Chaillot Paper

December 2008

n°114

Negotiating the final status of Kosovo

Marc Weller

Institute for Security Studies
Institut d'études de Sécurité
European Union
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*The author has chosen to use the term Macedonia throughout this text.
European Union usage is FYROM.

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ISSN 1017-7566
ISBN 978-92-9198-132-8
Published by the EU Institute for Security Studies and printed in Condé-sur-Noireau (France) by Corlet Imprimeur. Graphic design by Claire Mabille (Paris).

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Foreword

This *Chaillot Paper* by Marc Weller deals with a very important question for the Common Foreign and Security Policy (CFSP) of the European Union: the long and extraordinary political process that led to Kosovo's declaration of independence. I am convinced that Mark Weller's cogently argued paper is a significant contribution to the ongoing debate within the European Union on the recognition of independence, at a moment when all Member States have agreed to deploy the largest EU civilian mission so far, EULEX, in Kosovo. This *Chaillot Paper* also looks to the future and emphasises the importance of the protection of minority rights. In fact, just as in the past, the challenge is to defend diversity throughout the continent against all forms of extremism, and to act so that democracy in Europe becomes uniformly consolidated through EU enlargement to the Balkans. If this goal is achieved satisfactorily, then there is no reason why in the near future Kosovars and Serbs should not resolve any remaining differences and happily coexist within the Union – one of whose most laudable strengths, it should not be forgotten, is its role in exorcising the demons of nationalism that haunted Europe for so long. All of these are good reasons for paying serious attention to the content of this paper.

Álvaro de Vasconcelos
Paris, December 2008

Acknowledgements

The views expressed in this *Chaillot Paper* are the author's own and are not attributable to any government or institution. This paper is based on a forthcoming book on the Kosovo crisis since 1998, entitled *Contested Statehood: Kosovo's Struggle for Independence* (Oxford University Press). The author acknowledges the valuable assistance provided by Ms. Katherine Nobbs, Mr. William McKinney and Mr. Adrian Zeqiri of ECMI.

Introduction

When two express trains race towards one another on a single-track line, there is not much room for compromise. Either one side gives up and selects reverse gear in a hurry, or there is an almighty crash. This is how self-determination conflicts outside of the colonial context have traditionally been resolved. The secessionist entity either renounces its claim to independence, or a violent conflict ensues. The conflict will continue, often for decades, until those invoking the right to self-determination have been crushed or have given up.

In the past, it has nearly always been the central state that has emerged victorious from these violent contests. The one exception is Bangladesh, which seceded from Pakistan in the wake of an armed invasion mounted by India, purportedly also for humanitarian purposes. Given the humanitarian dimension and India's elevated position among the neutral and non-aligned states at the time, the international protest sparked by that episode ebbed away fairly rapidly and Bangladesh attained widespread recognition. But otherwise, international actors have tended to steer clear of involvement, waiting until the attempt at secession could be forcibly terminated.

Consider, for instance, the case of Biafra. That clearly defined territory was inhabited almost exclusively by one ethnic group (the Ibo) that sought secession as a way of gaining freedom from what was regarded as the dominance of the central authorities of Nigeria. The organised international community stood by as the Nigerian armed forces crushed the secession in a very bloody conflict, triggering a massive humanitarian crisis and great suffering among a starving civilian population. Only after the violence ended did the United Nations launch a significant humanitarian relief operation. Another example is furnished by Katanga. A United Nations peacekeeping force was used (admittedly under somewhat nebulous circumstances) to defeat the secession of that mineral-rich province from recently independent Congo in the early 1960s.

Even after the Cold War ended, this pattern of practice remained in place. Despite its own pledges relating to future independence made in 1996/7, Russia was allowed to reincorporate Chechnya by force some three years later.[1] While the European Union and other international actors protested against human rights violations perpetrated by the Russian armed forces, the incorporation itself was not challenged.[2]

The organised international community struggled hard to explain why the dissolution of the USSR and of the Yugoslav Federation did not amount to a broadening of the circumstances of application of the right of peoples to self-determination at the expense of the doctrine of territorial unity.[3] For the right to self-determination is a very potent one. It legally privileges a defined population by giving it a status separate from the state from which it wishes to secede, allowing it to mount even an armed self-determination struggle with international support if necessary. In short, the international system is skewed in favour of self-determination struggles, but only if the narrowly conceived right to self-determination applies. And herein lies the rub for ethnic and other groups aspiring towards independence in the deserts, jungles and other places around the globe. As the right to self-determination, in the sense of secession, has been defined by governments, they have ensured that it cannot be applied against them.[4] Hence, it can only be invoked in the narrowly conceived circumstances of classical colonialism and closely analogous cases.[5] However, such situations have all but disappeared from the contemporary international system. Accordingly, virtually all groups seeking secession find themselves trapped within the doctrine of territorial unity – a doctrine that heavily privileges central governments resisting secession.

The demise of the Soviet Union was explained as falling outside of the confines of this doctrine. It was not a secession, but a case of the voluntary dissolution of a composite state. This, of course, did not quite explain the position of the Baltic republics that considered themselves independent before the dissolution of the USSR. However, this fact receded into the background when, after the abortive coup against President Gorbachev, the entire USSR fell apart in September 1991. Its constituent units, in the end, agreed unanimously to the termination of the Union in the Alma-Ata Declaration of 21 December 1991.[6] Moreover, the USSR constitu-

1. These were a ceasefire agreement of 27 May 1996, the two Nazran Protocols of 10 June 1996, the Khasavyurt Agreement of 31 August 1997 and the 'Peace Treaty' of 12 May 1997.

2. This position was consistent with its earlier emphasis on limiting violence and human rights abuses while supporting the reincorporation of Chechnya, e.g., EPC declaration of 16 January 1996: 'It calls for a peaceful settlement to the conflict which respects the territorial integrity of the Russian Federation.'

3. See Marc Weller, 'The international response to the dissolution of the Socialist Federal Republic of Yugoslavia', *American Journal of International Law*, vol. 86, no. 5, July 1992, p. 569.

4. See Marc Weller, 'Why the legal rules on self-determination do not resolve self-determination disputes', in Marc Weller and Barbara Metzger (eds.), *Settling Self-determination Conflicts* (Dordrecht: Martinus Nijhoff, 2008), pp. 17-47.

5. The term 'colonies', in this sense, applies only to territories forcibly acquired during the period of imperialism by a distant metropolitan power, from which they are racially distinct and divided by an ocean, for the purposes of economic exploitation. To those covered by this definition the cases of Palestine, South Africa and secondary colonies (Western Sahara, Eastern Timor) were subsequently added.

6. Alma-Ata Declaration, Letter dated 27 December 1991 from the Permanent Representative of Belarus to the United Nations addressed to the Secretary-General, 30 December 1991, UN Doc. S/23329, Annex II.

tion had contained a notional right of the constituent republics to secede. Accordingly, it was argued that this was not a precedent of general application of self-determination in international law, but merely a constitutional particularity. This argument was also made in relation to the former Yugoslavia. The 1974 constitution of the Socialist Federal Republic of Yugoslavia (SFRY) contained a reference to the right to self-determination, appertaining to the nations of Yugoslavia and hence, arguably, to the republics. According to Marxist Leninist doctrine, the Serbs, Croats, Slovenes, Macedonians, Bosnians and Montenegrins were 'nations', given that there was no external kin state or ethnic homeland. Accordingly, they were entitled to their own titular republic and a possible right to self-determination in relation to the Federation.

Below the level of the 'nations' there were the nationalities. These were very sizeable populations that, according to this theory, would not need to have their own republic as they had the benefit of the existence of an ethnic kin state. This applied to the ethnic Hungarians of the Vojvodina, and the ethnic Albanians of Kosovo. Hence, Yugoslavia was composed of six republics (Serbia, Montenegro, Croatia, Slovenia, Macedonia, and Bosnia and Herzegovina) and the two autonomous provinces of Vojvodina and Kosovo. According to the 1974 constitution, the latter two enjoyed a dual status.[7] On the one hand, they were full federal subjects, just like the republics. They were equally represented in the Federal Presidency and enjoyed the full powers of self-governance appertaining to the republics, including even their own central bank. On the other hand, as autonomous provinces, they were also subordinated to the Serb Republic.

When four of the six constituent republics of the SFRY demanded independence in 1991, the EU took the view that the entire Federation was in the process of dissolution.[8] Hence, this was not really a case of secession that required the application of the doctrine of self-determination. Instead of being a matter of law, it was a matter of fact. The majority of the constituent units of the SFRY had left the Federation. Hence, the state as a whole had dissolved. The rump Yugoslavia, then consisting of Serbia and Montenegro, was treated as a new state, just like the other four entities that emerged. Moreover, should the dissolution theory be regarded as flawed, as dissolution only occurred after there had

7. Constitution of the Socialist Federal Republic of Yugoslavia, 1974, in Marc Weller, *The Crisis in Kosovo 1989-1990* (Cambridge: Documents and Analysis Publishing, 1999), pp. 54-56.

8. Badinter Arbitration Committee, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Determination of Peoples', Opinion no. 1, 29 November 1991. Available at: http://207.57.19.226/journal/Vol3/No1/art13.html.

been an initial secession of just two constituent republics (Croatia and Slovenia), one might still argue that this was a unique case. After all, the SFRY constitution had assigned to the republics a right to self-determination of sorts.

Both of these arguments aimed to explain the existence of the new Yugoslav states against the consent of the central authorities in Belgrade, without having to rely on the general right to self-determination outside of the colonial context. Having adopted this line, the EU Member States and other international actors were now committed to the maintenance of the territorial unity of the Yugoslav successor states. With the exception of Montenegro, which had not yet exercised its rights flowing from the dissolution of the SFRY, no other cases of 'secession from secession' could be countenanced without further jeopardising the doctrine of territorial unity. Accordingly, Bosnia and Herzegovina had to stay together under the umbrella of the 1995 Dayton Agreement that was pressed upon the parties.[9] The agreement was implemented under cover of a sizeable NATO-led force to help keep the country in existence and was guaranteed by the United Nations Security Council.

Similarly, Serb communities in Eastern Slavonia and the Krajina could not proclaim their own state or join Serbia. Instead, the UN administered the transfer of the former back to Croatia while Zagreb forcibly reincorporated the latter. Despite the mass exodus of ethnic Serbs produced by 'Operation Storm' in the Krajina region, there was little international condemnation of the action in principle, given its consistency with the principle of the maintenance of the territorial unity in relation to Croatia.

The reluctant majority parties in Macedonia had to accept a US/EU-brokered power-sharing deal with the ethnic Albanians in their state.[10] The authorities in Skopje were forced into this settlement in order to ensure the continued territorial unity of the state in the wake of an ethnic Albanian armed campaign of 2001. The deal was, again, guaranteed through NATO involvement.

In short, the elements of the organised international community most involved in the Yugoslav crisis, from the UN Security Council to NATO and the US government and the EU, were all very strongly committed to the maintenance of the territorial *status quo* at the level of former Yugoslav republics, including Serbia.

9. The General Framework Agreement for Peace in Bosnia and Herzegovina ('Dayton Peace Agreement'), 14 December 1995. Full text available at: http://www.ohr.int/dpa/default.asp?content_id=379 (last accessed 15 July 2008.).

10. Framework ('Ohrid') Agreement, 13 August 2001. Full text available at http://www.venice.coe.int/docs/2001/CDL(2001)104-e.asp (last accessed 15 July 2008).

This attitude was fully in accordance with hitherto unshakeable structural principles of the international system itself. These principles would ordinarily rule out unilateral secession against the wishes of a central government. Nevertheless, Serbia managed to lose Kosovo, a territory apparently clearly encompassed by its territorial sovereignty. This loss was administered by the very agencies and governments that had committed themselves so strongly to the principle of territorial unity. This *Chaillot Paper* investigates how this extraordinary process could have developed.

1

Initial negotiations

Kosovo is a territory inhabited by some two million people. 90 percent of the population are ethnic Albanian, some 7 percent are ethnic Serbs and the remainder include Roma, Ashkali, Egyptian, Bosniak, Turk, Gorani and other minorities. While Serbia stakes a claim to it as the cradle of its own history, ethnic Albanians have been struggling to assert their identity in the territory for some decades. The autonomy of the territory was strengthened significantly in the 1974 SFRY constitution. However, after the death of Tito, Serbia under Slobodan Milosevic started to exert increasing influence throughout the Federation as a whole. One of the first steps in this process was the virtual abolition of Kosovo's autonomy and the appointment of executive authorities for the territory from Belgrade. This move confirmed the suspicions of Croatia and Slovenia that Serbia would attempt to take over the Federation as a whole. Initially, both republics were willing to re-negotiate the federal constitution for Yugoslavia with a view to retrenching and enhancing their own powers in the face of pressure from Belgrade. When such negotiations proved impossible, both republics declared independence on 25/26 June 1991.

The states of the European Community responded to the crisis, and to the first wave of fighting that erupted in Croatia, by calling an international peace conference led by Lord Carrington. The conference was meant 'to ensure peaceful accommodation of the conflicting aspirations of the Yugoslav peoples' and 'full account [was] to be taken of all legitimate concerns and aspirations'.[11] In fact, from as early as August 1991, only six weeks after the declarations of independence, the then European Community (EC) states had confirmed the separate international legal status of the secessionist republics in demanding that Belgrade respect their 'territorial integrity'.[12] From that point onwards, it was clear that the genie of independence for the Yugoslav republics could hardly be put back into the bottle. Instead, an initial Carrington draft for a settlement provided for the option of (agreed) independence for

11. European Political Cooperation (EPC) Declaration on Yugoslavia, Extraordinary Ministerial Meeting, The Hague, 3 September 1999, EPC Press Release P.84/91.

12. EPC Declaration of 27 August, Extraordinary Ministerial Meeting, Brussels, 27 August 1991, EPC Press Release P.82/91.

those republics that wished it. In exchange for agreed independence, republics achieving that status would consent to autonomy for ethnic Serbs living in their territories and significant other guarantees for minority populations.[13] This approach, it was hoped, would allay Belgrade's concerns about ethnic Serbs who would now find themselves as enclaves marooned within the newly independent states. While all other participants in the conference were ready to endorse the settlement, Serbia refused it.

In order to avoid a Serb veto over the conference process, the European states adopted a new approach. They offered unilateral recognition to those republics that committed themselves to the key principles of the Carrington proposals, even in the absence of an agreement by all parties.[14] In this way, all legitimate concerns, including those of Serbia, would be addressed in the event that no accord was reached.

The Carrington process had excluded Kosovo. Milosevic had made it very clear from the beginning that the difficult and highly sensitive subject of Kosovo would need to be off the agenda if Serbia was to participate in the process. Instead, the second Carrington draft settlement noted that the republics would also apply 'fully and in good faith established provisions for the benefit of ethnic and national groups, and for autonomous provinces which were given a special constitutional status'.[15] Presumably, this was meant to refer to the re-establishment of the full status of autonomy that Kosovo had enjoyed before 1988. However, Serbia might also have argued that it was merely required to apply 'fully and in good faith' the provisions that were in force at that time, following the unilateral abrogation of Kosovo's status.

Whatever the possible interpretations of this proposal, it was unacceptable to Kosovo. Kosovo argued that, if its autonomy could simply be annulled within the elaborate federal system of checks and balances of a six-republic SFRY under the 1974 constitution, its position would be far worse within the rump Yugoslavia composed only of Serbia and its then compliant ally Montenegro. A simple restoration of its previous autonomy would not be sufficient. Instead, there were some suggestions that Kosovo would accept a constitutional arrangement for the creation of three federal republics (Serbia, Montenegro and Kosovo) within a new Yugoslav Federation. However, this proposal was not seriously explored, given the focus of the EC conference on the other aspects of the crisis. No settlement being in sight, Kosovo, along with

13. 'Carrington Draft for a Settlement', 18 October 1991, in Marc Weller, op. cit. in note 7, p. 80.

14. 'EPC Guidelines on the Recognition of New States', 16 December 1991, Press Release P.128/91; and 'EPC Declaration on Yugoslavia', 16 December 1991, EPC Press Release P.91/465, both in Weller, op. cit. in note 7, pp. 80-1.

15. Second Carrington Draft, 1 November 1991, in ibid, p. 80.

Croatia, Slovenia, Macedonia and Bosnia and Herzegovina, applied to the EC states for recognition.[16] Needless to say, Kosovo's request was ignored.

Another attempt to engage was made in August 1992, at the London Conference on Yugoslavia. By that time, all republics bar Montenegro had obtained independence, leaving in place only the 'rump' Yugoslavia composed of that republic and Serbia. The conflict in Bosnia had erupted with full force, occupying the attention of the delegations present. Kosovo was not entirely forgotten, though. Dr. Ibrahim Rugova, who had been appointed President of Kosovo after an overwhelming victory in unofficial, parallel elections, received a letter that must be unique in diplomatic history. He was informed that it had been agreed that representatives of 'communities not formally represented at the London conference' would nevertheless be welcome to express their views within the overall framework of the conference:

> 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 Queen Elizabeth II Conference Centre for meetings ... As it will not, for practical and other reasons, be possible to grant our 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.[17]

This letter avoided issuing an invitation, while claiming to reflect 'strenuous efforts to ensure that the views of the Kosovar Albanians are heard'.[18] This somewhat schizophrenic approach reflected the sense on the part of the negotiators that, somehow, the Kosovo issue would need to be addressed. On the other hand, in view of Belgrade's position on the issue, they did not really wish to insist on it.

Kosovo did attend the meeting from what became known as its 'echo chamber', offering television pictures of the proceedings. Occasionally Lord Carrington and other dignitaries visited the room, listening rather haughtily to the pleas of Dr. Rugova and his delegation. However, there was no substantive engagement with the Kosovo issue. Instead, that problem was referred to a follow-on phase of negotiations held mainly in Geneva. That abortive process included a 'Special Group' under the chairmanship of German Ambassador Geert Ahrens.[19] The Group did not really

16. Letter from Dr. Ibrahim Rugova to Lord Carrington, 22 December 1991, in Weller, *Kosovo*, op. cit. in note 7, p. 81.

17. Letter from Lord Carrington to Dr. I. Rugova, 17 August 1992, in ibid, p. 86.

18. Ibid.

19. Geert-Hinrich Ahrens, *Diplomacy on the Edge: Containment of Ethnic Conflict and the Minorities Working Group of the Conferences on Yugoslavia* (Baltimore, MD: Johns Hopkins University Press, 2007), pp. 333-77.

engage with the Kosovo status issues, but instead occupied itself for the most part with fruitless talks about re-establishing a public education system in Kosovo.[20]

The next opportunity to address the Kosovo issue came in 1995. Pristina politicians, under pressure from their constituencies to abandon the policy of peaceful resistance they had pursued hitherto, had received assurances that the series of Yugoslav conflicts would not be settled without also addressing Kosovo. The Dayton settlement on Bosnia of December 1995 appeared to constitute that final settlement. However, Slobodan Milosevic, who attended on behalf of the Serb entity in Bosnia and Herzegovina, had again excluded any discussion of the subject. The lack of any significant mention of Kosovo in this context led to a loss of public confidence in the leadership of Dr. Rugova and his moderate Democratic League of Kosovo (LDK) party. Instead of peaceful resistance, an armed campaign was launched by the Kosovo Liberation Army (KLA), which was to bring the Kosovo issue to the centre stage of international diplomacy.

By 1988, the armed campaign of Serb military and paramilitary forces in Kosovo against the KLA had led to major displacement of civilians. In March of that year, the Security Council finally adopted a resolution on the situation under enforcement Chapter VII of the UN Charter. The very first operative paragraph of the resolution called upon 'the Federal Republic of Yugoslavia immediately to take the further necessary steps to achieve a political solution to the issue of Kosovo through dialogue ...'[21]

Over the summer of that year, a delegation led by US Ambassador Christopher Hill attempted to generate a settlement for Kosovo. The various drafts proposed by the Hill mission foresaw an enhanced autonomy for Kosovo, balanced by extensive provisions for separate self-administration of the ethnic Serb community in Kosovo, plus blocking powers for that community in the Kosovo Assembly and other bodies. Moreover, the basic unit of self-governance in the territory would not have been Kosovo itself, but the local municipalities. The legal personality of Kosovo would therefore have been highly diluted.

In the meantime, NATO had threatened the use of force against FRY/Serbia, which was narrowly averted when Belgrade appeared to have agreed to many of the demands made by the UN Security Council.[22] The resulting Holbrooke Agreement of October 1988, providing for a ceasefire, a scaling back of Serb military

20. Report of the UN Secretary-General, 'Recent Activities of the Working Groups', 30 March 1993, UN Doc. S/25490, 30 March 1993, paras. 17-20. In the end, the St. Eugidio Community mediated an Education Agreement in September 1996, which remained unimplemented. A further agreement on education was signed by Slobodan Milosevic and Dr. Rugova in March 1998, when armed conflict had already erupted.

21. Security Council Resolution 1160 (1998), para. 1.

22. Ibid, and Security Council Resolution 1199 (1998).

and paramilitary troops and the deployment of unarmed OSCE 'verifiers', should have led to an acceleration of the Hill process. Indeed, the agreement foresaw the completion of a political settlement by early November, based on principles Belgrade had declared to be acceptable. Instead, however, the process stalled when fighting broke out again in Kosovo before the end of the year. Moreover, a third version of the Hill plan, introduced on 2 December, was opposed by Kosovo, as it expressly provided for powers for Serbia, rather than for the rump Federation, in relation to Kosovo. Previous versions had carefully avoided the issue of Serb (rather than federal) sovereignty and powers. Indeed, it appeared as if this draft settlement reflected the commitments made during contacts between Richard Holbrooke and President Milosevic in October, rather than a balanced outcome of the shuttle diplomacy that had taken place over many months.

The main elements of the Hill plan served as the basis for the discussions at Rambouillet that were to follow. That conference, convened under the threat of the use of force by NATO, produced a political settlement that appeared, at one stage, acceptable to both sides.[23] However, in the end it was accepted by the Kosovo delegation and rejected by Belgrade. Like the Hill drafts, it was an interim settlement, intended to run for a period of at least three years. It would have offered significant powers of self-administration to Kosovo while offering extensive provisions for the benefit of ethnic Serbs living in the territory. Painfully for the Kosovars, the settlement also recalled the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the Helsinki Final Act – the latter generally being taken as a reference to the doctrine of territorial integrity and unity. On the other hand, the agreement also held out the prospect of a final status settlement, *inter alia*, 'on the basis of the will of the people'.[24]

The conflict that ensued upon the termination of negotiations was a particularly brutal one. Hundreds of thousands of ethnic Albanians were forcibly displaced in a systematic operation of ethnic cleansing, in which buses and even cattle wagons were used in practices reminiscent of deportations in Nazi Germany, provoking widespread shock and revulsion throughout Europe. The displaced were dumped on the other side of the borders to Albania and Macedonia, thereby risking significant destablilisation of both states that were overwhelmed with the influx of refugees.

23. 'Interim Agreement for Peace and Self-government in Kosovo, 23 February 1999', in Weller, *Kosovo*, op. cit. in note 7, pp. 453-69.

24. Ibid., Chapter 8, Article I(3), pp.453-69, p. 469.

They were deprived of identity documents and even cars were stripped of their registration plates, as there was no expectation of their return. Initial estimates were that some 10,000 Kosovars had been killed during this campaign of violent displacement. While this assessment was later reduced to around 5,000 to 8,000, mass graves of Kosovars murdered during the campaign were discovered upon the termination of the conflict. It was clear that Kosovo was meant to be brutally cleansed once and for all of its ethnic Albanian majority under cover of the NATO aerial campaign.[25]

The NATO armed action against the Federal Republic of Yugoslavia (FRY) was terminated in conjunction with the adoption of UN Security Council Resolution 1244 (1999) of 10 June 1999. That resolution provided the basis for a period of international administration of the territory according to a Chapter VII mandate. The UN interim administration for Kosovo was rapidly established. In its Regulation No. 1999/1 of 25 July 1999, it established as 'the authority' of the administration that:

> All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the [UN] Secretary-General.

During the period of international administration, three phases relating to constitution-making occurred. During the initial phase, the UN presence claimed full and undiluted authority for itself. This was soon replaced by a Joint Interim Administrative Structure. Essentially, governance was shared between UN officials who headed ministries jointly with local appointees. Finally, a formal constitutional framework was adopted in 2001.[26] That document, which was mainly generated by international officials with only limited local input, transferred significant powers to local authorities while retaining 'reserved powers' relating to sensitive areas such as policing and justice for the international mission. Some of the provisions of the framework document governing what could be described as supervised autonomy were to be reflected in the Ahtisaari document and, consequently, in Kosovo's post-independence constitution of supervised independence.

25. See the relevant international agency reports reproduced in Marc Weller, *The Kosovo Conflict: Forced Displacement, the Conduct and Termination of Hostilities and the Renewed Search for a Settlement* (Cambridge: Documents and Analysis Publishing, 2001), pp. 71-320.

26. Constitutional Framework for Provisional Self-government in Kosovo, UNMIK Regulation 2001/9, 10 June 1999. Available at http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf (last accessed 15 July 2008).

2

Moving towards final status negotiations

With Kosovo under international administration, a general sense prevailed among international actors that the status issue would be best left untouched for as long as possible. Time might heal the wounds of history and memories of the 1999 conflict. As has already been noted, during that conflict, the Belgrade authorities had caused the forcible displacement or expulsion from Kosovo of over half of its ethnic Albanian population.[27] Among the thousands of Kosovars murdered during the campaign of ethnic cleansing was one of Pristina's lead negotiators at Rambouillet, the moderate and gentlemanly Professor Fehmi Agani. When the Serb forces finally withdrew, ethnic Serbs were terrorised in turn and over 100,000 fled to southern Serbia.[28] Those who remained were placed under NATO protection in heavily guarded enclaves.

A delay in status talks also seemed convenient for other reasons. It was clear that the majority population of Kosovo would not accept any deal short of independence. However, if independence was to ensue, this might have unhelpful consequences for Bosnia and Herzegovina; its mainly ethnic Serb Republika Srpska might claim independence too. A comparison might be made with the two Georgian breakaway regions of Abkhazia and South Ossetia, where an analogous situation prevailed. These two regions had existed as quasi-independent states, under the protection of Russian-led 'peacekeepers', since the 1992-3 separatist wars, and Russia has recognised their independence in the wake of the August 2008 war. A similar situation existed in relation to Moldova's territory of Transnistria. That area, too, harboured secessionist aspirations and had been placed under effective Russian military protection under the guise of a peacekeeping presence.

While these may have been legitimate concerns in the eyes of international crisis managers, they were of little relevance to the population of Kosovo. The period of the ineffective and increasingly unpopular international administration appeared to stretch on endlessly.

27. See footnote 25.

28. Belgrade figures at times refer to 280, 000 Serbs who left. However, this would be a figure larger than the number of ethnic Serbs originally resident in Kosovo. Moreover, it is generally agreed that around 100,000 remained within Kosovo.

The Rambouillet Agreement had foreseen discussions on a mechanism to address status by early 2002. In April of that year, the UN Secretary-General reported to the Security Council that he had asked his Special Representative to develop benchmarks against which progress could be measured in Kosovo.[29] Introducing the report to the Council, the Special Representative, Mr. Michael Steiner, claimed that significant advances had occurred in Kosovo, arguing that it had entered a new phase. Referring to an 'exit strategy' for the Security Council, he added: 'The road is not endless. We have a vision of how to finish our job'.[30] Mr. Steiner noted that the United Nations Mission in Kosovo (UNMIK) was now transferring responsibilities to the local institutions in the process of building substantial autonomy. This would mean moving closer to the beginning of the political process designed to determine Kosovo's future status. However, he also noted that the time for this had not yet come:

> Kosovo society and institutions will have to show that they are ready for this process – without prejudicing the outcome. We must make clear what is expected of them. Therefore, I am embarking on a benchmarks process. These benchmarks should be achieved before launching a discussion on status, in accordance with resolution 1244 (1999).[31]

The benchmark areas were drawn from the coalition agreement of the Kosovo parties that had been brokered by UNMIK after the recent elections in the territory. They related to:

- Existence of effective, representative and functioning institutions;
- Reinforcement of the rule of law;
- Freedom of movement for all;
- Respect for the right of all Kosovans to remain and return;
- Development of a sound basis for a market economy;
- Clarity of property title;
- Normalised dialogue with Belgrade;
- Reduction and transformation of the Kosovo Protection Corps in line with its mandate.

The Security Council endorsed this proposal that became known as the 'standards before status' policy.[32] However, it took until December 2003 for the eight standards to be developed and presented jointly by UNMIK and the provisional institutions of self-government in Kosovo (PISK). The standards were then still

29. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2002/436, 22 April 2002.

30. Provisional Report of the 4518th Meeting of the UN Security Council, UN Doc. S/PV.4518, 24 April 2002, p. 3.

31. Ibid., p. 4.

32. Statement by the President of the Security Council, UN doc. PRST/2002/11, 24 April 2002; also S/PRST/2003/1, 6 February 2003, where the terminology of Standards before Status was formally adopted.

put forward in a relatively compact form. Each of the each issue areas was presented in relation to two or three more specific items which in turn were developed into particular requirements in bullet point form. By March 2004, however, the UNMIK bureaucracy had taken hold of the process. It had developed a Kosovo Standards Implementation Plan ranging over some 117 pages and covering so many items that they could only be listed in the form of highly complex tables.[33]

It was foreseen that a status review process would commence concurrently with standards implementation. Such a review mechanism was formally endorsed by the Council on 12 December 2003, two days after the standards had been presented.[34] The international administration would assess periodically to what extent standards had been met, with a view to recommending whether or not the time was right for a commencement of status talks. There was also provision for a comprehensive review of performance. 'Reaffirming the "standards before status" policy, the Council stresses that further advancement towards a process to determine future status of Kosovo in accordance with resolution 1244 (1999) will depend on the positive outcome of this comprehensive review'. A 'first opportunity' for such a comprehensive review 'should occur around mid-2005'.

While the Kosovo authorities struggled mightily to develop even just a computer-based matrix in order to understand and track the demands of the massive UNMIK standard implementation plan, this effort was soon overtaken by events and the shifting priorities of international institutions.

In March 2004, violent riots erupted, triggered by an incident along the dividing line between Northern Kosovo (Mitrovica) and the rest of the territory. The North had remained under the control of a local majority of ethnic Serbs. The UN administration had been unable to establish a unified system of governance throughout Kosovo, leaving Mitrovica under a form of parallel administration steered from Belgrade. The riots were directed against ethnic Serbs and Serb religious and cultural monuments in many areas of Kosovo. They involved a spontaneous uprising of over 50,000 people, mobilised and guided via mobile phones.[35] This showed how rapidly the situation might escalate in the territory. The Kosovo population might not be willing to remain subject to the policy of standards before status forevermore and could easily opt for more direct action.

33. Kosovo Standards Implementation Plan, 31 March 2004. Available at: http://www.unmikonline.org/pub/misc/ksip_eng.pdf (last accessed 15 July 2008).

34. Statement by the President of the Security Council, UN Doc. S/PRST/2003/26, 12 December 2003.

35. OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, 'Human rights challenges following the March riots, 2004', p. 4.

In the wake of the March riots, elements of the standard implementation projects were accelerated, including rule-of-law and security issues. Moreover, in view of the instability and tension that had manifested itself in the riots, the UN Secretary-General launched a general review process of the Kosovo operation.[36] This process was led by Ambassador Kai Eide, the Permanent Representative of Norway to NATO.

Ambassador Eide presented an initial report in August of 2004, which was only published some three months afterwards, along with the Secretary-General's own recommendations for future steps.[37] The Eide report noted the depth of dissatisfaction of the majority population with the international administration and the vulnerability of the minority population. He found that the 'standards before status' policy lacked credibility and should be replaced by a 'priority-based and realistic standards policy'. Moreover, he predicted that the situation in Kosovo was likely to get worse rather than better. While there would never be an ideal time for moving on status, 'raising the future status question soon seems – on balance – to be the better option and is probably inevitable'. The UN should therefore initiate contacts with key government officials on this issue. In the meantime, the process of transferring power to the local actors should be accelerated. Further reviews of the performance of the Kosovo institutions should be conducted until mid-2005, when the comprehensive review that had been foreseen might open the way towards the initiation of status talks.

The UN Secretary-General consulted with governments, the OSCE and NATO before issuing his own recommendations, broadly in line with the Eide report.[38] However, his initial recommendations focused on strengthening the capacity of UNMIK and the responsibilities of the local Kosovo institutions, not on the possible status process itself. He merely added cautiously that 'progress in all these aspects is essential for the success and sustainability of any future status process, and only if progress is sufficient will it be possible to consider moving gradually into talks on the future status of Kosovo'. However, with the Eide report, the sense spread in Kosovo that by mid-2005 a comprehensive review of implementation of the simplified standards would pave the way for status discussions.

After the reconfiguration of the standards before status process had taken place, the UN Secretary-General did indeed

36. Report of the UN Secretary-General, UN Doc. S/2004/613, 30 July 2004.

37. Letter dated 17 November from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2004/932, 30 November 2004.

38. Ibid., Annex II.

request a further comprehensive assessment of the conditions in Kosovo, asking in particular whether 'the conditions are in place to enter into a political process to determine the future status of Kosovo, in accordance with Security Council Resolution 1244 (1999) and relevant Presidential statements'.[39]

On 7 October 2005, Ambassador Eide reported to the Security Council that the record of standards implementation was uneven, but that nevertheless the time had come to move on status. Ambassador Eide added:

> The future status process must be moved forward with caution. All the parties must be brought together – and kept together – throughout the status process. The end result must be stable and sustainable. Artificial deadlines should not be set. Once the process has started, it cannot be blocked and must be brought to a conclusion.[40]

This final observation was critical for the design of the status process. It seemed inevitable that final status would have to lead to some form of independence, or at least disguised independence for Kosovo. Such a result, however, would hardly be acceptable to Belgrade. Hence, there was already a sense at this early stage that a settlement could not, in the end, be 'blocked', if it was to come about at all. A process would therefore need to be devised that would offer every opportunity for an agreement, but that might, ultimately, lead to a settlement in the absence of Serbia's consent.

On 24 October, the Security Council authorised the commencement of the status process.[41] It strongly urged the Kosovo leadership to increase their efforts to ensure the implementation of standards. However, the policy of standards before status had now lost all credibility and, instead, an argument was made that Kosovo would want to comply with relevant standards in its likely future bid to seek Euro-Atlantic integration.

The Council supported the Secretary-General's intention to start a political process to determine Kosovo's future status, as foreseen in Security Council Resolution 1244 (1999). Reaffirming the framework of the resolution, the Council welcomed the appointment of the Special Envoy to lead the process. The Council also encouraged the Contact Group, composed of France, Germany, Italy, the Russian Federation, the UK and the US, to remain closely engaged in the political process 'that will be led by the United Nations', and to support the Secretary-General's Future Status Envoy.

39. Letter dated 7 October from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/635, 7 October 2005.

40. Ibid., Annex.

41. Statement by the President of the Security Council, UN Doc S/PRST/2005/51, 24 October 2005.

In agreement with the Council, the Secretary-General appointed Martti Ahtisaari, the former President of Finland who had helped negotiate the end of the NATO air campaign against Yugoslavia, as his Special Envoy for the Future Status Process for Kosovo.[42]

42. Ibid.; Letter dated 31 October from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/708, 10 November 2005; and Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2005/709, 10 November 2005.

Final status negotiations

3

The structure for the negotiations on Kosovo's final status was complex. As noted previously, the framework for the negotiations had been established by the UN Security Council, on the basis of the recommendations of Ambassador Eide and the UN Secretary-General. This framework was rooted in a general sense in Security Council Resolution 1244 (1999).

That resolution had reaffirmed the commitment of all Member States to the sovereignty and territorial integrity of the FRY and the other states of the region. Acting under Chapter VII of the UN Charter, the Security Council had authorised the establishment of an international civil and security presence in Kosovo, providing for an interim administration there by the UN, 'under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia'. Serbia, as the universal successor to the rights of the FRY (Serbia and Montenegro), would be able to invoke the provisions of Resolution 1244, including what might be perceived as a guarantee of its continued territorial integrity, to its benefit.[43]

However, the confirmation of the continued territorial unity of the FRY (now Serbia) in Resolution 1244 could be read in one of two ways. Either it applied to the interim period of UN administration or it applied beyond that, constraining options for a final status agreement on Kosovo. The resolution itself appeared to clarify that the UN mandate was concerned with 'promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo': in other words, that the focus on autonomy would be limited to the interim period ('pending a final settlement'). The resolution also mandated 'facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords'. The Rambouillet accords were interim agreements, preceding a final settlement to be adopted also on the basis of the 'will of the people'.[44] This would not rule out independence as a final settlement.

43. Serbia's universal succession was laid down in the Union Treaty with Montenegro, and the Constitutional Charter of the State Union, which stated in Article 60 that Belgrade would inherit the FRY's legal rights and duties should Montenegro exercise the option of secession, which it eventually did: 'Should Montenegro break away from the state union of Serbia and Montenegro, the international instruments pertaining to the Federal Republic of Yugoslavia, particularly UN SC Resolution 1244, would concern and apply in their entirety to Serbia as the successor.' The UN Security Council confirmed this arrangement in PRST/2003/1, 6 February 2003.

44. The Rambouillet accords (see Weller, *Kosovo*, op. cit. in note 7, p. 469) foresaw '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 . . .'.

Resolution 1244 also incorporated the statement by the chairman on the conclusion of the meeting of the G8 foreign ministers held at the Petersberg Centre on 6 May 1999. That statement, annexed to the resolution, foresaw 'a political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region'. Again, self-governance under the sovereignty and territorial integrity of Yugoslavia appeared to be guaranteed for the 'interim' period only. Annex 2 to the resolution, restating nine points accepted by the then FRY before the cessation of hostilities, contained a similar provision, adding that 'negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions'. Once more, it appeared that autonomous self-governance was linked to the period before final settlement.

Accordingly, it is at least possible to argue that the affirmation of the territorial unity and integrity of Yugoslavia in relation to Kosovo in Resolution 1244 related to the interim period of international governance, or Kosovo self-governance, pending a final settlement. This period, one might say, had been exhausted over some five years of internationally supervised self-governance under the provisional constitutional framework established in 2001. While substantial autonomy was prescribed for this interim period, the outcome of the final settlement was open. A final status settlement that included the option of independence was therefore not necessarily precluded by the terms of a Chapter VII resolution. Of course, Serbia continued to enjoy the protection of general international legal rules. As noted at the outset, international practice hitherto has certainly tended to favour the maintenance of territorial unity over the granting of independence.

While the Security Council had confirmed the leadership of the UN in the status process, in reality the Contact Group was to act as the controlling body for the negotiations and for the UN Special Envoy, Martti Ahtisaari. In this way, Russia gained and retained an immediate blocking power over the actual conduct of the negotiations, rather than just over the eventual outcome, at the level of the Security Council. This arrangement was intended to ensure that the results of the negotiations would be guaranteed

passage through the Security Council, given Russia's controlling involvement throughout.

However, much as had happened under its purported leadership during the Rambouillet negotiations, the Group itself was divided. While some of the major West European governments and the United States were coming to accept that independence for Kosovo might be inevitable, Russia consistently opposed any such notion. Moreover, Russia was not willing to countenance the possibility of a settlement being imposed by the UN Security Council upon Serbia, if Belgrade refused a reasonable agreement. This stance seemed to reduce the pressure on Belgrade.

The Contact Group issued ten 'guiding principles' for a settlement of the status of Kosovo. Essentially, these principles set the red lines that were to be imposed by the mediators in the negotiations. They concerned compliance with human rights, democratic values and principles of Euro-Atlantic integration; assurances that mechanisms would be provided to ensure that political participation remained available to all ethnic groups, including minority groups; provision for the return of refugees and the displaced; protection of cultural and religious heritage; regional stability and economic development; and the acceptance of continued international supervision of the implementation of the status package. It was also made clear that there would be no return to the situation that had prevailed in Kosovo preceding the NATO intervention. Moreover, the Contact Group added later that any settlement would need to be acceptable to the population of Kosovo – perhaps a reference to the possibility of a referendum on the results of the process. Of course, it was fairly clear that the Kosovo population would not accept any result other than independence. On the other hand, even Russia could not argue successfully that a settlement could be realistically adopted if it was rejected by its intended beneficiaries.

The guiding principles also stipulated that 'any solution that is unilateral or results from the use of force would be unacceptable. There will be no changes in the current territory of Kosovo, i.e., no partition of Kosovo and no union of Kosovo with any country or part of any country. The territorial integrity and internal stability of regional neighbours will be fully respected.' The remit for the negotiations therefore precluded any trading of territory for independence, for instance by offering a merger of the Mitrovica region with Serbia, perhaps compensated for by a transfer to

Kosovo of the mainly Albanian-inhabited Presevo Valley of Serbia. Similarly, the possibility of a Greater Albania, consisting of a merger of Kosovo with Albania and perhaps claims for the incorporation of territories in Macedonia inhabited by ethnic Albanians, was to be ruled out for the long term.

The format of discussions

While the Contact Group steered the negotiations, the process was nevertheless formally a UN venture. The UN Secretary-General appointed not only the Special Envoy, Martti Ahtisaari, but also his deputy, Albert Rohan of Austria, who directed the talks. The mediators were supported by a secretariat, the UN Office of the Special Envoy for the Future Status Process for Kosovo (UNOSEK). Housed on the top floor of a modest office building in the centre of Vienna, this body consisted of expert advisers drawn mainly from the foreign ministries of the Contact Group states and some other governments or organisations. It was noticeable that the core team of advisers appeared to be carefully balanced, giving the key Contact Group states a direct voice and representation in the process. The legal drafting work of the secretariat was also supported by very experienced legal advisers from other expert institutions, including in particular the OSCE High Commissioner on National Minorities and the Secretariat of the Council of Europe Venice Commission.

While the UNOSEK's accommodation facilities were modest, the mediation itself was conducted in some style. Building on the precedent of Rambouillet, the early rounds of the negotiations were conducted in splendid classical Viennese city palaces that were otherwise available for rent as venues for costume balls and similar entertainments. However, just as the follow-on process to the Rambouillet talks had been moved to a nondescript conference centre in Paris when impatience with the inability of the parties to come to an agreement reached a certain pitch, so, as time moved on, the Vienna talks migrated from the baroque glory of the city's most beautiful landmarks to the rather colourless concrete environment of the UN conference centre.

The direct negotiations normally followed a certain pattern. The mediators would invite the delegations to Vienna for a period of several days, offering an agenda on just one issue area (say,

decentralisation) to be addressed over this period. They would invite the parties to come prepared with papers, offering views in relation to specific issues or questions that had been identified as worthy of discussion by the mediation team. In issuing these invitations, the mediators sometimes offered brief explanations of the areas they were hoping to address; in other instances they issued questionnaires, seeking to establish the positions or proposals of the parties on very specific points.

The direct negotiations were conducted around a a large, horseshoe-shaped table in one of the Vienna city palaces. The parties would sit opposite one another on either side, with the UNOSEK team, often bolstered by representatives from the EU and other bodies, grouped around head of the table. At the beginning of each round of discussions, each delegation would usually be invited to a short, separate meeting with the Special Envoy, who would offer general words of encouragement to the parties. The actual negotiations were chaired for the most part by his deputy, Albert Rohan.

Each party was restricted to seven representatives in the negotiating chamber. At the beginning of each round, the parties would make general opening statements, followed by prepared statements on the specific issues raised by the mediators. The sides would then answer queries from the mediation team, or engage one another directly. The Serb side appeared generally unprepared to engage in much substantive discussion that went beyond its opening position or platform. Instead, it appeared at times to be seeking to provoke the Kosovo delegation into walking out by launching into historical debates or, occasionally, insults.

The delegation on the Kosovo side comprised the minister or ministers covering the appointed issue area for each individual negotiation session, representatives from the communities (the term 'minority' was avoided because of its negative connotation in the region), and senior experts. Accordingly, its composition varied according to which issue was being discussed. The delegation operated under the guidance of the so-called 'all-party unity team' composed of President Fatmir Sejdiu (Democratic League of Kosovo, LDK); Prime Minister Agim Ceku (nominated to that post by the Alliance for the Future of Kosovo, AAK); the President of the Kosovo Assembly, Kole Berisha; Hashim Thaci, the leader of the Democratic Party of Kosovo (PDK) in opposition; and Veton Surroi, a leading intellectual heading the smaller Ora Party. The

team was supported by a 'political-strategic group' made up of senior representatives of these mainstream parties together with, on occasion, some experts whose role was to develop positions for approval by the unity team and who participated in the day-to-day negotiating rounds. Both the unity team, and the political-strategic group reflecting the same party allegiances, were of course often fundamentally divided in their positions.

While Kosovo was represented at ministerial level or below, Serbia opted for an even lower level of representation from its foreign ministry alongside representatives from other authorities, experts, and its 'own' representatives of the communities in Kosovo. The question of the representation of the various communities in Kosovo led to a somewhat anomalous situation. The mediators and the Contact Group had urged Kosovo to ensure that these communities would have an input into the Kosovo delegation and be represented by it. In response, Kosovo had established a Community Consultative Council (CCC), which allowed community representatives to be briefed on the negotiations and to offer initiatives for presentation in Vienna. It was headed by Veton Surroi, who had been deputed for this purpose by the unity team, and was supported by the European Centre for Minority Issues. In fact, acting through the CCC, the communities themselves took the lead in developing the very detailed platform on minority rights protection in the future Kosovo that was formally presented in Vienna by the Kosovo delegation.

The representatives of the Serb community in Kosovo adopted a seemingly ambiguous position. On the one hand, the community was formally represented in the delegation of Serbia. On the other hand, as negotiations progressed, the view spread among members of the Serb community that the interests of ethnic Serbs in Kosovo were not effectively represented by the Belgrade delegation. This applied in particular to the ethnic Serbs who lived outside of the northern area and who would be dependent on the solid protection of community rights throughout Kosovo – an issue more or less ignored by the Serb delegation.[45] Accordingly, even the mainstream ethnic Serb parties in Kosovo, which had refused to participate in the Kosovo institutions of government since the March 2004 riots, nevertheless periodically joined the proceedings of the CCC and contributed to the construction of Kosovo's platform on minority rights. Thus the Serb community in Kosovo appeared to be represented on both sides in the negotiations.

45. See section entitled 'Content of the negotiations' below, pp. 34-41.

However, as Kosovo had declared its desire to offer maximum protection to communities and their members, it had no objection to this unorthodox situation.

Direct negotiation was combined with shuttle diplomacy, conducted through so-called expert missions led by UNOSEK. These involved expert advisers from UNOSEK visiting the two capitals in order to refine their understanding of the positions of both parties on specific issues, and to float ideas about possible compromise solutions. In total, 26 such expert missions were launched. There were also occasions, especially during the final stages of the discussions, when a proximity format was adopted. On these occasions the delegations would work in separate rooms, with the mediators moving between them. Once it was felt that an issue area had been sufficiently explored, UNOSEK would produce papers purporting to reflect emerging areas of agreement. However, more often than not these papers merely served as invitations to the parties to state their disagreement and to criticise the texts as misrepresenting their positions, rather than helping to consolidate agreement.

Basic positions

Belgrade was primarily interested in the confirmation of its territorial sovereignty, even if it was willing to suspend the exercise of public power for a further period and to accept its significant limitation in the longer term. However, in a departure from its previous position at Rambouillet, it was now also interested in maintaining in the territory a robust and effective international security presence. This would transfer to the organised international community the duty to guarantee, by force if necessary, that Kosovo would remain within Serbia, in addition to the duty to protect the ethnic Serb population should riots break out again.

Before the negotiations commenced, the National Assembly of Serbia issued a mandate to its delegation, in which it invoked the protection of international law very extensively, declaring

> its firm belief that the UN Security Council is a reliable guarantor of respect of the international law and the entire world order . . . Accordingly, the National Assembly of the Republic of Serbia expects the UN Security Council to use the power of its authority to ensure that the inviolable principle of respecting sovereignty

> and territorial integrity is not violated in the case of Serbia and Montenegro either . . . Any attempt at imposing a solution towards *de facto* legalization of partition of the Republic of Serbia by a unilateral secession of part of its territory would be not only legal violence against a democratic state, but violence against the [sic] international law itself.[46]

Thus Belgrade's position was firmly aligned with the structural principles of classical international law noted at the beginning of this article, favouring territorial unity over demands for self-determination outside the colonial context. This seemed to place Belgrade in a comfortable position. No significant concessions would need to be made as the requirement of Serbia's consent to overcome this obstacle meant that Belgrade would control any outcome.

However, there were two risks. On the one hand, if Belgrade were to frustrate negotiations the organised international community might constitute itself in a new way, making use of the enforcement powers of the UN Security Council under Chapter VII to overcome the lack of agreement. The Security Council had never previously been used in such a way, to decree that a sovereign state should lose territory in the interest of international peace and security.[47] However, the Council might claim such a power, and it might do so with some justification. The unresolved situation in Kosovo did constitute a genuine threat to international peace and security, and Belgrade's previous treatment of the ethnic Albanian population might also be invoked to justify such an extraordinary step.

Of course, this risk existed only to the extent that it was likely that the Council would be in a position to act decisively. In the event, Moscow provided assurances to Serbia that it would not permit the imposition of a solution against its will.

If collective action to overcome a lack of consent from Serbia was unlikely, there remained the prospect of unilateral action. There seemed to be several possibilities here, depending on how the negotiating process progressed. If negotiations failed as a result of Belgrade's perceived intransigence, international sympathy might lie with Pristina. A declaration of independence would be the only way out, all avenues of negotiation having been exhausted. If negotiations stalled as a result of the parties' inability to agree, there would most likely be pressure for further talks.

46. Resolution of the National Assembly, 21 November 2005. See: http://www.mfa.gov.yu/Policy/Priorities/KIM/draft_resolution_kim_e.html (last accessed 15 July 2008).

47. Resolution 687 (1991) required Iraq to submit to a boundary demarcation process. However, it was deliberately a demarcation, and not a delimitation, exercise, in order to avoid any allegation that the Security Council was taking on the role of judge in a territorial dispute. S/RES/687 (1991). See footnote 5 above.

Kosovo would be impelled at least to delay unilateral action. Finally, if the talks were to collapse as a result of Kosovo's intransigence, even those governments that supported Pristina's ambitions might find it very difficult to recognise unilaterally declared independence.

Hence, during the negotiations it appeared that Serbia had opted for a strategy of seeking to gain time. It would participate in the negotiations to the extent necessary to avoid the allegation that it was obstructing the process. It might also hope that the Kosovo side would lose patience, or be unable to present a unified front, or be provoked into a walk-out, thereby becoming itself responsible for a failure of the process. During negotiations, Belgrade would also seek to lock in concessions from Pristina about the future of governance in Kosovo. These might be called upon in later negotiations on substantial autonomy, for instance in a further round of talks at the level of the UN Security Council.

In pursuit of this strategy Serbia published an opening 'platform' for the negotiations. The platform emphasised that there should not be any kind of imposed solution which would not bring about stability in the long term. Moreover, a negotiated solution would have the advantage of being 'situated between two unacceptable extremes – the status Kosovo and Metohija had in the period 1989-1999, and independence, i.e., the creation of a new Albanian state'. Serbia also again directly invoked the structural principles of the classical international order to its benefit:

> The future status of Kosovo and Metohija should fully conform to the fundamental principles and norms of the international community, as well as to the specific documents of the international community that affirm the sovereignty and territorial integrity of Serbia. Any settlement of the future status of Kosovo and Metohija that would go against the existing international law, infringing the sovereignty and territorial integrity of Serbia, could only represent an imposed solution and, as such, would have to be declared illegitimate, illegal and invalid by the relevant institutions of Serbia. [48]

Rather than appearing to draw its own red line limiting the remit of the negotiations, Serbia therefore claimed that international legal rules would preclude a settlement leading to independence for Kosovo. This, of course, was not so. There is nothing in international law to stop a central government from agreeing to secession by consent, as was the case between Ethiopia and Eritrea,

48. 'Platform on the future status of Kosovo and Metohija', 5 January 2006. Available at: http://www.b92.net/eng/insight/strategies.php?yyyy=2006&mm=06&nav_id=35257 (last accessed 15 July 2008).

for instance, or when Czechoslovakia dissolved by agreement in 1993. Indeed, on 15 March 2002 Serbia itself had concluded a union agreement with Montenegro, providing for the possibility of secession of that entity.

The Serb platform appeared to offer quite significant autonomous powers to Kosovo, including control over its own finances and access to international financial institutions. Kosovo would even have the right to maintain relations with states, provinces, and regional and international organisations, 'provided this does not require the status of a sovereign international subject'. On the other hand, it was also made clear that Serbia would retain and exercise certain powers in relation to Kosovo. In view of the apartheid-like practices experienced by the ethnic Albanian population during the 1990s, it was known that Kosovo was unlikely to accept this proposition.

Another issue related to the form of the agreement. It was foreseen by the Serb side that the accord would not really be concluded by Kosovo. While, somehow, Kosovo would be a 'party to the agreement', the text would be signed and guaranteed by Serbia and the UN alone, in view of Kosovo's lack of international legal personality. Through these complicated twists in its position, Belgrade unnecessarily undermined the credibility of its commitment to genuine and very wide-ranging self-government.

Kosovo's basic position, on the other hand, was very clear. From beginning to end Pristina insisted on outright independence. Kosovo was aware of the fact that the organised international community needed to achieve a final settlement, and needed to do so sooner rather than later. The international administration of Kosovo would not be viable forever, especially if Kosovo's final status aspirations were being manifestly frustrated. Visits by leading international representatives coincided with mysterious explosions in and around Pristina, hinting at the threat that life in the territory could turn unpleasant if movement on status were to be delayed indefinitely. And whatever the divisions between the various factions of Kosovo politicians, they were all unified in their unwavering demand for independence. The Kosovo leadership could also deploy the 'trade union negotiator's ploy' of arguing that its home constituency would lynch it, or disown any result of negotiations, should this fall short of independence.

However, this uncompromising core stance was tempered by a more accommodating approach to other aspects of negotiations.

Kosovo had been advised by the United States and others to 'negotiate generously' if it wished to see its hopes for status fulfilled. Accordingly, it indicated a willingness to be accommodating on issues of governance within Kosovo, including in particular the rights of communities, religious and historic monuments, and other issues of key interest to the organised international community.

Kosovo's position, however clear, was not free from risk. Pristina could hardly refuse to participate enthusiastically in the very status process it had been demanding energetically for several years. On the other hand, it was not evident where the process might lead once initiated. True, Kosovo was represented in the talks in Vienna, but there were other, more powerful players to these negotiations beyond its control: namely, the Contact Group and the Security Council. The Kosovo delegation received advice from experts who feared that the Vienna negotiations might focus only on practical issues of governance within Kosovo. In the absence of an agreement by Belgrade on the wider issues of status, Kosovo might be stuck with a claim that it had agreed to important concessions relating to decentralisation, the treatment of communities and relations with Serbia. That 'settlement' without status might then be internationally imposed upon it by way of autonomy, at least for a further, undefined interim period.

Kosovo's concerns in this respect were fuelled by the poor level of consultation between the Special Envoy and its delegation. When the formal invitation to the first round of talks arrived, there had been no briefing on the format of discussion, the agenda or the negotiating process, nor had it been established whether or how the process might continue beyond Vienna. It was feared that, if the parties did come to an agreement there, the package might be undone to Kosovo's detriment at the level of the UN Security Council, where considerations of great power politics, rather than the interests of Pristina, might dominate.

At least where process was concerned, the delegation from Belgrade enjoyed certain advantages over Kosovo. It could draw on its own, highly competent foreign ministry and its well-established international contacts. It was obvious to the mediators that they would discuss and agree the negotiating process with their diplomatic colleagues in Belgrade, as would ordinarily be the case. Kosovo was not quite treated in the same way.

According to Belgrade, the basic approach to the negotiations had been established in these preliminary discussions between the

Special Envoy and the Serb side. In particular, it had been agreed that 'negotiations should begin with relatively concrete questions on the agenda' and should be conducted 'on a status neutral basis'.[49] Kosovo, principally interested in the status issue, was unaware of this agreement.

Lacking the stature and tools of diplomatic practice, Pristina did not have the benefit of extensive preliminary consultations about the negotiating process. This problem was amplified by the inability of its leading politicians to organise themselves into an effective delegation that could seek such consultations at an early time. Instead, party leaders went off on individual missions for discussions with friendly governments, receiving reassurances in the process that all would be well in the end.

Content of the negotiations

The initiation of the first round of talks was a matter of some delicacy. In accordance with the principles outlined by Ambassador Eide in his second report to the UN Secretary-General, there was a presumption that the talks, once commenced, should not be 'blocked' by any party. Beginning the talks therefore had certain risks for both sides. If Serbia participated, it might be signing up to a process that could ultimately endorse independence for Kosovo. Even if Belgrade were to object, it would be difficult to escape from the political dynamic that might develop. If Kosovo participated, Pristina might ultimately be stuck with a practical settlement on decentralisation and minority rights, without any commitments on status. It was feared, therefore, that Belgrade might demand guarantees that independence would not be on the cards as a precondition for participation, while Kosovo would participate only if that option was expressly on the table.

To avoid deadlock on such possible preconditions, on 12 January 2006 the Special Envoy sent an invitation to the parties 'in furtherance of the political dialogue on the future status of Kosovo' to discuss the fairly technical issue of decentralisation. This was rather a cunning move, as there had existed a technical working group on this issue before the status process had commenced. Pretending merely to continue this dialogue therefore lessened the psychological hurdle of joining the first session of what were, after all, vital status talks. Similarly, the other issue that was to domi-

49. Letter from Boris Tadic and Vojislav Kostunica to the foreign ministers of the Contact Group and to the UN Secretary-General's Special Envoy, 18 May 2006, *Kosovo Perspectives*, no. 4, 26 May 2006. See: http://www.kosovoperspectives.com/index.php?categoryid=22&selected=4&parentid=2&p202_articleid=330 (last accessed 15 July 2008).

nate the Vienna discussion, protection of religious and cultural heritage, had also already been discussed between the sides in a working group process. Moreover, this approach was in line with the undertaking given to Belgrade to engage initially only in 'status neutral' issues of a technical nature.

Another proposal of Ambassador Eide's had been to agree the agenda, format and procedure for the talks with the parties, so as to make the process transparent and predictable for both sides. This was not the case from the beginning. While the thematic emphasis of the talks appeared to correspond to the undertakings given to Belgrade, no longer-term plan was offered. However, the negotiations developed their own routine which stabilised over time, and more comprehensive agendas were shared later with both parties as the talks progressed.

In total, there were 15 rounds of direct negotiations in Vienna throughout 2006. Belgrade was for the most part willing to discuss issues relating to ethnic Serb control over territory. During these discussions, Belgrade spent much time elaborating on the model of Swiss cantons when addressing decentralisation. However, in the end the expositions of a Swiss expert on these matters were cut short by Ambassador Rohan, who stated curtly that 'Kosovo is not Switzerland'. Still, the topic of decentralisation claimed a great deal of negotiating time – over half of the sessions – and both sides engaged substantively with this issue. This engagement related in particular to the number and delimitation of municipalities that would enjoy powers of self-governance, and the extent of these powers. Belgrade was demanding the establishment of some 15 new, mainly Serb-inhabited, municipalities. In some instances these might be small, including only several hundred inhabitants. In other instances the population balance was to be adjusted in favour of an ethnic Serb majority. There was also the proposal that displaced persons in Serbia be directed towards these new areas, rather than returning to their homes. Kosovo, on the other hand, proposed the establishment of three new ethnic Serb municipalities, later upping the offer to five under intense international pressure.

There was also the difficult issue of whether or not municipalities could join to form collective units or regions – a proposal resisted by Kosovo, which feared the *de facto* division of the territory into a mainly Serb region that would administer itself through parallel structures. Moreover, there arose the issue of

links between such regions and Serbia. The comprehensive proposal that emerged in the end overruled Kosovo's objections on many of these issues.

As there were no discussions on issues that Kosovo wanted to pursue with Serbia, there was no room for the traditional 'trade-offs' that would ordinarily characterise negotiations of this kind (as had been the case at Dayton, or even Rambouillet, for instance). Kosovo was pressed into making concessions on the basis of a hope that an overall package would ultimately develop in favour of establishing final status.

More progress might been made in three sets of discussions about the protection of religious and cultural heritage. While Kosovo favoured a functional approach to this issue, the talks stalled over the very extensive claims by Serbia to territorial zones around historical and cultural monuments.

Only one session was devoted to economic problems.

The difference in attitude between the two sides became, ironically, most visible in relation to the issue of the protection of communities. To the representatives of the organised international community this issue was of key importance, wishing as they did to ensure that ethnic Serbs and others might live peaceably and without discrimination in Kosovo after status had been established. Indeed, before the first round of negotiations on this issue the Contact Group issued an exhortation to the Kosovo side to the effect that 'the more the vital interests of minorities are addressed, the quicker a broadly acceptable agreement can be reached'.[50] It was presumed that Serbia would similarly press for solid protection of community rights. However, Belgrade was mainly interested in territorial solutions, arguing that ethnic Serbs would be safe only in areas under ethnic Serb control. It did not offer its own package of proposals for the protection of human and minority rights.

Pristina, on the other hand, took the advice to 'be generous' to heart where community issues were concerned. It had spent a full year preparing a detailed catalogue of legally entrenched entitlements and institutional mechanisms for the protection of community rights. These had been developed in consultation with the communities in Kosovo and under the guidance of the European Centre for Minority Issues. Kosovo also informally involved senior advisers from the European human rights institutions in its preparatory work in this area. This approach offered two advan-

50. 'Statement by the Contact Group on the future of Kosovo', London, 31 January 2006. See: http://www.unosek.org/docref/fevrier/STATEMENT%20BY%20THE%20CONTACT%20GROUP%20ON%20THE%20FUTURE%20OF%20KOSOVO%20-%20Eng.pdf (last accessed 15 July 2008).

tages to Kosovo. First, the involvement of these external agencies would improve the technical quality of its proposals. Second, it was known that the same international organisations supporting this process would also, later, advise the Ahtisaari team on the positions taken by the parties. In this way, they would have had the opportunity to observe the attempt by Kosovo to craft advanced provisions in this area and, indeed, to contribute to them.

The Kosovo authorities were more hesitant when it came to power-sharing issues. The experience of Bosnia and Herzegovina had taught the Kosovo delegation to be wary of short-term concessions in this area that would make the territory ungovernable in practice. This hesitancy extended to the issue of assured ministerial appointments for members of ethnic minorities; to guaranteed or reserved seats for community representatives in the Kosovo parliament, which would lead inevitably to a numerical overrepresentation of minorities; and to proposed veto powers for communities in relation to legislative projects affecting their 'vital interests'. Kosovo was concerned that such an approach would entrench ethnic division and a system of ethnic politics, rather than providing opportunities for interest-based politics to develop across ethnic lines. Hence, Pristina argued during the negotiations that it should not be left indefinitely with a consociationalist post-conflict settlement, but should be given the opportunity to develop into a 'normal', diverse state.

However, the mediators held the line on power-sharing. They asserted that the Contact Group would not entertain the idea of a reduction of the power-sharing mechanisms provided for in the existing constitutional framework adopted by UNMIK in 2001. Rather than reduce such provisions, it was argued, one might expect their enhancement, given the possible change in status. Hence, the Ahtisaari comprehensive proposal renders permanent many of the provisions of the constitutional framework that were originally intended to cover only a period of interim administration in the immediate post-conflict environment.[51] On the other hand, the mediators also resisted attempts by the Serb delegation to go beyond the constitutional framework and to resurrect provisions from the days of Rambouillet.[52] One such example relates to blocking powers in the Kosovo Assembly reserved for representatives of the Serb community alone.

In fact, the issue of community rights was discussed in only two rounds of talks in August and September, over six months after

51. The final version of the comprehensive proposal adopted a compromise on the issue of guaranteed or reserved seats in the Kosovo Assembly, retaining the provisions from the constitutional framework for two electoral cycles before the application of a somewhat more modest form of representation.

52. Rambouillet foresaw far more significant power-sharing for the Serb community, including more extensive blocking power and greater room for separate political and legal organisation: see Marc Weller, 'The Rambouillet Conference on Kosovo', *International Affairs*, vol. 75, no. 2, April 1999, pp. 163-203.

the negotiations had opened. This discussion created an awkward situation for Belgrade. Kosovo had offered a comprehensive platform on this issue, ranging over some 70 pages of specific provisions for community protection. While Serbia was holding itself out as the protector of the communities in Kosovo, in fact it had little to say on the matter, emphasising instead that decentralisation would be the key to community protection.

Moreover, Serbia was unable to engage on these matters of crucial importance to its Kosovo constituency as its delegation seemed to have no instructions in relation to issues that could be seen as 'constitutional', claiming that such an approach would prejudice status. This was, of course, slightly odd, given that the parties were at the time supposed to be in the middle of status negotiations. In the absence of their own suggestions, the Serbian interlocutors pointed to an outdated proposal made by Belgrade in 2001, when the constitutional framework for Kosovo under UNMIK administration was discussed. That appeared to be a safe option in the absence of guidance from their capital, for that proposal had been approved by Belgrade – albeit some five years earlier.

This lack of preparedness to discuss constitutional issues at the level of the delegation, even at that late stage, jarred with Serbia's position at a higher level. As early as 18 May 2006 the Serbian President and Prime Minister had complained to the Contact Group and the Special Envoy that it had been a mistake to focus at the outset only on technical issues, such as decentralisation and cultural heritage. Belgrade argued that, as progress remained elusive in these areas, and as Pristina had refused to make proposals in a way that was 'status neutral', contrary to the promises of the Special Representative, it might now be appropriate to begin initial consultations on status. Belgrade proposed that there should be one round of negotiations on status, followed by four sets of discussions on the Kosovo constitution, covering community rights, security issues (including the demilitarisation of Kosovo), economic issues and decentralisation.[53] Two weeks later Belgrade reissued a declaration, proposing again wide-ranging autonomy for a period of 20 years.

The Contact Group was responsive to the suggestions made in the letter from Belgrade. After some six months of talks conducted within the Vienna format, on 24 July 2006 a meeting was held at the level of heads of state and government to address status itself.

53. See footnote 23.

Serbia was represented by President Boris Tadic and Prime Minister Vojislav Kostunica, with Kosovo's President, Fatmir Sejdiu, leading the Kosovo delegation. At that meeting the widely differing perspectives of both sides towards status became evident. Instead of managing to engage in a substantive discussion on specific status issues, the sides treated the mediators to their respective versions of recent history. Serbia also argued that Kosovo had failed to implement the standards imposed by the 'standards before status' policy and that the situation for ethnic Serbs in the territory remained intolerable. Serbia demanded wide-ranging protection for ethnic Serbs, but once again focused this demand on the issue of territorial control, rather than minority rights systems and mechanisms for political representation throughout Kosovo. 'Only if these guarantees are ensured through decentralization would the Serbians in Kosovo create conditions for [a] normal life', Tadic argued.[54]

Kosovo, on the other hand, admitted that the situation on the ground was still far from perfect, but pointed to significant progress in governance in the territory. Moreover, it argued that further progress would be impossible unless the status issue were finally resolved through independence.

Given this deadlock, the Contact Group focused the talks again on the practical issues that needed to be resolved. While acknowledging the flexibility shown by Pristina with regard to decentralisation, it demanded further concessions. Kosovo, which had genuinely engaged with the arguments of the mediators and had changed its positions in response, was disappointed, feeling increasingly that Belgrade's attitude of sticking to its maximum position was being rewarded. Kosovo had given some ground and was now requested to give more in the absence of movement on the other side.[55] However, the Contact Group also called upon Belgrade to exhibit much greater flexibility and to begin finally to consider 'reasonable and workable compromises for many of the issues under discussion'. Again, the Contact Group reiterated that once 'negotiations are underway, they can not be allowed to be blocked. The process must be brought to a close . . . The Contact Group will monitor the extent of constructive engagement on the part of both parties, and will draw conclusions accordingly.'[56]

This was a reminder of the threat that a settlement might be imposed upon Belgrade unless it showed genuine engagement in the talks. However, in view of Russia's attitude, the credibility of

54. 'Unofficial transcript: what was said in Vienna', *Kosovo Perspectives*, no. 14, 4 August 2006. See: http://www.kosovoperspectives.com/index.php?categoryid=24&selected=14&parentid=2&p202_articleid=399 (last accessed 15 July 2008).

55. In fact, Kosovo significantly modified its position on decentralisation at the end of August, in response to this pressure. Its updated proposals were much closer to the demands of the Contact Group and the eventual provisions contained in the comprehensive proposal. See 'Kosovo Delegation's Proposals for Decentralisation', *Kosovo Perspectives*, no. 19, 8 September 2006. Available at: http://www.kosovoperspectives.com/index.php?categoryid=22&selected=19&p202_articleid=416 (last accessed 15 July 2008).

56. Contact Group statement, Vienna, 24 July 2006. See: http://www.unosek.org/docref/Statement_of_the_Contact_Group_after_first_Pristina-Belgrade_High-level_meeting_held_in_Vienna.pdf (last accessed 15 July 2008).

that threat may not have been high. At any rate, the Serb delegation did not engage in a more substantive way during the negotiations that followed. Rather, its delegation started to threaten walkouts and restated maximum positions on decentralisation. Moreover, in a development outside the conference chamber, Belgrade arranged the suspension of cooperation between the municipal authorities in the north of Kosovo and UNMIK.[57] Apparently, Belgrade had concluded that the negotiation process was working against its interests and sought to devalue it.[58]

On 20 September the Contact Group reiterated yet again its warning that no side would be able to prevent the status resolution process from advancing. With the agreement of Russia, it now encouraged the Special Envoy to prepare a comprehensive proposal for a status settlement on this basis, so as to engage the parties in moving the negotiating process forward.[59] However, Moscow made its agreement highly conditional, adding in explanation: 'We consider it necessary that negotiations on the future status of Kosovo be preceded by a decision of the UN Security Council based on the results of the Council's review of the progress in the application of the standards. At the same time, it would be counterproductive to set any deadline for the negotiations on the status.'[60] In this way, Moscow appeared to be arguing (1) that status negotiations had not even commenced yet and (2) that it would retain a veto in the Council over the commencement of such negotiations. Hence, the agreement to the preparation of a comprehensive proposal document was conditioned by the assumption that this was not really a status document.

Russia adopted a further tactic to forestall action on status that might take the direction of independence. Moscow added in its statement that:

> It is of principal importance to assume that the decision on Kosovo will be of a universal character. It will set a precedent. Any speculation about the uniqueness of the Kosovo case is just an attempt to circumvent international legal rules, which distracts from reality. What is worse is that attempts of that kind generate distrust of the international community as it creates an impression of double standards being applied to the settlement of crises in various regions worldwide and of rules being enforced arbitrarily, depending on each individual case.[61]

57. Contact Group Statement on the Situation in Northern Kosovo, 4 August 2006. See: http://www.unosek.org/docref/2006-08-04_CG%20_Statement_on_the_situation_in_Northern_Kosovo-english.pdf (last accessed 15 July 2008).

58. Belgrade claimed that the UN Special Envoy had indicated in a round of discussions on 8 August 2006 that Serbia might have to accept losing Kosovo as it was 'guilty as a nation': 'Report of the Serbian government negotiating team to the Serb parliament', *Kosovo Perspectives*, no. 20, 15 September 2006. See: http://www.kosovoperspectives.com/index.php?categoryid=22&selected=20&p202_articleid=421 (last accessed 15 July 2008).

59. Contact Group ministerial statement, 20 September 2006. See: http://www.unosek.org/docref/2006-09-20_CG%20_Ministerial_Statement_New%20_York.pdf (last accessed 15 July 2008).

60. 'Russian position on Kosovo', *Kosovo Perspectives*, no. 21, 22 September 2006. See: http://www.kosovoperspectives.com/index.php?categoryid=22&selected=21&p202_articleid=426 (last accessed 15 July 2008).

61. Ibid.

This view was in direct conflict with that held by the United States and some West European states, which hoped to present the case of Kosovo as a unique one, given its previous suppression and the prolonged period of international administration. From this perspective, a Council decision imposing a settlement might not be taken as establishing a precedent. It was known that China, Indonesia and several other states on the Council and beyond that were themselves experiencing secessionist campaigns were much concerned about this very issue.

Belgrade added to the pressure on the negotiating process by adopting a new constitution which confirmed that Kosovo was an integral and inseparable part of Serb territory, offering it a form of autonomy within the framework of Serb sovereignty. The new constitution had emerged within a period of two weeks without any form of public consultation, and also without any involvement at all on the part of the Kosovars. The document was adopted unanimously on 30 September by all 242 members of the Serb parliament present.[62] It was endorsed in a referendum held a month later, although only narrowly, voter turnout being poor.[63] There were also significant allegations of vote-rigging.[64] Ethnic Albanian voters from Kosovo were not eligible to participate.[65]

The Venice Commission of the Council of Europe later investigated the new constitution and its provisions for Kosovo. It found that 'the constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realized or not'.[66]

On 3 October Russia demanded of the EU Presidency that talks should be continued into 2007 should no agreement have been reached by the end of 2006. Moreover, as reported by the EU Presidency, the Russian Federation added that the Contact Group, in giving a mandate to generate a comprehensive proposal document, 'did not envisage the imposition of any solution on Belgrade without its consent and goodwill'.[67] Instead, the comprehensive proposal should be submitted 'to all sides for the purpose of engaging them in moving the negotiating process further'. Russia added that it would not give its consent to any decision that would not be accepted by Belgrade – either in the Contact Group, or in the United Nations Security Council.

62. Katarina Subasic, 'Serbia adopts new constitution in bid to keep Kosovo', Agence France-Presse, 29 September 2006.

63. Boris Babic, 'Serbia narrowly passes new constitution', German Press Agency, 29 October 2006.

64. 'Serbian leaders bolstered by approval of new constitution re-asserting claim on Kosovo', Associated Press, 30 October 2006.

65. 'Serbia passes new constitution', *Der Spiegel*, 30 October 2006.

66. European Commission for Democracy through Law, 'Opinion 405/2006 on the constitution of Serbia', 19 March 2007, CDL-AD(2007)004, para. 8.

67. Letter from the EU Presidency to member states of the Union, 3 Oct. 2006, *Kosovo Perspectives*, no. 27, 3 November 2006. See: http://www.kosovoperspectives.com/index.php?categoryid=22&selected=27&p202_articleid=27 (last accessed 15 July 2008).

Putting the package together

In the meantime, the various elements of a comprehensive settlement proposal had been put together on the basis of the negotiations up to this point. The overall proposal was therefore ready, for the most part, by the end of September. An end to the final status process had been promised by the Special Envoy before the end of the year. However, publication of the proposal was delayed several times pending a series of elections to be held in Serbia. These delays increased the risk of protests and instability in Kosovo. However, the mainstream Kosovo politicians, some of whom were tough former resistance fighters who had been promising since early 2005 that independence was imminent, managed to maintain a surprisingly calm attitude in the territory. This may have been achieved in part by informal assurances from key players at a senior level that things would turn out all right in the end, provided Kosovo allowed events to take their course without disrupting the process.

Although it was the situation in Serbia that had caused publication of the proposals to be postponed, the Belgrade government's response to that delay was to call for the replacement of the UN Special Envoy and a resumption of talks. 'Serbia has not been informed about one letter of Ahtisaari's document and that shows that talks actually do not exist, but that Ahtisaari is attempting to replace the actual talks with controlled negotiations whose end has been predetermined.'[68]

When, on 2 February 2007, the draft settlement was finally shared with the parties, the Contact Group encouraged them once more to engage fully and constructively in order to advance the process in accordance with Resolution 1244.[69] However, the Russian Federation had already removed any pressure to negotiate seriously on the basis of the text. According to Serbian Prime Minister Vojislav Kostunica, President Vladimir Putin had offered fresh reassurances that the proposal would not be passed by the Security Council unless Belgrade had signed it.[70] On the eve of the follow-on negotiations, the Serb parliament adopted a resolution rejecting the comprehensive package: 'The National Assembly of the Republic of Serbia concludes that the Proposal of UN Security-General's Special Envoy Martti Ahtisaari breaches the fundamental principles of international law since it does not take into consideration the sovereignty and territorial integrity of the Republic of Serbia in relation to Kosovo-Metohija.'[71]

68. Serbian government spokesman Srdjan Djuric, in *Kosovo Perspectives*, no. 28, 6 November 2006. See: http://www.kosovoperspectives.com/index.php?categoryid=21&selected=28&p202_articleid=229 (last accessed 15 July /2008).

69. Contact Group statement, 2 Februry 2007. See: http://www.unosek.org/docref/Joint%20Contact%20Group%20Statement%202nd%20february%202007.doc (last accessed 15 July 2008).

70. Radio Television Serbia, 'Status proposal won't fly in UNSC if not acceptable to Serbia', 15 January 2007.

71. Serbian Parliament, 'Resolution on UN Special Envoy Martti Ahtisaari's "comprehensive proposal for the Kosovo status settlement"'. Available at: http://www.mfa.gov.yu/Policy/Priorities/KIM/resolution_kim_e.html (last accessed 15 July 2008).

Nevertheless, the mediators arranged for further direct negotiations, covering all parts of the comprehensive proposal, to continue for the second half of February. During that fortnight of talks, which were now chaired by Ahtisaari himself, Kosovo embraced the proposal in principle, offering modest suggestions for amendment. Belgrade returned to the negotiations with its own version of the proposal. Mirroring events at the Rambouillet follow-on conference immediately preceding the initiation of hostilities in March 1999, the Serb document was filled with deletions and amendments. It referred to Kosovo consistently as the Autonomous Province of Kosovo and Metohija, which was to be governed in accordance with the Constitution of the Republic of Serbia and under its sovereignty.

During the discussions Serbia started to attack the Special Envoy personally and claimed that, in fact, no negotiations had yet taken place and that, while the parties had put forward their own platforms for discussion, up to this point no actual dialogue had occurred. Moreover, while the draft document did not formally assign statehood to Kosovo, it equipped the territory with all the elements that typically appertain to states. Serbia demanded that the actual negotiations should now commence, at the very moment when the Contact Group and the UN mediator had thought that a final round of discussions was about to take place.

Despite its claim that there was as yet no agreed basis for discussion, Serbia nevertheless sought some changes to specific provisions in the package. Similarly, a few relatively minor changes were made at the suggestion of Kosovo. A final high-level meeting among the parties was held in March to review its final version, as amended in the light of the discussions that had been held. At the meeting, Serbia's President again rejected the package: 'Mr. Ahtisaari's document is fundamentally not acceptable to us because it fails to reaffirm the sovereignty of the Republic of Serbia over Kosovo and Metohija and therefore brings into question the territorial integrity of our country.'[72] Prime Minister Kostunica added: 'We are issuing a timely warning that any attempt to impose a settlement on a free independent state would be tantamount to legal violence.'[73] He also confirmed that the decision of the Serb National Assembly to reject the agreement was final and irrevocable and called on the Special Envoy to re-engage in negotiations on the basis of 'the substantive autonomy model'.[74]

72. Statement by the President of the Republic of Serbia, HE Boris Tadic, 10 March 2004. See: http://www.mfa.gov.yu/Policy/Priorities/KIM/tadic100307_e.html (last accessed 15 July 2008).

73. Statement by the Prime Minister of the Republic of Serbia, HE Vojislav Kostunica, 10 March 2007. See: http://www.mfa.gov.yu/Policy/Priorities/KIM/kostunica100307_e.html (last accessed 15 July 2008).

74. Ibid

On 26 March 2006 the UN Secretary-General nevertheless forwarded the final version of the package to the Security Council, along with a recommendation on status by the Special Envoy which he fully endorsed.[75] The comprehensive proposal and the recommendation of the Special Envoy were deliberately separated, leaving room for the Security Council to endorse the substance of the settlement without necessarily confirming the status.

The recommendation on status was as follows:

> The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community. My Comprehensive Proposal for the Kosovo Status Settlement, which sets forth these international supervisory structures, provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence.[76]

The Special Envoy added that, in the light of the recent history of the region, the 'autonomy of Kosovo within the borders of Serbia – however notional such autonomy may be – is simply not tenable'.[77] Similarly, continued international administration would not be sustainable. Instead:

> Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary.[78]

This statement was clearly aimed at persuading hesitant states on the Security Council to support the concept of supervised independence. Nevertheless, there remained significant reluctance to impose the Ahtisaari package by virtue of a Chapter VII resolution. Indeed, Russia, which had been part of the Contact Group process of guiding the negotiations throughout, now joined with Serbia in launching strong attacks on the UN Special Envoy, demanding

75. Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/168, 26 March 2007.

76. Ibid, para. 5.

77. Ibid, para. 7.

78. Ibid, para. 15.

fresh negotiations and a new mediator. However, other states were hesitant too. Indonesia, for instance, was keen to avoid a precedent in favour of independence. South Africa also voiced hesitations. Panama and Peru were undecided.

On 3 April the Security Council heard the Special Envoy introduce his proposal in confidential session. Serbia argued that the Envoy had exceeded his mandate by proposing to redraw Serbia's internationally recognised boundaries in a way that was consistent neither with the UN Charter nor with international law in general. It therefore demanded further negotiations under a new mediator. Kosovo, on the other hand, formally endorsed the Ahtisaari package in accordance with a declaration of the Kosovo Assembly on 5 March 2007.

4

The contents of the Ahtisaari package

The Comprehensive Proposal for the Kosovo Status Settlement consists of a short framework agreement and 12 annexes. The agreement offers elements for a future constitution of Kosovo, detailed guidance on minority rights and community issues, decentralisation and other issues, and provides for an international civil and military presence after the transition.

Status

The document is silent about the status of Kosovo. While it was transmitted to the Security Council along with a separate recommendation in favour of supervised independence, neither the framework text nor the annexes address this issue. But in contrast to Resolution 1244 (1999), there was no longer any mention of the need to preserve the continued territorial integrity of Yugoslavia (now Serbia) and of establishing mere autonomy or self-governance for Kosovo. Instead, the package provided everything that Kosovo would require in order to form itself into a state, and for others to recognise it as a state should they so wish.

In order to form a state, international law requires a clearly defined territory, a population that is attached to the territory and an effective government. That government must have the capacity to enter international relations. In line with the non-negotiable principles of the Contact Group, Kosovo retained its own clearly defined territory. Furthermore, consistent with statehood, the package referred to the population traditionally resident in the territory, including refugees and the displaced, as 'citizens' of Kosovo.

The package also made it clear that Kosovo would have all the powers of governance that attach to statehood, covering the legislative, executive and judicial branches. According to UNMIK Regulation No. 1, adopted pursuant to Security Council Resolu-

tion 1244 (1999), 'All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK'. The package clearly provided that UNMIK's mandate would expire and 'all legislative and executive authority vested in UNMIK' would be transferred to the governing authorities of Kosovo. As UNMIK enjoyed 'all' public authority, and 'all' authority was to be transferred en bloc to the Kosovar authorities, Kosovo would have gained full public powers consistent with state sovereignty. Belgrade, on the other hand, is not mentioned at all in this context. It would retain no original or sovereign powers relating to Kosovo.

Would Kosovo really have obtained the sovereign powers needed to be able to claim that it exercised the functions of a state 'independently of others' – the requirement of sovereignty? It is true that the new institution of the International Civil Representative, and the International Steering Group of governments and organisations overseeing the transition, would continue to enjoy certain prerogatives for a period yet to be established. According to the package, Kosovo authorities would have had to give effect to the decisions of the relevant international bodies. However, the package emphasised repeatedly the principle that Kosovo's authority to govern 'its own affairs' would be full and complete, subject only to temporary review and supervision in relation to certain specific areas. Such an arrangement would not have been inconsistent with the assumption or preservation of full sovereignty, as international practice has demonstrated.

Bosnia, for instance, retained its statehood during the period of international involvement in its affairs, as have many other states in other regions of the world that were subjected to a far more intensive international administration. Cambodia and Somalia are examples of established states that fell under full or partial international administration without this having repercussions on their statehood, Namibia and Eastern Timor obtained full statehood in the context of international administration.

Accordingly, the continued but far more limited international involvement in Kosovo would not have been inconsistent with its assumption of statehood. Moreover, the package foresaw that Kosovo itself would invite the activities of the international agencies. Hence, they would have undertaken their activities under the

authority both of the United Nations Security Council (had it endorsed the package) and of Kosovo's consent.

While the international role in relation to Kosovo was to be limited in time, there were two restrictions on Kosovo's freedom of action that appear to have been intended to be permanent. The first relates to certain human rights guarantees that are to be permanently anchored in the constitution. This poses no problem. A number of states remove human rights from the danger of ill-advised constitutional change. This includes, for instance, Germany. The other provision concerned the abandonment of any territorial claims in relation to neighbouring states, including the acceptance of the boundary with Macedonia that was agreed by Belgrade. While it was a matter of some controversy whether Belgrade then still had the power to address that issue when it concluded this deal, its agreement was endorsed by the UN Security Council at the time and cannot now be renegotiated.

Moreover, Kosovo was not to seek union with another state. Presumably this requirement was intended to be anchored permanently in a binding Security Council decision, had one been forthcoming.

The package confirmed the possibility of statehood in several other ways. It unambiguously assigned to Kosovo the capacity to enter into international relations, including the conclusion of treaties and membership in international organisations. It specifically requested that Kosovo sign and ratify the European Convention on Human Rights – an act that can only be performed by a state. The package even insisted that Kosovo should assume control of its airspace – another function typically only exercised by a fully sovereign state.

If the package contained everything necessary to constitute Kosovo as a state, the next question that arose was whether it allowed enough room for the development of a state that could actually function in practice? In some other instances, including Bosnia and Herzegovina, international mediators insisted on constitutional provisions that have stunted the development of the state and led to consistent deadlock in its institutions. To answer this question, it is necessary to consider three principal issues. These are (i) the basic constitutional structure of the state, (ii) the particular provisions that were foreseen in favour of communities, and (iii) the future role of the international agencies.

Basic construction of the polity

The basic organisation of Kosovo is that of a unitary state with a decentralised structure. That is to say, proposals for creating a federal-type system of autonomous and powerful 'cantons' according to the Swiss model were rejected. Such proposals would have risked the division of Kosovo. Instead the municipalities were established as the basic units only of local self-government. While they have 'full and exclusive powers' in relation to a range of issues, these apply only insofar as they 'concern local interest'. Moreover, these powers were to be exercised within the framework of central legislation. In principle, this design follows standard Western European practice on local governance.

Additional, primarily ethnic Serb, municipalities were to be created. Mainly Serb municipalities were given enhanced competences relating to higher education, secondary health care, cultural affairs and arrangements concerning policing. Provision was made for a Serbian language university in Mitrovica and the use of Serbian curricula and textbooks in Serbian language schools.

As already noted, the provision for extensive cooperation between municipalities that decide to exercise their competences together was also controversial. According to the package, they would be entitled to establish common institutions, including a 'decision-making body' comprised of representatives from municipal assemblies. In Vienna, Kosovo objected to this proposal very strongly, explaining that this would offer the opportunities to certain municipalities to form, in effect, a third layer of governance between the central and the local. This would risk entrenching divisions in Kosovo, rather than furthering the integration of the territory, and introduce cantonisation by the back-door. The Ahtisaari proposal ignored this objection. Similarly, direct financing for municipalities from Belgrade was retained in the document.

Particular interests of the communities were also recognised in provisions concerning the central Kosovo institutions. For two electoral periods, communities would continue to enjoy reserved seats in the Kosovo Assembly, in addition to those they might actually win in elections. Afterwards, the system would change to that proposed by Kosovo during the negotiations whereby the communities are guaranteed a certain number of seats in the

Assembly. However, there was no double representation if more than those guaranteed seats are won in the elections.

There was also provision for power-sharing in relation to ministries and deputy ministers roughly in accordance with practice under international administration. Moreover, in accordance with European standards, there were detailed requirements for adequate representation of members of the various ethnic communities in the executive agencies and also in the prosecutorial and judicial branches. Somewhat painfully for Kosovo, there was a strong international representation in its future constitutional court. It was not clear how long these provisions would be in force.

Another important issue in the Vienna discussions related to the possible veto powers of the communities in the Assembly. Initially, the Kosovo delegation had proposed merely a conciliation process in the Assembly, followed by access to the Constitutional Court if the communities felt that their collective rights had been violated by a decision in the Assembly. However, Kosovo then offered a limited system of double majority in the Assembly instead, following the example of the Ohrid agreement on Macedonia. Accordingly, the Kosovo Assembly would only be able to adopt or modify certain, clearly enumerated pieces of legislation of key interest to the communities if the majority of representatives of communities in the Assembly also supported that change. This system guaranteed sufficient input of communities into decisions of vital importance to them, without exposing the Assembly to the risk of constant gridlock due to the application of a veto mechanism in all areas of legislation or decision-making.

Community rights

When presenting the Vienna Package, UN Mediator Ahtisaari emphasised that the most important part related, in fact, to the rights of minorities or communities in Kosovo. In addition to the right of representation in the government, the Assembly and in the executive, the package did indeed contain a detailed list of rights for communities and their members, and of related obligations for Kosovo.[79] This listing was fully reflective of the position Kosovo had taken in Vienna, when submitting a very substantive framework document on community issues. In fact, the list of rights and

79. For more details on the protection of communities, see Marc Weller, 'The Kosovo Constitution and Provisions for the Minorities of Kosovo', *European Yearbook of Minority Issues*, vol. 6, 2006/2007 (Flensburg: European Centre for Minority Issues, forthcoming).

obligations did not fully reflect all of the commitments Kosovo had been willing to accept during the negotiations. Instead, it converged with the Council of Europe's human rights standards in this area, in particular the European Framework Convention for the Protection of National Minorities.

International presence

If a Security Council resolution had been forthcoming, this would have formalised the full transfer of authority from UNMIK to Kosovo, as well as the establishment of the office of the International Civil Representative, which would function under the guidance of the International Steering Group composed of France, Germany, Italy, Russia, the UK, US, EU and European Commission and NATO. The package emphasised that, in principle, Kosovo would be fully responsible for its own affairs. The International Civil Representative's mandate was limited to interpretation of the package and corrective measures in the event of its violation.

The International Civil Representative would also head the new EU Security and Defence Policy Mission addressing rule-of-law issues. It is in this area that the mandate was perhaps not defined sufficiently clearly. The package merely declared that this mission would, after all, 'retain certain powers'. It was assumed that the EU mission would exercise support and monitoring functions and only intervene in certain circumstances that would later be defined in greater detail.

The International Military Presence would continue to be NATO-led, ensuring a safe and secure environment and taking responsibility in relation to the building up of the new security force. Controversially for Kosovo, it was foreseen that the Kosovo Protection Corps, composed mainly of former KLA fighters, would have to be abolished. Instead, a smaller Security Force was envisaged.

Conclusions

The negotiations on the final status of Kosovo in Vienna were conducted in four dimensions. At the top level, the UN Security Council had set the overall negotiating framework in Resolution 1244

(1999). Serbia had expected that the resolution would confirm and preserve its territorial integrity when it agreed to the termination of hostilities with NATO in 1999. The UN administration would prepare the territory for self-governance. After an interim period, the territory would be returned to Belgrade's territorial jurisdiction, enjoying wide-ranging autonomy. In Belgrade's view, this design constrained options for final status. This, it asserted, was also in accordance with the emphasis of international law on the maintenance of the territorial integrity and unity of states. Accordingly, the negotiations would be 'status determined', focusing on the exact shape of an autonomy settlement, rather than on the question of whether autonomy or independence should be adopted.

The alternative view of many western governments noted that Resolution 1244 referred to autonomy only within the context of interim governance. There was no limitation on options for final status. Hence, the negotiations would be 'status open'.

The UN Special Envoy adopted a third route. According to Belgrade, he agreed in advance of the talks that these would, at least in the first instance, be conducted in a way that was 'status neutral'.[80] That is to say, there would be discussions on practical, technical issues first – issues that could be addressed irrespective of what agreement might emerge on status at a later stage. If there was to be no agreement on status, the Special Envoy would make his own recommendation on status to the Security Council. But this was to be separable from the bulk of the agreement. That is to say, even if the Council failed to endorse his recommendation on status, it might still endorse – or, if need be, impose – the substantive comprehensive settlement package.

The substance of that package had been circumscribed at the second level by the Contact Group. It had made clear that Kosovo would enjoy more authority than it had in the years prior to the NATO intervention. However, the question of how much more authority remained unclear, as did the issue of whether this might extend to independence. Instead, certain baselines were drawn on minority rights, returns of displaced persons and refugees and other topics.

At the third level, the Vienna negotiations, the parties were given the opportunity to build substantively upon those baselines. While the parties were not able to agree on many aspects, the mediators filled in the gaps between the positions of the parties with their own compromise proposals. This related mainly to

80. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN doc. S/2008/354, 12 June 2008, para 10.

decentralisation and religious and cultural heritage. They also adopted a solid system for minority rights, although one that was somewhat less ambitious than that proposed by Kosovo.

A fourth layer of the negotiations concerned the domestic environment in Serbia and Kosovo. The Kosovo issue was one where compromises on status would be politically very costly to those who made them. In fact, neither side was willing or able to depart from its perceived popular mandate.

The original international script followed by the majority of states in the Contact Group anticipated that Serbia would not accept a settlement proposal granting independence to Kosovo. However, it was thought possible to persuade Serbia to protest against such a settlement publicly, while acquiescing silently. This acquiescence would be bought with promises of rapid EU accession and other incentives. Under such circumstances, it was thought, Russia would be willing to facilitate approval by the Security Council of the Ahtisaari package, as this would not really amount to a betrayal of its key ally.

Should Belgrade not acquiesce, there existed another option. As the UN Special Envoy had separated his recommendation in favour of supervised statehood from the substance of the comprehensive proposal, it might be possible to persuade the Council, including Russia, to accept only the substantive proposal, without reference to status. Kosovo would then still be bound into the commitments on decentralisation, human rights and minority rights deemed essential by many governments. The replacement of UNMIK by an EU-led mission might still take place. Only the issue of status would be left unresolved at the level of the Security Council, and could be determined instead through recognition of statehood by governments, in the event that it was eventually proclaimed by Kosovo.

When the Ahtisaari proposal was finally published, it did reflect in many parts the substantive compromises offered by the mediators after exhaustive discussion with the parties. However, the plan also went further. As there had been no in-depth discussions of 'constitutional' issues beyond problems of power-sharing in Vienna, they offered certain provisions addressing the future shape of the polity of Kosovo. These were meant to reflect and entrench the multi-ethnic character of the territory, democracy, human rights and other general principles. Most of these provisions did not directly address the issue of statehood. For instance,

in the opening paragraph of the comprehensive proposal, Kosovo is described as a 'society', rather than a state or an autonomous unit.[81]

On the other hand, the general parts of the comprehensive proposal also address some aspects of the public powers to be enjoyed by Kosovo. Some of the functions assigned to Kosovo are typically only exercised by states. These include, for instance, 'the right to negotiate and conclude international agreements and the right to seek membership in international organizations' and the assumption of 'full ownership, responsibility and accountability for its airspace'.[82] Hence it could be said that elements of the general provisions of the plan were no longer strictly 'status neutral'.

In the end, Belgrade did not acquiesce to a settlement that would lead to independence. In this situation, the UN Security Council was unable to follow the recommendation of the Special Envoy and endorse supervised independence. However, it would not have been possible to implement the second option. A vote in favour of the comprehensive proposal, without a pronouncement on status, would also be blocked as this was seen by Moscow, and by some other governments represented on the Security Council, as an indirect endorsement of independence. Hence the search for new approaches began.

81. 'Comprehensive proposal of the Kosovo status settlement', Letter dated 26 March 2007 from the Secretary-General to the President of the Security Council, UN doc. A/2007/168/Add.1, 26 March 2007, addendum, Article 1 (1).

82. Ibid., Annex 8, Article 7.

Further negotiations

Several attempts were made to overcome the deadlock triggered by the mixed reception that greeted the Ahtisaari document in New York. First, the UN Security Council decided, on the initiative of Russia, to dispatch its own mission to Kosovo late in April 2007 in order to allow Council members to obtain first-hand information on progress made in Kosovo on the implementation of agreed standards and other matters.[83] During the visit to the region, Belgrade argued again that the Comprehensive Proposal amounted to an endorsement of independence – a result that could not be accepted. Instead of supervised independence, as proposed by the UN Special Envoy, the negotiations had not even begun to address the Serb proposal of 'supervised autonomy' for Kosovo. That proposal would offer executive, legislative and judicial powers to Kosovo, while Serbia would retain control over foreign policy, defence, border control, monetary and customs policy and the protection of Serbian religious and cultural heritage and human rights. Kosovo would also continue to be represented in Serbia's institutions.[84] The Kosovo authorities, on the other hand, maintained their insistence on independence. The mission concluded that the position of the sides on the Kosovo settlement proposal 'remain far apart'.[85]

Serbia then launched a formal 'Initiative to Commence a New State of Negotiations on the Status of Kosovo and Metohija'.[86] It argued that both the substance and the process of the Ahtisaari negotiations were totally unacceptable to Serbia. Hence, new negotiations should be commenced without the imposition of artificial time limits.

In the meantime, the EU and the US started to lobby in the Security Council in favour of elements of a draft resolution that would endorse the Ahtisaari package. There was no hope of achieving a resolution that would endorse Kosovo's independence outright. A more modest approach would simply seek endorsement of the substance of the Ahtisaari plan, and authorise the new

83. Letter dated 19 April 2007 from the President of the Security Council to the Secretary-General, UN Doc. S/2007/220, 20 April 2007.

84. Report of the Security Council Mission on the Kosovo Issue, UN Doc. S/2007/256, 4 May 2007.

85. Ibid., para. 59.

86. Letter dated 25 May 2007 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, UN Doc. S/2007/312, 29 May 2007.

implementation missions. Individual states would then have been free to take a view on recognition, without the Security Council having pronounced itself on statehood. However, at least the conditions for independence, including the very intricate provisions for minority protection and guarantees against a possible merger of Kosovo with Albania or ethnic Albanian-inhabited territories in Macedonia, would have been anchored at the level of a binding Chapter VII Security Council resolution.

The presentation of various different drafts in New York was flanked by intensive efforts by EU foreign ministers to change the attitude of the Russian government, involving a succession of visits to Moscow. These efforts were not successful. Similarly, attempts at achieving agreement at the G-8 meeting in Heiligendamm, Germany, on 6-8 June, failed. However, at that meeting, France stole the limelight somewhat from German Chancellor and host Angela Merkel. She had been supposed to 'deliver the Russians' on the Ahtisaari plan. Instead, newly elected President Nicolas Sarkozy proposed a further period of 120 days of negotiations. If, at the end of the period, there was still no agreement among the parties, the Security Council would endorse the Ahtisaari package.

The period of 120 days was the same as the transitional period that had been foreseen by the comprehensive proposal. Kosovo would have had 120 days from the endorsement of the proposal by the Security Council to adopt its constitution and the key pieces of legislation foreseen in it. At the conclusion of the period, the new international implementation mechanisms would take over and, presumably, Kosovo would be free to declare independence.

Two days after the conclusion of the Heiligendamm conference, US President George Bush visited Albania, promising rapid independence for Kosovo: 'The time is now,' he proclaimed.[87] However, as it turned out, there were to be further negotiations after all. In July, Belgium, France, Germany, Italy, the UK and the US put forward a formal draft resolution, reflecting elements of the French initiative in favour of further negotiations. Instead of the formal endorsement of the Ahtisaari package and the recommendation on status that had been expected at the end of the 120 day period, it was less ambitious. The draft resolution recalled:

> the specific circumstances that make Kosovo a case that is *sui generis* resulting from the disintegration of the former Yugoslavia, including the historical context of Yugoslavia's violent break-up,

87. Remarks by President Bush and Dr. Sali Berisha, Prime Minister of Albania, at Joint Press Availability. Tirana, Albania, June 10 2007. Available at: http://fpc.state.gov/fpc/86270.htm (last accessed 7 July 2008).

> as well as the massive violence and repression that took place in Kosovo in the period up to and including 1999, the extended period of international administration under resolution 1244, and the UN-led process to determine status, and that this case shall not be taken as a precedent by the Security Council. [88]

Instead of referring to the territorial integrity of Serbia, it reaffirmed the Council's commitment to a multi-ethnic and democratic Kosovo. The draft expressed its appreciation for the work of the Special Envoy without formally endorsing his comprehensive proposal. However, it did confirm that the *status quo* in Kosovo would not be sustainable and that the unresolved situation in Kosovo constituted a threat to international peace and security, opening the avenue for action under Chapter VII of the UN Charter. The draft then provided for the opportunity of a further round of negotiations, to be facilitated by the EU and the Contact Group. The Council would review the situation further in the light of these negotiations. At the end of the 120 day period, and irrespective of the outcome, the UNMIK international civil presence in Kosovo would be replaced by an International Civil Representative, nominated by the EU, who would head a European Security and Defence Policy Rule of Law Mission in Kosovo. NATO would continue to lead an international military presence.

The initial French proposal had been perceived by Russia and Serbia as a trap. Further negotiations would merely provide a figleaf for the eventual and automatic endorsement of the Ahtisaari document upon expiry of the period of 120 days. The draft resolution placed before the Council did not suggest automatic endorsement of the plan at that point. Nevertheless, the draft did arouse certain suspicions. In exchange for the continuation of negotiations, the Council would have agreed to put in place the implementation machinery for the Ahtisaari plan. Accordingly, it would have been possible for the EU, the US and others to recognise Kosovo without Security Council endorsement, and still to administer supervised independence as the comprehensive proposal had foreseen, under a Security Council mandate. 'It's kind of a hidden automaticity of the Ahtisaari plan,' Russia's UN ambassador Vitaly Churkin noted.[89]

Russia's opposition killed the prospect of the adoption of the text, which was accordingly withdrawn by its sponsors before a vote could be held. Instead, the sponsors announced that they

88. Belgium, France, Germany, Italy, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution, UN Doc. S/2007/437, 17 July 2007.

89. Evelyn Leopold, 'EU-US debate whether to call vote on Kosovo at UN', *Reuters*, 18 July 2007.

would now be pursuing the option of further, time-limited discussions. Should these not lead to agreement, 'we continue to believe that the Ahtisaari Plan is the best way forward'.[90]

In pursuit of this new initiative, the Contact Group dispatched a troika of negotiators, led by Ambassador Wolfgang Ischinger of Germany for the EU, along with Alexander Botsan-Harchenko of Russia and Frank Wiesner of the United States. This initiative was welcomed by the UN Secretary-General, who requested a report on the venture by 10 December 2007, that is, after 120 days.

The troika reaffirmed that it would act on the basis of Security Council Resolution 1244 (1999) and the Guiding Principles established by the Contact Group in November 2005. The troika also agreed that 'while the Ahtisaari Settlement was still on the table, we would be prepared to endorse any agreement the parties might be able to reach'.[91]

The troika clarified with the parties at the outset that it would not seek to impose any solution. Its principal role would be that of a facilitator of direct dialogue between the sides. However, in addition to such good offices, they might also act as mediators in the sense of 'taking an active role in identifying areas of possible compromise'. Essentially, therefore, the troika mission offered an opportunity for Serbia to return to the drawing board and start the negotiations afresh. Kosovo, on the other hand, was reluctant to contemplate any move away from the Ahtisaari package which it had negotiated in good faith, believing it to be the definitive settlement.

Indeed, at one point the troika even departed from the Contact Group principles. Ambassador Ischinger raised the issue of territorial exchanges, or trading northern Kosovo/Mitrovica for independence. This trial balloon was rapidly deflated when both sides rejected the suggestion. However, it was generally understood as an attempt by the troika to open up all possible avenues for a settlement, even those that had previously been regarded as taboo. As the troika put it in its final report: 'While it was broached, we did not dwell on the option of territorial partition, which was deemed unacceptable by both of the parties and the Contact Group'.[92] It therefore seemed that the troika felt free to operate outside of the ten points for final status negotiations that had been issued by the Contact Group to guide the Ahtisaari negotiations. These had expressly and very clearly excluded any possibility of territorial adjustments.

90. Statement issued by Belgium, France, German, Italy, the UK and the US, 20 July 2007. Available at: http://www.unosek.org/docref/2007-07-20%20-%20Statement%20issued%20by%20the%20co-sponsors%20of%20the%20draft%20resolution%20.doc (last accessed 4 July 2008).

91. Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/723, 10 December 2007.

92. Ibid., para. 10.

In its initial discussions, Serbia requested that the troika reach an international agreement over Kosovo's status that would support the essential autonomy of Kosovo. While Serbia had remained passive during much of the Ahtisaari talks, Belgrade now produced more concrete ideas for an autonomy solution that would offer powers of self-governance that went beyond those previously enjoyed by Kosovo. Belgrade would also reduce its own claims to powers it wished to exercise in relation to Kosovo. It was a proposal that might have appeared sufficiently reasonable to international negotiators to warrant further exploration had it been made in the context of the Ahtisaari negotiations. Kosovo would have come under very heavy pressure to defend its insistence on independence under those circumstances. However, after 15 months of Ahtisaari talks, there was little inclination to start again from scratch and Kosovo restated its insistence on independence.

In the talks, Ambassador Ischinger recalled the experience of the two Germanies. Both states concluded a treaty in 1972, in which they agreed to disagree in their views of their respective legal positions. 'Let us resolve the practical issues here as well', Ischinger reportedly stated, 'Serbia is Serbia, and Kosovo is Kosovo. The two entities can agree to regulate economic cooperation and to form joint governing bodies, while temporarily shelving the dispute over Kosovo's status as either a province or an independent nation.'[93] It was not entirely clear whether 'temporarily shelving' meant refraining from declaring independence, or whether it meant that Kosovo would consider itself independent while Serbia would not.

The 1972 treaty was, after all, concluded between two entities that were unquestionably states and in fact confirmed the statehood of the German Democratic Republic (GDR) even in the eyes of the Federal Republic of Germany (FRG). The FRG had previously denied GDR statehood *de jure*, if not *de facto*. While it was concluded 'without prejudice to the different view of the Federal Republic of Germany and the German Democratic Republic on fundamental questions, including the national question' both sides agreed to develop normal, good neighbourly relations with each other 'on the basis of equal rights'.[94] The treaty confirmed that both 'States' would 'respect each other's independence and autonomy in their internal and external affairs'.

For Serbia, the idea of the Ischinger agreement therefore appeared to be another trap. Instead of offering a clear standstill

93. Quoted in Gerhard Spoerl, 'Mission Impossible in the Balkans', *Spiegel Online International*. Available at: http://www.spiegel.de/international/europe/0,1518,522406,00.html (last accessed 4 July 2008).

94. *Grundlagenvertrag* (Basic Treaty), 21 December 1972, Article 6.

for a further interim period during which the *status quo* on status would be maintained, the proposal seemed to imply that Kosovo would be entitled to proclaim independence and seek international recognition. The only benefit for Serbia would be that it would be entitled to continue to consider Kosovo part of its sovereign realm, which it could do anyway.

Nor was Kosovo particularly interested in this idea. Either it would involve freezing the campaign for independence for yet a further interim period. Or, if it was not meant to include a standstill on status, then it would nevertheless add to the legitimacy of Serbia's opposition to its independence. However, the Ischinger initiative, which was also accorded the backing of the US, offered Pristina a way out of the difficult dilemma of how to engage with the new round of negotiations. Kosovo did not wish to appear obstructive. On the other hand, the negotiations could only detract from the Ahtisaari package that Kosovo had endorsed.

Kosovo therefore embraced the notion of an agreement between the two sides that would address practical cooperation, although it did so on the assumption that Kosovo would be fully independent. Hence, it presented a proposal for an agreement with Serbia on how to manage cooperation and mutual relations after independence. In so doing, it acknowledged that Belgrade had certain legitimate interests and concerns that would warrant discussion, but that these were based on assumptions that had grown out of the Ahtisaari process. Of course, the very act of concluding a treaty with Belgrade might also have been taken as acknowledgement of its sovereign status.

Given the diverse views of the parties, the troika merely succeeded in prompting the sides to declare that they would undertake not to undermine peace and stability for the remainder of the negotiating process.[95] The Contact Group reminded the parties in a statement on 27 September that the onus was on each of them to develop realistic proposals and that neither party could unilaterally block the process from advancing. It underlined that any future status settlement should focus on developing the special nature of the relations between both sides, especially in their historical, economic, cultural and human dimensions. Kosovo took this as an invitation to present its proposed draft agreement on future relations with Serbia. Belgrade, on the other hand, persisted in its view that autonomy with minimal powers reserved for Belgrade would best allow for the development of relations between both sides.

95. 'Vienna non-paper', read to both delegations on 30 August 2007 and confirmed in the presence of all the members of the troika, Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/723, 10 December 2007, Annex IV.

While there were rumours that Belgrade might even propose a confederal arrangement between Serbia and Kosovo, such a proposal did not, ultimately, materialise. Serbian President Boris Tadic seemed to open that door when he referred to partnership under a common sovereign roof, promising to be 'very flexible with regard to the scope of self-governance for Kosovo'.[96] However, in substance, Belgrade continued to refer to substantial autonomy. This may have been due in part to the fact that it was known that Vojvodina would demand similar treatment within a new constitutional order if a confederal solution was to be adopted, leading to further loss of authority by Belgrade. However serious the willingness to go beyond wide-ranging autonomy, Serbia was perhaps not best advised when presenting its proposed autonomy as a means of minority protection:

> It would be most useful for us to hear a well-substantiated argument that there is a national minority in Europe or anywhere in the world enjoying the rights more extensive in any segment than those outlined for Albanians in the proposal granting substantive autonomy to Kosovo. We are also inviting the Albanian side and the troika alike to quote to us any example of a fuller exercise of minority rights ... I can assure you that Serbia ... will ... promptly amend its substantive autonomy model, all the way up to the red line where its sovereignty and territorial integrity become threatened. No national minority has ever been entitled to create a state within a state, and neither can the Albanian national minority be given the liberty to do so in the state of Serbia.[97]

Of course, to the ethnic Albanians of Kosovo, who constitute a 90 percent majority in the territory, it was exactly the Serb attitude of treating them as a minority in what they perceived as their own country that made their position on independence uncompromising. It appeared not only to the Kosovars, but also to the international negotiators, that Belgrade had learnt little from recent history, despite the forward-looking declarations of some of its interlocutors, including its President.

After the initial, fruitless discussions, the troika offered its assessment of the negotiations' 'principal conclusions'. These were meant to identify areas of agreement.[98] This included a sense by both parties that there would be no return to the pre-1999 status and that Belgrade would neither govern Kosovo, nor establish a physical presence on its territory. Both sides would resolve all

96. Address by HE Mr Boris Tadic, the President of the Republic of Serbia, New York, 28 September 2007. Available at: http://bratislava.mfa.gov.yu/index.php?option=content&task=view&id=116&Itemid= (last accessed 4 July 2008).

97. Address of the Prime Minister of Serbia Vojislav Kostunica at the Direct Talks on the Future Status of the Province of Kosovo Metohija, New York, 28 September 2007. Available at: http://www.mfa.gov.yu/Policy/Priorities/KIM/kostunica280907_e.html (last accessed 4 July 2008).

98. Letter dated 10 December 2007 from the Secretary-General to the President of the Security Council, UN Doc. S/2007/723, 10 December 2007, Annex VI: Principal conclusions.

issues between them peacefully. Kosovo would be entitled to full integration into regional structures and both would move towards association and eventual membership of the EU and Euro-Atlantic arrangements. Pristina would implement broad measures on behalf of Kosovo Serbs and other non-Albanian communities. Both sides would cooperate on issues of mutual concern, including economic and infrastructure issues and transport, minorities and cultural heritage protection, banking, public health and social welfare and the fight against crime. They would also establish common bodies to implement such cooperation. Kosovo would manage its own public finances and enjoy unhindered access to international financial institutions. The international community would retain civilian and military presences in Kosovo after its status had been determined.

Having stated these areas of potential common positions (which were however not fully accepted as such by the parties), the mediators then reviewed all possible options of implementing them through different forms of legal relationships. These ranged from autonomy to confederal models and to full independence. Particular examples, such as Hong Kong, were also put forward by Belgrade and explored. Serbia, again engaged in the negotiations at the presidential and prime ministerial levels, argued strongly that if the UK and China had been able to agree on the establishment of Hong Kong as a special administrative area within China's sovereign jurisdiction, such an approach should also be possible for Kosovo.[99] At a subsequent session, Belgrade presented a comparative table outlining purportedly similar situations, highlighting Hong Kong, the Aaland Islands and Kosovo as examples of autonomy arrangements.[100]

Belgrade also argued against the three main reasons Kosovo had advanced to oppose a reinstatement of autonomy.[101] The first argument was that Kosovo had now been under international administration for some eight years, and could not be expected to accept reintegration with Serbia. Belgrade pointed to the fact that Hong Kong had been administered by the UK for a century before being turned into a special administrative unit of China. Moreover, the UN interim administration had been set up exactly in order to prepare for substantial autonomy for the territory. Second, autonomy would not disrupt regional stability. On the contrary, it was unilateral independence that would generate such instability and potential conflict. Third, Serbia was indeed offer-

99. Serbian President Boris Tadic's Speech at the Fourth Round of Negotiations on Kosovo's Status, 5 November 2007. Available at: http://www.predsednik.yu/mwc/default.asp?c=303500&g=20071105115746&lng=eng&hs1=0 (last accessed 4 July 2008).

100. *Kosovo Perspectives*, no. 82, 23 November 2007, Annex. Available at: http://www.kosovoperspectives.com/index.php?categoryid=23&selected=82&parentid=2&p202_articleid=1004 (last accessed 4 July 2008).

101. Serbian Prime Minister Vojislav Kostunica's Speech at the Fourth Round of Negotiations on the Future Status of Kosovo-Metohija, Vienna, 5 November 2007. Available at: http://www.kim.sr.gov.yu/admin/article/download/files/Statement%20of%20the%20Serbian%20Prime%20Minister%20at%20the%20fourth%20round%20of%20Vienna%20talks,%2005.11.2007.doc?id=5 (last accessed 4 July 2008).

ing meaningful autonomy, despite the record of its recent past, and was willing to accept virtually any solution as long as its sovereign claim remained in place.

At a high-level negotiating meeting in Baden, Austria, President Tadic offered 'to Kosovo most competencies and symbols that are normally reserved only for sovereign countries':

> Kosovo would have access to international financial institutions and other international and regional organizations except the UN, OSCE and Council of Europe. This would provide Kosovo with legitimacy in international and other lending institutions.
>
> Kosovo would have trade and cultural representative offices abroad.
>
> Kosovo would have its own flag, anthem and national teams as they are accepted by international sporting federations.
>
> Relations with Serbia would be normalized thus enhancing the prospects for stability and development of Kosovo.
>
> Kosovo [would be integrated] into the network of official regional relations and with Serbia would accelerate European integration.
>
> Serbia is prepared to ask for benefits of its relationship with the EU to be enjoyed by Kosovo.[102]

Once more, one wonders what would have happened if Belgrade had engaged with the debate on status as openly and decisively in the run-up to Ahtisaari talks, and substantively during the talks. During 2005/2006, there had been much academic discussion about solutions that would offer substantive independence while not necessarily formally disrupting the territorial unity of Serbia (the 'Taiwan scenario'). Had Serbia opened the door for discussions along those lines a year and a half earlier, it would have been very difficult for Kosovo to resist the dynamic towards such a solution. This option was, after all, in compliance with the structural principles to which the entire organised international community was committed in principle. Had it been pursued earlier, it might have been imposed on Kosovo by the UN Security Council.

However, at this late stage, with the Ahtisaari Comprehensive Settlement Proposal in hand, Kosovo did not feel under significant pressure to address these points. Indeed, the presentation of the Serbian President was somewhat undermined by that of his Prime Minister, who referred again to the Albanians as a minority that would need to seek accommodation within the sovereignty of Serbia.[103] It seemed unlikely after all that even now, close to the

102. President Tadic's Speech at the Negotiations on the Future Status of Kosovo and Metohija in Baden, 27 November 2007. Available at: http://www.predsednik.yu/mwc/default.asp?c=303500&g=20071127103315&lng=eng&hs1=0 (last accessed 4 July 2008).

103. Serbian Prime Minister Vojislav Kostunica's Speech at the Negotiations on the Issue of the Future Status of Kosovo-Metohija in Baden, 26 November 2007. Excerpts available at: http://www.osce.mfa.gov.yu/index.php?option=content&task=view&id=374&Itemid (last accessed 4 July 2008).

abyss, Belgrade was really seriously willing to contemplate a solution beyond substantial autonomy.

In the end, Ambassador Ischinger introduced formally his earlier suggestion of an agreement between the two sides. He produced a draft containing some ten articles. Without taking a view on status, the parties would agree to exercise their powers separately, but to cooperate where mutually advantageous. 'Neither party shall be entitled to act on behalf of or in the name of the other party in foreign relations', the text reportedly added.[104] While the idea of the agreement to disagree on status had initially apparently attracted Russian backing, Moscow went cold on the initiative. Serbia apparently saw it as another form of the Treaty of Friendship and Cooperation that Kosovo had been proposing, essentially confirming its independence. Kosovo, on the other hand, could see little advantage in agreeing to the maintenance by Serbia of a position that was directed against its aspirations.

In total, there were ten negotiating sessions, including a final, intensive three-day conference held in Baden, Austria, in a last-ditch gamble to foster agreement. True to form, the meeting was held, once more, in a splendid chateau. In the end the troika concluded:

> After 120 days of intensive negotiations ... the parties were unable to reach an agreement on Kosovo's status. Neither side was willing to yield on the basic question of sovereignty.[105]

By the year's end, the UN Secretary-General warned that the present impasse might lead to events on the ground taking on 'a momentum of their own, putting at serious risk the achievements and legacy of the United Nations in Kosovo. Moving forward with the process to determine Kosovo's future status should remain a high priority for the Security Council and for the international community.'[106] He added that, in the wake of the recent Kosovo elections that had brought to power former KLA leader Hashim Thaci, there was a high expectation that independence was imminent.

The Serb parliament, on the other hand, adopted a further resolution committing itself to the protection of sovereignty, territorial integrity and the constitutional order of the Republic. It threatened the reconsideration of diplomatic relations with states recognising an independent Kosovo and indicated that it might take action to protect the ethnic Serb population of the

104. EPC Declaration of 27 August, op. cit. in note 12.

105. Ibid., para. 10.

106. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2007/768, 3 January 2008.

territory.[107] The Serb government reiterated its proposals for autonomy and the need for more talks. However, reverting somewhat to its previous positions, the statement added that 'the Republic of Serbia cannot accept any request for secession by any of the twenty-seven national minorities which make [up] part of its citizenry'.[108] Again, this kind of approach, equating the position of the two million Kosovars with 26, then quite tiny, minorities, removed any sense that innovative solutions seeking to circumvent the sovereignty issue might be explored.

107 Resolution of the National Assembly on the Protection of Sovereignty, Territorial Integrity and Constitutional Order of the Republic of Serbia, 26 December 2007. Available at: http://www.mfa.gov.yu/Facts/resolution_kim_261207_e.html (last accessed 04 July 2008).

108. Letter dated 4 January 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/7, 7 January 2008.

Independence

6

Consultations in the UN Security Council continued from December onwards.[109] On 16 January, President Tadic of Serbia addressed the Security Council. He claimed that Belgrade had negotiated constructively over a period for two years. 'Substantial autonomy has figured in various models as a functioning, sustainable and successful solution. It has been proved that such solutions are in accordance with international law and that they are the only way to arrive at a compromise in conflicts similar to the Kosovo conflict.'[110] Unilateral recognition of Kosovo's independence, he argued, would create a precedent causing unforeseeable consequences for other regions. Instead, he urged the resumption of negotiations on autonomy. Rather movingly, the Prime Minister argued that Serbia should not be punished for the sins of its past, given that the previous government had been ousted by its people, nor could it be deprived of its rights on that account. While Boris Tadic warned that his government would use all legal and democratic means to preserve the sovereignty and territorial integrity of Serbia, he reaffirmed 'once again that Serbia will not resort to violence or war'.[111] This commitment was restated by Serbia's Foreign Minister, at a further meeting of the Council on 14 February, called by Russia and Serbia amidst reports that Kosovo's declaration of independence was imminent. [112] The Foreign Minister added:

> The direct and immediate consequence of this act would be the destruction of the first principle of the United Nations, namely the sovereign equality of all member states. Such a precedent, imposed on the world community, would echo far, far away, into every corner of our globe. For we would discover that the rushing river of self-determination has become an uncontrolled cascade of secession. We all know that there are dozens of Kosovo-s [*sic*.] around the world, just waiting for secession to be legitimized, to be rendered an acceptable norm. Many existing conflicts would escalate, frozen conflicts would reignite, and new ones would be instigated.[113]

109. These consultations involved a number of countries additional to the Council membership that had requested to be heard, e.g. UN Doc., S/PV/5811, 19 December 2007.

110. Statement published by the Serbian Permanent Mission to the UN, UN Doc. S/PV/5821, 16 January 2008.

111. Ibid., p. 4.

112. Letter dated 12 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, UN Doc. S/2008/92, 12 February 2008; and Letter dated 12 February 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, 12 February 2008, UN Doc. S/2008/93.

113. Address Before the United Nations Security Council by H.E. Mr. Vuk Jeremiæ Minister of Foreign Affairs of the Republic of Serbia, New York, 14 February 2008. Available at: http://www.mfa.gov.yu/Policy/Priorities/KIM/jeremic140208_e.html (last accessed 4 July 2008).

Serbia requested in vain that the Council should condemn the intention of the authorities in Pristina to declare independence. Kosovo then declared independence on 17 February 2008. In its declaration, the Kosovo Assembly noted that Kosovo 'is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation'. In substance:

> We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of the UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal of the Kosovo Status Settlement.
>
> We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making process.
>
> (...)
>
> We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. In all of these matters, we shall act consistent with principles of international law and resolutions of the Security Council of the United Nations, including resolution 1244 (1999).
>
> We declare publicly that all states are entitled to rely upon this declaration, and appeal to them to extend to us their support and friendship.

The Declaration had been adopted unanimously, by 109 votes, including those of virtually all non-Serb minorities. The ten representatives of the ethnic Serb community, and one Gorani associated with them, had boycotted the meeting of the 120 member Assembly.

The declaration had been drafted in conjunction with, and checked by, key governments. It was phrased in a way that had important legal implications for Kosovo. Employing the international legal notion of a 'unilateral declaration', it created legal obligations *erga omnes*. These are legal obligations upon which all other states are entitled to rely, and of which all other states can demand performance. In this sense, an attempt was made to

replace the binding nature of a Chapter VII resolution of the Security Council imposing the limitations on Kosovo's sovereignty foreseen in the Ahtisaari plan with a self-imposed limitation of sovereignty. In view of the fact that Kosovo had not yet adopted its new, Ahtisaari-compliant constitution at the time of the declaration of independence, this fact was of particular importance.

Serbia's parliament promptly adopted a decision purporting to annul this declaration.[114] Serbia and the Russian Federation also immediately protested at the international level, demanding an urgent meeting of the Security Council which, for the first time in several months, would address the Kosovo issue in public.[115] The meeting was opened by the UN Secretary-General, who informed the meeting that the Kosovo Assembly had indeed declared independence by unanimous vote of all 109 deputies attending.[116] The Secretary-General noted that the declaration confirmed Kosovo's full acceptance of the obligations contained in the Comprehensive Settlement Proposal as well as continued adherence to Resolution 1244 (1999). There had also been a strong commitment by the Kosovo Prime Minister to the equal opportunities of all inhabitants and a pledge that there would be no ethnic discrimination. The Secretary-General also noted a Letter from the EU High Representative for the Common Foreign and Security Policy, stating that the EU would deploy a rule-of-law mission within the framework provided by Resolution 1244 (1999) and a EU Special Representative for Kosovo. The Secretary-General confirmed that, pending guidance from the Council, UNMIK would continue to exercise its mandate under Resolution 1244 (1999).

The Council then heard statements from the President of Serbia and the Russian Federation, condemning the declaration of independence in terms of their previous statements already discussed above. Serbia requested that the Secretary-General instruct his Special Representative in Kosovo, Mr. Ruecker, to declare the act of secession null and void. 'The Special Representative has binding powers, and they have been used before. I request that he use them again.'[117] This demand was echoed by the Russian Federation. Russia also declared that the EU Rule of Law Mission had been launched without the mandate of the Council and was not covered by the existing authority contained in Resolution 1244 (1999).

Vietnam found that the declaration of independence was not in conformity with Resolution 1244 (1999), also stating its com-

114. 'Decision on the Annulment of the Illegitimate Acts of the Provisional Institutions of Self-government in Kosovo and Metohija on their Declaration of Unilateral Independence', undated. Available at: http://en.wikisource.org/wiki/Decision_on_the_annulment_of_the_illegitimate_acts_of_the_provisional_institutions_of_self-government_in_Kosovo_and_Metohija_on_their_declaration_of_unilateral_independence (last accessed 4 July 2008).

115. Letter dated 17 February 2008 from the Permanent Representative of Serbia to the United Nations addressed to the President of the Security Council, S/2008/103, 17 February 2008; Letter dated 17 February 2008 from the Permanent Representative of the Russian Federation to the United Nations addressed to the President of the Security Council, S/2008/104, 17 February 2008.

116. Record of the 5829th meeting of the UN Security Council, UN Doc., S/PV/5829, 30 January 2008.

117. Ibid., p. 7.

mitment to the doctrine of territorial integrity.[118] South Africa made a similar statement, indicating that the current developments in Kosovo would have serious implications for the international community that warranted further study.[119] China offered a rather measured assessment. It did not condemn or declare illegal the declaration of independence in an outright way. However, it did voice its concern:

> Safeguarding sovereignty and territorial integrity is one of the cardinal principles of contemporary international law, as enshrined in the Charter of the United Nations. The issue of Kosovo's status does indeed have its special nature. Nevertheless, to terminate negotiations, terminate pursuit of a solution acceptable to both parties and replace such efforts with unilateral action will certainly constitute a serious challenge to the fundamental principles of international law.[120]

Indonesia also expressed its sense that negotiations had not yet been exhausted, referring in rather an indirect way to international legal principles.[121] Libya pointed to the unique circumstances of the case, which would preclude it from becoming a precedent.[122] Burkina Faso regretted the situation in general terms but declared that one could only take note of it at this stage.[123]

The states of the European Union confirmed their view that this situation was a very special and unique one. Belgium noted that:

> Kosovo's independence is situated within a historical context that no one can ignore: the disintegration of Yugoslavia, which led to the creation of new independent States. The independence of Kosovo is part of this framework and can thus in no way be considered a precedent.[124]

Panama echoed this view, reminding the Council that Kosovo had 'enjoyed an autonomy much like the autonomy of the old republics of greater Yugoslavia, and an attempt was made to deprive it of that autonomy'.[125] The US added that the violent break-up of Yugoslavia, Milosevic's policies of repression and ethnic cleansing, and the adoption of Resolution 1244 (1999) removing Kosovo from Belgrade's control, had all led to a unique situation. 'We have not, do not and will not accept the Kosovo example as a precedent for any other conflict or dispute'.[126]

118. Ibid., p. 4.
119. Ibid., p. 16.
120. Ibid., p. 8.
121. Ibid., p. 12.
122. Ibid., p. 15.
123. Ibid., p. 15.
124. Ibid., p. 9.
125. Ibid., p 21.
126. Ibid., p. 19.

Italy similarly expressed its sense that the independence of Kosovo was now a fact which had come about due to the impossibility of achieving a negotiated settlement.[127] The UK added that Resolution 1244 (1999) had not placed any limits on the outcome of a status process which, according to the Rambouillet Accords, was to be based on the will of the people of Kosovo: '... the substantial autonomy which Kosovo was to enjoy within the Federal Republic of Yugoslavia was an interim outcome pending a final settlement'.[128] Instead, Serbia had effectively ended any chance of a negotiated settlement when it unilaterally changed its constitution in the middle of the final status process.

Croatia declared that '[t]he recognition of independence is a sovereign decision of each individual state', indicating that it would form a view in the matter soon.[129] France similarly emphasised the national prerogative of deciding whether or not to recognise Kosovo's independence, in addition to the unique facts of the situation.[130] Costa Rica indicated that it had engaged in very careful legal consideration of the issue:

> We are convinced that Resolution 1244 (1999) and the 1999 general principles on a political solution to the Kosovo crisis set out in annexes 1 and 2 of that resolution, and the Interim Agreement for Peace and Self-government in Kosovo contain sufficient legal foundations to enable us to recognize the independence proclaimed yesterday. We believe that with this recognition, we are responding primarily to the will of the people of Kosovo – a people who find it impossible to live together with the Serb majority in the same country after the 1998 campaign of ethnic cleansing...[131]

The Council of the European Union, in its Conclusions on Kosovo adopted the following day, noted that EU Member States 'will decide in accordance with national practice and international law, on their relations with Kosovo'.[132] This pragmatic approach avoided a split within the Union, which would not have been able to agree a common stance on this issue. However, the Council was united in adding:

> The Council reiterates the EU's adherence to the principles of the UN Charter and the Helsinki Final Act, inter alia the principles of sovereignty and territorial integrity and all UN Security Council Resolutions. It underlines its conviction that in view of the conflict of the 1990s and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions.

127. Ibid., p. 11.

128. Ibid., p. 13.

129. Ibid., p. 16.

130. Ibid., p. 19.

131. Ibid., p. 17.

132. 2851st External Relations Council meeting, Brussels, 6496/08 (Presse 41), 18 February 2008. Available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98818.pdf (last accessed 4 July 2008).

This statement disguised the fact that the EU had failed to meet the one clear target it had set itself in its attempt to manage this aspect of the Kosovo crisis. As opposed to the acrimonious debate about the recognition of Croatia and Slovenia in December of 1991, this time the EU Member States wanted to present a united front and act together. In reality, however, the statement only confirmed the inability of the EU to act as a unified entity in the matter of recognition. This admission appeared to confirm the sense of the US government that this affair had better be managed through strong leadership from Washington, rather than hoping for a consensus among the European states.

The situation was different, however, in relation to action on the ground. The EU had prepared to take over responsibility for the implementation of the Ahtisaari proposal since its publication. In April 2006 it had adopted a Joint Action on the Establishment of an EU Planning Team regarding a possible EU crisis management operation in the field of rule of law and possible other areas in Kosovo, followed by several amendments and extensions of the mandate.[133] On 14 December 2007, after the termination of the troika mediation, the European Council declared its readiness to assist Kosovo through a European Security and Defence Policy Mission and a contribution to an international civilian office as part of the international presence in Kosovo. On 16 February, the day before independence was declared, the Council decided to launch the EULEX Kosovo mission in the wider area of the rule of law. Simultaneously, Pieter Feith was appointed as EU Special Representative in Kosovo.[134] The mandate of the EULEX mission was, as foreseen in the Ahtisaari document, to assist Kosovo authorities in the legal and judicial field, in policing and customs issues, and to ensure the functioning of these institutions according to European best practices. It would become fully operational 120 days after the launch.

On 28 February 2008, the International Steering Group anticipated by the Comprehensive Proposal was constituted, appointing the EU Special Representative as the International Civilian Representative for Kosovo, exercising the functions and powers outlined in Annex IV of the Ahtisaari document. Given the absence of additional Security Council authority, the Steering Group became operational at the request of the Kosovo leadership.[135] However, subsequently, the role of the UN mission, and its relationship with UNMIK, became the subject of some contro-

133. Council Joint Action 2006/304/CFSP, 10 April 2006. Available at: http://www.eupt-kosovo.eu/new/legalbasis/docs/060426Joint_Action_Kosovo_EN.pdf (last accessed 4 July 2008).

134. See Council of the European Union, S060/08, 16 February 2008. Available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98772.pdf (last accessed 4 July 2008).

versy. Russia, at the Security Council, argued strongly that UNMIK would not be entitled to transfer its powers to Kosovo and the EU mission respectively, in the absence of a fresh mandate. While some EU states felt that the mission could proceed as planned from the moment of the coming into force of the Kosovo constitution, others appeared to become more hesitant.

The UN Secretary-General then sought a consensus on how to proceed further. Consultations with both sides had revealed that they agreed on the need for an international presence. He proposed a way forward that would be 'status neutral'.[136] The Secretary-General noted that the unilateral declaration of independence, and the impending adoption of the Kosovo Constitution, 'would effectively remove from UNMIK its current powers as an interim civil administration'.[137] The Kosovo government had indicated, however, that it would welcome a continued UN presence in the territory provided that it would carry out only limited residual tasks. The Kosovo Serbs, he reported, had engaged in protests, attacking customs service points on the Administrative Boundary Line to Serbia and forcibly seizing control over a courthouse in Northern Mitrovica. Kosovo Serbs were boycotting the Kosovo institutions, including the police, judiciary, transportation and municipal administrations.[138]

At the international level, the EU informed the UN that it would no longer fund the economic reconstruction pillar of UNMIK. Apparently, this decision had not been coordinated with UNMIK. On the other hand, the EU High Representative for the Common Foreign and Security Policy of the EU informed the Secretary-General of the willingness of the EU to play an enhanced role in the area of the rule of law in Kosovo 'within the framework provided by resolution 1244 (1999)'.[139]

In view of the risks of instability, and 'pending guidance from the Security Council', the Secretary-General announced his intention to 'adjust operational aspects of the international civil presence in Kosovo'.[140] This would include an enhanced operational role for the EU in the area of rule of law, including, gradually, policing, justice and customs throughout Kosovo. The OSCE would remain in place, addressing the promotion of democratic values and the protection of the interests of communities. UNMIK would take on the role of monitoring and reporting, facilitating arrangements for Kosovo's engagements in international agreements, facilitating Pristina-Belgrade dialogue, and certain func-

135. Press Statement of the International Steering Group, Vienna, 28 February 2008. Available at: http://www.ico-kos.org/press/First%20meeting%20of%20the%20International%20Steering%20Group%20(ISG)%20for%20Kosovo..pdf (last accessed 04 July 2008).

136. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/2008/354, 12 June 2008, para 10.

137. Ibid., para 7.

138. Ibid., para 6.

139. Ibid., para 8.

140. Ibid. paras 13-16.

tions discussed with Belgrade. These functions were outlined in a letter of the Secretary-General to the Serbian President Boris Tadic. In particular, Kosovo Police Service operations in majority ethnic Serb areas would remain under the overall authority of the UN. There would be additional local and district courts generated within Serb majority areas operating within the Kosovo court system under the applicable law and within the framework of Resolution 1244 (1999). A solution for the maintenance of a single customs area in Kosovo would be sought. There would be a joint committee on transportation and infrastructure that included Serbia. NATO would continue to fulfil its existing security mandate, including with respect to boundaries, throughout Kosovo. Finally, the Serb Orthodox church would remain under the direct authority of its religious seat in Belgrade, retaining the sole right to preserve and reconstruct its religious, historical and cultural sites in Kosovo. It would be afforded international protection.[141]

Kosovo was informed of these steps, which would be of limited duration and without prejudice to the status of Kosovo.[142] The Secretary-General noted that his proposal might 'not fully satisfy all sides' but would at least be 'the least objectionable course to all'.[143] Indeed, during the debate in the UN Security Council of 20 June, Serbia's President Boris Tadic opposed Kosovo's adoption of its constitution as a 'usurpation' of the Council's mandate for UNMIK.[144] He also asserted that the reconfiguration of UNMIK would require a decision by the Security Council – a view echoed by Russia and Vietnam. Moreover, Serbia would not be able to endorse the suggestions of the Secretary-General as to the nature of this reconfiguration, as this might be taken to give rise to a process of compromise in relation to the status of Kosovo. This issue was yet to be negotiated through the status process envisaged in Resolution 1244 (1999). Nevertheless, Serbia seemed to be in accord with the substantive areas of continued involvement foreseen by the UN Secretary-General for the UN civilian presence. Russia also did not oppose the substance of the Secretary-General's proposals, reminding him, however, that only the Council could decide on a transformation of UNMIK's mandate. The discussion in the Council was only a first step in this direction, and no action should be taken to 'reformulate' UNMIK without Council approval.[145]

141. Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr Boris Tadic, ibid., Annex 1.

142. Letter dated 12 June 2008 from the Secretary-General to His Excellency Mr. Fatmir Sejdiu, ibid., Annex II.

143. 'Plan to reconfigure UN presence in Kosovo "least objectionable option" – Ban', UN Press Release, 13 June 2008. Available at: http://www.unmikonline.org/news.htm (last accessed 8 July 2008).

144. See the record at UN doc. S/PV/5917, 20 June 2008.

145. Ibid.

The Council did not adopt a resolution on this issue. At the conclusion of the meeting, the Secretary-General indicated again that his proposal offered a balanced solution developed fully within the framework of Resolution 1244 (1999). The proposal was the result of an effort at compromise, having benefited from extensive consultation, he added. Emphasising his own broad mandate provided by the UN Charter and Resolution 1244 (1999), he declared that the meeting had given the Council an important opportunity to consider the matter. In this way, he appeared to lay the groundwork for an argument in favour of acquiescence by the Council to his proposal. The next day, Javier Solana welcomed the report of the Secretary-General, indicating that the reconfiguration of the civilian presence would allow for the EULEX mission, in the framework of Resolution 1244 (1999), to intensify its deployment and move towards operational functions.[146]

Overall, therefore, it was accepted by all that Resolution 1244 (1999) remained in place. Kosovo had somehow hedged its position, indicating that it would act 'in accordance with' the resolution, rather than accepting its continued validity *de jure*. It was also accepted by all sides that the UN civil presence would remain in place, providing a roof under which the new EULEX mission might operate. In practice, it seemed clear that most of UNMIK's functions would devolve on the EU mission, with the UN retaining a role focused mainly on reporting and monitoring, and facilitating dialogue between Kosovo and Belgrade. While Russia appeared to maintain that this plan had not been approved, it seemed as if the UN Secretary-General had done enough to give himself the space to implement this design without a further Security Council Resolution.

An attempt to formalise this design according to a six point plan put forward in October 2008 initially failed. That plan had been developed in close cooperation between the UN Secretariat, the French Foreign Ministry and the Serbian Government. Kosovo had been left out of the loop. Hence, it was not surprising that it resisted the imposition of a proposal that appeared to be focused, once again, mainly on Serbia's interests. Kosovo's changed position, now regarding itself as a sovereign state, had not been taken into account. Instead, it appeared as if, after all,

146. Council of the European Union, Press Release, S223/08, 21 June 2008.

UNMIK rule and international tutelage were to continue in fact. Moreover, there was concern about the *de facto* division of Kosovo, in particular in relation to its northern regions – a risk that might continue to persist under the plan. Further discussion therefore became necessary.

Conclusions

The history of international discussions and action on Kosovo, including the deliberations on its final status, is an extraordinary one. Over a period of some 20 years, it involves nearly the entire arsenal of international diplomatic tools, ranging from good offices to direct negotiations and mediation, including shuttle diplomacy and proximity talks, to major international conference diplomacy and Security Council action. It even includes action that seemed to have been eliminated from the repertoire of the international diplomatic dictionary since the advent of the UN Charter in 1945, such as ultimata involving threats of the use of military force and humanitarian intervention. Somewhat ironically, in view of this vast international effort deployed to address the situation, the provisional result of the crisis came in the shape of a unilateral act on the part of Kosovo. This result is one that goes against the very grain of the fundamental structural principles of the international system, overturning the traditional dominance of the doctrine of territorial unity and integrity over the notion of self-determination of ethnic populations. Indeed, until the final phase of this episode, the Western European governments had consistently asserted that their aim was a return to autonomy for Kosovo. So how could such an outcome have come about?

The answer is threefold. First, there are more highly developed international structures for engaging with self-determination conflicts. Second, there is a changing appreciation of the doctrine of self-determination. And third, there are issues of practical politics, concerning the relative power of the principal actors in this drama and of their allies, and their respective skill in operating within a changing international system.

Mechanisms

Superficially, the story told here seems to point to the inability of the organised international system to deal with self-determination challenges outside of the colonial context. One might say that all institutions and mechanisms were deployed and utilised. They failed. In the end, a *de facto* situation was created unilaterally which the system will have to accommodate, whatever its principles or preferences. However, such an assessment would not be entirely accurate. The Kosovo crisis has not shifted the parameters of the international system as far as it was perhaps initially anticipated, and the end result has contributed to the ongoing development of the system.

True, the early phases of the Kosovo crisis were characterised by an absence of mechanisms and procedures that could be invoked effectively. This phase lasted for a decade, from the virtual abolition of Kosovo's autonomy in 1988 to 1998, when the UN Security Council started to become active, adopting its first Chapter VII resolution in relation to the deteriorating situation in the territory. During that first decade of the post-Cold War transformation of Europe, the international institutional tools and mechanisms for engagement were lacking. The doctrine of non-intervention in the domestic affairs of states, which had served Europe well during the division of the Cold War period, still had credibility. New OSCE and EU instruments of crisis management and crisis prevention were only being developed, concurrently with the development of the Yugoslav episode. There was also a lack of will to address the Kosovo episode, given Belgrade's strong resistance to international involvement. While it was clear to all analysts that Kosovo represented perhaps the most difficult and dangerous aspect of the Yugoslav crisis, it seemed more convenient to ignore it and hope that it would, somehow, go away if left simmering on the back-burner.

Since 1998, the level of engagement has been high. Both the US and certain European states had learnt from their failings in the Bosnian crisis. They were unwilling to countenance another campaign of ethnic displacement and possible genocide. Through the activation of the Contact Group mechanisms, an attempt was made to link European diplomacy to the management of international crises by the 'great powers', in this instance the US and Russia, and the Security Council. This engagement nearly resulted in an interim settlement at Rambouillet.

The subsequent use of force by NATO may be seen by some as a breakdown of international order. To others, this action represents an important step which articulated the doctrine of humanitarian intervention not only in relation to Africa and other distant places, but also in relation to Europe itself. The action led to the reversal of the forced displacement of over half of the established population of Kosovo.

While NATO had acted outside of the framework of the Security Council, in the absence of an express mandate in favour of the use of force, the Council was ready to re-engage upon the termination of hostilities. It mounted a very significant international operation establishing interim governance in Kosovo under international supervision and in accordance with a UN mandate on the basis of the agreement terminating the hostilities negotiated by the NATO states, with the involvement of international mediators. These negotiations had been bound tightly into the attempt to re-establish pre-eminence of the UN Security Council in relation to this episode.

While the resulting governance operation was deficient in many respects, it generated a surprisingly long period of time until a final status settlement became necessary. During that period, it was not only possible to establish fairly effective institutions of self-governance in Kosovo, but, perhaps more importantly for a peaceful transition, to socialise the former resistance fighters into a political elite willing and able to play a patient game of international diplomacy, instead of directing their struggle for independence against the international presence.

Much like the armed intervention of 1999, the status process will also give rise to international debate in the years to come. The institutional structure for the status negotiations was, again, complex. A mandate for the talks, and the appointment of the Special Envoy who headed the mediation, came from the UN Security Council. The talks were conducted within the framework of Security Council Resolution 1244 (1999), although dispute existed over to what extent, if any, that resolutions would constrain their outcome. The Contact Group, however, dominated the negotiations process. It set the actual boundaries for a possible settlement and controlled the UN Special Envoy more directly than the UN Security Council or UN Secretariat. The mediation team itself was composed of 'national' representatives of interested states, ensuring that the perspectives of the Contact Group's governments

were constantly represented during the actual negotiations. However, the US dominated the process, at times obstructed in its aims by the more hesitant Western Europeans and Moscow's watchdogs.

There was also the level of the UN administration in Kosovo. First, there was the policy of standards before status. Serbia and Russia noted, with some justification, that the policy had not been fully carried through. Initially, the standards process was allowed to become so complex as to be impossible to administer. Then, in the wake of the March 2004 riots and the first Eide report, it was significantly curtailed. Under the doctrine of prioritisation, the policy of standards before status became 'Some Standards before Status'. When it became clear that it was unrealistic to demand fulfilment of all priority standards before commencing the status process, the policy was changed to 'Standards with Status'. That is to say, the status process was commenced while work on implementation of standards was still progressing. Then, that policy was changed again to an attitude of 'Standards after Status'. Independence came at a time when implementation was still uneven, carried by the hope that Kosovo would give itself a constitution that would be fully responsive to the standards in the hope of rapid Euro-Atlantic integration.

The implementation of the standards policy is certainly worthy of criticism. But Serbia and Russia, in pointing out the failure to carry through the standards project in a consistent way, overlook one critical fact. Standards before status did imply a promise of independence. It was clearly presented as a policy designed to test whether Kosovo would be ready for a new status. This could hardly have been a return from UN- supervised self-governance to autonomy within Serbia. While the policy was nominally adopted without prejudice to the final status, standards before status was in fact a commitment to full status, adopted as early as 2002.

Another question concerns the status negotiations themselves. One might say that it was clear from the beginning that the parties would not be able to agree on status. Given the conduct of the talks under the aegis of the Security Council and the under the supervision of the Contact Group, where Russia exercised a controlling voice, one might have expected a retention of the *status quo* in the absence of agreement by the parties. Traditionally, in such circumstances a status process would be skewed in favour of the maintenance of territorial integrity in accordance with classical

principals of international order. In this instance, however, there were a number of additional factors. These concerned the background history to the conflict and the terrible experience of Belgrade's rule endured by the ethnic Albanian population. Moreover, the Yugoslav Federation had entirely disappeared. This would have meant that Kosovo would have been returned to the sovereignty only and exclusively of Serbia – the entity responsible for the suffering of the population – rather than a broader federal system where authority could have been diluted more. Finally, Kosovo had been under international administration for a period of some eight years, gearing up for independence under the standards before status policy that had been fully authorised by the Security Council. It was clear that outcomes other than independence would be very difficult, if not impossible, to implement. Moreover, international, possible forcible action taken to implement a settlement against the manifest will of the people concerned would have been highly unattractive. In this sense, the future stability of Europe was at stake. Some national actors, led decisively by the US, were unwilling to countenance a lack of resolution of this potentially dangerous situation, whatever the performance of the collective agencies involved, or the lack thereof.

Self-determination, territorial unity and consent

A second factor concerned the changing appreciation of the doctrine of self-determination in relation to the preference for continued territorial unity. It was noted above that much effort had been expended on retaining a restrictive view of this doctrine, despite the challenges posed by the dissolution of the USSR and the SFRY. However, it is also true that there has been a very significant trend towards the settlement of self-determination conflicts. There have been some 40 such settlements since the termination of the Cold War.[147] While many of these involve autonomy solutions, much like those suggested by Serbia, a new trend has become visible. In several settlements, a future option of self-determination has been built in, or independence has been accepted as an outcome. These cases range from the dissolution of Czechoslovakia to the agreed secession of Eritrea, the settlements for Southern Sudan and Bougainville that provide for a referendum on self-determination after an interim period, and Northern Ireland, which also

147. See Marc Weller, *Escaping the Self-determination Trap* (Dordrecht: Nijhoff Publishers, 2008).

contemplates the possibility of territorial change according to the will of the people. All these cases undermine the presumption that a change in status is generally excluded. In fact, in 1996-7 Moscow accepted such an arrangement in relation to Chechnya, although it subsequently disowned it and forcibly reincorporated the entity. Serbia itself had agreed to a right of secession for Montenegro in a Union Treaty.[148] The Rambouillet agreement for Kosovo also foresaw such an option through its reference to a settlement based, *inter alia*, 'on the will of the people'.[149]

The combination of this general trend opposing a strict and automatic insistence on territorial integrity with the specific background facts of this case made the suggestion of independence for Kosovo more internationally acceptable. This became evident in the responses of states in the Security Council after the declaration of independence. Even the states deeply attached to the principle of territorial unity were quite cautious in their criticism of the event. Most interestingly, no state in the Council other than Russia and Serbia argued that the declaration of independence by Kosovo constituted an internationally unlawful act that would need to be resisted by the organised international community, for instance through a collective policy of non-recognition or even sanctions.

This is in marked contrast to cases of unilateral independence obtained in breach of a core (*jus cogens*) rule of international law. In such cases, a positive obligation of non-recognition obtains for all states, along with a duty not to assist the unlawful entity in maintaining its purported independence. Examples are the declaration of independence of Southern Rhodesia in the offensive pursuit of its policy of apartheid, the purported independence of the Turkish Republic of Northern Cyprus after the Turkish armed invasion, or the purported establishment of the Republika Srpska through a policy of ethnic cleansing and possible genocide.

In cases of this kind, it is not the disruption of the territorial unity as such that renders the independence unlawful, but the attendant factors, such as breaches of the prohibition of apartheid, of aggression, or of ethnic cleansing or genocide. Kosovo's independence was not tainted in this way. Hence, it was not, *per se*, unlawful at the level of international law. Instead, it is treated simply as a fact that has occurred. While Serbia is free to oppose this fact, third states are free to form a view whether they wish to recognise and establish diplomatic relations or not.

148. Constitutional Charter of the State Union of Serbia and Montenegro, Article 60. Full text available at: http://www.mfa.gov.yu/Facts/const_scg.pdf (last accessed 15 July 2008).

149. See footnote 38.

It is quite clear that all states involved would have preferred a settlement of this question by agreement between the parties, in the same way that Sudan, Papua New Guinea, Ethiopia and others had reached settlements. When such a settlement proved impossible, the question arose whether the Security Council would be willing to exercise its collective security powers to overcome the lack of consent of one of the parties. While it could be argued that the Council would have acted in response to a genuine threat to regional peace and stability in Europe, this would have been a very major development in its practice. For, in addition to reevaluating the relationship between self-determination and territorial unity, the Council would also have had to act inconsistently with a further classical, structural principle of international order. This is the principle of state consent.

Classically, a state cannot be forced to accept a means of settlement of a dispute, for instance, through an international court, without its consent. It would be even more radical to propose the imposition of the substance of a settlement without the consent of the relevant state, especially where a dispute involving the territorial definition of the state is concerned. States represented in the UN Security Council were simply not prepared to take such an unprecedented step.

A Chapter VII decision confirming or granting independence in this instance would not only have had legal effects in relation to Serbia. Such a decision would have clarified *erga omnes*, in relation to all states, that Kosovo is a sovereign state. This would not have meant automatic membership in all international organisations and world-wide diplomatic relations for Kosovo. However, its entitlement to be treated as a state, and the fact that it can invoke the fundamental rights of states, would have been put beyond question.

But even if the states on the Security Council had been willing in principle to assign to that body the international constitutional function of deciding a self-determination dispute and determining or confirming status, in this instance the mechanisms would have failed due to the Russian veto. In one sense, this attitude of Russia and, indeed, of Serbia, was quite counter-productive. For, having blocked a role for the Security Council in this matter, they precluded a firm international anchoring of important legal obligations incumbent upon Kosovo.

It had been foreseen that Kosovo's acceptance of the Ahtisaari comprehensive proposal would have been reinforced by a Security Council decision according to Chapter VII. In that case, original limitations on Kosovo's sovereignty would have been anchored very firmly in the international legal order. These limitations would have related to a possible future merger of Kosovo with a neighbouring state, minority rights provisions and other elements of the Ahtisaari package. As it stands now, these obligations have been enshrined in a self-limiting act contained in Kosovo's declaration of independence. While it is, in practice, unlikely that Kosovo will disown these commitments, they have a somewhat less firm legal foundation than a Chapter VII resolution.

The governments that have recognised Kosovo have advanced various more or less persuasive reasons to explain why this result does not set a precedent for other cases. In particular, it is asserted that the period of over eight years of international administration renders the case unique. Furthermore, the dissolution of the former Yugoslavia, and the fact that Serbia was the only surviving entity of that edifice, had rendered it impossible to return Kosovo to the autonomy status which it had enjoyed previously under the roof of the Federation. In addition, it was asserted that Resolution 1244 (1999) had provided the option of a settlement in accordance with the wishes of the population of Kosovo. In the special circumstances that followed from the 1999 conflict, a return to autonomy would have been unrealistic.

All of these arguments were put forward in order to explain why Kosovo was a special and unique case that could not ever be a precedent for the future. However, these attempted explanations might contribute incrementally to the construction of a new branch of the right to self-determination, rather than detracting from it. Kosovo does appear to be the first case of 'remedial self-determination'. In such a case, where a constitutionally relevant, defined segment of the state population has been persistently oppressed, excluded from governance of its own area of compact habitation and from the central state, and exposed to a systematic and widespread campaign of permanent displacement, the doctrine of territorial unity may lose its persuasive force. Instead, the will of the people, unambiguously expressed, may increasingly guide international action in dramatic circumstances of this kind.

It is interesting to note in this context that Russia has chosen to embrace the doctrine of remedial secession, despite its vulnerabil-

ity in the matter in relation to Chechnya, and despite its initial rejection of this argument in relation to Kosovo. Within a period of only a few months, it deployed both lines of argument concerning remedial secession. Russia first relied on the doctrine of representation, even invoking the expansive but controversial interpretation of the Friendly Relations Declaration when justifying its recognition of Abkhazia and South Ossetia:

> .... Taking into account the appeals of South Ossetian and Abkhaz peoples, of the Parliaments and Presidents of both Republics, the opinion of the Russian people and both Chambers of the Federal Assembly, the President of the Russian Federation decided to recognize the independence of South Ossetia and Abkhazia and to conclude treaties of friendship, cooperation and mutual assistance with them. Making this decision, Russia was guided by the provisions of the Charter of the United Nations, the Helsinki Final Act and other fundamental international instruments, including the 1970 Declaration on Principles of International Law concerning Friendly Relations among States. It should be noted that in accordance with the Declaration, every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence, to adhere in their activities to the principle of equal rights and self-determination of peoples, and to possess a government representing the whole people belonging to the territory. There is no doubt that Mikhail Saakashvili's regime is far from meeting those high standards set by the international community.[150]

Of course, in that instance, it was principally Russia that had precluded the establishment of an agreement providing for the full inclusion of Abkhazia and South Ossetia within the Georgian political system. Georgia had offered detailed provisions on representation for both territories by way of wide-ranging autonomy.[151] In view of Russia's obstruction of an autonomy settlement, it was spurious to refer to the lack of representation of the two territories in the overall Georgian state.

In fact, Russia also invoked the second branch of the argument concerning remedial secession, referring to purported attacks by the Georgian military against the civilian population:

> By the aggressive attack against South Ossetia on the night of 8 August 2008, which resulted in numerous human losses, including among the peacekeepers and other Russian citizens, and by the

150. Statement by the Ministry of Foreign Affairs of Russia, Doc. 1246, 26 August 2008. Available at: http://www.un.int/russia/new/MainRoot/docs/off_news/260808/newen1.htm (accessed 3 November 2008).

151. See Marc Weller and Jonathan Wheatley, *The War in Georgia: Power Politics and the Failure of Conflict Prevention* (London: Hurst Publishers – forthcoming).

> preparation of a similar action against Abkhazia, Mikhail Saakashvili has himself put paid to the territorial integrity of Georgia. Using repeatedly brutal military force against the peoples, whom, according to his words, he would like to see within his State, Mikhail Saakashvili left them no other choice but to ensure their security and the right to exist through self-determination as independent States.[152]

This argument suggests that active mistreatment or repression of a population gives rise to a right to remedial secession, although it is again doubtful whether the facts of the particular case supported its invocation.

The EU opposed Russia's action in this instance. The states of the EU demanded 'that a peaceful and lasting solution to the conflict in Georgia must be based on full respect for the principles of independence, sovereignty and territorial integrity recognised by international law, the Final Act of the Helsinki Conference on Security and Cooperation in European and United Nations Security Council resolutions. In this context, the Council deplores any action that runs contrary to a solution based on these principles.'[153] However, as will be noted below, the EU effectively started to take action that contributed to the stabilisation of the situation that had been forcibly created. In any event, the rejection of the Russian claims, muted though it was, did not address the existence or otherwise of the doctrine of remedial self-determination. Instead, it appeared to focus on the absence of facts in this instance that might warrant its application.

It remains to be seen whether possible abuse of the doctrine of remedial secession will dampen international enthusiasm for its further development. The forthcoming advisory proceedings in the International Court of Justice concerning Kosovo will offer useful crystallisation of state practice in this respect. At a conceptual level, the doctrine certainly represents a logical extension of classical self-determination. That doctrine recognises that certain types of government, however effective, cannot claim to represent certain types of populations. As noted above, it is widely accepted that, in addition to colonialism, this includes alien occupation and racist regimes. Remedial self-determination concerns further cases where a population is excluded from political participation in the state or is severely mistreated, on grounds of its ethnic appurtenance.

152. See Statement by Russian MFA, op. cit in note 150.

153. Council of the European Union, 'Council Conclusions on Georgia', 2889th External Relations Council meeting, Brussels, 15/16 September 2008.

Politics

Were the negotiations a setup, designed to trick or force Belgrade into accepting a result it was fundamentally unable to accept? Such a view overlooks the fact that the design of the status process generated significant risks for both sides. Kosovo was very concerned that it would be forced into agreeing a practical power-sharing deal among the ethnic communities of Kosovo, thinking that this would be the price for independence. However, once any agreement was presented before the Security Council, it might have been changed to Kosovo's detriment. Moreover, given the structural impediments to the acceptance of self-determination claims outside of the colonial context, it was quite possible that the Council would have refused independence (as, in a sense, it did). Instead it might have imposed autonomy on the basis of the agreed practical provisions contained in the Ahtisaari document, at least for a further interim period.

A similar dilemma existed on the Serb side. Belgrade had to participate in the talks. Obstructing the process would have provided grounds for the Security Council to impose a settlement. On the other hand, participating in the negotiations would lend legitimacy to the result. It might have been easier to impose a settlement if it appeared that Serbia had substantially contributed to it.

Initially, the negotiation format of addressing practical issues of interest to Belgrade, such as decentralisation and the protection of religious and cultural monuments, appeared to bear out Kosovo's fears. Pristina might have been forced into a process of agreeing to issues of interest to Serbia without obtaining status. However, the confidential assurances apparently given by the mediators to Belgrade in response to its request that the talks would focus on technical problems and be 'status neutral' ultimately worked against Serbia.

Kosovo decided to participate in the Vienna talks in good faith, accepting many compromise solutions while placing reliance on assurances that status would be delivered in the end. Serbia also participated, but did not really negotiate genuinely. Its delegation was present, but there was little or no give and take. There appeared to be a sense that the actual settlement process was still to come, outside of the framework of the Vienna talks.

It was only half way through the process that the Belgrade leadership appeared to realise its strategic mistake, seeking to refocus the talks directly on the status issue. While it did so at one meeting held at the level of heads of state and government, it did not manage to translate this change of strategy into action on the level of its working delegation. There, the process continued as one of limited engagement and mild disinterest.

Where Belgrade did not engage substantively (for instance, on minority rights) the Ahtisaari team effectively assumed the side of Belgrade, demanding concessions from Kosovo on issues like power-sharing with the ethnic communities in Kosovo. Hence, the outcome was a balanced comprehensive proposal safeguarding the legitimate interests of Serbia and ethnic Serbs and others in Kosovo. As had been promised, the proposal was status-neutral in the sense that it did not expressly determine whether Kosovo would be a state or not. However, it contained everything that Kosovo would need in order to become a state.

The separation of the comprehensive proposal from the recommendation on status made by the Special Envoy in a different document opened up two possibilities. The Security Council might endorse the comprehensive proposal and the recommendation, endorsing statehood. Or, if the Council was unwilling to pronounce itself directly on status, it might just endorse the comprehensive proposal. When neither decision was forthcoming, the US and EU states introduced a third option. The Council might not pronounce itself on the substance of the comprehensive proposal at all, but would instead agree to the transformation of the international implementation mission. When even this plan failed, the door was opened to a further round of negotiations.

Belgrade did obtain a second chance to make up for the failure to engage positively during the Ahtisaari process through the Ischinger negotiations. To Kosovo's dismay, the Ischinger mission did not appear to feel bound by the work that had been conducted in the Ahtisaari process. The attempt to 'leave no stone unturned' in seeking any sort of agreement appeared to open up the process again. However, nearly two years into the negotiations, pressure on Kosovo to compromise further was limited. The US President had committed himself very clearly to Kosovar independence over the summer. Other governments were discussing the modalities of recognition should Kosovo declare unilateral independence. And the Ahtisaari proposal offered a way of establishing an inter-

nationally acceptable internal settlement for Kosovo should it obtain external independence with or without Council approval.

Moreover, Belgrade did not make maximum use of this final opportunity. Had Serbia from the first moment of these talks clearly and unambiguously offered to accept virtual independence of Kosovo on condition that a notional link of sovereignty be retained to Belgrade (the Taiwan option), it might have been able to build momentum in favour of such a solution. However, the Serb government itself appeared to be divided, and the offers it made late in the game of very wide self-governance under a merely notional roof of common sovereignty were not in earnest nor were they seriously pursued. Indeed, Belgrade kept referring to Kosovo as an autonomous province and to the Kosovars as a minority within Serbia, undermining the credibility of these initiatives.

This failure to understand the negotiation environment reflects on the attitude of Belgrade throughout the 20 years of international engagement with the Kosovo crisis.[154] Its acceptance of possible solutions generally came out of sequence, several rounds after these options had been on the table and had been overtaken by events. In 1989, it might have been sufficient to restore Kosovo's position under the 1974 constitution in order to end the crisis. A year later, a willingness to renegotiate the SFRY constitution might have prevented the dissolution of Yugoslavia. Later on, the rump Yugoslavia might have been able to form a federation or confederal arrangement involving Serbia, Montenegro and Kosovo. At Rambouillet, it would have been possible to retain sovereignty over Kosovo under a regime of self-governance, at least for a prolonged interim period. Finally, had Belgrade begun the Vienna final status process by offering confederation or an even looser arrangement, it might have been able to preserve at least a notional link with Kosovo. Even the merely tacit acceptance of the Ahtisaari package at the end of the day, permitting Russia to let it achieve Security Council backing, might have offered advantages over the situation that now exists.

The end result

The end result was a somewhat odd one. Through its unilateral declaration of independence, Kosovo has committed itself to all of the concessions agreed during the Ahtisaari process in the expecta-

154. See Marc Weller, *Peace Lost: The Failure of Conflict Prevention in Kosovo* (Dordrecht: Nijhoff Publishers, 2008).

tion of status. Belgrade could 'bank' these concessions relating to its own interests in Kosovo, while still being able to actively oppose Kosovo in its quest for recognition. Moreover, having opposed the handover from UNMIK to EULEX, Belgrade, backed by the threat of a Russian veto in the Security Council, managed to 'renegotiate' the Ahtisaari implementation system to some extent from the outside. It managed to retain a role for the UN in Kosovo, and a mechanism for itself to engage on Kosovo in relation to issues of core interest, such as religious heritage. This was placed expressly under the terms of Resolution 1244 (1999), confirming the continued applicability of the resolution, very much in accordance with Belgrade's wishes.

While enjoying these benefits, Belgrade has intensified its efforts to undermine the functioning of Kosovo's independence. Local Serbian elections were also conducted in northern Kosovo, where a new regional assembly was set up beyond the control and new constitutional order of Pristina. Ethnic Serb officials have been instructed to withdraw from the Kosovo administration. This includes in particular ethnic Serb members of the Kosovo Police Service, undoing some of the progress that had been made on ethnic integration during the UNMIK period.

It is quite possible that this constellation contains the seeds of a further round of armed confrontation. If Serbia manages to integrate the north of Kosovo over time, this will once more put strain on the doctrine of territorial integrity within *uti possidetis* boundaries inherited at the time of independence. In some measure, Serbia would have succeeded in achieving a limited version of its original aim of uniting ethnic Serb populations within a greater Serbia, should the SFRY dissolve. Once such a result becomes clear, it is possible that elements in Kosovo will seek to oppose it forcibly.

It is a pity, of course, that the issue of northern Kosovo was not actually addressed during the Vienna negotiations. While paying lip-service to Kosovo being one legal space, neither UNMIK nor the Vienna mediators were willing to engage the issue of parallel Serb administration with any vigour. In fact, the issue was excluded from the discussions by the UN Special Envoy. There was no room for even raising proposals for a phased transfer of authority with strong international involvement as occurred in Eastern Slavonia. It is not clear if there was a sense within the Contact Group, or the mediation team, that the loss of Northern Kosovo

might be the price Kosovo might have to pay for independence.

Strangely, Serbia has not been penalised by the European Union for its obstruction of the Ahtisaari design. The same benefits that would have been available if Belgrade had tacitly consented to a gentle and agreed secession still seem to be on offer and some effort has been made to persuade Belgrade to reach out and grasp them, despite its hesitation due to domestic division and opposition. Moreover, Belgrade has managed to consolidate the benefits of the Ahtisaari design for itself, while retaining some legitimacy in its attempt to frustrate Western attempts to stabilise the territory after independence.

As the Security Council has neither endorsed the substance of the Ahtisaari plan, nor the implementation missions foreseen in association with it, the 'new', post-status international presence on Kosovo's territory theoretically depends on the consent of Kosovo. Of course, Resolution 1244 (1999) arguably remains in force. Given the inability to change the terms of that resolution in view of Russia's likely veto, UNMIK is entitled to stay, and will presumably now stay as something of an empty shell until the resolution is eventually terminated or modified after all. Nevertheless, this outcome has changed the dynamics of the situation contrary to what was foreseen by Western governments.

True, the implementation system of the new institution of the International Community Representative (ICR) and EULEX foreseen by the Ahtisaari package would have enjoyed a nominal UN mandate. But its implementation was not meant to be subjected to specific Security Council guidance. Like the international governance operation of the High Representative in Bosnia and Herzegovina, the mission was meant to be accountable principally to a self-selected group of states represented in a Steering Committee acting outside of the Security Council. Presumably Serbia and Russia will boycott this body, thus removing any influence they might otherwise have had over the implementation process. But through Russia's refusal to amend Resolution 1244 (1999) they have enhanced the degree of control that can be exercised at the level of the Security Council. The design proposed in October 2008 was initially rejected by Kosovo, fearing an imposition of arrangements at the behest of Serbia that did not take account of Kosovo's new status.

The administration of the final phases of negotiation process by the various actors involved raises a number of questions. It was

surprising to see how easily the Comprehensive Proposal presented by Martti Ahtisaari was discarded in July 2007 and replaced with entirely new negotiations once it encountered the opposition of Russia. Although formally conducted under UN authority, the initial mediation process had been carried forward under the quite close control of the Contact Group, which had included Russia. The US and the EU states were willing to grant Russia a controlling seat at the table, without insisting on collective responsibility for decisions taken. Hence, Russia felt free to disown the outcome of the process it had supported, at least nominally, throughout. This outcome mirrored exactly the position at Rambouillet, where Russia too had obtained the benefit of exercising influence and even control over the negotiations process without having to show commitment to it at the very end.

Third, there is the issue of the cohesion of the EU states. During the Ahtisaari talks, the European actors appeared to focus more on the need to maintain their own unity, than on the substance of the negotiations. 'This is not about Kosovo, it is about the ability of the EU to act' was a comment frequently heard from EU officials and EU governments, along with 'this is about EU-Russian relations'. In truth, of course, this crisis was about Kosovo, and not about the EU's internal politics or bilateral relations with Russia. In the end, therefore, history repeated itself. As happened in relation to the Bosnian crisis, and then at Rambouillet, the United States government took over the administration of the crisis. Distrusting her European allies to some extent, the US dominated the final phases leading up to the independence of Kosovo, in particular the process of constitutional drafting in Kosovo and the management of the declaration of independence. While EU governments, the EU foreign affairs officers and UNMIK complained about being left out of the loop, it is rather sad to note that the US anticipated rightly that, in the end, Europe would not be able to speak with one voice when faced with Kosovo statehood.

However, with the uncertain arrangements for the transfer of authority from UNMIK to EULEX, the EU will once again be called upon to assume a leading role. At this juncture, the challenge remains to retain the territorial unity of Kosovo while simultaneously fashioning a workable system of cooperation between all international and regional actors involved, despite the ongoing dispute over Kosovo's legal status.

Abbreviations

AAK	Alliance for the Future of Kosovo
CCC	Community Consultative Council
DDK	Democratic Party of Kosovo
EC	European Community
EPC	European Political Cooperation
FRY	Federal Republic of Yugoslavia
GDR	German Democratic Republic
KLA	Kosovo Liberation Army
LDK	Democratic League of Kosovo
NATO	North Atlantic Treaty Organisation
OSCE	Organisation for Security and Co-operation in Europe
SFRY	Socialist Federal Republic of Yugoslavia
UN	United Nations
UNMIK	United Nations Mission in Kosovo
USSR	Union of Soviet Socialist Republics
UNOSEK	UN Office of the Special Envoy for the Future Status Process for Kosovo

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The international administration of the Kosovo crisis generated the very result that the organised international community had most wanted to avoid: independence for Kosovo. However, in the wake of the armed confrontation between NATO and Serbia in 1999, and the forced displacement of a very large part of the ethnic Albanian population by Serb authorities, independence for Kosovo became the only realistic option for a settlement.

This *Chaillot Paper* investigates how the international negotiations on the final status of Kosovo held under the auspices of the United Nations sought to address the tension between the rule of territorial unity and the need to come to terms with this reality. It considers the format and substance of the Vienna negotiations on Kosovo and of the follow-on talks held throughout 2006 and 2007, eventually leading to the unilateral declaration of independence in February 2008.

published by
the European Union
Institute for Security Studies
43 avenue du
Président Wilson
F-75775 Paris cedex 16
phone: +33 (0)1 56 89 19 30
fax: +33 (0)1 56 89 19 31
e-mail: info@iss.europa.eu
www.iss.europa.eu
€ 10

ISSN 1017-7566
ISBN 978-92-9198-132-8
QN-AA-08-114-EN-C