, rather than a US airbase in Ohio, was intended to symbolize the ability of the Europeans to sort out their own backyard, without the need to rely on the kind of decisive US action which had eventually led to the termination of active hostilities in Bosnia and Herzegovina.

This struggle for influence among the states of the Contact Group was also reflected in the second aspect of the changing role of international actors: namely, the functions and authority of the relevant international organizations or mechanisms themselves. The previous episodes in the Yugoslav crisis had demonstrated that the much-vaunted new 'European security architecture' was more myth than reality. The attempt to achieve a settlement for Kosovo once again reopened the struggle for pre-eminence between the OSCE, which Russia considers to be the principal focus of authority in relation to peace and security in Europe, the EU and its as yet feeble attempts to establish a security identity, and the aim of the United States and United Kingdom to preserve the dominant role of NATO.

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The contest about the roles and hierarchy of regional organizations and mechanisms in Europe was also related to another major issue: the relationship between regional security and the universal system of collective security administered by the UN Security Council. The provisions of Chapter VIII of the UN Charter which require prior Security Council authorization for enforcement action by regional organizations or arrangements had already been undermined by the recent practice of ECOWAS in relation to Liberia and Sierra Leone, of SADC in relation to Lesotho, and of NATO in relation to Bosnia and Herzegovina—and, indeed, Kosovo. Forcible action by NATO in the absence of a clear UN Security Council mandate in relation to Kosovo in connection with the Rambouillet talks increased this pressure upon the pre-eminence of the United Nations system.

A third and final aspect of the change in the roles of international actors concerns the position of non-state actors. Obviously, the representation of ethnic groups and of the majority population of Kosovo posed a difficulty. The questionable legitimacy of purported representatives of the minority groups in Kosovo included in the FRY delegation highlighted one aspect of this problem. The extraordinary influence of a few individual members of the delegation of Kosovo and the relationship between the Kosovo Liberation Army (KLA) and the elected government of Kosovo may perhaps raise other questions. Most startling to the Contact Group, and especially the United States, must have been the inability of the mighty states assembled in force at Rambouillet to exercise decisive influence over such groups, on whose assent the entire project depended.

Of course, the issue of non-state actors touches upon the question of the status of Kosovo itself which lay at the very heart of the attempt to achieve an interim settlement, and which provided the focal point of the debate about core values of the international system.

The struggle about core values of the international system

The international response to the crisis in the former Yugoslavia was conditioned on the perceived need to retain three essential principles of the international constitutional order which had come under considerable tension. There were the principles of territorial unity, of non-intervention and of the non-use of force.

Territorial unity vs self-determination. The first principle at issue concerns the rationing of the legal entitlement to statehood. The classical international legal system was created by governments acting on the international plane for their own benefit. It comes as no great surprise that all existing governments share an interest in perpetuating the existence within the existing boundaries of the respective states they claim to represent. This is achieved through the doctrine of territorial unity.

Of course, this doctrine is balanced and circumscribed by the right to self-determination. While self-determination has many layers of meaning, also in the legal context, its scope of application in the context of unilateral opposed

secession has been defined by government very narrowly. Self-determination as a legal entitlement to independent statehood has been made available only to colonial non-self-governing territories and analogous circumstances (internal colonialism, alien occupation, racist regimes and secondary colonialism). It is not a right appertaining to a self-constituting people, but instead applies to territorial entities defined through colonial administration to which a population is attached in a more or less incidental way. And the right is to be exercised only once, at the point of decolonization.

In this way, the rhetoric of self-determination could be safely endorsed by governments, including those of newly independent states (former colonies) from the 1960s onwards, without at the same time embracing a concept which might be invoked against them at some future stage. However, the attempt by the Baltic republics to re-establish statehood and obtain independence from the USSR in 1990 foreshadowed the pressure which this restrictive view has had to face after the unfreezing of international relations upon the conclusion of the Cold War. The unilateral declarations of independence of, initially, Croatia and Slovenia which followed in 1991 were seen to pose a dangerous challenge to the doctrine of territorial unity. Hence, when it emerged that these actions could not be undone, governments set about limiting the effect of these precedents in favour of unilateral opposed secession carried out under the banner of self-determination. This was achieved by combining two arguments. The SFRY, it was asserted, had not been subjected to secession, but had in fact dissolved entirely. Hence, there was no bar to statehood for the federal republics which emerged free and unencumbered by the doctrine of territorial unity as the beneficiary of that doctrine, the overall federation, had disappeared. In addition, the federal republics were entitled to claim statehood on the basis of a right to self-determination which was located not in general international law, but in SFRY constitutional law. After all, the SFRY constitution of 1974 had in fact provided for the possibility of secession of its constituent units.

Oddly enough, a wider assertion of the right to self-determination had been made by the rump Yugoslavia. It claimed that the mainly Serb-inhabited areas of Croatia and Bosnia and Herzegovina should be entitled to secede from secession, as it were, and to constitute themselves as independent states. This argument was rejected by the Badinter Commission, established to advise the International Conference on the Former Yugoslavia on issues of recognition, statehood and succession. While self-determination also applied to Serbs and others who now found themselves minorities in new states, this was a different kind of self-determination. It was not an entitlement to statehood; instead, self-determination in this context was reduced in content to human and minority rights, and to autonomous structures of governance in areas where Serbs constituted a local majority.¹

¹ Opinion No. 2 of the Badinter Arbitration Commission.

It was partially in order to prevent a further extension of self-determination claims that the governments involved in the international administration of the collapse of the SFRY, acting through the EU, the OSCE, NATO and the UN Security Council, insisted on the maintenance of Bosnia and Herzegovina as a state within its former SFRY boundaries. Hence, in Dayton it was accepted that the mainly Serb entity of Srpska would administer itself with a high degree of autonomy, but within the continued territorial unity of Bosnia and Herzegovina.

The legal management of the creation of new states from within the former SFRY thus contrived to avoid a precedent in favour of a wider right of secession outside of the colonial context in general international law. However, it also soon became clear that the concept of self-determination based in the constitutional status of a republic within a federation was not free of dangers. This was made evident by the example of Chechnya. Chechnya had been an autonomous territory within Russia while Russia was a federal unit of the USSR. With the disappearance of the USSR, Russia achieved statehood. The new Russian constitution in turn promoted Chechnya to the status of a republic within the Russian Federation. Would Chechnya now be able to claim constitutional self-determination and statehood on the basis of the Yugoslav precedent? The answer provided by other governments was an emphatic no. Chechnya found that it was not accorded the legal protection available under the doctrine of self-determination when it took on the Russian Federation and engaged in an armed struggle for independence. Instead of insisting on a cessation of repressive measures, a withdrawal of Russian troops and the maintenance of the territorial integrity of Chechnya, the international community merely insisted on the compliance by Russia with human rights and humanitarian law when re-establishing effective control over the territory. Chechnya's status was consolidated only after Russia effectively lost the armed conflict and after it had to accept the possibility of Chechen independence in an interim agreement it voluntarily concluded in 1996.

The case of Kosovo was seen to fall squarely on the borderline between the precedent of the Yugoslav republics and that of Chechnya. Under the 1974 SFRY constitution, Kosovo was defined as a part of the Republic of Serbia, but it also had its own separate federal status. It was represented separately on the collective presidency of the SFRY, and had its own structures of governance (including a national bank) and its own territorial identity. Hence, Kosovo argued that with the disappearance of the SFRY it too should be entitled to opt for independent statehood.

The governments and international organizations involved in responding to this claim took a restrictive view of constitutional self-determination and did not accept a right to statehood for Kosovo. Instead, they insisted that its human rights should be respected and that meaningful self-administration should be restored. The referendum of September 1991 in which the population of Kosovo overwhelmingly declared itself in favour of independence and the declaration of

independence which followed were ignored. This approach also dominated the talks at Rambouillet.

Non-interference vs. human rights. Even while the SFRY was still in existence, Serbia had unilaterally abolished the status of Kosovo as a federal type entity.² In terms of SFRY federal law, this was unlawful and null and void. But in practice it meant the total subordination of all aspects of life in Kosovo under Serb law, which was administered in an overtly discriminatory way. The literal disenfranchisement of ethnic Albanians in what they considered 'their own country', their removal from public functions and the increasingly vigorous suppression of human rights were reported upon extensively, including by the UN Special Rapporteur on Human Rights in the Former Yugoslavia, over some six years.³ These reports had triggered formal and consistent condemnation of the FRY by the UN Commission on Human Rights, its Sub-Commission, the UN General Assembly and other bodies.⁴ However, no significant action was taken to act upon these urgent and dramatic findings. Indeed, following upon the signing of the Dayton accords in 1995, sanctions against the FRY were progressively lifted and tentative attempts were made to integrate Belgrade once more into the community of states.

When it became necessary to increase international involvement in the Kosovo crisis, the FRY was still permitted to some extent to shelter behind the doctrine of sovereignty and non-interference in its internal affairs. There was no suggestion that Belgrade could no longer claim sovereignty over a population it had, according to objective international agencies, disenfranchised, suppressed and to a considerable extent displaced. However, the restoration of human rights was no longer to be left within the exclusive competence of the FRY. Instead, public authority was to be relocated principally to a local level of governance in Kosovo, according to the plan which was to underpin the Rambouillet talks. And the exercise of such authority was to be subjected to very vigorous international supervision to the exclusion of the Serb-dominated structures of governance in the territory.

Non-use of force and humanitarian action. A third area of tension relates to the prohibition of the use of force in international law. Up to 1990, it was widely accepted that there exists no exception to the prohibition on the use of force which would permit forcible humanitarian action in the absence of the consent of the government and/or effective authorities of the target state. Since 1990, there have been some 15 instances of forcible humanitarian action. However, most of these were conducted within the framework of Chapter VII mandates

² These developments are chronicled in Helsinki Watch, Belgrade, Kosovo, *Law and Politics* (1998), *passim*.

³ e.g. E/CN.4, 1992/S1/9, 28 August 1993, para 32; A/48/92, 26 February 1993, paras 153–171, E/CN.4/1994/47, 1 November 1993, paras 188–205; A.49.641, 4 November 1994, paras 182–5; E/CN.4/1996/63, 14 March 1996, paras 119–80; E/CN.4/1998/9, 10 September 1997, *passim*; A/53/322, 11 September 1998, paras 82–96.

⁴ See e.g. UN Commission on Human Rights Resolution 1993/7, 23 February 1993; Resolution 1994/76, 9 March 1994; Resolution 1998/79, 22 April 1998, paras 16–29; General Assembly Resolution 49/204, 23 December 1994; Resolution 50/190, 22 December 1995; Resolution 51/111, 12 December 1996; Resolution 52/139, 1 December 1997, etc.

granted by the UN Security Council. Some more adventurous activities undertaken by regional arrangements had at least obtained a retroactive blessing from the Council. The administration of forcible humanitarian action without some justificatory link to the Security Council was a more difficult issue. True, forcible action had been taken by a self-selected coalition of the willing in relation to northern and southern Iraq without a formal Chapter VII mandate. However, this action was initiated when Iraq had just suffered a significant military defeat by the international coalition and was internationally entirely isolated. The FRY, on the other hand, retained a measure of international support, and had not been subjected to a direct military defeat. Moreover, states sympathetic to Belgrade's point of view noted that while it had been possible to dissuade the Kurds from declaring independence under the protection of the aerial exclusion zone maintained by the coalition, Kosovo had already declared itself independent.

As early as 1992 the US administration, then led by President George Bush, had threatened the use of force should further FRY military units be deployed in Kosovo.⁵ Of course, no action was taken when the Yugoslav army and special police forces administered special legislation equivalent to martial law in the territory, until, the military attacks by Yugoslav armed units against Kosovo villages and the displacement and occasional slaughter of civilian populations early in 1998 led to a renewal of US military threats, and later also to threats by NATO. While NATO engaged in aerial manoeuvres on the Albania/Kosovo border during the summer, no further action was taken even then to oppose the re-establishment of military control by FRY forces.⁶ In fact, some argued that this inaction was meant to teach the KLA a lesson, to ensure that it would not obstruct a settlement short of outright independence after having been beaten in the field. It was only when over 200,000 civilians had been displaced from their homes and a humanitarian catastrophe was expected with the onset of winter that NATO issued an activation order for military strikes in October 1998.⁷ While the Security Council had adopted Chapter VII measures in relation to Kosovo in March 1998, there was no authorization for the threat or use of force. NATO's action was therefore justified with reference to the overwhelming necessity of averting a humanitarian disaster in general international law, in accordance with the doctrine of humanitarian 'intervention' which is still considered controversial in international law in some quarters.

The threat and possible use of force by NATO caused tension with Russia and also with China, another permanent member of the UN Security Council which had been effectively circumvented. It also posed a practical dilemma. If

⁵ See Richard Caplan, 'International diplomacy and the crisis in Kosovo', *International Affairs* 74: 4, 1998, pp. 745, 753.

⁶ Statement by the NATO Secretary-General on Exercise 'Determined Falcon', 13 June 1998.

⁷ Statement by the NATO Secretary-General following Decision on the ACTORD, 3 October 1998: 'Just a few moments ago, the North Atlantic Council decided to issue activation orders—ACTORDs—for both limited air strikes and a phased air campaign in Yugoslavia, execution of which will begin in approximately 96 hours.'

NATO was willing to enforce the withdrawal of FRY military forces and special police forces from Kosovo, it was unlikely that the small Serb minority would be able to maintain its stranglehold on the administration of all public functions in the territory. Instead, Kosovo authorities would establish themselves ever more firmly and they would ultimately obtain effective control over the territory. Kosovo would then be effectively independent and this status would have been achieved under NATO protection, as it were.

To overcome this problem, the threat of the use of force was coupled with a demand that the parties agree a settlement for self-governance in Kosovo. This demand, of course, had previously gone unheeded for some seven years.

Early attempts to settle the Kosovo crisis

The demand for a restoration of self-governance for Kosovo had been included in the initial attempt to achieve an overall settlement of the Yugoslav crisis in October 1991.⁸ Kosovo was also invited to attend the fringes of the London conference on the former Yugoslavia of August 1992, which represented the second attempt to achieve an overall settlement, after the conflict in Bosnia had broken out in all its ferocity.⁹ However, no substantive progress was made in relation to Kosovo, and instead discussions were continued in a special working group convened in Geneva. This process was allowed to languish into a silent death, no progress having been made.¹⁰ In the meantime, the CSCE/OSCE established an 'observer mission of long duration' in Kosovo, Sandjak and Vojvodina, which was in fact quite short-lived, being terminated by the FRY in the summer of 1993.

Hopes for a settlement relating to Kosovo receded when the issue was not considered in the context of the 1995 Dayton settlement on Bosnia and Herzegovina. In order to secure implementation of the agreement, it was felt necessary to rely on the cooperation of Mr Milosevic and his government. It was only when the initially very small Kosovo Liberation Army engaged in military operations in the autumn and winter of 1997 that international interest focused again on Kosovo. The FRY countered the threat posed by the KLA by launching military attacks against entire villages in Kosovo, including the civilian

⁸ Caplan, 'International diplomacy and the crisis in Kosovo', p. 749.

⁹ Letter from the Rt Hon. Lord Carrington, Chairman, Conference on Yugoslavia, to Dr I. Rugova, 17 August 1992. The invitation read: 'If you are planning to be in London at the time of the Conference (from 26–28 August) then I am pleased to inform you that it will be possible for you and your delegation to have access to the Question Elizabeth II Conference Centre for meetings, for example with me, Secretary Vance, and other participants. As it will not, for practical and other reasons, be possible to grant your delegation access to the Conference chamber itself, the organizers will set up a "salle d'écoute" to which the formal conference proceedings will be relayed live.'

¹⁰ There was an attempt to achieve at least an agreement on the restoration of the education system in Kosovo in the Geneva talks. See Report of the Secretary-General on the International Conference of the Former Yugoslavia, S/25490, 30 March 1993. However, there was no progress and an agreement, to this day unimplemented, was in the end achieved through the mediation of an NGO in September 1996. An attempt to activate the agreement as a result of discussions between FRY President Milosevic and Dr Ibrahim Rugova on 23 March 1999 also failed.

population. This technique, reminiscent of the conflict in Bosnia and Herzegovina, led to the displacement of initially tens of thousands of civilians, and later some 200,000 ethnic Albanians.

The UN Security Council responded by adopting, under Chapter VII, an arms embargo against the FRY. At the same time, the Council called for substantive and meaningful dialogue between Belgrade and the leadership of the Kosovar Albanian community on 'political status issues' and noted the readiness of the Contact Group to facilitate such dialogue. The Council added that the outcome of such dialogue should be based on the territorial integrity of the FRY and respect OSCE standards and the UN Charter, and should provide for 'an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration.'¹¹

Despite the fact that the Security Council had just confirmed that the crisis in Kosovo amounted to a threat to international peace and security, the FRY insisted that the issue was purely an internal one—a proposition supported by a referendum called in Serbia in April 1998.¹² In order to avoid international initiatives in the crisis, the FRY and Serbia also attempted to establish bilateral negotiations with the Kosovo Albanian leadership. In fact, a number of meetings between the two sides had occurred, on occasion at presidential level. However, the process stalled at the end of May 1998, when the level of hostilities in Kosovo increased. As the crisis worsened over the summer, the United States, acting with the involvement and support of the Contact Group, commenced a process of indirect negotiations through shuttle diplomacy. This process was principally guided by Chris Hill, US Ambassador to Macedonia, and Jim O'Brian of the US Department of State, who had exercised a leading role in drafting the Dayton agreement.

The Hill process

On 1 October 1998, the first Hill draft for a settlement in Kosovo was produced. This draft was useful, inasmuch as it did not purport to define the legal status of Kosovo in any way. Instead, it assigned public authority to differing levels of governance. Principal authority was located in the local communes in Kosovo. A second level of authority was to be exercised by the national communities, whose members would exercise special and additional rights through their own institutions. Kosovo itself would have an assembly with rather limited powers and a directly elected chairman who would head a government. The agreement would be subjected to a comprehensive assessment after a period of three years with a view to improving its implementation and considering proposals by either side for additional steps, which would require mutual agreement for adoption.

¹¹ Resolution 1160 (1998), 31 March 1998.

¹² FRY press release, 'Serbian government proposes calling of a referendum', 2 April 1998.

Both parties were invited to comment upon the initial draft, which was refined over the months which followed. The government of Kosovo indicated that the document could not furnish a basis for a settlement, inasmuch as it diluted the legal personality and overall powers of Kosovo as a whole very significantly. In addition, it was not a genuine interim agreement, as it could be modified or terminated at the end of the three-year period only with the consent of all parties. In effect, Kosovo would be locked into this arrangement for ever.¹³

The FRY too initially responded cautiously to the draft and instead referred to eleven points it had stipulated for a political settlement in the context of the Holbrooke agreement which temporarily led to the suspension of threatened NATO air strikes in October.¹⁴ However, on 20 November the FRY and Serbia put forward a formal counter-proposal to the Hill plan, which was claimed to enjoy the support of the non-Albanian groups in Kosovo (Turks, Gorancies, Muslims, Romanians, Egyptians, etc.). This proposal used some of the concepts proposed by Ambassador Hill, but retained the formal subordination of Kosovo to Serbia.¹⁵ A third draft of the Hill plan was presented on 2 December. This text, too, now formally referred to the powers to be exercised by Serbia in relation to Kosovo. It was immediately rejected by both parties.

By the end of the year, then, the Hill process appeared to have led into a cul-de-sac. Nevertheless, on instruction from the Contact Group the negotiators continued to pursue a settlement on the basis of the proposals they had presented and engaged in further informal discussions with the parties. This circumstance proved auspicious, in view of the developments which followed.

On Christmas Eve, FRY armed forces engaged in another offensive against Kosovo villages. As before, the reason given was the need to engage Kosovo 'terrorists'; and, as before, the attacks were directed against civilian concentrations as a whole, rather than individual positions held by the KLA. In January, journalists discovered the bodies of some 45 individuals who had evidently been executed at close range by Serb forces. Only after the atrocity had been recorded and reported upon were the bodies removed to a Serb-controlled morgue.¹⁶ Investigators from the International Criminal Tribunal for the Former Yugoslavia were, in a rather dramatic showdown captured live on television, barred by FRY officials from entering Kosovo. The FRY also attempted to declare the head of the Kosovo Verification Mission *persona non grata* and remove him from its territory. The KVM itself appeared to be an increasingly helpless

¹³ See the 'Statement on fundamental principles for a settlement of the Kosovo question issued by the government of the Republic of Kosovo', 3 November 1998.

¹⁴ Press release by the FRY Ministry of Foreign Affairs, 10 November 1998. The eleven-point statement of 13 October can be found in Helsinki Watch, Belgrade, 'International community and Kosovo', 1998, p. 33.

¹⁵ Joint proposal of the agreement on the political framework of self-governance in Kosovo and Metohija, Belgrade, 20 November 1998.

¹⁶ See the report of the EU forensic experts team on the Racak incident, 17 March 1999.

observer of the unravelling of the October Holbrooke agreement as armed incidents proliferated.¹⁷

Faced with a breakdown of the ceasefire and a full resumption of hostilities even before the onset of spring, the Contact Group resorted to an unprecedented step.

The Rambouillet talks and the Paris follow-on conference

The Contact Group summons, the non-negotiable principles and the threat of force

On 26 January 1999, in view of the deteriorating situation, US Secretary of State Albright and Russian Foreign Minister Ivanov met. They called upon the 'Serbian authorities to carry out the commitments in their 11 point Statement of Principles of a Political Settlement of October 13' and determined to maintain close contact in order to 'coordinate US and Russian support for a resolution of the crisis'.¹⁸ The next day, the United States announced that a strategy aimed at resolving the crisis in Kosovo by 'combining diplomacy with a credible threat of force' had been agreed with US allies and would be implemented through a decision of the Contact Group.¹⁹ On 28 January, NATO Secretary-General Solana confirmed that the organization supported a 'political settlement under mediation of the Contact Group, which will provide an enhanced status for Kosovo, preserve the territorial integrity of the Federal Republic of Yugoslavia and protect the rights of all ethnic groups'.²⁰ In addition, the FRY

must immediately bring the Yugoslav Army and Special Police force levels, posture and actions into strict compliance with their commitment to NATO on 25 October 1998 and end the excessive and disproportionate use of force in accordance with these commitments. All Kosovar armed elements must immediately cease hostilities and any provocative actions, including hostage taking. All parties must end violence and pursue their goals by peaceful means only.

The Secretary-General also added that the North Atlantic Council had increased military preparedness to ensure that the demands of the international community are met. The United Nations Secretary-General also took the opportunity to visit NATO headquarters that day, indicating, rather extraordinarily, that the use of force to halt internal conflict, 'particularly against the wishes of the government of a sovereign state', might now need to be contemplated, especially in view of the experience of Bosnia and Herzegovina.²¹

¹⁷ On the developments of December/January, see e.g. Report of the Secretary-General prepared pursuant to Security Council Resolution 1160 (1998), 1199 (1998) and 1203 (1998) of the Security Council, S/1999/99, 30 January 1999.

¹⁸ Secretary of State Albright and Russian Foreign Minister Ivanov, joint statement on Kosovo, Moscow, 26 January 1999.

¹⁹ State Department press release, 'Albright looks forward to January 29 meeting in London', 27 January 1999.

²⁰ NATO press release (99), 11, 28 January 1999.

²¹ Statement by UN Secretary-General Kofi Annan, Brussels, 28 January 1999.

On 29 January the Contact Group met, confirming its view that the situation ‘remains a threat to peace and security in the region, raising the prospect of a humanitarian catastrophe’.²² The ministers

- insisted that the parties accept that the basis for a fair settlement must include the principles by the Contact Group;
- considered that the proposals drafted by the negotiators contained the elements for a substantial autonomy for Kosovo and asked the negotiators to refine them further to serve as the framework for agreement between the parties;
- recognized that the work done by the negotiators had identified the limited number of points which required final negotiation between the parties;
- agreed to summon representatives from the federal Yugoslav and Serbian governments and representatives of the Kosovo Albanians to Rambouillet by 6 February, under the co-chairmanship of Hubert Vedrine and Robin Cook, to begin negotiations with the direct involvement of the Contact Group. The Contact Group recognized the legitimate rights of other communities within Kosovo. In the context of these negotiations, it would work to ensure their interests are fully reflected in a settlement;
- agreed that the participants should work to conclude negotiations within seven days. The negotiators were then to report to the Contact Group Ministers who would assess whether the progress made justified a further period of less than one week to bring the negotiations to a successful conclusion.

In the meantime, the Contact Group demanded that the FRY stop offensive actions and repression in Kosovo; comply with the commitments it had made to NATO and the OSCE, and with Security Council Resolutions; cooperate with the International Criminal Tribunal for the Former Yugoslavia; and ensure humanitarian access, etc. The Contact Group concluded its statement by reminding the parties that it would ‘hold both sides accountable if they fail to take the opportunity now offered to them, just as the Group stands ready to work with both sides to realize the benefits for them of a peaceful solution’.

The UN Security Council immediately welcomed and supported the Contact Group decision in a presidential statement. The Council ‘demands that the parties should accept their responsibilities and comply fully with these decisions and requirements, as with its relevant resolutions’.²³ The following day, the North Atlantic Council declared that

The crisis in Kosovo remains a threat to peace and security in the region. NATO’s strategy is to halt the violence and support the completion of negotiations on an interim political settlement, thus averting a humanitarian catastrophe. Steps to this end must include acceptance by both parties of the summons to begin negotiations at Rambouillet by 6 February 1999 and the completion of the negotiations on an interim

²² Chairman’s conclusions of the ministerial Contact Group in London, 29 January 1999.

²³ UN Security Council Presidential Statement, 29 January 1999.

political settlement within the specified timeframe; full and immediate observance by both parties of the cease-fire and by the FRY authorities of their commitments to NATO, including by bringing VJ and Police/Special Police force levels, force posture and activities into strict compliance with the NATO/FRY agreements of 25 October 1998; and the ending of excessive and disproportionate use of force in accordance with these commitments.

If these steps are not taken, NATO is ready to take whatever measures are necessary in the light of both parties' compliance with international commitments and requirements, including in particular assessment by the Contact Group of the response to its demands, to avert a humanitarian catastrophe, by compelling compliance with the demands of the international community and the achievement of a political settlement. The Council has therefore agreed today that the NATO Secretary-General may authorize air strikes against targets on FRY territory. The NATO Secretary-General will take full account of the position and actions of the Kosovar leadership and all Kosovo armed elements in and around Kosovo in reaching his decision on military action. NATO will take all appropriate measures in case of a failure by the Kosovar Albanian side to comply with the demands of the international community.

NATO is also studying how to support measures to curb arms smuggling into Kosovo.

This action by NATO was quite daring. While the continued territorial integrity and sovereignty of the FRY were being continuously acknowledged, air strikes against FRY territory were formally and explicitly threatened. The authority for such a threat of the use of force, *prima facie* inconsistent with Article 2(4) of the United Nations Charter, was placed on three pillars. In the first place, NATO consistently referred to the impending humanitarian catastrophe in Kosovo. By linking the political settlement to this looming emergency, acceptance of a political settlement was converted into a step necessary to avert this disaster. Hence, the threat or use of force in order to achieve a settlement was justified as forcible humanitarian action.

This argument could be coupled with the authority, already claimed by NATO in October, to enforce a ceasefire, or the terms of the undertakings given by the FRY in the context of the Holbrooke agreement. While the text of the military aspects of Belgrade's undertakings has not been published, it has now been confirmed that it required the withdrawal of FRY/Serb military and special police forces and heavy weaponry to the level of before February 1998—roughly 10,000 internal security troops and 12,000 army troops.²⁴ However, since the threat of the use of force and the ACTORD (activation order) adopted by NATO then was not based on a mandate from the Security Council, authority for the renewed threat of the use of force would rest with the original justification given in October, which was also one of humanitarian action.

²⁴ Statement by Prime Minister Tony Blair in the House of Commons, 23 March 1999. However, in subsequent press briefings the ceiling for the Interior Ministry Police was claimed to be only 4,500. While it may be understood why Richard Holbrooke came to informal and unpublished arrangements in his discussions with President Milosevic in early October, it is odd that NATO apparently concluded a formal agreement of 25 October on troop ceilings and future FRY conduct by way of a secret agreement. This in itself may have contributed to a feeling of a lack of accountability on the part of the FRY.

A further possible argument to justify this action could be drawn from the references to the threat to peace and security in the region. These references had been made in the Security Council Resolutions adopted in 1998 which were expressly adopted under Chapter VII of the UN Charter. However, there was no mandate for the use of force attached to the Article 39 finding as to the existence of a threat to international peace and security. Instead, the Council had indicated that it would consider 'additional measures' and would remain seized of the matter.²⁵ The argument that a Chapter VII finding as to a threat to the peace would entitle individual states to implement demands made by the Council in connection with that threat in the absence of a mandate had been strongly contested only a few weeks before, when the United States and the United Kingdom launched air strikes against Iraq, purportedly to enforce the demands of the Council. The argument of an implied enforcement mandate is also weakened by the fact that the Council found it necessary, in Resolution 1203 (1998) of 24 October 1998, to emphasize in a preambular paragraph that 'primary responsibility for the maintenance of international peace and security is conferred on the Security Council.'

Finally, one might assert that the Security Council had, in fact, indirectly authorized the threat or use of force against the FRY. After all, it had formally endorsed the Holbrooke agreement which resulted from the threat of force made by NATO in October 1998. However, the actual language of Resolution 1203 (1998) in which the Council decided to endorse and support the agreements signed by the FRY and the OSCE and NATO respectively does not expressly endorse the process which led to the conclusion of these agreements. Moreover, the agreements themselves do not assign to NATO or the OSCE authority to use force. The Kosovo Verification Mission (KVM) agreement of 16 October does not provide for the defence of KVM personnel, but instead merely obliges the FRY to guarantee the safety and security of members of the mission, and to permit and cooperate in their evacuation in an emergency situation in Kosovo. Nor does the NATO aerial monitoring agreement provide for the use of force, although self-defence would be available under general international law. Instead, a failure to implement its provisions is subjected to immediate arbitration through bilateral channels.

On the other hand, the Security Council presidential statement of 29 January 1999 does expressly 'welcome and support' the decisions of the Contact Group adopted on that day. Hence, the Council did endorse the threat of the use of force to the extent that the Contact Group threatened forcible action in that decision. However, given the somewhat ambiguous nature of the wording that was adopted ('the Contact Group will hold both sides accountable') this view might be challenged.

Overall, therefore, NATO's action was based principally on the doctrine of humanitarian action. It occurred in a context which could no longer be

²⁵ Resolution 1160 (1998), 31 March 1998, paras 19, 20; Resolution 1199 (1998), 23 September 1998, paras 16, 17.

The Rambouillet conference on Kosovo

considered an internal affair of the FRY, as was confirmed by the finding of the Security Council according to Article 39 of the UN Charter. The threat of force was focused on achieving aims which had been spelt out by the Security Council, including a political settlement as a means of terminating an actual or imminent large-scale humanitarian emergency. While not expressly endorsing the threat of the use of force, the Council nevertheless embraced the process which was to be supported through this threat.

The format of the Rambouillet talks

A few days after the adoption of the Contact Group decision, the Contact Group negotiators presented to the parties a one-page document containing 'non-negotiable principles/basic elements' for a settlement. This document established the following principles, which need to be quoted in full, as they were a constant point of reference at the Rambouillet talks:

General elements

- necessity of immediate end of violence and respect of ceasefire;
- peaceful solution through dialogue;
- interim agreement: a mechanism for a final settlement after an interim period of three years;
- no unilateral change of interim status;
- territorial integrity of the FRY and neighbouring countries;
- protection of rights of the members of all national communities (preservation of identity, language and education; special protection for their religious institutions);
- free and fair elections in Kosovo (municipal and Kosovo-wide) under the supervision of the OSCE;
- neither party shall prosecute anyone for crimes related to the Kosovo conflict (exceptions: crimes against humanity, war crimes, and other serious violations of international law);
- amnesty and release of political prisoners;
- international involvement and full cooperation by the parties on implementation.

Governance in Kosovo

- people of Kosovo to be self-governed by democratically accountable Kosovo institutions;
- high degree of self-governance realized through own legislative, executive and judiciary bodies (with authority over, *inter alia*, taxes, financing, police, economic development, judicial system, health care, education and culture (subject to the rights of the members of national communities), communications, roads and transport, protection of the environment);

- legislative: assembly; executive: President of Kosovo, government, administrative bodies; judiciary: Kosovo court system;
- clear definition of competencies at communal level;
- members of all national communities to be fairly represented at all levels of administration and elected government;
- local police representative of ethnic make-up with coordination on Kosovo level;
- harmonization of Serbian and federal legal frameworks with Kosovo interim agreement;
- Kosovo consent required *inter alia* for changes to borders and declaration of martial law.

Human rights

- judicial protection of human rights enshrined in international conventions and rights of members of national communities;
- ombudsman selected under international auspices;
- role of OSCE and other relevant international organizations;

Implementation

- dispute resolution mechanism;
- establishment of a joint commission to supervise implementation;
- participation of OSCE and other international bodies as necessary.

The parties were required to note these non-negotiable principles. There was no formal demand to indicate consent to them, but there was an expectation of acceptance implied in the decision of the parties to participate in the Rambouillet conference. While some of the points on this list reflect the structure of the final version of the Hill draft, which had been presented two days before the Contact Group decision of 29 January, there was one noteworthy addition. This relates to the prospect of a mechanism for a final settlement after the conclusion of the three-year interim period.

The two delegations which had been invited to negotiate on the basis of these principles were composed somewhat oddly. The FRY was of course represented at Rambouillet, along with Serbia, and the negotiating documents in fact provided for signatures on behalf of both entities. The stationery of the FRY/Serb delegation, however, referred to The Delegation of Serbia only, perhaps to emphasize the view of the FRY/Serbia that issues concerning Kosovo would need to be principally addressed by the Serb Republic, according to the constitutional changes which that entity had brought about unilaterally. In addition, the FRY had included in its delegation a number of individuals whom it considered representative of some of the ethnic groups in Kosovo. The legitimacy and representativeness of these individuals were questioned by the leaders of organizations of some of the respective groups back in Kosovo, when they learnt about this arrangement. However, in practice these individuals did

not appear to have a significant role in the negotiations. In fact, once the FRY/Serb delegation started to engage in more serious talks towards the end of the Rambouillet conference, it strengthened the membership of its delegation and included a greater number of professional negotiators and experts.

The composition of the Kosovo delegation was not free from controversy either. During the Hill process, there had existed a small delegation which had unofficially commented upon the successive incarnations of the Hill draft. That delegation, headed by Dr Fehmi Agani, consisted principally of individuals nominated by the elected government of President Rugova and the LDK party. For Rambouillet, the delegation had been broadened, in response to pressure from within Kosovo and also from the negotiators, who were said to have exercised some influence in this matter. In consequence, the delegation included a large element from the umbrella opposition party LBD, or United Democratic Movement, headed by Academician Rexhep Qosja. That group was perceived to be closer to the KLA than the elected government and its party. In addition, five members of the delegation represented the KLA itself. Hence, overall, the government which had been elected by an overwhelming majority of the population of Kosovo constituted only a minority—one-third—of the delegation. Oddly, the negotiators who may have helped construct the delegation were somewhat taken aback when the delegation voted to appoint 29-year-old Hashim Thaci from the KLA, rather than President Rugova, to head the tripartite presidency of the Kosovo team.

The process of proximity talks and the outcome

The Rambouillet conference was opened on 6 February. It was formally co-chaired by the French and British foreign ministers. All foreign ministers from the Contact Group would assemble to consider the progress that had been made after the first week, again after the second week, and at the conclusion of the conference. The members of the Contact Group also maintained sizeable delegations at Rambouillet, in addition to representatives from the OSCE, the EU Presidency and the European Commission and other institutions. Occasionally, individual foreign ministers would offer to address delegations, even after the initial opening of the conference, and especially towards the rather dramatic final phase of the talks. However, the actual conduct of negotiations was focused on the three negotiators appointed by the Contact Group, Ambassadors Christopher Hill (United States), Wolfgang Petritsch (EU) and Boris Mayorski (Russian Federation). These, in turn, were represented by a group of Contact Group legal experts, headed by Jim O'Brian of the US Department of State. Most of the substantive negotiations were conducted through this expert group.

The physical arrangements were well suited to proximity talks. Each of the two parties was given a separate conference room (on different floors) where deliberations within the delegations and with the negotiators could take place. There were also two adjoining dining rooms. It so happened that one was

mainly used by the FRY delegation and the other by the Kosovo delegation, with members of the Contact Group staff alternating informally between both rooms at mealtimes.

The delegates of the two parties were issued with conference badges which precluded them from leaving the grounds of the chateau. However, the negotiators quickly had to realize that in the age of mobile telephones it would not be possible to isolate the talks from the outside world. In addition, no provision had been made for the accommodation of legal, economic, security and other experts of the two delegations in the chateau; so they had to be permitted to leave the grounds.²⁶

At the beginning of the conference, the parties were handed a new proposal for most elements of the proposed political settlement, contained in a framework agreement, a substantial annex entitled 'Constitution of Kosovo' and two further annexes on elections and the proposed ombudsman respectively. The negotiators defined the procedure to be followed in the negotiations as follows. Both sides would be invited to submit comments on the drafts. If the two parties agreed on a modification to the draft, this modification would be adopted. If there was no agreement, the draft would remain unchanged, unless the negotiators were persuaded that the modification would better facilitate the implementation of the agreement. No proposals could be made which were inconsistent with the non-negotiable principles, and no significant changes would be entertained in relation to the two implementation annexes (military and civilian) once they had been tabled.

The conference opened with some skirmishing about the need to achieve a firm ceasefire on the ground in Kosovo before substantive negotiations could take place. While pressing this point, the delegation of Kosovo nevertheless submitted detailed oral comments on the draft framework agreement on 9 February and proceeded to construct written responses to the other elements of the draft that had been tabled. Before the end of the first week, Kosovo had submitted detailed and substantive comments on all documents that had been placed before it. In its written comments, the delegation expressly and with some deliberation stated that each respective document (annex) was in principle 'acceptable'. The comments would then focus on improvements that might be made in the draft. All comments were carefully developed so as to remain both within the non-negotiable principles and even largely within the terms of the initial draft.

The FRY/Serb delegation made an opening oral comment and then fell silent.²⁷ Instead of engaging with the negotiators in substantive dialogue, two principal diversionary tactics were employed. Although the FRY/Serb delegation had initially argued that it would not attend the conference if representatives

²⁶ In fact, a system of five revolving badges per delegation was adopted, to permit the delegations to obtain the benefit of different experts on different days, depending on the subjects to be discussed.

²⁷ A rumour circulated by 'spin doctors' to the effect that the FRY/Serb delegation had requested a piano to help it pass the time was not well founded. Instead, it appears that such a request had been made by a distinguished Russian official connected with the negotiations. It is true, however, that the Kosovo delegation felt on occasion discomforted by the singing of Serb patriotic songs late at night.

from the KLA (in its view a terrorist organization) were present, it proposed to engage in direct, rather than proximity talks. This proposal was strongly supported by Ambassador Mayorski, while the other negotiators took a more neutral view.

The Kosovo delegation responded that it was engaged in a fruitful and constructive process of drafting detailed comments, and that, while direct talks were not precluded later, they would at that moment not assist in maintaining this positive momentum. There were in fact at least two occasions when the presidencies of both delegations met, although no direct negotiations took place.

On 14 February the Contact Group met and determined that negotiations should continue until noon on 20 February, by which time an agreement would have had to be reached. The FRY had at this stage still not produced any written comments and instead retreated behind its second tactic, which was to offer formally to sign the non-negotiable principles. Perhaps the hope was that the Kosovo delegation might find it politically inconvenient to do the same and the talks could then have been pronounced a failure. However, this was something of a non-issue, and the negotiators did not apply any pressure upon the Kosovo delegation formally to sign the principles. Instead, it was maintained that constructive negotiations on the basis of these principles and of the Contact Group draft reflecting them were a sufficient indication of acceptance.

In the meantime, the negotiators had produced two further annexes (on economic issues and humanitarian assistance) which were again commented upon in writing very expeditiously by the Kosovo delegation.

To overcome the absence of a response from the FRY, Ambassador Hill then travelled to Belgrade for consultations with President Milosevic, taking with him a senior member of the FRY/Serb delegation. Kosovo formally protested against the breach of the isolation imposed upon the delegations.²⁸ Almost instantly on Ambassador Hill's return from Belgrade, some eleven days after the commencement of negotiations, the FRY/Serb delegation finally submitted a lengthy document, much of which was incompatible with the non-negotiable principles and the overall structure of the draft for a settlement. The negotiators then proceeded to engage the FRY/Serb delegation in an intensive dialogue, so as to whittle down the wide-ranging comments into a more limited number of submissions which might be discussed.

As the proposals that had been put forward by the Kosovo delegation kept within the terms of the original draft and were intended to improve the functioning of the political settlement in a practical way, the expectation and hope in the delegation was that its constructive attitude would now be rewarded. Given the balance of political groups within the delegation, and the fact that it was not composed of experienced international affairs professionals, this constructive attitude was perhaps surprising to some and would have required some nurturing by the Contact Group. Unfortunately, Kosovo's

²⁸ By way of compensation, Hashim Thaci was subsequently also permitted to leave the chateau to consult with his political authorities at home.

reasonable written comments may have deceived the negotiators into thinking that the Kosovo delegation was fully united behind the Rambouillet project and willing to sign up to any political settlement provided it brought NATO enforcement with it.

In reality, all of the written comments represented the outcome of sophisticated and also difficult discussions. For the members of the delegation, after all, the documents under discussion represented the future constitution of their own country, at least for an interim of three years. Proposals which had been put forward by the negotiators, perhaps in deference to certain political necessities and without fully thinking through their practical implications, were now being considered by those who would have to live with the end results, and who would be held accountable for these results by their domestic constituents. The appreciation of these proposals was also coloured by the fact that the members of the delegation had had to live under FRY/Serb repression for a decade and were unwilling to settle for a continuation of the same. The fact that the draft retained some ethnically based structures of governance was also deeply resented as being out of tune with the ideas of a multi-ethnic, democratic system based on the principle of equal rights and representation for all.

Negotiating on the basis of the Contact Group draft was therefore quite painful for the Kosovo delegation. Unhappily, rather than appreciating the miracle of having obtained comments which sought to improve upon that initial draft, instead of fundamentally questioning it, the negotiators continued to ignore the comments which had been produced until after the FRY/Serb delegation had submitted its own text a week or more later. When the legal experts of the Contact Group finally made themselves available for discussion on 17 February, the conversation did not really address Kosovo's proposals in any depth.²⁹ Instead, the Kosovo delegation was told that the FRY had reduced its submissions to a list of key changes it required, and negotiations focused on concessions that would now need to be granted to Belgrade.

The following day, the negotiators submitted a revised draft for a political settlement. The new draft had, in the view of the Kosovo delegation, been fundamentally changed in accordance with demands apparently put forward by President Milosevic as a precondition for substantive participation in the talks when meeting Ambassador Hill in Belgrade. In essence, the new draft reintroduced the issue of the legal status of Kosovo into the constitutional settlement, and sought to resolve it firmly in favour of Belgrade. The actual exercise of authority by the Kosovo organs was also severely limited. Also reintroduced was a veto mechanism for members of all national communities which would effectively have paralysed legislative action in Kosovo. By contrast, very few of the suggestions proposed by the Kosovo delegation had been adopted.³⁰

²⁹ The exception being the idea of joint authority (see below) which the negotiators appeared to deem impractical.

³⁰ One exception to which the negotiators pointed frequently was the introduction of a technical commission to deal with economic claims.

The new draft was presented by the negotiators along with an invitation to the parties to consider it the final version of a political settlement. This invitation was declined by both sides. In fact, the delegation of Kosovo issued a strongly worded protest, indicating that it considered the submission of a substantially new document two days before the scheduled conclusion of the conference, apparently as the result of talks conducted directly with Belgrade, a breach of faith and that it refused even to receive this document. This gesture was meant to communicate to the negotiators a serious warning that the fundamental change of the draft in favour of the side which had obstructed progress in the talks until the last minute jeopardized further constructive participation from the Kosovo delegation. The Kosovo delegation would not be in a position to accept any settlement, whatever its contents, and could not continue to be taken for granted. In fact, the introduction of the new draft had infused into the delegation a feeling of betrayal which would be very difficult to overcome in the days which followed.

The protest from the Kosovo delegation was not understood in this way by the Contact Group and instead was severely criticized as being impetuous and ill-founded. As there appeared to be no prospect of reverting to the original draft, the Kosovo delegation reluctantly prepared a very short non-paper of less than a page, indicating crucial changes which would have to be made if discussions were to be continued with any prospect of success. For its part, the FRY continued to demand changes on a number of key points. Hence, the day before the deadline for acceptance of the agreement, a significant number of substantive issues had not even been negotiated. Moreover, the crucial annexes on civilian and military implementation had only just been presented to the parties (or at least to the Kosovo delegation).

The reasons for the delay in presenting the military annex seem to have been twofold. It appeared that the Contact Group itself remained divided in relation to the functions, modalities and powers of NATO implementation of the agreement. In addition, as it had been announced that no proposals for changes to the implementation annexes would be entertained, it may have been felt unnecessary to acquaint the parties with the content of a document which they were expected simply to accept.

Whatever the merits of this strategy, it had the disadvantage that the Kosovo delegation, and especially its military elements, had not had the opportunity to discuss in depth with NATO representatives and others the way in which the NATO annex would be interpreted in practice.³¹ As the annex provided for the demilitarization of the KLA, it could not have come as a surprise to the negotiators that some reassurances as to the implications of this concept would have to be given to a delegation which was effectively dominated by the KLA and a political party close to it.

³¹ There had been one briefing on military implementation before the text of the security annex had been made available. That briefing left the KLA and its supporters in something of a state of shock and was evidently not designed to reassure the military elements of the Kosovo delegation on whose consent the entire process would, in the end, depend.

Despite these uncertainties, on 20 February, shortly before the noon deadline, the parties were presented with a short document in which they were to indicate acceptance of the agreement, subject only to technical changes which would be made later by experts. Unfortunately, at that time the negotiators had not been able to provide the delegations with the actual text of the agreement as it stood at that time. In fact, it was known that negotiations were continuing with the FRY/Serb delegation in relation to the further substantive concessions it had demanded, which were manifestly not mere technical changes.

When it became obvious a few hours after the deadline that neither the FRY/Serb delegation nor the Kosovo delegation was in a position to sign this text, the Contact Group decided to prolong negotiations until 3 p.m. on 23 February. While much time was spent on outstanding issues raised by the FRY/Serb delegation during this period, attention was finally also paid to the concerns of the Kosovo delegation. This was made manifest in three ways. First, negotiations on finalizing the political settlement were now actually being conducted in the form of genuine proximity talks. Substantive proposals by one side were transmitted through the group of legal experts. A number of these proposals were accepted by the other side. Where no agreement was forthcoming, the Contact Group representatives would seek to reduce the scope of the respective proposals through very tough and skilful negotiation and refine them until they could become acceptable. In this way, it was possible to produce a consolidated text of the entire agreement in advance of the expected signature on 23 February. At the insistence of the FRY/Serb delegation, that text now no longer consisted of a brief framework agreement, tying together a number of substantive annexes. Instead, all the annexes had been incorporated into an overall document, entitled *Interim Agreement for Peace and Self-Government in Kosovo*.

Secondly, a belated but intensive effort was finally begun to persuade the KLA and its supporters of the merits of signing the agreement. This included briefings by military experts, including, at the very final stage of the negotiations, by NATO itself. Through these contacts, the KLA was to be assured as to the actual meaning of demilitarization in practice. One government also offered to record its willingness to contribute to the transformation of the KLA in full compliance with the terms of the accords.

Finally, a determined effort was made to address the issue of the final settlement which would take place after the interim period of three years. The Kosovo delegation had addressed this issue in its initial comments on the draft framework agreement, but since then there had been no discussions on this point. To satisfy the requirements of the Kosovo delegation, an important addition was made to the final section of the agreement, referring to 'the will of the people'. In addition, as a result of quite dramatic all-night negotiations, one delegation may have indicated a willingness to give certain bilateral assurances to the effect that this formulation did indeed refer to a right of the people of Kosovo to make manifest their will in relation to the future status of the territory through a referendum.

All three of these strands of persuasion were directly supported by US Secretary of State Albright, who had remained in Paris in order to help obtain acceptance of the accords. However, even her presence could not assure formal signature on 23 February. In fact, her personal intervention had helped sway the majority of the Kosovo delegation, which was ready to sign, despite the fact that the KLA leadership in Kosovo was being subjected to considerable and somewhat confusing changes at this very moment. But, according to news reports, one single member of the delegation was unable to support such a step.³² As the delegation had agreed at the outset of the talks to act according to the consensus principle, this made formal signature impossible at that stage. Instead, the delegation adopted by consensus a statement in which it noted that it had the option to sign the agreement after a short period of consultation with the people of Kosovo and its political and military institutions. The declaration also noted that in order to facilitate such consultations, the delegation had voted in favour of the agreement as presented in the negotiations on 23 February.

The FRY/Serb delegation for its part issued three declarations as the day progressed. When it appeared early in the day that Kosovo would not sign, it put forward a lengthy statement containing demands for further concessions. There then followed a more conciliatory text which was superseded by a yet more compact version, issued when it appeared that Kosovo would, after all, accept the text. In that final declaration the FRY/Serb delegation emphasized that major progress had been achieved in defining a political solution on substantial self-government for Kosovo respectful of the sovereignty and territorial integrity of the Republic of Serbia and of the FRY. The modalities for self-government would, however, need to be defined further. The FRY/Serbia would also agree to discuss the scope and character of an 'international presence' in Kosovo to implement the agreement.

The end result of the Rambouillet conference was therefore somewhat confusing. Kosovo argued that its delegation had accepted the text as the definite outcome of the negotiations and that it would sign subject to consultation at home. This position had been taken because the negotiators had indicated that a further conference would be in the nature of a signature conference, in accordance with the precedent of the 1995 agreement on Bosnia and Herzegovina which was formally signed in Paris some weeks after negotiations had been concluded in Dayton. The FRY/Serbia, on the other hand, regarded the process of negotiations as by no means concluded.

The Contact Group then issued chairmen's conclusions, which were perhaps not fully reflective of the intention of either of the parties. It was noted that a political framework was now in place and the groundwork had thereby been laid for finalizing the implementation chapters of the agreement, including the modalities of the invited international civilian and military presence in Kosovo. As it was essential that the agreement be completed and signed as a whole, the

³² Jeffrey Smith, 'Kosovar rebel upset western strategy', *International Herald Tribune*, 25 February 1999, p. 6.

Contact Group indicated that the parties had committed themselves to attend a further conference, covering all aspects of implementation, on 15 March.³³ This further conference, it appeared, would neither be a simple signature conference, nor a conference at which the discussions about a political settlement would be reopened. Instead, talks were apparently intended to focus only on implementation—the very issues which had been declared to be non-negotiable through the entire Rambouillet process thus far.

The Paris Follow-on Talks

The Contact Group negotiators and the delegations of the FRY/Serbia and of Kosovo assembled as requested at the Paris International Conference Centre on Avenue Kleber on 15 March 1999. That day, the delegation of Kosovo presented to the co-chairmen of the Conference and others a formal letter, confirming its decision taken at Rambouillet to accept the interim agreement as presented on 23 February. 'We would be honoured to sign the Agreement in your presence at a time and place of your choosing', the letter stated.

Rather than offering an immediate opportunity to sign, the negotiators strongly pressed Kosovo to delay such a step, to permit further discussions to take place with the FRY/Serb delegation. That delegation engaged in a procedural debate with the negotiators. At the invitation of the FRY/Serb delegation, on 16 March the negotiators responded, in a formal letter signed by all three of them, emphasizing 'the unanimous view of the Contact Groups that only technical adjustments can be considered which, of course, must be accepted as such and approved by the other delegation'. Hence, it was confirmed that the exhausting process of seeking to tempt the FRY/Serb delegation into accepting the agreement by making further and further concessions had now been concluded. Instead, the talks would indeed focus on implementation.

Over the days which followed, Kosovo was presented with the opportunity to discuss the issues of economic reconstruction, of civil implementation and of the holding of elections by the OSCE, and of military implementation in detail with the relevant implementing organizations. The FRY/Serb side did not take up this offer. Instead, it presented on the first day its own version of the Agreement. The fact that the first change proposed in that version was to strike the word 'peace' from the title did not augur well for the acceptance of the Rambouillet accord.

Rather than focusing on limited changes, this counter-draft effectively sought to re-open the discussions on a political settlement and start again from the beginning, actually outside of the non-negotiable principles. The draft proposed a formal subordination of Kosovo to Serbia, abolished restrictions on the exercise of Federal functions in Kosovo and correspondingly reduced the functions of the Kosovo assembly. The office of the President of Kosovo would be

³³ Co-chairmen's conclusions, 23 February 1999.

abolished and the government replaced by a weakened Council of Ministers. There would be no Kosovo Constitutional and Supreme Court. In effect, the draft would have introduced a regime of what external observers have described as an institutionalized system of apartheid in Kosovo. In addition, the entire implementation chapters, both military and civilian, had been simply struck out, with the exception of OSCE election monitoring and provisions for the Ombudsman, although even those provisions were significantly altered. Even Chapter 4 (a) on humanitarian assistance, reconstruction and economic development was deleted in its entirety.

In this way, any substantive negotiations were effectively foreclosed by the FRY/Serb delegation, which also took to insulting the negotiators in rather stark terms. Given this deadlock, the text of the agreement in its form of 23 February was opened for signature on 18 March. In a formal ceremony, Kosovo signed the agreement, witnessed by only two of the three negotiators. The flat refusal of Ambassador Mayorski to witness the signature of Kosovo of the outcome of the Rambouillet and Paris talks is somewhat startling. After all, up to that moment at least the pretense had been maintained that the negotiators were serving the Contact Group, rather than a particular government represented within it or even a particular party to the talks. There was even an attempt to prevent the European Union negotiator to witness the signature. This attempt was overruled by the government representing the Presidency of the European Union.

As is customary upon signature or ratification of legal instruments of this kind, the delegation of Kosovo issued an interpretative statement at the moment of signature. In so doing, it communicated certain understandings. It indicated that the text was now definite and not subject to further modification, other than purely technical changes. Kosovo also indicated that it regarded NATO led implementation according to the provisions of the interim agreement to constitute a condition essential to the overall package and to the consent given by Kosovo. It committed itself to full cooperation with all implementing organization and invited their early deployment. Kosovo confirmed its intention, already indicated at the conclusion of the conference at Rambouillet, that at the termination of the interim period of three years the people of Kosovo will exercise their will through a referendum, conducted freely and fairly. The expressed will of the people will be conveyed to the international meeting to determine the mechanism for a final settlement for Kosovo, consistent with the interim agreement, in particular Article I (3) of Chapter 8. Finally, the delegation noted again the intention of the KLA to exercise the opportunity to engage in a process of transformation and welcomed assurances as to cooperative bilateral contacts to carry out this process consistent with the interim agreement.

The following day, one last attempt was made to engage the FRY/Serb delegation in substantive discussions. As this attempt proved fruitless, the co-chairmen issued the following statement:

- 1 The Rambouillet Accords are the only peaceful solution to the Kosovo problem.
- 2 In Paris, the Kosovo delegation seized this opportunity and, by their signature, have committed themselves to the Accords as a whole.
- 3 Far from seizing this opportunity, the Yugoslav delegation has tried to unravel the Rambouillet Accords.
- 4 Therefore, after consultation with our partners in the Contact Group (Germany, Italy, the Russian Federation, the United States, the European Union, the Chairman-in-Office of the OSCE), we consider there is no purpose in extending the talks any further. The negotiations are adjourned. The talks will not resume unless the Serbs express their acceptance of the Accords.
- 5 We will immediately engage in consultations with our partners and allies to be ready to act. We will be in contact with the Secretary-General of NATO. We ask the Chairman in Office of the OSCE to take all appropriate measures for the strategy of the KVM. The Contact Group will remain seized of the issue.
- 6 We solemnly warn the authorities in Belgrade against any military offensive on the ground and any impediment to the freedom of movement and of action of the KVM, which would contravene their commitments. Such violations would have the gravest consequences.

The Belgrade government had used the break in talks since 23 February to deploy troop concentrations on the border with Kosovo and in Kosovo itself. These forces had already engaged in significant offensive operations during the Paris follow-on talks and now increased their activities even further, attacking again entire villages and other civilian installations. In view of this situation, the KVM was rapidly withdrawn from Kosovo. Within a few days the number of displaced had again risen to over 200,000.

On 22 March, the negotiators travelled to Belgrade, along with Richard Holbrooke, to attempt one final time to persuade the FRY/Serbia to cease offensive operations and to accept the Rambouillet accords. Again, no progress was made. Instead, the following day, the parliament in Belgrade voted to reject the interim agreement. Richard Holbrooke then returned to Brussels where NATO, upon having received a briefing on his discussions, authorized the launching of military operations against the FRY. The NATO Secretary General explained:³⁴

I have just directed SACEUR, General Clark, to initiate air operations in the Federal Republic of Yugoslavia. I have taken this decision after extensive consultations in recent days with all the Allies, and after it became clear that the final diplomatic effort of Ambassador Holbrooke in Belgrade has not met with success. All efforts to achieve a negotiated, political solution to the Kosovo crisis having failed, no alternative is open but to take military action. We are taking action following the Federal Republic of

³⁴ Press Statement by Dr Javier Solana, Secretary-General of Nato, Press Release 1999/040, 23 March 1999.

Yugoslavia Government's refusal of the International Community's demands: Acceptance of the interim political settlement which has been negotiated at Rambouillet; Full observance of limits on the Serb Army and Special Police Forces agreed on 25 October; Ending of excessive and disproportionate use of force in Kosovo. As we warned on 30 January, failure to meet these demands would lead NATO to take whatever measures were necessary to avert a humanitarian catastrophe.

The NATO Secretary expanded upon the aims of the operation by indicating that it would be intended to support the political aims of the international community and to this end: 'It will be directed towards disrupting the violent attacks being committed by the Serb Army and Special Police Forces and weakening their ability to cause further humanitarian catastrophe. We wish thereby to support international efforts to secure Yugoslav agreement to an interim political settlement. As we have stated, a viable political settlement must be guaranteed by an international military presence. It remains open to the Yugoslav Government to show at any time that it is ready to meet the demands of the international community.'

Javier Solana also appealed to the Kosovar Albanians to 'remain firmly committed to the road to peace which they have chosen in Paris. We urge in particular Kosovar armed elements to refrain from provocative military action'. He concluded by restating twice more that the objective would be to prevent more human suffering and more repression and violence against the civilian population of Kosovo.

The strong references to the unfolding humanitarian tragedy were meant to point to the legal justification for the operation, which remained one of humanitarian action. The three principal demands that were to be enforced militarily could be logically connected with that justification. In order to arrest the further deterioration of the humanitarian situation, the use of excessive and disproportionate force by the FRY/Serbia would need to stop, as this practice had caused the large-scale displacement of civilians in Kosovo. This requirement was rather a cautious one, inasmuch as it did not appear to insist on an immediate cease-fire. The ongoing FRY/Serb offensive against the KLA was therefore not necessarily rejected, but only the means through which it was being conducted was condemned and subjected to counter-action.

In the absence of compliance with this demand, NATO would strike directly against the military infrastructure actually engaged in excessive and indiscriminate attacks. This aim clearly fulfils the legal requirement of necessity, imminence of the threat to a civilian population, and proportionality of the forcible counter-measure. In addition, the aim of stopping such violent repression had been endorsed by the UN Security Council, although no forcible mandate had been attached.

There would also be included a prospective element of action, i.e. that of weakening the future potential of the FRY/Serbia to engage in such activities. This, slightly broader aim was justified with reference to the past record of these forces, which had extended from the involvement in probable genocide and

ethnic cleansing in Croatia and Bosnia and Herzegovina, to causing the initial exodus from Kosovo in 1998. Through this measure, the demands of the Security Council for a troop withdrawal, and the FRY's own commitments in the Holbrooke agreements of October 1998, would be forcibly implemented. Again, as there existed no Security Council mandate towards this end, the use of force in this context would need to be justified with reference to an overwhelming humanitarian need.

The use of force in support international efforts to secure Yugoslav agreement to an interim political settlement also reflects an aim established by the United Nations Security Council to which no enforcement mandate was attached. It reflects a view that the humanitarian emergency could not be improved in the longer term in the absence of a settlement. However, the statement of the NATO Secretary-General was rather nuanced, inasmuch as it referred merely to the interim political settlement. The Rambouillet accord, however, contains as an integral part provisions on military implementation. The modalities of that implementation are stated clearly, providing for a very strong NATO-led force operating outside of United Nations or OSCE command or control.³⁵

On the other hand, the UK Prime Minister stated that the operation would have as its minimum the objective to curb continued Serbian repression in order to avert a humanitarian disaster. It would therefore target the military capability of the Serb dictatorship. To avoid such action, 'Milosevic must do what he promised to do last October. End the repression; withdraw his troops to barracks; get them down to the levels agree; and withdraw from Kosovo the tanks, heavy artillery and other weapons he brought into Kosovo early last year. He must agree to the proposals set out in the Rambouillet Accords, including a NATO led ground force'.³⁶ It will be interesting to see whether this clear inclusion of the acceptance of the entire Rambouillet package among the conditions which would need to be fulfilled by Belgrade in order to avert air strikes or their continuation will be maintained.

The political interim settlement

The issue of status and the basic distribution of powers

The non-negotiable principles had reflected the FRY/Serb demand that the territorial integrity of the FRY and its neighbouring countries be respected. The government of Kosovo had responded that it would be willing to attend the Rambouillet talks, provided a proposed settlement would not prejudice the status of Kosovo, in accordance with the approach that had been adopted in the initial Hill proposals. The first draft of the agreement presented to the con-

³⁵ The use of force by NATO was thus, at least according to this initial statement, not necessarily directed towards achieving an acceptance of the Rambouillet package in its entirety. Instead, the Secretary-General referred to the more flexible requirement that a 'viable political settlement must be guaranteed by an international military presence'.

³⁶ Prime Minister's Statement on Kosovo, 23 March 1999.

ference was in accordance with this idea of leaving out express statements on issues on which no agreement could be achieved. It contained, in what started out as the draft framework agreement, merely a preambular paragraph which only recalled the commitment *of the international community* to the sovereignty and territorial integrity of the FRY. Hence, in signing this text, Kosovo itself would not have had to take an express view in this matter. There was also a reference to United Nations and OSCE principles. As these contain both the rule of territorial unity and the principle of self-determination, this reference was also acceptable. The constitution (initially Annex 1) did not contain a preamble and, instead of addressing the status of Kosovo and the legal quality of its relations with the FRY or even Serbia, it focused on a reasonable division of competences.

When the second draft of the agreement was presented on 18 February, a preamble had been added which referred to 'democratic self-government in Kosovo grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia, from which the authorities of governance set forth herein originate'. While the Contact Group attempted to assert that this was an insubstantive addition, it did in fact fundamentally change the nature of the entire interim settlement. To avoid a failure of the Rambouillet process on account of this unilateral change made without explanation two days before the deadline for signature, the following compromise formulation was eventually adopted: 'Desiring through this interim Constitution to establish institutions of democratic self-government in Kosovo grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia and from this Agreement, from which authorities of governance set forth herein originate ...' Even as amended, this provision almost led the Kosovo delegation to reject the agreement. Still, the formulation permitted Kosovo to argue that the commitment to territorial integrity and sovereignty is limited to the interim period.³⁷ In any event, this commitment and the legal personality and powers of Kosovo are rooted in the agreement, rather than in a temporary grant of autonomy by the FRY/Serbia.

Another important change that had been made in the draft of 18 February related to the assignment of powers. According to Article I (2) of the initial draft of what then was Annex 1, Kosovo as an entity would enjoy responsibility for 'all areas' other than those where authority was expressly assigned to the FRY. Those areas of authority were enumerated exclusively and their exercise was subjected to important restrictions and safeguards for Kosovo. In the draft of 18 February, the express presumption in favour of Kosovo authority had been abandoned. Instead, a new paragraph had been added, indicating that Serbia, too, would exercise competence in relation to Kosovo as specified in the agreement.

³⁷ A proposal to entitle Chapter 1 'Interim constitution' was not adopted. However, given the overall title of the agreement, the specific reference to the interim period in this preambular provision, and the concluding provisions, this was not seen by the Kosovo delegation as a significant setback.

The FRY/Serbia strongly insisted on the inclusion of a further provision in the introductory section of the agreement (formerly the framework agreement), stating that the parties would only act within their powers and responsibilities in Kosovo as specified by this agreement. Acts outside those powers and responsibilities would be null and void, although Kosovo would have all rights and powers set forth in the agreement, in particular as specified in the constitution. While the FRY/Serb delegation might have intended this provision as a safeguard against creeping jurisdiction by the Kosovo organs, the Kosovo delegation interpreted it as a helpful confirmation that the powers of Kosovo were indeed based in the agreement, and not in a sovereign grant of rights by the FRY. In addition, this formulation supports the view that FRY/Serb exercises of powers in relation to Kosovo would be strictly limited to competences that have been expressly granted to them.³⁸

Chapters 2 and 7 of the Agreement establish very strict limitations for the operation of FRY/Serb law enforcement, border police, customs and military personnel, both in terms of numbers and in terms of competence.

The agreement, in Article IX, provides for the possible representation in FRY and Republic legislative, executive and supreme judicial organs for Kosovo and citizens in Kosovo. It is not necessarily likely that Kosovo will wish to make use of this option.

The issue of legal personality for Kosovo as a whole was also clarified in some measure through a provision concerning the communes. As was noted above, one of the difficulties with the initial Hill proposal was its insistence that Kosovo communes would be the basic unit of self-governance in Kosovo, and that they would exercise all authority not assigned to other Kosovo organs. While the latter element was retained,³⁹ it was clarified in what was to become Article I (8) of Chapter 1 of the final text that the communes were merely the basic unit of *local* self-government. The insertion of the word 'local' ensures that this provision no longer dilutes the overall legal personality of Kosovo as a whole.

The Kosovo institutions and their powers

The principal organs of Kosovo according to the agreement are the assembly, the President of Kosovo, the government and administrative organs, the judicial organs and the communes.⁴⁰ The assembly is to be composed of 120 members, of whom 80 will be directly elected. The other 40 members will be elected by members of qualifying national communities. Communities whose members constitute more than 0.5 per cent but less than 5 per cent of the Kosovo population

³⁸ Federal functions were still expressly and, in the view of Kosovo, exhaustively listed: territorial integrity, maintaining a common market within the Federal Republic of Yugoslavia, monetary policy, defence, foreign policy, customs services, federal taxation, federal elections and other areas specified in this agreement.

³⁹ See also Article VIII (5) of Chapter 1, and the important reference contained therein to Article II (5) (b) of Chapter 1.

⁴⁰ On the national communities and their institutions, see the section which follows.

are to divide ten of these seats among themselves. Communities whose members constitute more than 5 per cent of the Kosovo population (in fact only the ethnic Albanians and Serbs) will divide the remaining 30 seats equally.

The draft of 18 February had unilaterally introduced as an additional feature a second chamber of the assembly as a result of FRY/Serb pressure. In that chamber of 100 seats, the Turks, Gorancies, Romanies, Egyptians, Muslims and any other group constituting more than 0.5 per cent of the population (hence also including the ethnic Albanians and Serbs) would be equally represented. The chamber would have had the right of consultation in relation to legislative acts of the assembly, and any of the groups represented within it could have initiated so-called vital interest motions which would amount to an attempted veto of legislation.

The FRY/Serb delegation itself abandoned the concept of the second chamber and instead focused on attempting to strengthen the power of veto of national communities in the assembly. According to the initial draft and the draft of 18 February, the decision as to which legislative acts would violate the vital interests of a national community and would thus be null and void would have been taken by the constitutional court of Kosovo. The Kosovo delegation had grave reservations about the very concept of special powers for ethnic groups, including separate elections according to ethnic criteria. While strongly endorsing the notion of equal rights for members of all ethnic groups, the idea of separate representation appeared to grant to very small groups broad rights of codecision which were unrepresentative and hence undemocratic. Moreover, the example of ethnic politics in Bosnia and Herzegovina had demonstrated the divisive nature of a political system organized on an ethnic basis. Finally, a legislative system which was subjected to the constant threat of a veto by any ethnic group would result in perennial paralysis.

Despite these concerns, in the spirit of compromise the Kosovo delegation was willing to endorse, however reluctantly, the concept of special representation for ethnic groups for the interim period. However, this concession was dependent on a judicial process to check vital national interest motions, in order to avoid an arbitrary use of this procedure. The Contact Group disregarded this view and gave way to a Serb/FRY proposal for settling disputes about vital national interest motions outside of the judicial system. According to Article II (8) (c) of Chapter 1, the final agreement provides that the decision about such motions is to be rendered by a panel comprising three members of the assembly: one Albanian, one Serb, each appointed by his or her national community, and a third member of a third 'nationality' to be selected within two days by consensus of the presidency of the assembly. As the Serb national community is guaranteed a member of the presidency of the assembly (in fact, actually the president of the assembly), it appears that this nominating process itself can be blocked by a factual veto.

Decisions of the assembly which have been challenged according to the vital national interest procedure are to be suspended in regard to the national

community having brought the challenge, pending completion of the dispute settlement procedure. Hence, it might appear that a Serb veto in relation to assembly decisions was being introduced through the back door. However, as this veto would depend on an abuse of process in frustrating the nomination of the third member of the arbitration panel, the general dispute settlement mechanism attaching to the agreement as a whole, or the general powers of the constitutional court, would probably be brought to bear on a matter of this kind. It should also be noted that the decision on the merits of a vital interest motion, while conducted by a political body, is to be made according to legal criteria.⁴¹

The substantive powers of the assembly are reasonably wide, covering most aspects of governance. Importantly, this includes the power to set the framework of, and to coordinate, the exercise of competences assigned to the communes. The first elections in Kosovo are to be held within nine months of the entry into force of the agreement under international supervision.

The President of Kosovo is to be elected by the assembly by a majority vote. His or her functions include representation before international, FRY or Republic bodies, the conduct of foreign relations consistent with the authorities of Kosovo institutions, proposing to the assembly candidates for prime minister and for the principal courts of Kosovo, etc. The government, also to be approved by the assembly, has general authority for implementing the laws of Kosovo, etc. At least one minister must be a member of the Serb national community.

The powers reserved for the communes have been narrowed down somewhat. However, importantly, while there is provision for Kosovo-wide coordination, the police is to be organized on a communal basis and limited to a ceiling of 3,000 active law enforcement officers throughout Kosovo. In addition, there is authority in relation to education, child care, the communal environment, local economic issues, etc.

The judiciary consists of a constitutional court composed of nine judges. At least one judge must be a member of the Serb national community and five other judges will be selected from a list drawn up by the President of the European Court of Human Rights. The powers of review of the constitutional court are quite wide. They include, but are not limited to, determining whether laws applicable in Kosovo, decisions or acts of the President, the assembly, the government, the communes, and the national communities are compatible with the constitution.

The supreme court, composed of nine judges including one member of the Serb national community, hears final appeals from subordinated courts in Kosovo, including communal courts.

A special feature relates to the right of citizens in Kosovo to opt to have civil disputes to which they are party adjudicated by courts in the FRY, which shall apply the law applicable in Kosovo. In criminal cases, a defendant is entitled to

⁴¹ A vital interest motion shall be upheld if the legislation challenged adversely affects the community's fundamental rights as set forth in Article VII, or the principle of fair treatment.

have his or her trial transferred to another Kosovo court that he or she designates. In effect, this means that a defendant can opt to be tried in the local court of a specific commune, which may be dominated by members of his or her ethnic group. In criminal cases in which all defendants and victims are members of the same national community, all members of the judicial council will be from the national community of their choice should any party so request. A defendant in a criminal case may also insist that one member of the judicial council hearing the case is from his or her national community. This may include judges of courts in the FRY serving as Kosovo judges for these purposes.

Human rights and additional rights of national communities

The provisions on human rights are strangely short and undeveloped in the constitution and indeed throughout the agreement. There is no listing of fundamental human rights to be applied in Kosovo. Instead, Article VI (1) of the constitution states rather generally that all authorities in Kosovo shall ensure observance of internationally recognized human rights and fundamental freedoms. As opposed to the Dayton agreement, which included a long list of human rights instruments identifying what internationally recognized human rights and fundamental freedoms are, the agreement in Article VI (2) rather ingeniously incorporates by reference the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, which 'shall apply directly in Kosovo'. In this way, a very sophisticated body of human rights law, refined in decades of jurisprudence by the European Court and Commission of Human Rights, is instantly available in Kosovo. The Kosovo assembly also has the power to enact into law other internationally recognized human rights instruments.

The rights and freedoms established in this way shall have priority over all other law. Interestingly, all 'courts, agencies, governmental institutions, and other public institutions of Kosovo or operating in relation to Kosovo shall conform to these human rights and fundamental freedoms' (Article VI (3)). This means that FRY and Republic authorities must also exercise their competences in relation to Kosovo in accordance with these standards. As the FRY is not a party to the European Convention and its Protocols, this would place it in an unusual position.

While the human rights provisions are compact, the additional rights granted to national communities are extensive, but not unlimited. First, these rights are tied to the specific purpose of preserving and expressing their national, cultural, religious and linguistic identities. This is to be done in accordance with international standards and in accordance with human rights and fundamental freedoms.

More controversially, each national community can elect and establish its own institutions—a feature which was feared might give rise to a parallel state structure within Kosovo. However, national community institutions must act in

accordance with Kosovo law and must not adopt discriminatory action. National communities can arrange for the inscription of local names of towns, villages, etc., in the language and alphabet of the respective community, issue information in that language, provide for education and schooling in that language and in national culture and history, reflecting a spirit of tolerance between communities and respect for the rights of members of all national communities, display national symbols, including those of the FRY and Serbia, protect national traditions on family law, arrange for the preservation of sites of religious, historical or cultural importance in cooperation with other authorities, implement public health and social services on a non-discriminatory basis, operate religious institutions in cooperation with religious authorities and participate in non-governmental organizations.

National communities may also enjoy unhindered contacts with representatives of their respective national communities within the FRY and abroad. They must be guaranteed access to and representation in the media and may finance their activities by collecting contributions from their members. Importantly, every person has the right freely to choose to be treated or not to be treated as belonging to a national community.

Final status

The draft presented to the parties at the outset of the conference restated the concluding provision from previous Hill proposals providing for amendments to the agreement to be adopted by consent of all the parties. Each party was to be entitled to propose such amendment at any time. However, after three years, there would occur a comprehensive assessment of the agreement under international auspices with the aim of improving its implementation and determining whether to implement proposals by either side for additional steps.⁴² The means of undertaking this assessment, and the procedure to be adopted, were left unclear.

The Kosovo delegation argued strongly that, in accordance with the interim character of the agreement, provision would need to be made for a further international conference on a final settlement for Kosovo. The decisions of that conference should be based on the will of the people of Kosovo, made manifest in a referendum. The negotiators pointed out that they were not authorized by the Contact Group to adopt language on a referendum. However, even the non-negotiable principles had at least provided for 'a mechanism for a final settlement after an interim period of three years'. In the dramatic final phase of the conference, it became possible to obtain significant changes to the final provision, in reflection of this wording. The final text of what became Article I (3) or Chapter 8 reads:

⁴² This formulation actually represented a slight retreat from the final Hill draft, put forward on 27 January, which had referred to a 'procedure' for considering such additional steps to be determined taking into account the parties' roles in and compliance with this agreement.

Three years after the entry into force of this agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals by any Party for additional measures.

This wording stops short of actually establishing a mechanism for a final settlement, contrary to what might have been expected in view of the language contained in the non-negotiable principles. However, startlingly, it was accepted that this mechanism shall be established and/or operate, *inter alia*, on the basis of the will of the people.³⁸ The delegation of Kosovo obtained certain assurances that this formula actually establishes a legal right to hold a referendum of the people of Kosovo (as opposed, say, to the people of the FRY or the Serb Republic). Given the likely outcome of such a referendum, it will be difficult to construct a mechanism for a final settlement which can easily ignore the longer-term aspirations of the people of Kosovo.

Implementation

The provisions for implementation contained in the Rambouillet text are complex and distributed throughout the interim agreement. They consist principally of the introductory section of the agreement entitled Framework, Chapter 2 on Police and Public Security, Chapter 3 on the Conduct and Supervision of Elections, Chapter 4 (a) on Humanitarian Assistance, Reconstruction and Development, Chapter 5 on the Civilian Implementation Mission in Kosovo, Chapter 6 concerning the Ombudsman and Chapter 7 on 'Implementation II', that is to say, military implementation. For reasons of space it will only be possible to review some of the principle features of this implementation structure here.

Confidence building

Upon signature of the agreement, a cease-fire is to come into force immediately. Alleged violations of the cease-fire are to be reported to international observers and must not be used to justify use of force in response. The status of police and security forces in Kosovo, including withdrawal of forces is to be achieved according to Chapter 7. Paramilitary and irregular forces in Kosovo are incompatible with the terms of the agreement. The latter provision gave rise to some difficulty, inasmuch as the KLA does not consider itself a paramilitary or irregular force. However, it is clear that it, too, is addressed through Chapter 7 of the agreement.

All abducted persons or other persons held without charge are to be released, including persons held in connection with the conflict in Kosovo. No one is to be prosecuted for crimes related to the conflict, except for persons accused of having committed serious violations of international humanitarian law. Persons

already convicted for committing politically motivated crimes related to the conflict are to be released, provided these convictions do not relate to serious violations of humanitarian law obtained in a fair and open trial conducted pursuant to international standards.

The agreement confirms the obligation, already contained in mandatory Security Council resolutions, to cooperate with the Hague International Criminal Tribunal for the Former Yugoslavia. This includes the obligation to permit complete access to tribunal investigators and compliance with the orders of the Tribunal. This provision was somewhat contested at Rambouillet. Kosovo attempted to strengthen its scope, as did, indirectly, the Tribunal itself. However, in the face of determined opposition from the FRY, a rather short paragraph was adopted which does not greatly improve upon the obligations already contained in the demands of the Security Council.

The parties also recognize the right to return of all persons to their homes, including those who have had to leave the region. There is to be no impediment to the normal flow of goods into Kosovo, including materials for the reconstruction of homes and structures. The FRY must not require visas, customs or licensing for persons or things connected with international implementation.

NATO implementation and the withdrawal of forces

The military implementation chapter is the most detailed element of the entire accords, ranging over some 25 densely printed pages, including two appendixes. The parties agree that NATO would establish and deploy a force (KFOR) operating under the authority and subject to the direction and the political control of the North Atlantic Council (NAC) through the NATO chain of command, and in accordance with a Chapter VII mandate to be obtained from the Security Council. Other states may assist in military implementation. While this is not spelt out, it was envisaged that this would include a Russian contingent.

KFOR would be authorized to take such actions as required, including the use of necessary force, to ensure compliance with Chapter 7. As opposed to the arrangements of Dayton, it was made clear at the beginning that KFOR would not only be available to ensure compliance with the military aspects of the agreement, but that it would also actively support civilian implementation by the OSCE and others as part of its original mandate. As in the Dayton agreement, the mandate of KFOR can be broadened through further action by NATO, in this instance acting through the North Atlantic Council.

A Joint Implementation Commission would be established to consider complaints by the parties and other matters. It would be composed of FRY military commanders, Fry and Serb officials, Kosovo representatives and representatives of the military and civilian implementation missions. The agreement envisages that final authority to interpret the provisions of Chapter 7 would rest with the KFOR military commander.

The regular armed forces of the FRY (VJ) would be subjected to a rigorous regime of redeployment and withdrawal according to fixed deadlines. This includes the removal of assets such as battle tanks, all armoured vehicles mounting weapons greater than 12.7mm and all heavy weapons of over 82 mm. Within 180 days of the coming into force of the agreement, all VJ units, other than 1,500 members of a lightly armed border guard battalion would have to be withdrawn from Kosovo. An additional 1,000 support personnel would be permitted in specified cantonment sites. The border guards would be limited to patrolling the border zone and their travel through Kosovo would be subject to significant restrictions.

The air defence system in Kosovo would be dismantled and associated forces withdrawn, as would be other FRY or Serb forces, including the Ministry of Interior Police (MUP). The MUP would initially be drawn down to a size of 2,500, and be entirely withdrawn upon the establishment of a Kosovo police within one year.

Upon entry into force of the agreement, all other forces would have to commit themselves to demilitarization, renounce violence, guarantee security of international personnel, etc. The definition of the term 'demilitarization' has been subject to some discussion, especially as it applies to the KLA. That organization has declared its intention to transform itself in a way which is fully compliant with the agreement.

Civilian implementation

The OSCE would be charged with principal responsibility over the civilian elements of implementation, operating under a Chief of the Implementation (CIM). The implementation mission would monitor, observe and inspect law enforcement activities in Kosovo, which would be established principally at communal level. The police force of around 3,000 is to be lightly armed only. The authority of Federal and Serb police would be very significantly restricted. Importantly, the CIM would have final authority to interpret the provisions of the agreement in relation civilian implementation.

All aspects of civilian implementation would be coordinated and monitored by a Joint Commission, including Federal, Republic and Kosovo representatives and others, and chaired by the CIM who would have a final right of decision in this rather powerful body. In addition, an ombudsman would exercise wide powers to monitor the realization of the rights of members of national communities and the protection of human rights and fundamental freedoms.

Elections are to be held at communal and Kosovo level within a period of nine months from entry into force of the agreement, once the OSCE certifies that conditions have been established for a free and fair ballot. Difficulties are likely to be encountered in relation to the establishment of an electoral role, should the agreement be implemented. This includes also the matter of absentee balloting of refugees.

Finally, the agreement provides for an administration of humanitarian aid and reconstruction principally through the organs of Kosovo, with strong involvement by the European Union. In fact, throughout the conference, the European Union, through its negotiator and through representatives of the Commission, exercised a considerable influence, also and especially in relation to this issue. Great emphasis was placed on careful planning, rapid and unbureaucratic deployment of resources once needs have been identified, and close cooperation with the beneficiaries of such aid.

Conclusion

The approach of the states and organizations involved in the international administration of the crisis in Kosovo was informed by the need to attempt to reconcile several underlying tensions. On the one hand, it had been determined somewhat arbitrarily that Kosovo should not be assigned an entitlement to statehood. This decision was arbitrary, inasmuch as Kosovo had enjoyed a federal status within the SFRY not unlike that of the republics to which the privilege of statehood was assigned. The decision was perceived to be necessary, to avoid a proliferation of claims to statehood elsewhere, based on an expanded view as to the scope of application of the right to self-determination at the expense of the doctrine of territorial unity.

On the other hand, it would not be easy to persuade the people of Kosovo that they should continue to live under an apartheid-style regime, suppressed by a small minority in their own country, for the sake of international principles and the perception of stability by others. Kosovo possesses a clearly defined territory, it had elected its own government, administered some of its affairs to some extent through a parallel structure and its population had overwhelmingly voted for independence in a referendum.

To address this tension, lip-service had at least been played to the need to restore self-governance and human rights to Kosovo. However, the systematic suppression of the population of that territory and its literal disenfranchisement from all aspects of public life was allowed to continue for seven years. It was only with the initially limited campaign of the KLA that the issue once again entered the European consciousness, given the risk of regional destabilization which it was thought might flow from a radicalization of Albanians in Kosovo, and also in neighbouring states.

The FRY/Serb military campaign to engage the KLA appeared to target civilian concentrations indiscriminately and was somewhat reminiscent of ethnic cleansing in Bosnia and Herzegovina, although there were, at least initially, few mass killings of civilians. The massive displacement which resulted from this campaign was answered through Chapter VII Security Council demands and non-military enforcement measures. In particular, the Council required a cessation of repression, a withdrawal of the bulk of FRY/Serb forces and the negotiation of a political settlement within a short time-frame. That

settlement, it was indicated, should not conflict with the doctrine of territorial unity.

Over the summer of 1988, attempts were made to lay the groundwork for shuttle diplomacy in preparation for a political settlement which turned into the Hill process. The Hill initiative wavered between seeking to establish an interim agreement which would leave the status of Kosovo in some way unaddressed, and one which would formally subordinate it to the territorial unity of the FRY. Throughout the second half of 1998, it did not appear to offer a realistic chance of obtaining a settlement, even for the interim.

Of course, the use of force for humanitarian purposes should have been triggered exclusively by humanitarian considerations. However, until the Rambouillet agreement had been established, NATO was very reluctant to use force. It was feared that such an action might be used to consolidate Kosovo's claim to independence. Hence, no action was taken when the civilian population was under direct threat throughout the summer of 1998. Even when the humanitarian situation became intolerable, NATO chose to settle for a somewhat dubious arrangement negotiated by Richard Holbrooke, which sought to reign in the excesses of FRY/Serb forces, lead to a withdrawal of some of them and to permit international monitoring on the ground and from the air. This arrangement was never fully implemented, despite the fact that NATO threats of air strikes remained in place.

When hostilities were re-ignited in December 1998 and January 1999, and in the light of the Racak massacre of ethnic Albanians, the Contact Group took the decisive step of insisting on the adoption of an interim political settlement, within a period of just a few weeks.

In terms of substance, the Rambouillet settlement represents a further step in the development of innovative mechanisms to address, if not resolve, self-determination conflicts. In fact, it combines within it, and advances upon, some of the elements pioneered in innovative responses to other crises that may have appeared unresolvable. The Dayton settlement provided for the retention of the territorial unity of a state (Bosnia and Herzegovina) which had come under unbearable pressure as a result of armed strife, while at the same time granting very substantive powers of self-governance to the entity that needed to be contained within it (Srpska). The Good Friday agreement for Northern Ireland and the Accords on Palestine introduced the concept of the allocation of authority at differing levels of governance, without necessarily prejudicing questions of legal status. Discussions over Eritrea and Chechnya introduced the notion of an interim agreement pending an exercise of the will of the people. In drawing upon these previous initiatives, the Kosovo agreement avoided the need to reconcile propositions which are essentially irreconcilable (self-determination *vs* territorial unity) and instead focused on more or less pragmatic solution for the interim. It must be admitted, however, that the separate structures of administration established for ethnic groups will likely strain the civil implementation of the agreement, should it ever come to implementation.

The acceptance of an interim status and of at times not fully satisfactory provisions for self-governance for Kosovo was balanced by the promise of NATO-led implementation through a force of some 30,000. The proposed removal of control over the operation from the UN or the OSCE reflected the desire to draw lessons from the experience of the UN protected areas in Croatia and from UN operations in Bosnia and Herzegovina, both in terms of the reliance that could be placed on FRY/Serb promises of compliance and in terms of the effectiveness of UN led implementation.

In terms of process, the Rambouillet conference on Kosovo represented a significant departure in international mediation. The presence of the parties at the talks had been ensured through the threat of the use of force by NATO. Acceptance of the political interim settlement on the basis of non-negotiable principles which contained difficult elements for both parties was to be obtained, if necessary, through the threat or use of force. The implementation of the agreement was to be assured through the presence of a 30,000 strong NATO force, in addition to a sizeable OSCE element. Acceptance of this presence, too, was to be obtained through the threat of the use of force, if necessary. At the time of the conference, there existed no express UN Security Council mandate for the threat or use of force in relation to the parties. Instead, NATO had to rely on the justification of forcible humanitarian action in general international law to justify its posture.

Despite the emphasis on coercion of the parties, the actual proximity talks that were conducted at Rambouillet were rather odd in several respects. The initial draft for a political settlement that was presented to the parties allowed the delegation of Kosovo to accept it in principle and to engage in constructive negotiations about its practical implementation. The FRY delegation abstained almost entirely from constructive participation in the negotiating process, but was rewarded, a few days before the scheduled conclusion of the conference, with a draft text which had been substantially revised in its favour. There then followed an intensive period of talks between the international negotiators and the FRY/Serb delegation, resulting in further changes of the text to the detriment of the position of Kosovo. The argument put by the FRY/Serb delegation that there was no full process of negotiations on the political element of the settlement is therefore not well founded. To the contrary, if anything, there may have existed an imbalance in favour of that delegation.

When it became apparent that the delegation of Kosovo might not be in a position to agree to sign the text, the focus of attention shifted sharply and significant efforts were made by the United States to meet some of its fundamental concerns which had been ignored from the very outset of the negotiations. However, initially even the direct intervention of US Secretary of State Albright, sustained over some three days, could not persuade one single member of the Kosovo delegation to join the otherwise existing consensus on signature.

Throughout the talks, significant rifts in the Contact Group were visible, relating to the political settlement, to the implementation force and to the threat

or use of force as a tool of achieving a settlement. These divisions became more pronounced towards the conclusion of the conference, when a collapse of the talks appeared likely. In fact, one might say that towards the end, the talks were less about Kosovo and more about relations within the Contact Group. In consequence, the credibility of the negotiations somewhat suffered. There were deadlines for a final acceptance of a definite text which were not insisted upon. The non-negotiable principles appeared to be subject to discussion, at least in relation to one delegation. Doubts arose as to the commitment of the Contact Group to the concept of NATO-led implementation. And one negotiator appeared almost in the way of a representative of a particular party to the talks.

Despite these uncertainties, the delegation of Kosovo voted by a majority to accept the overall text of the agreement, as presented on the final day of the conference. Given the failure to achieve consensus, however, it required a period of three weeks to consult the people of Kosovo and their political and military institutions before signature. The FRY/Serb delegation noted that major progress had been achieved and offered to participate in a further round of talks.

At the Paris follow-on talks, the attempt of the FRY/Serbia to undo the package of Rambouillet was rebuffed. Instead, Kosovo signed the agreements, exposing the FRY to be held 'accountable' for its obstruction of progress and for the renewed military campaign it had unleashed in Kosovo through NATO air-strikes. The connection of the legal justification of humanitarian action with the aim of achieving FRY/Serb acceptance of the Rambouillet package in its entirety, if it is maintained, would represent an innovative but justifiable extension of international law.