ARTICLES

EXTENDING DECOLONIZATION: HOW THE UNITED NATIONS MIGHT HAVE ADDRESSED KOSOVO

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EXTENDING DECOLONIZATION: HOW THE UNITED NATIONS MIGHT HAVE ADDRESSED KOSOVO

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I. INTRODUCTION

Use of force against Yugoslavia, initiated on March 24, 1999, raised vexing problems about international governance. This article identifies two problems in particular and suggests an alternative approach which may have averted them.

The Kosovo crisis can be characterized as a crisis of self-determination. When a group of human beings achieves self-determination, it is manifested by the participation of the group in the governance of a state. Where there are no other groups in the territory of the state, this will mean a monopoly by the group over governance. Where more than one group lives within a state, (which is to say, in most states) self-determination means shared participation in governance either through democratic institutions constituting a unitary government or through sub-state territorial units possessing their own competencies such as “autonomy” or “self-government.” An important incident of self-determination when expressed this way is the right of the state to maintain its territorial integrity. Not all groups however have achieved self-determination. Where a group has not achieved self-determination, it may later be achieved through a change in the organization of the state in which the group lives. That change aims to give the group participatory rights in governance in either of the two ways just noted. Or, self-determination may be achieved through creation of a new state. Neither reorganizing a state nor creating a new state, however, is a simple matter. When a group of people breaks from the state of which they were a part, that state may be said to suffer a derogation of its territorial integrity—derogation of the self-determination its people had earlier achieved. A state, for many reasons, may resist pleas to make internal changes sufficient to give self-determination to a hitherto rights-deprived part of its population. Thus, attempts to achieve self-determination have many times resulted in conflict.

During the United Nations (UN) era (1945 to present), there has been an unprecedented increase in the number of states. Each new state has vindicated the right of self-determination for one or more groups of people. However, it is inaccurate to say that state creation was a legally-mandated result of self-determination. As noted above, self-determination need not result in the creation of a state. Moreover, self-determination has notoriously lacked concrete legal content. In particular, it has lacked a procedural framework for its realization.1 Though the new states, which have appeared since 1945, have vindicated the right of people to self-determination, those states did not result directly from the right to self-determination. Most new states in fact resulted from the process of decolonization.

The process of decolonization is often described simply as a “retreat from empire” or “abandonment of the colonial project.” It was indeed that. However, decolonization also involved the UN system, which responded to and encouraged “retreat” in legally innovative ways. The process of decolonization has been in some senses the most successful form of state-creation yet achieved.

This is not to ignore the many difficulties faced by the new states that resulted from decolonization. Continuing economic dependency and susceptibility to outside political influence are notorious crises of new states. However, it is not entirely clear that these crises resulted from the process by which these states gained independence.

Whether formed by decolonization, consent-based processes outside the colonial context, or secession (e.g., Bangladesh), new states have often faced tribulation. What is clear is that, in terms of number, decolonization has been the most productive process of state creation.

Decolonization produced more states than any other legal process; it created them, for the most part, without interstate violence (and that at a time when two rival superpowers competed for clients among new states). Moreover, it created states within a well-defined UN institutional structure. It did so in a manner widely heralded as vindicating the right of peoples to self-determination, without revising the principle that existing states possess a right to preserve their territorial integrity. Decolonization produced or clarified new facts on the ground and conserved legal principles at the same time. This article proposes that extending the UN-guided decolonization

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1 See Yoram Dinstein, *Is There a Right to Secede?*, 90 AM. SOC'Y INT'L L. PROC. 296, 303 (1996) (“Modern international law has created a right (self-determination) loaded with political and psychological explosives, but it does not have an answer to the question of how that right is going to be put into effect in the event of disagreement about its implementation.”).
process to new terrain might have provided a solution to the crisis of Kosovo and Yugoslavia.

II. A PROBLEM OF UN POLITICS

The UN Security Council, under chapter VII of the UN Charter, is the only organ in the UN institutional order which may authorize the use of force where there is no immediate threat to the security of a state. A persistent problem in this aspect of the UN security system is that the Security Council may only authorize the use of force when all five permanent members agree to use force. For much of the history of the UN, especially during the Cold War, political division on the Security Council made unanimity a rarity. Even without Cold War political friction, obtaining a Security Council mandate for use of force has been difficult. A blockade by one or more Council members would usually arise when other members proposed enforcing international law with military measures. This did not always result in paralysis, as member states on occasion attempted to enforce international law with military measures outside the UN framework. This reliance on extra-UN processes of authority at times could cast doubt, however, on the efficacy of the UN security system.

By March 1999, a number of states, especially the United States and its Western European allies, began to take the view that a situation had arisen in the Serbian province of Kosovo that required an international response. Full treatment of the history and politics of the situation would exceed the scope of the present essay, so a thumbnail sketch must suffice.

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2 Because of this, the utility of the Council has come under recent scrutiny. See, e.g., Jose E. Alvarez, Forward, What's the Security Council For?, 17 MICH. J. INT'L L. 221 (1996).


4 Some actions would be described by some states as violations of law rather than enforcement. Consider the following examples of use of force outside the UN framework: the Soviet Union in East Germany (1953), Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979); the United States in the Dominican Republic (1964), Grenada (1983), and Panama (1989); South Africa in Angola and Mozambique (1975-1991).

EXTENDING DECOLONIZATION

The Socialist Federal Republic of Yugoslavia consisted of six republics: Serbia, Montenegro, Macedonia, Bosnia-Herzegovina, Croatia, and Slovenia. The Republic of Serbia contained two semi-autonomous provinces, the Vojvodina in the north and Kosovo in the southwest. The status of the provinces was established under the SFRY Constitution of 1974 and seemed suitable for accommodating the distinct ethnic identities of the provinces. Vojvodina had a Hungarian minority (19 percent), and Kosovo had an Albanian majority (90 percent). Albanian Kosovars administered Kosovo after 1974. Friction between Albanians and Serbs nonetheless surfaced as early as 1981 in the form of student demonstrations. Serbs in Kosovo accused the provincial government of discriminatory practices against the Serb minority. Kosovo at length became a cause célèbre among Serb nationalists. Slobodan Milosevic, then head of the Republic of Serbia, capitalized on nationalist sentiment by visiting Kosovo and promising that the Serb minority of the province would not be ill-treated by Albanians. Serbia ended Albanian Kosovar self-rule in 1989. The province, from then on, was administered directly from the federal capital, Belgrade, by Serbs.

The federal government stationed a substantial army contingent and paramilitary forces to keep order in Kosovo, and violent incidents took place between these and Albanian Kosovars. Starting in late 1990, the institutions of the SFRY began to erode. By winter 1991-92, the process was complete, with most states taking the view that, by then, the SFRY had disintegrated.

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Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia were de facto independent states by the summer of 1992. Kosovo, however, remained a province of Serbia, and Serbia with Montenegro claimed to continue as a geographically reduced but legally uninterrupted Yugoslav state, the Federal Republic of Yugoslavia (FRY). The claim of SFY-FRY continuity has been rejected by writers, states, and the UN. FRY political and security institutions nonetheless remained sufficiently robust to enable the FRY to continue to administer Kosovo without deference to the wishes of the Albanian majority. In 1992, Kosovo, in a referendum not recognized by the FRY government, voted to secede from Serbia. The FRY then had to rely more than ever on an armed presence to maintain its jurisdiction over Kosovo. In 1997, the Kosovo Liberation Army (KLA) began attacking Serb security forces and Albanians who accommodated the FRY. The KLA gathered enough strength to take control of some parts of the province.

Faced with a rural insurgency, in February 1998, the FRY launched a campaign to reaffirm control of Kosovo. This resulted in the killing of civilian Albanian Kosovars and, in turn, riots broke out. The Permanent Council of the Organization for Security and Cooperation in Europe (OSCE) issued a decision on March 11, 1998, calling on the parties in the conflict to enter into "meaningful dialogue" and to cooperate with the OSCE in re-establishing a verification mission in Kosovo and permitting humanitarian and relief agencies to operate in the province.


See United States Dep’t of State, Kosovo Chronology (visited May 21, 1999) <http://www.state.gov/www/regions/eur/fs_kosovo_timeline.html> (giving a very brief sketch of the events leading to the current crisis).


See Plenary Meeting, 156 PC JOURNAL AGENDA ITEM 3 (Mar. 11, 1998) <http://www.osceprag.cz/e/pcdec218.htm>. A previous verification mission, the OSCE Mission of Long Duration in Kosovo, had consisted of no more than twenty verifiers. It had been authorized by a decision of August 14, 1992, and implemented after a Memorandum of Understanding (MOU) was signed with the FRY on October 28, 1992. When the FRY declined to sign an instrument prolonging the MOU, the mission, along with two other missions on FRY territory (in the Sanjak and the Vojvodina), was withdrawn. All three missions had been operating under the same OSCE mandate. See The OSCE Missions of Long Duration in Kosovo, Sanjak and Vojvodina (last modified Nov. 26, 1998) <http://www.osceprag.cz/e/docs/surv_kos.htm>.
OSCE statement and called for a cessation of hostilities and return of the OSCE mission to Kosovo.\textsuperscript{13} From May 1998 on, the Democratic League of Kosovo—the moderate Albanian political formation in the province—held talks with the FRY government, but these talks were intermittent and unfortunately did not result in a durable settlement. FRY security forces conducted an offensive against the KLA from July through September, resulting in extensive loss of life and property in the central part of the province. The UN Security Council in September 1998 took note of the situation and called again for a cease-fire and political dialogue.\textsuperscript{14} Talks in October led to a cease-fire, and the FRY agreed, by an instrument signed on October 16, to permit the OSCE to put in place a Kosovo Verification Mission (KVM).\textsuperscript{15} The Security Council endorsed the KVM in Resolution 1203.\textsuperscript{16} The KVM deployed, amounting finally to the largest such mission in OSCE history.\textsuperscript{17} Violence nonetheless intensified through the autumn.

Albanian Kosovars and the FRY government began talks under western auspices at Rambouillet, France, on February 6, 1999. The FRY did not accept proposals that Kosovo receive a NATO peacekeeping force. However, NATO involvement was not removed as a term of the proposed settlement. The FRY withdrew from the talks. On March 13, a number of bombings killed ethnic Albanians in two FRY-administered towns. Apparent breakdown of the peace process notwithstanding, Albanian Kosovar representatives remained at Rambouillet, and on March 18, 1999, they signed the proposed accords, including provision for a 28,000-soldier NATO implementation force in the province. The FRY delegation did not sign.\textsuperscript{18}

\textsuperscript{17} See id. With headquarters in the seat of provincial government, Pristina, and field offices ("coordination centers") in the capital of every administrative subunit of the province (optsina), the KVM was permitted to include up to 2,000 unarmed verifiers. This personnel came from OSCE member states. By February 5, 1999, the KVM had deployed 1,125 personnel in Kosovo. See Press Release: Overview of Countries' Representation in the Kosovo Verification Mission (last modified Feb. 5, 1999) <http://www.osceprag.cz/e/docs/presrel/kpr20-99.htm> (listing countries contributing personnel and their numbers).
\textsuperscript{18} The full text of the draft accords, as signed by the Kosovar Albanian representatives, is posted on the Balkan Action Council website. See Interim Agreement for Peace & Self Government in Kosovo (visited Feb. 23, 1999) <http://www.balkanaction.org/archives/kia299.html>. The text of the draft accords, with amendments proposed by the FRY representatives, is also posted at the Balkan Action Council website. See Serbian Counter-Proposal to Interim
OSCE monitors evacuated Kosovo on March 20, 1999, in anticipation of air strikes by NATO.19 As early as October 1998, NATO member states had authorized air strikes in the event that the FRY did not agree to curtail its police action, did not allow the return of refugees, or did not accept unarmed OSCE monitors—requirements enunciated by the Security Council in Resolutions 1160 (March 31, 1998) and 1199 (September 23, 1998). The only requirement that the FRY met was to permit deployment of the KVM, though FRY forces allegedly obstructed the OSCE verifiers on a number of occasions.20 The breakdown of the Rambouillet talks in March was treated as the trigger for military action. NATO member states may well have doubted whether the North Atlantic Council, political arm of the Alliance, had authority to initiate an armed enforcement action against the FRY.21 A Security Council resolution crafted specifically to allow an action enforcing Resolutions 1160 and 1199 would have clarified the legal situation.

The Security Council, however, in all likelihood would not have authorized action against Yugoslavia. No draft resolution was put to the Council seeking authorization, the states moving for action likely having recognized the improbability of gaining Council consent.22 Instead, the locus of decision-making shifted from the UN to a regional security organization. The decision to initiate an armed action against Yugoslavia in response to the situation in Kosovo took place in the North Atlantic Council, not in the UN Security Agreement (visited Mar. 15, 1999) <http://www.balkanaction.org/archives/skia399.pdf>.


22 See Conflict in the Balkans: NATO Leaders Focus on Genocide as Legal Basis for Bombing. Ugly Word Helping to Create a New Model of Law to Justify Other, Similar Interventions, THE GLOBE AND MAIL (Toronto, Can.), Apr. 9, 1999, at A10 (“U.S. Policymakers did not seek [Security Council] authorization, officials have acknowledged, in part because Russia and China would be expected to veto it.”).
Those states on the Security Council opposed to intervention (Russia and China) protested that NATO lacked authority to approve intervention, but NATO commenced a bombing campaign on March 24, 1999.

A number of international lawyers advocating the UN security system characterized the NATO campaign as illegal because it fell outside the UN institutional structure. Some of these shared their views with the press, both through interviews and editorials, shortly after the commencement of Operation Allied Force. A few even expressed the view before the action.

23 The "by-pass" of UN institutions in favor of an alternative force-regulatory structure, NATO, was recognized by the press. See Why the United Nations Was Ignored Over Kosovo: The Prospect of a Russia Veto Justified Reliance on Another Tool, THE GLOBE AND MAIL (Toronto, Can.), Mar. 29, 1999, at A12. (The unattributed editorial article argued that although UN authorization would be best, because of a Russian veto, NATO was the appropriate answer.) The grounds for such a by-pass were questioned by one editorialist even before Operation Allied Force commenced. See Jonathan D. Tepperman, Kosovo Dilemma: NATO Alone, Without UN Backing?, INT'L HERALD TRIB., Mar. 22, 1999, at 10, available in 1999 WL 5110301 (stating that "[b]efore NATO members give up on the United Nations and the legitimacy it confers, they should be clearer about what exactly they are doing, and prepared for others to do likewise"). Distinguished publicists also doubted the legality of the by-pass. See Jules Lobel & Michael Ratner, Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime, 93 AM. J. INT'L L. 124 (1999).

24 See Elizabeth Sullivan, NATO May Be in Violation of International Law; Attack Counters UN Guarantee, STAR-LEDGER (Newark, NJ), Mar. 28, 1999, available in 1999 WL 2966422 (quoting Michael Ratner, a lawyer specializing in war-powers acts); Michael Doyle, Strike in the Balkans, FRESNO BEE, Mar. 26, 1999, at A12, available in 1999 WL 4016967 (quoting Ted Galen Carter of the Cato Institute); Paul Campos, Editorial, Rule of Law Turned into Obscene Joke, DENVER ROCKY MOUNTAIN NEWS, Apr. 6, 1999, at 33A, available in 1999 WL 6645063 (Campos is director of the Byron R. White Center for American Constitutional Study at the University of Colorado); Tepperman, supra note 23, at 10 (Tepperman is an associate editor of Foreign Affairs); Proinsias De Rossa, Editorial, NATO's Unilateral Actions Make it Guilty of Selective Indignation, IRISH TIMES, Mar. 30, 1999, available in 1999 WL 14004571 (De Rossa was spokesperson on foreign affairs for the Irish Labor Party); Joseph W. Samuels, Letter to the Editor, Yugoslavia Bombing Undermines UN Charter, LONDON FREE PRESS (Ont.), Mar. 31, 1999, at A14, available in 1999 WL 14869389 (Samuels is a former legal advisor to the Canadian Red Cross); Valerie Alvord, NATO Action Poses Dangerous Precedent, Legal Experts Warn, SAN DIEGO UNION-TRIB., Apr. 1, 1999, at A22, available in 1999 WL 4060755 (quoting both Robert Hayden, director of East European Studies at the University of Pittsburgh, and Thomas Valasek, a research analyst at the Center for Defender Information); Michelle Shephard, Country Violating 'Tradition of War and Peace,' Group Says, TORONTO STAR, Apr. 7, 1999, available in 1999 WL 16004887 (quoting Douglas Roche, a former chairperson of the UN Disarmament Committee, University of Toronto professors emeritus Ursula Franklin and Watkins, and international lawyer David Jacobs); Ingvar Carlson & Shridath Ramphal, Editorial, NATO Damages International Law, SEATTLE POST-INTELLIGENCER, Apr. 6, 1999, at A7, available in 1999 WL 6586882 (Carlson is a former prime minister of Sweden; Ramphal is a former secretary-general of the commonwealth); Peter Erlinder, NATO Action Unwisely
began that such an action would be illegal. Mary Ellen O’Connell stated shortly before Operation Allied Force that NATO action without the mandate of the UN would be illegal.\(^{25}\) Michael Byers stated at a 1999 American Society of International Law Conference that Operation Allied Force is a clear violation of the UN Charter and that the crisis in Kosovo should be addressed by prosecuting individual war criminals.\(^{26}\) Bruno Simma of the University of Munich called NATO action a breach of the article 2(4) prohibition on use or threat of force.\(^{27}\)

Though not calling Operation Allied Force illegal, UN Secretary General Kofi Annan did state that the Security Council should have been involved in the decision to commence the action at arms.\(^{28}\) Allan Gerson of the Council of Foreign Relations also did not call the action illegal, saying nonetheless that it “flout[ed] the traditional interpretation of the [UN] charter.”\(^{29}\) Ruth Wedgewood of the Yale Law School also noted that lack of a UN mandate was problematic, even if it did not render the action illegal. “The old presumption,” Wedgewood remarked, “is that you would go to the UN Security Council for a blessing.”\(^{30}\) Christoph H. Schreuer, professor of international law at the School of Advanced International Studies at Johns Hopkins University, and Anthony Arend, professor of government at Georgetown University, also noted problems in using force outside of the UN system.\(^{31}\)

Indeed, the tension between sanctity of UN institutions and humanitarianism

\(^{25}\) See Mary Ellen O’Connell, Editorial, Crisis in Kosovo: Area Experts Give Perspectives on US Strategy Toward Serbs, CINCINNATI ENQUIRER, Mar. 28, 1999, at B01, available in 1999 WL 9428865 (O’Connell is Visiting Professor of Law at the University of Cincinnati).

\(^{26}\) See Panel, Accountability of Genocide and Other Crimes Against Humanity, 93 AM. SOC’Y INT’L L. PROC. 1999 (publication forthcoming).

\(^{27}\) Bruno Simma, NATO, the UN and the Use of Force; Legal Aspects, 10 EUR. J. INT’L L. 1, 5-6 (1999).

\(^{28}\) See Penny Kozakos, Countries Raise Chorus of Dissent: Crisis in Kosovo, USA TODAY, Mar. 25, 1999, at 5A.


\(^{30}\) Doyle, supra note 24, at A12; see also Ruth Wedgewood, NATO’s Campaign in Yugoslavia, 93 AM. J. INT’L L. 828-34 (1999).

was identified by a number of prominent writers as the heart of the legal problem.32

Foreign affairs correspondents and editorialists in major newspapers further noted the potential risk to UN institutional structures governing use of force.33 Doug Cassel, director at the Center for International Human Rights at Northwestern University School of Law, noted similar threats to the integrity of the UN system.34

The general view of these publicists is that to conduct an intervention without the mandate of the Security Council was to vitiate the United Nations security order, which all UN member states were obliged to support by virtue of their ratification of the UN Charter. In response, advocates of the NATO action called Operation Allied Force argued that circumstances in Kosovo were exigent and that political blockades in the Security Council could not be permitted to prevent international enforcement action in cases of clear breaches of humanitarian law.

Some also argued that a UN mandate did in fact exist in the form of Security Council Resolutions 1160 and 1199. United States Secretary of State Madeleine Albright expressed this view.35

The resolutions, however, furnished at best a rather tenuous mandate, and reliance on such non-specific "permissions" for the use of force has been heavily criticized.36

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32 See, e.g., Christine M. Chinkin, Kosovo: A 'Good' or 'Bad' War?, 93 AM. J. INT'L L. 841-47 (1999); Jonathan I. Charney, Anticipatory Humanitarian Intervention in Kosovo, 93 AM. J. INT'L L. 837-41 (1999). Chinkin appears to lean toward the view that the humanitarian imperative was well-served, even if by measures that raised acute problems of legality. Charney takes the view that Operation Allied Force was in balance a violation of international law.


36 See, e.g., Lobel & Ratner, supra note 23, at 124.
Most of those publicists who expressed the view that use of force against Yugoslavia was legal, grounded the view on the law of humanitarian intervention arguing that humanitarian concerns trumped the right to territorial integrity. 37

Lawyers advancing the two positions in at least one respect argued past one another. 38 The view that the NATO action was illegal depended on the assumption that such action required the operation of the institutional apparatus contained within the UN system for regulating use of force. Advocates of the NATO action, by contrast, assumed that while it was perhaps desirable when conducting armed enforcement action to do so within the UN security framework, the framework was not essential if political division within it prevented necessary action. Advocates of both positions would concur, however, that Operation Allied Force was prosecuted essentially


38 See RONALD DWORKIN, LAW’S EMPIRE 44-45 (1986) (discussing what it means for two discussants to argue past one another).
outside the institutional\textsuperscript{39} structure which the UN system provided for the use of force.\textsuperscript{40}

A question presented by the Kosovo action is whether, despite the political blockade on the Security Council, international intervention might have been orchestrated within the UN institutional structure. I will argue that it may indeed have been possible to develop an approach which would have taken place within the UN institutional structure yet avoided the Security Council political blockade that compelled resort to extra-UN institutions.

III. A PROBLEM OF RIGHTS AND STATEHOOD

The Kosovo action, as noted above, raised a problem over UN governance of the use of force. It also raised a problem over rights and statehood. On the one hand, groups of human beings enjoy certain collective rights involving their relations to the states in which they live and to international society. On the other hand, international order, if no longer consisting entirely or even chiefly of states, still relies in crucial ways on states,\textsuperscript{41} and states, reflecting their role in international order, possess, it is said, a right to maintain their territorial integrity. These considerations, as noted in the introduction, may be seen as flip sides of the same coin. Operation Allied Force brought the tension between rights and statehood into sharp relief.

Self-determination has been a recurring concept in discussions of the relationship between states and the human beings they govern. The Wilsonian origins of self-determination and its great false start at the end of World War I are ably recounted elsewhere.\textsuperscript{42} Suffice it to say that self-determination has

\textsuperscript{39} The word "institutional" is important here. NATO countries took the position that Operation Allied Force was very much consistent with the principles of the UN Charter and with specific resolutions of the Security Council regarding Yugoslavia and Kosovo in particular. It may well have been. But this is distinct from whether the decision to take action took place within those UN institutions designed to govern use of force and collective enforcement. It is beyond the scope of this essay to inquire whether, under international law, actions consistent with legal principles can be legal if they violate procedural rules.

\textsuperscript{40} This is not to ignore that advocates of the NATO action also drew attention to the two Security Council resolutions calling for peaceful settlement of the Kosovo crisis—Resolutions 1160 and 1199. See Res. 1160, \textit{supra} note 13; Res. 1199, \textit{supra} note 14. Despite these resolutions, there was no explicit UN authorization.


resonated as a political principle and gained a sure position in both the rhetoric of international relations and in the politics of group rights, yet its status as a legal rule has been uncertain. While it is widely agreed that certain groups of human beings (usually those thought to constitute a "people") possess a right to self-determination, there is little consensus as to what actions such groups may lawfully undertake to vindicate that right. Still less clear may be what actions third parties (i.e., parties other than the party asserting a right to self-determination and other than the party against which the right is claimed) may take to assist in vindicating the right. It has been said that the right to self-determination equates to a right to establish a state. This view, however, was the first associated with self-determination to be refuted. Self-determination indeed entails something about statehood, but it has not meant that every group of human beings who constitute a distinct ethnic community has a right to establish its own state. Achieving self-determination through


Problems with extending to every ethnic group a right to establish a state were recognized at the time Woodrow Wilson declared self-determination a principle of American foreign policy. Wilson’s Secretary of State, Robert Lansing, warned, “The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives . . . What a calamity that the phrase was ever uttered! What misery it will cause!” Robert Lansing, The Peace Negotiations: A Personal Narrative 97-98 (1921). Not long after he put it in print, the League of Nations, through a commission of jurists, bore Lansing’s warning in mind. In the Ålands arbitration, it was held that a group of islands in the Gulf of Bothnia between Finland and Sweden, though under Finnish jurisdiction but inhabited by persons of Swedish ethnic origin and language, did not have a right to secede from Finland. The Ålanders instead became a self-governing unit within Finland with special controls regarding residency to preserve the ethnic identity of their islands. Self-determination, as is typical, was realized there not through creation of a new state but through participation in governance of an existing state. See Aaland Islands, League of Nations Official Journal, O.J. Supp. 3, at 5 (1920) (“Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish.”); Cassese, supra note 42, at 27-31.

See Michael Curtis, International Law and the Territories, 32 HARV. INT’L L. J. 457, 471 (1991); Emilio J. Cárdenas & María Fernanda Cañás, The Limits of Self-determination, in SELF-DETERMINATION AND SELF-ADMINISTRATION: A SOURCEBOOK, supra note 42, at 153, 159 (“Self-determination must not be used as an instrument to achieve secession; therefore, autonomy is
creation of a new state conflicts with the right of existing states to preserve their territorial integrity.

The right to territorial integrity runs to all states and is more strongly installed in law and in practice than any right to establish a new state. Indeed, preservation of territorial integrity is the object for which the UN Charter permits states an exception to the otherwise extensive limitation on use or threat of force. International instruments which create or codify rights on the part of communities or individuals within states frequently carry provisos that those rights in no way derogate the right of states to maintain territorial integrity. States taking an interest in crises inside the borders of other states note that any solution must not infringe on the right of those states to territorial integrity. Very few states have been created since World War II without the


47 See DUURSMA, supra note 31, at 77-84 (discussing the balance between self-determination and territorial integrity).

48 See G.A. Res 2625, U.N. GAOR, 25th Sess., at para. 7, U.N. Doc. A/RES/2625 (XXV) (1970). (“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or color.”).

49 The narrowness of the application of self-determination and strength of the countervailing principle of territorial integrity is evident in the ongoing crisis over Chechnya, an entity which seceded from the Russian Federation. For the French reaction to the 1994-95 Chechen crisis, see 41 Annuaire Francais de Droit International 911 (1995) (respecting territorial integrity as a foundation of international law).

The British reaction was more subdued:

[T]he exercise of the right [of self-determination] must also take into account questions such as what constitutes a separate people and respect for
Another feature of state practice further illustrating the strength of the rule of territorial integrity is that a state may permit a community in its territory to become a new state, but lacking permission, the community must bow to the parent state's right to territorial integrity.

Despite these demands, claims to independent statehood have abounded since World War II. Over one hundred of these have resulted in the formation of new states. In virtually every case, the advent of a new state was heralded as a vindication of the principle of self-determination. Thus, it would seem that the principle of self-determination has taken on legal force.

Again, as noted above, the difficult question is not whether self-determination confers some general right as a matter of law. The difficult question is what particular right self-determination confers and how that right can be enforced in practice. In a stable, democratic state that does not practice legal discrimination and permits its constituent ethnic groups to realize their identity free from legal impediment, ethnic groups exercise their right to self-determination through their participation in the governance of the state. This may be confirmed perhaps by a referendum giving the ethnic group the chance to alter the governing arrangement in countries like Quebec, Scotland, and Puerto Rico. In countries where the self-determination of a minority is in doubt, one solution may be to amend constitutional instruments so as to

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50 See Cassese, supra note 42, at 123 (explaining that Bangladesh may be the only successful example).

reinforce minority rights. Self-determination may allow a people to experience a certain level of autonomy within the state they inhabit and to experience legal safeguards when they are a minority in the state. Consider, for example, Croatia. The EC/EU compelled Croatia to incorporate safeguards into its constitution to protect a Serb minority. Indeed, minority rights treaties have been a far more common form of vindication of the self-determination rights of minorities than secession. It is highly unlikely that a group in such a country may exercise its right to self-determination through violent revolt or unilateral secession. The right to self-determination is not always a right to secede.

**DOES THE RIGHT TO SELF-DETERMINATION EVER EQUATE TO A RIGHT TO SECEDE?**

Secession is the unilateral severance of ties between a community and the territory it inhabits from a state by which it was hitherto governed. As such,

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There simply is no right of secession under international law, nor has there been even preliminary agreement on the criteria that might be used in the future to determine when secession should be supported. Of course, there is no prohibition in international law against secession, either. If a country disintegrates as the result of a civil war, international law poses no barrier to recognition of the two or more succeeding states. That is, however, a quite different position than recognizing the right of a group to secede from an existing state.

secession does not involve the consent of the parent state, and it derogates the territorial integrity of the parent state. Secession has rarely in the UN era resulted in the lasting establishment of a new state. Attempts at secession failed in Katanga and Biafra. When Rhodesia issued a Unilateral Declaration of Independence (UDI) from Britain in 1964, the act was almost universally judged illegal (albeit not only because it was an act of secession). Rhodesia under its UDI was a state with an African majority but ruled by a tiny minority of European settlers. That post-UDI Rhodesia distributed citizenship rights (including the right to vote, freedom of movement, and access to schooling and other public resources) on the basis of race was the chief reason the state was never formally recognized by other states and was by 1981 compelled to comprehensively change its constitutive basis. It submitted briefly again *de jure* to British rule and then became an independent state under the title Zimbabwe. Secession arguably resulted only once since 1945 in a secure new state—Bangladesh. The vast majority of new states created between 1945 and 1989 did not result from secession. Instead, the creation of states in that period was usually the result of a legal decolonization process closely governed by the UN. To assess the parameters of self-determination and, in particular, to determine what actions find legal validation under the title of self-determination, it is necessary to examine how decolonization produced new states. I will argue below that it is within the process of decolonization that there may have been an alternative approach to the crisis in Kosovo.

IV. DECOLONIZATION

When the period immediately after the Second World War ended, self-determination was understood to fundamentally mean ‘achieving independence from colonial domination.’ It certainly proved to be an important tool through which colonization almost vanished from our world... Self-determination—with its caveats—provided the legal foundation for decolonization.

Self-determination, indeed, has been the source of legal principles leading to independence for colonial countries. But it was certainly not the “tool.” *Decolonization* was the tool that made self-determination work. To be sure,

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decolonization is not the only tool that has made self-determination work. In many cases, self-determination has been effectuated through consent of the parties involved. Indeed, most of the new states created since the end of the Cold War have resulted from a process of consent between the claimants to statehood and the parent state. At its outset, decolonization, too, was essentially a consent-based process, but (as I will describe shortly) decolonization within the framework of UN institutions was developed into something more.

Decolonization began in earnest after World War II when European powers in possession of a substantial portion of the world’s land surface began to give up the colonial enterprise that had led them to that possession. The post-World War II process of decolonization was not smooth in all cases. In a number of countries, costly anti-colonial wars marked the end of European dominion. Declarations of independence in some cases came without the consent of the colonial power and were met with violence. Curiously, the legal nature of decolonization was such that few if any instances of state creation through decolonization are properly spoken of as cases of secession. More curiously still, in some instances, independence was achieved through armed conflict, sometimes supported by outside powers, and neither the uprisings nor the external aid rendered to them was properly termed a violation of the territorial integrity of the parent state. To understand these seeming paradoxes, it is necessary to understand how the UN regulated the process of decolonization.

The process of decolonization was thoroughly integrated into and monitored by the UN system. Under the Charter, this was accomplished by reference to two types of colonial territories. Chapter XII of the UN Charter provided a framework for territories formerly under the system of Mandates established by article 22 of the Covenant of the League of Nations. Chapter XI dealt with the substantially more numerous colonial territories classified by the UN as non-self-governing territories (NSGTs). The situation in which self-determination has had its clearest legal link to the formation of new states is that of NSGTs. Article 73 of the UN Charter defines NSGTs as “territories whose peoples have not yet attained a full measure of self-government.” The first territories designated NSGTs were possessions of Australia, Belgium, France, the Netherlands, New Zealand, the United Kingdom, and the United States. These powers voluntarily admitted the territories to the UN régime.

See Crawford, supra note 46 (noting that even the Baltic States, widely viewed as having simply reclaimed an independence put in abeyance by illegal Soviet annexation, may owe their post-Cold War independence to a process of consent).
However, Portugal and Spain, members of the UN from 1955, did not volunteer to admit their colonies as NSGTs. The General Assembly, in response to this, set forth criteria for NSGTs in Resolution 1541 (XV) (1960).\textsuperscript{57} Since then, the Assembly has declared certain territories NSGTs despite the resistance or lack of consent of the administering colonial power.\textsuperscript{58} This marked an important evolution in the UN decolonization process.

NSGTs, whether voluntarily designated by the administering power or mandated by the General Assembly, are the territories to which self-determination most clearly applies as a principle that may lead to the establishment of new states. According to the International Court of Justice in its \textit{Namibia Opinion}:

\begin{quote}
[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self determination applicable to all of them.\textsuperscript{59}
\end{quote}

At the same time, the Court emphasized that the NSGT régime is one concerning \textit{colonies}: "[I]t clearly embraced territories under a colonial régime . . . A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514 (XV) of 14 December 1960), which embraces all peoples and territories which 'have not yet attained independence.'"\textsuperscript{60} To date, the régime indeed has never been extended to territories geographically integral to a state. The major restriction of the UN decolonization process was the requirement that it be applied only to noncontiguous colonial possessions. Interestingly enough, the limiting rule was cemented in the same General Assembly resolution that turned the NSGT designation process from a voluntary to a potentially mandatory one. The legal process of decolonization arguably underwent its most substantial extension to date when the General

\textsuperscript{59} Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 6 (June 21).
\textsuperscript{60} \textit{Id.} at 31.
Assembly adopted Resolution 1541 (XV) on December 15, 1960, yet in the same resolution the parameters of the process were strictly set.

Under Resolution 1541 (XV), a Special Committee would assess whether a territory was an NSGT and thus a subject requiring transmission of information. The resolution specified two elements that, prima facie, show an obligation to transmit information. If the territory under alien administration is (a) geographically separate and (b) ethnically and/or culturally distinct, then the territory is an NSGT. The first element, geographic separation, has been called the “saltwater rule”; only territories outre-mer can be addressed under the decolonization regime in its current form. The second, arguably more malleable criterion, has not generally been viewed as an objective limit (though it may be that the General Assembly has exercised some reserve in assessing whether ethnic or cultural distinction obtains in a given population).

After establishing that the territory in question is geographically separate and ethnically and/or culturally distinct from the administering power, a claimant may then use other factors to disprove or support the presumption that an obligation to report exists. Other factors might include aspects of administration, politics, judicial system, economy, or history. At the end of the day, the General Assembly decides the case. When introduced in the 1960s, this amounted to a new system. Whereas before the colonial powers would voluntarily designate territories as NSGTs, after Resolution 1541 the General Assembly would designate territories NSGTs, whether or not the administering power consented to the designation and the obligations that it entailed.

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61 See G.A. Res. 1541 (XV), supra note 57 (Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter).


64 Cassell’s French-English/English French Dictionary 532 (Denis Girard ed., 1982). The term is usually used in association with France, thus “La France d’outre-mer.”

65 See G.A. Res. 1541, supra note 62, at Principle V.
As noted above, the new system was first put into practice in Resolution 1542(XV), which determined that Portugal's overseas territories were NSGTs. This effectuated a change in legal status for Cape Verde, Guinea, Sao Tomé et Príncipe, Sao Joao Batista de Ajuda, Angola and its Cabinda enclave, Mozambique, Goa and its dependencies, Macao, and East Timor. A Special Committee on Territories Under Portuguese Administration was established during the next General Assembly session. Further territories declared NSGTs absent administering power consent included the Spanish overseas possessions, Southern Rhodesia, the New Hebrides, French Somaliland, the Comoros, and New Caledonia.

Once a territory is designated an NSGT, its administering power faces a number of obligations alluded to above. Article 73, chapter XI of the UN Charter indicates that states administering NSGTs "recognize the principle that the interests of the inhabitants of these territories are paramount." Administering states, under article 73, further must "promote to the utmost, within the system of international peace and security established by the [UN Charter], the well-being of the inhabitants of these territories." The Charter elaborates upon this general requirement in the form of five specific obligations:

to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

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73 U.N. CHARTER art. 73, para. 1.
74 Id.
to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

to further international peace and security;

to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible.\textsuperscript{75}

The UN process of decolonization became a powerful tool for obtaining self-governance for territories and peoples under alien rule. Whether the process might be extended to geographically integral parts of a state is uncertain, but, as I will argue shortly, in view of the history of the development of the legal institution of decolonization, such extension is by no means excluded. Just as important for our discussion, NSGTs are the only territories over which the principle of self-determination may, under certain circumstances, produce a right to secession and a right to use force to promote the secessionist program. This means that the process designating territories NSGTs has a profound impact as regards the rights of the ethnic groups in territories so designated and equal impact as regards the rights of the states claiming title to such territories. It also highlights that, outside that process, the right of a people to assert self-determination through secession is extremely limited, if it exists at all.

"[T]he fears of claims for secession based on self-determination for minority or other groups," Dominic McGoldrick writes, "remains an

\textsuperscript{75} Id.
overriding concern for many States." Particular international instruments, such as the International Covenant on Civil and Political Rights (ICCPR), may provide for special rights for minorities of various kinds, but, in their provisions guaranteeing territorial integrity and limiting those rights to internal self-determination, they reflect the prevailing conservatism. Minorities may enjoy international legal protections, but a right to secede in most situations is not one of them. According to McGoldrick, communications to the International Commission of Jurists during drafting of the ICCPR made clear the belief by many states that self-determination was of limited scope in law. Self-determination, though a principle of some general force, is not then, freestanding, a potent legal process. The mechanism by which so many states have established independence during the UN era has been the process of decolonization. Outside that process, territorial integrity has prevailed in almost every instance of attempted state creation.

Decolonization has a special, and narrowly circumscribed, relationship with self-determination. The designation of a territory as an NSGT had a transformative effect on the territory. Before designation, the territory was juridically indistinguishable from the metropolitan or parent state (unless that state wished a different arrangement). But after designation, the territory took on a new status distinct from its metropolitan or parent state. Before designation, removal of the territory from metropolitan jurisdiction, absent metropolitan consent, would have violated the territorial integrity of the parent state, but, after designation, removal produced no violation whatsoever. This was made particularly clear where the colonial power claimed that its colonies were integral parts of the metropolitan territory. Portugal, for example, treated Angola and Mozambique as "overseas provinces." Rejection of the legal fiction did not alone remove the practical grounding for continued Portuguese administration, but it did erode the presumption of territorial integrity favoring


77 The ICCPR reads in pertinent part, "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

78 See id. at 268 n.115 (replying to query from Rosalyn Higgins regarding secessionist claims by Casamance). A Senegalese official stated, "[T]he right to secession, ought not be likened to a principle of international law. As for the first element of article 1 [of ICCPR], it in fact referred to a colonial situation. However, no colonial situation existed in Casamance." Id.
continuation. With that presumption eroded, the principle of self-determination might then lead to independent statehood for the colonies.

It is misleading to say that colonies simply exercised a free-standing right to self-determination and that it was this right alone that accounted for the creation of states in the wake of colonial empires. Decolonization indeed involved self-determination, for this was the principle that decolonization sought to effectuate. It was also the principle that required the inhabitants of the territory be left to freely decide their political disposition once the rule of territorial integrity was rendered inapplicable to the territory in question. But it was only after the presumption of territorial integrity was displaced that self-determination had an unimpeded path. Without the special juridical status colonies possessed as NSGTs, self-determination would have confronted the legally robust principle of territorial integrity and, in short, led nowhere. The process of decolonization produced a great efflorescence of states. By contrast, polities that attempted to establish states against the wishes of the parent state and outside the context of chapter 11 and decolonization seldom succeeded. Assertions of the right to self-determination by polities seeking to establish new states against the wishes of parent states worked best (indeed, almost worked only) within the process of decolonization. This attests to the legal force of NSGT status.

V. EXTENDING THE PROCESS OF DECOLONIZATION

Could, then, the decolonization process regulate latter-day claims to statehood? It possessed, in its original application, two great virtues. First, it kept state-creation and self-determination within the institutional framework of the United Nations. Second, it displaced the presumption of territorial integrity as regarded the colony while preserving the presumption as regarded the metropolitan state. If the UN process of decolonization could have been

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79 Bangladesh is often cited as the rare case of success. See Simpson, supra note 63, at 263 n.39. Failed attempts at secession, by contrast, are numerous. Consider Katanga (from Congo), Biafra (from Nigeria), Kashmir (from India), East Punjab (from India), the Karen and Shan states (from Burma), the Turkish Federated State of Cyprus and its continuation the Turkish Republic of Northern Cyprus (from Cyprus), Tamil Elam (from Sri Lanka), the South Sudan (from Sudan), Somaliland (from Somalia), Bougainville (from Papua New Guinea), Kurdistan (from Iraq and Turkey), the Republika Srpska (from Bosnia-Herzegovina), Abkhazia (from Georgia), South Ossetia (from Georgia), Nagorny-Kharabakh (from Azerbaijan), and the Democratic Republic of Yemen (from Yemen). Even where a polity has wrested effective control of part of the territory of the “parent” state, international recognition has not been forthcoming. The law is extremely conservative of territorial integrity.
extended to Kosovo, the two conundrums raised by Operation Allied Force might well have been avoided.

Extending the process of decolonization to Kosovo would have required a major evolution in the process, namely, removal of the "saltwater" rule. Yet the law of decolonization has not been static. The post-1945 development of the law has been rapid, and it may as yet be incomplete. Decolonization, even as a process limited to the special case of NSGTs as defined by Resolution 1541, has proven a potent trump of vested rights. Few doubted the validity of European title to most of Africa and much of the Caribbean, Asia, and Australasia before World War II, but few colonies remained in European hands thirty years later. The limit on the process has been that it applies only to territories defined as NSGTs. The way in which the UN defines NSGTs, however, underwent at least one major transition during the years of decolonization. At the outset of the UN Charter era, decolonization operated only with the consent of the colonial power. After 1960, it operated even in the face of systematic obstruction. An indication of the shift was the Declaration on the Granting of Independence to Colonial Countries and Peoples. This was a

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This was the system stemming from U.N. CHARTER art. 73. Member states administering colonies designated NSGTs held them in "sacred trust" and committed to (1) the political, economic, social, and educational advancement of the peoples therein; (2) development of self-government; and (3) regular transmission to the Secretary-General of reports on each NSGT. U.N. CHARTER art. 73, para. 1. For the last UN administrative year before what was arguably the watershed in decolonization practice (the advent of nomination of NSGTs without administering power consent), several administering powers transmitted information under article 73(e) for the following territories: Australia, regarding Papua and the Cocos (Keeling) Islands; Belgium, regarding the Belgian Congo; France, regarding the New Hebrides (administered in condominium with the United Kingdom); the Netherlands, regarding Netherlands New Guinea; New Zealand, regarding the Cook Islands, Niue Island, and the Tokelau Islands; the United Kingdom, regarding the Aden Colony and Protectorate, the Bahamas, Basutoland, Bechuanaland, Bermuda, British Guiana, British Honduras, the British Solomon Islands, British Somaliland, the British Virgin Islands, Brunei, Cyprus, the Falkland Islands and dependencies, Fiji, the Gambia, Gibraltar, the Gilbert and Ellice Islands, Hong Kong, Kenya, Malta, Mauritius, the New Hebrides (administered in condominium with France), Nigeria, North Borneo, Northern Rhodesia, Nyasaland, Pitcairn Island, St. Helena and dependencies, Sarawak, the Seychelles, Sierra Leone, Singapore, Swaziland, the West Indies (Antigua, Barbados, Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, and Trinidad and Tobago), Uganda, and Zanzibar; and the United States of America, regarding American Samoa, Guam, and the Virgin Islands. See Information on Non-Self-Governing Territories Transmitted under Article 73(e) of United Nations Charter, Transmission of Information in 1960, 1960 U.N.Y.B. 502.

momentous transition, eventuated by increase in number of former colonies in the General Assembly and also by crystallizing of conviction in other member States that colonialism no longer was tenable or desirable. The resultant development of the process of decolonization introduced a mandatory aspect, whereas the process initially relied essentially on consent. General Assembly recognition of national liberation movements, most of which were carrying on armed resistance against colonial administrations, illustrated pointedly the transition from consent to mandate. It would require a transition of similar magnitude for the UN independence process to reach territories like Kosovo—not voluntarily admitted by the metropolitan state as a proper object of decolonization and not geographically distinct from the metropole.

For such a transition to take place, there would have to crystallize in state practice and informed opinion a belief that the present international legal regime does not adequately address the status of "peoples" geographically embraced by states that govern them without consent and a belief that international law could address that status.

NATO action against Yugoslavia suggests that states do indeed believe that international law must address the status of such peoples. The earnest efforts to do so within a legal framework attest that they also believe that international law has the requisite capacity. However, the approach in fact taken toward Kosovo cuts a broad swathe through existing international legal rules. By extending the principle of humanitarian intervention, it substantially qualifies the right of states to territorial integrity. And, by by-passing the UN Security Council, it may well compromise legal governance of the use of force. Extension of the UN decolonization process might well avoid both problems.

resolution further specified, in paragraph 5: "Immediate steps shall be taken, in trust and non-self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom." Note that successive sessions of the General Assembly passed resolutions pertaining to specific colonies, amplifying the general message of Resolution 1514. See supra notes 66-72.

It would keep the management of self-determination claims within the institutional framework of the UN. Where an administering power obstructed the exercise of self-determination, it might even permit resort to unilateral secession and use of force. By establishing a special juridical status—one distinct from that of the parent state—the process would render the territorial integrity of the administering power a non-issue.

Writers have observed that there would be a logic in extending the NSGT concept to contiguous territories. Buchheit complained:

One searches in vain . . . for any principled justification of why a colonial people wishing to cast off the domination of its governors has every moral and legal right to do so, but a manifestly distinguishable minority which happens to find itself, pursuant to a paragraph in some medieval territorial settlement or through a fiat of the cartographers, annexed to an independent State must forever remain without the scope of the principle of self-determination.\(^{83}\)

Buchheit further reflects that:

International law is . . . asked to perceive a distinction between the historical subjugation of an alien population living in a different part of the globe and the historical subjugation of an alien population living on a piece of land abutting that of its oppressors. The former can apparently never be legitimated by the mere passage of time, whereas the latter is eventually transformed into a protected status quo.\(^{84}\)

Buchheit states succinctly the rule and the paradox it raises. UN drafting practice however further suggests that resolution of the paradox is not impossible. Dominic McGoldrick notes that, in discussions on the Human Rights Committee during drafting of the ICCPR, "members . . . viewed article 1 [of the ICCPR] as having an application outside the colonial situation."\(^{85}\)

Article 1 provides:

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\(^{84}\) Id. at 18.

\(^{85}\) MCGOLDRICK, supra note 76, at 252, para. 5.15.
All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.  

State representatives in reference to article 1 adverted to internal conflicts in Lebanon, Sri Lanka, Afghanistan, Western Sahara, New Caledonia, and Northern Ireland, thus implying that the article could be relevant in places besides the overseas colonies which were the traditional context of decolonization law. In at least one General Assembly Third Committee session, a state representative suggested that the ambit of self-determination might be extended beyond those situations dealt with so far by decolonization.

Interestingly enough, as noted in a 1998 article by Benedict Kingsbury, an early proposal to apply decolonization practice to integral as well as overseas colonies was made in the 1950s by a European colonial power. The "Belgian Thesis," as Kingsbury calls it, would have extended UN scrutiny to nonautonomous peoples contiguous to their rulers, but the thesis was rejected, in part because it was perceived as a "rearguard defense of European colonialism." By making the proposed decolonization system far-reaching,  

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86 ICCPR, supra note 77.  
89 See id. at 439.
Belgium may have aimed to prevent such a system from taking root in any form. Powerful states continue, sometimes overtly, to favor the saltwater limitation on decolonization law.90

At least one publicist has suggested that the General Assembly itself has the discretion to extend the process of decolonization.91 Michael Reisman states that "while decolonization may have had a historically specific reference for some drafters and may have been limited to South Africa, Portuguese territories, and Israel, terms such as 'self-determination' and 'freedom and independence' are open-ended and could be applied to any group that a majority of the General Assembly wished to indulge."92 Reisman emphasizes the General Assembly voting procedure and leaves as speculation the limits on decolonization. He implies that self-determination claims could be addressed through expansion of the decolonization process.93

A kernel may exist for yet another watershed in the legal process of decolonization. The first was the change from decolonization as a process essentially reliant on colonial powers volunteering territories as NSGTs to a process initiated by the General Assembly nominating territories as NSGTs against the wishes of the administering powers. Additionally, twenty years before decolonization began, few colonial ministers, to paraphrase Dickens, had doubted that things in general were settled forever. The very advent of decolonization was a development of moment. Territories like Kosovo could achieve NSGT status if the General Assembly waived the old requirement of geographic remoteness of the dependent territory from the administering power. Such waiver arguably would mark a greater watershed in decolonization law than the transition from voluntary to compelled NSGT status. It would open the way for international legal management of the independence not only of Kosovo but of a number of ethnically distinct territories under alien rule. Chechnya in Russia and the Tamil region of Sri Lanka are two examples of particular concern. Quebec would be most unlikely to fall under the decolonization regime, for its relationship to Canada does not contain the pronounced elements of oppression that have justified most claims to disrupt

90 Kingsbury identifies the People's Republic of China as one such state. See id.
92 Id. at 14.
93 See id.
territorial integrity. But the point stands—numerous are the ethnic conflicts that might be mediated through the decolonization process. 94

VI. THE RISKS

Extending the process of decolonization to territories contiguous to the states administering them would not be risk-free. On the one hand, it may be that such a development in decolonization law would lead to too many territories obtaining NSGT status. On the other hand, the process might not be applied aggressively enough to address problems like Kosovo. I will assess these risks in two ways. First, I will consider the factors that would militate

for and against NSGT designation for Kosovo, as these might resemble the factors encouraging and restraining designation in other cases. Second, to put in perspective the risks in extending decolonization, I will consider the risks presented by the course NATO member states in fact chose for Kosovo.

There are a number of balancing mechanisms inherent in UN decolonization practice. To designate a territory an NSGT requires concurrence of a majority of the voting members of the General Assembly—at present, nearly half the states of the world. This is a meaningful procedural barrier. Yet it is not necessarily a formula for political blockade. One of the problems noted at the outset of this article is that Security Council authorization for use of force, owing to the problem of UN politics, is frequently impossible to obtain—thus the frustration leading to reliance on the mandate of a regional security organization. But the General Assembly cannot be prevented by one state or a small number of states from elevating a territory like Kosovo to NSGT status. Preventing the measure requires a majority of the member states.

The fact that NSGT designation requires concurrence of a majority of the UN member states would restrain the process. Yet it would not be as difficult to achieve as Security Council action. The veto power of permanent members has made the Council undependable as a source of collective security policy. And as long as the Security Council remains the only UN organ that might address crises such as Kosovo, the risk remains serious that the UN system will be bypassed altogether. If the proposition is correct that the UN, as the most broadly constituted international organization, contributes to public order, then a conceptual framework encouraging such bypass subtracts from public order. Conversely, making the General Assembly and the decolonization processes it oversaw from World War II through the early 1970s a possible modality through which to address latter-day self-determination crises would produce positive public order effects. The fact that the decolonization process contains balancing mechanisms might make it succeed.

If the requirement of geographic remoteness were removed, Kosovo might have satisfied the General Assembly Resolution 1541 (XV) criteria for admission to NSGT status. However, at least two political factors could nonetheless have militated against the General Assembly voting to designate Kosovo an NSGT. First, many countries in which there are potential separatist minorities (e.g., France, Canada, Britain, China, Russia, India, Iraq) might oppose extension of NSGT status to a territory integral to the geography of a state. Second, though many states in Africa, Asia, and the Caribbean were themselves NSGTs and benefitted from that status during their own processes of independence, many of these same states were members of the Non-Aligned
Movement of which Yugoslavia was a leader. Residual affinity toward Yugoslavia from the days of Marshal Tito's support for nonalignment might lead some former colonies to vote against NSGT status for Kosovo. Such political or sentimental dynamics would be present in many situations where a territory was nominated for consideration by the General Assembly for NSGT status. The dynamics would have a restraining effect. It is a matter of speculation whether that effect would overpower the decolonization process. It may well be that when confronted with severe and notorious deprivation of self-determination, individual member states would see themselves clear to principled voting. The fact that states in March 1999 were willing with some boldness to push forward the law of humanitarian intervention, even in the face of the principle of territorial integrity, suggests that in certain cases NSGT designation might very well be obtainable for territories like Kosovo. The risk that it would not—or that it would be too frequently—should be measured next to changes in international law likely to result from the course in fact chosen in March 1999.

A potentially radical change in international law toward which Operation Allied Force may have legislated concerns territorial integrity. The argument was put forward at the outset of Operation Allied Force that considerations of territorial integrity were unnecessary as regarded Yugoslavia. One of the most striking expositions of the argument was made by Paul R. Williams. Writing for the Balkan Action Council, Williams stated that "the former Yugoslavia is still in the process of dissolution and Serbia/Montenegro is not a recognized state under international law [and thus] does not possess full rights of sovereignty and territorial integrity." He added to this that the FRY is neither a recognized state nor the continuation of the SFRY and thus does not enjoy ordinary protections guarding its territorial integrity.

Involving an additional institution might allay fears that the General Assembly would use NSGT designation excessively. Perhaps the process to designate a territory an NSGT could be changed to require two votes—one by the General Assembly and one by the International Court of Justice (ICJ). The ICJ could be bid assess whether there obtained in a given instance (1) severe deprivation of self-determination and (2) the characteristics of ethnic distinctness. In cases widely understood to merit NSGT designation, the ICJ would likely concur and thus not pose a real additional hurdle. If, by contrast, a majority of states in the General Assembly formed a political block and used the designation process simply to vex an enemy, the ICJ could exercise a veto and thus block designation. The ICJ would in this view be a safeguard against spurious NSGT designations. If it worked as such, then states would perhaps hesitate less to make NSGT designations in justifiable cases.

Paul R. Williams, Legal Basis for NATO Military Action Taken Against Serbia/Montenegro (visited Apr. 9, 1999) <http://www.balkanaction.org/about.html>.
The argument is problematic in a number of respects. Two in particular require address. First, the premise that the FRY is still dissolving is doubtful. The Badinter Commission, in its first opinion, Opinion No. 1 of November 19, 1991, had concluded that the SFRY was in the process of dissolution. A later opinion, Opinion 8 of July 4, 1992, announced that the SFRY had dissolved. In Opinion 8, the Commission would seem to have identified the process as having ended. The logic of the Commission’s language casts doubt on whether the FRY in 1999 was subject still to the dissolution identified in Opinion 1. To say that the FRY was still dissolving is to ignore Opinion 8 and the contrast between its wording and the wording of Opinion 1. Moreover, the Badinter Commission opinions aside, it seems improbable that a status of such uncertainty could go on for nearly eight years. The FRY was, in terms of municipal order, a comparatively stable entity from July 1992, at least until unrest intensified in Kosovo in March 1998. Even after that, until it led to NATO action, the unrest hardly seemed an immediate threat to the cohesion of the FRY. It would be very surprising if for the period 1992-99 the FRY was “dissolving.”

Even if it is accepted that the SFRY/FRY in March 1999 was still dissolving, that situation is not necessarily relevant to Kosovo. The dissolution, which Badinter Opinions 1 and 8 determined, respectively, was happening and finished, concerned a system of governance and constitutive order binding together six republics of the SFRY. When that system ended, it left in its wake a disaggregated assemblage of republics. Importantly, the system in question did not directly involve the two autonomous provinces within Serbia, one of the republics. The atomistic units of that system, as it were, were the republics, not subunits of the republics. The Badinter Opinions may not have said this explicitly, but they did emphasize that the institutions that were collapsing (thus leading to the dissolution of the SFRY) were institutions relating to the participation of the republics (not of subunits of the republics) in SFRY governance. It is therefore arguable that dissolution of the ruling institutions of the SFRY would have had no immediate impact on the constitutional position of the Vojvodina and Kosovo.

Second, the Balkan Action Council’s legal position implies a role for the recognition of states that modern practice and the opinion of publicists have widely rejected. It is now taken to be the better view that recognition does not

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create a state. Even if certain aspects of statehood (e.g., competence to conclude treaties or participate in international organizations) depend on recognition, basic rights of a community most certainly do not depend on recognition. Among these rights is the right to be free from the threat or use of force. The UN Charter article 2(4) prohibition does not run to UN member states alone.\(^9\) It is a curious result of the formulation advanced in the Balkan Action Council position that Kosovo, itself unrecognized as a state, would enjoy no right to territorial integrity. The problems in a view that holds it to be "open season" on unrecognized states ought to be readily apparent.\(^{100}\) That view should be advanced to promote an extension of humanitarian law is ironic.

NATO action against Yugoslavia essentially consisted of (1) an armed intervention; (2) by a regional defensive organization; (3) without authorization by the UN Security Council; (4) against a state with uncertain international legal status; (5) to prevent a humanitarian disaster (possibly genocide); (6) in an administrative subunit of the state target of the intervention. These features of the action made it unusual within the recent history of use of force. A number of incidents involving the use of force in the nineteenth and early twentieth centuries arguably resembled Operation Allied Force, at least with regard to its enforcement of norms on the internal constitutive processes of a state. Interventions against the Ottoman Empire to protect Christian minorities and against certain Latin American states to enforce debt service come to mind. Such cases do not, however, prefigure the Kosovo action very closely. It may indeed be best to characterize the Kosovo action as an event \textit{sui generis} and of law-formative effect.\(^{101}\) The exact changes that Operation Allied Force will have on international law will not be known for some time, but the action would seem to expose a number of areas to possible revision.

The UN system for the regulation of use of force may be the aspect of international legal order that comes first to mind when thinking about how

\(^9\) See U.N. CHARTER art. 2, para. 4.

\(^{100}\) The merits of the Balkan Action Council's position aside, the prevailing position was not that territorial integrity did not apply to Yugoslavia, but rather that humanitarian considerations trumped territorial integrity. See supra p. 19 and note 35 (discussing publicists' assessments of the legality of Operation Allied Force).

\(^{101}\) Lewis, \textit{Conflict in the Balkans}, supra note 37, at A10 (showing that the Kosovo crisis is raising new ideas and difficult questions of international law that may have a law formative effect); Doyle, supra note 24, at A12 (quoting Ruth Wedgewood of YLS who calls the action legally innovative); see also Peter Riddell, \textit{NATO Attacks Create New Doctrine of Intervention}, TIMES (LONDON), Mar. 26, 1999, at 8, available in 1999 WL 7982618; William Rees-Magg, \textit{Where's the Justice?}, TIMES (LONDON), Mar. 29, 1999, at 20, available in 1999 WL 7983245.
Operation Allied Force may change the law. Warnings that the Kosovo action will result in degradation of the UN system whole clothe may be tempered, however, by considering the vitality of that system in the first place. The UN has seldom been as robust a mechanism for regulating armed force as its founders may have envisioned. Furthermore, a permanent UN general staff and standing UN corps have never been established. Combatants in a number of conflicts have not heeded UN practice. Yet, simply because the Charter has fallen short of the most optimistic projections of those who drafted it does not mean that the UN system has been wholly inoperative. A number of its provisions may have become established features of the international legal order, and at least one of these may well be derogated by Operation Allied Force.

Article 52 of the UN Charter recognizes the right of states to form regional collective security organizations. The most successful of these organizations has been NATO. In April 1949, NATO was originally established for self-defense. If any one member state of the Alliance were attacked, all other members were bound by the NATO treaty to use force to repel the attacker. The UN Charter permits this. However, article 53 of the Charter makes clear that regional collective security organizations are not permitted to use force without Security Council authorization (at least where members of the organization are not under attack). A noteworthy aspect of Operation Allied Force is that its mandate came essentially from the North Atlantic Council, the political arm of NATO. This bypasses UN Charter article 53. If the rule of article 53 is overtaken by Operation Allied Force, then interesting results could follow.

NATO, though the most successful collective security organization, is not the only one. The states of West Africa, for example, have organized themselves in a collective security arrangement. Similar arrangements have existed in the Americas, the Far East, and Eastern Europe. The Arab League was formed to promote the mutual interests and common defense of the Arab states. Suppose there were a resurgence of violence on the West Bank and Israeli security forces killed a number of Palestinians and damaged Palestinian property. Would the Arab League, by a unanimous resolution of its member states, have the legal authority to engage in an armed action against Israel? Under the precedent set by Operation Allied Force, Arab League lawyers might well argue that it would. The Israeli riposte in all likelihood would run along lines something like the following: human rights violations committed by Israel on the West Bank, if any, are not to be compared to those committed

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102 See supra pp. 17-19 and accompanying notes.
by Yugoslavia in Kosovo. This, however, would simply beg a further question. How serious do violations have to be in order to justify an attack by a regional collective security organization? Quandaries will arise when the facts are ambiguous—something worse than sporadic violation of a putative economic right but not as bad as open prosecution of genocide. Even if an objective standard were set in law, there is still the question of who would decide the facts. The Warsaw Pact countries all agreed in 1967 that something had to be done about Czechoslovakia. This agreement encompassed a reading of both the law and facts that could never have been obtained at the UN level. Allowing NATO to decide that the violations of human rights in Kosovo in 1999 justified armed intervention furnishes legal precedent for future intervention by regional security organizations elsewhere.  

The Kosovo action is unlikely to revise in its entirety the system for regulating force which is embodied in the UN Charter. Nor is it likely to leave that system entirely intact. This in turn leads to a second aspect of international law that may change under the influence of Operation Allied Force. International lawyers have long said that what states did within their own borders was not a matter which international law could address. Acts by one state against another might be actionable, but if the impact of the acts of a state were limited to its own citizens, then other states had no business intervening. This rule has been under reconstruction for some time. Events in the 1990s in particular have changed the rule. The United States led an intervention in Haiti, not because Haiti was under attack or was attacking another state, but because the government of Haiti refused to respect the results of a democratic election in Haiti.  

Similar actions were undertaken by the Economic Community of West African States (ECOWAS) in 1990 in Liberia  and in 1998 in Sierra

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103 It could be, however, that interventions by regional security organizations such as those in West Africa and the Balkans are now sufficiently numerous that a customary international norm governing them is emerging. Wedgewood alludes to the possibility, noting specifically that “NATO can claim the legitimacy of a nineteen-nation decision process, and the normative commitments of a democratic Europe.” Wedgewood, supra note 30, at 832-33. I have suggested elsewhere that collective process may be required by international law in certain forms of decision-making but that international law is taking shape to permit states to define “collective.” THOMAS D. GRANT, RECOGNITION OF STATES: LAW AND PRACTICE IN DEBATE AND EVOLUTION 187-93 (1999).


105 See Lobel & Ratner, supra note 23, at 126.
The no-fly zones in northern and southern Iraq were extended to protect minorities in Iraq (Kurds in the north, Shi‘ite Arabs in the south) from their own government. In none of these cases was armed intervention justified on traditional grounds—defense of a state from attack by another state. Instead, a new rule was being applied. Under that rule, states may intervene to protect the people of one state against their fellow citizens and rulers. NATO intervention against Yugoslavia is a new, and by far the most decisive, application to date of the new rule. Though some Kosovar Albanians have declared their province a state, nobody had recognized Kosovo as a state at the time Operation Allied Force commenced. NATO intervention had as its purpose the changing of the internal order of Yugoslavia—not the traditional purpose of defending one state from another.

This change in international law is momentous. In effect, it erodes the state as an independent unit in international affairs—or, at any rate, takes from external regulation certain acts within its borders. Some international lawyers once described the state as a social order independent from any other social order. That description, under the Kosovo precedent, can no longer

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107 See generally Alain E. Boileau, To the Suburbs of Baghdad: Clinton’s Extension of the Southern Iraqi No-Fly Zone, 3 ILSA J. INT’L & COMP. L. 875 (1997) (arguing that the real reason for the extension of the no-fly zones was to protect oil fields in Kuwait and Saudi Arabia); Jane E. Stromseth, Iraq’s Repression of Its Civilian Population: Collective Responses and Continuing Challenges, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS, supra note 106, at 77.


109 Baty wrote of a form of self-containment being an essential attribute of statehood, calling it “the existence among the people, or the bulk of the people, of a certain mutual reliance, not participated in by the outside world.” THOMAS BATY, THE CANONS OF INTERNATIONAL LAW 13 (1930). According to Henkin, statehood involves “privacy” or “impermeability.” LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10-12 (1995). And Kelsen wrote of “impenetrability” in connection with statehood: “The principle that the national legal order has the exclusive validity for a certain territory, the territory of the state in the narrower sense, and that within this territory all individuals are subjected only and exclusively to this national legal order or to the coercive power of this state, is usually expressed by saying that only one state can exist on the same territory, or—borrowing from physics, that the State is ‘impenetrable.’” HANS KELSEN, GENERAL THEORY OF LAW AND STATE 212 (Anders Wiedberg trans., 1949).
be entirely accurate, if ever it were. Again, problems may arise when this new concept of the relationship between states and international society is applied in the future. For example, consider the domestic situation in Indonesia. In that large developing country, a small minority of Indonesian citizens of Chinese ethnic background control as much as seventy percent of the economy. Indigenous Indonesians are openly hostile to the Chinese minority. At times, they have subjected their Chinese fellow citizens to attacks which observers have compared to pogroms earlier this century against European Jews.\textsuperscript{110} Under the traditional view, no state could take action against Indonesia for conduct that had no direct impact on persons outside the borders of Indonesia. However, under the Kosovo precedent, the rule is different. If Indonesians began a new round of terror against their Chinese co-nationals, an outside state would have an arguable case for intervention. Would a People’s Republic of China, keen on geopolitical expansion, use the opportunity to take over Indonesia? Would Russia try to revive the Soviet Union if persons of Russian ethnic background came under attack in the Baltic Republics or, more plausibly, one of the five Central Asian states?\textsuperscript{111} Such questions are more serious from the standpoint of international law now than before Operation Allied Force. Closer to home for Americans, erosion of the independence of the state from outside norms may expose to new international criticism United States laws not widely approved in the developed world. Western Europeans, for example, oppose the death penalty.\textsuperscript{112} There is, of course, no realistic

\textsuperscript{110} For a fascinating analysis of this vexed situation, and the relationship generally between ethnic conflict and free market reforms, see Amy L. Chua, 93 AM. SOC’Y INT’L L. PROC. (publication forthcoming 1999). See generally Amy L. Chua, Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development, 108 YALE L.J. 1 (1998) (discussing the phenomenon of ethnic minorities who have dominated economically the indigenous majorities around the one); Amy L. Chua, The Privatization-Nationalization Cycle: The Link Between Markets and Ethnicity in Developing Countries, 95 COLUM. L. REV. 223 (1995) (explaining the tension between “true” Indonesians and the country’s Chinese minority).


question of foreign armed intervention in the domestic affairs of the United States. But the legal bases for foreign pressure in the domestic affairs of all countries are arguably reinforced by the intervention in Yugoslavia.

By the same token, states may find after Operation Allied Force that the way they manage their own provinces or federal regions is no longer strictly a domestic matter. A further legal result of Operation Allied Force may well be to increase the profile of the subunits of states in international affairs. Kosovo is a province of Serbia, which in turn is a constituent republic of the Federal Republic of Yugoslavia. The traditional view under international law was that subunits of a state—even subunits with substantial powers of their own such as possessed by the fifty states of the United States—were not subjects of international law. Any profile that such subunits might have enjoyed outside the borders of their own country existed at the sufferance of the central government. The relations between the central government and its territorial subunits or provinces was of no legal interest to other countries. Operation Allied Force, while at one level about the rights of individual human beings, was also about the federal structure of Yugoslavia. Yugoslavia’s rejection of the Rambouillet agreement triggered the 1999 NATO action and required Yugoslavia to restore to Kosovo the autonomy stripped from it in 1989. Under the traditional view, Yugoslavia’s internal federal relations would have been a matter for Yugoslavia alone to govern. State practice is instructive. In 1962, the central government of Ethiopia terminated the autonomy of Eritrea, a former possession of Italy which had joined Ethiopia after World War II on the promise that it remain largely independent from the central government. No international action was taken against Ethiopia when it went back on the promise. The change was a change in the federal structure of Ethiopia and was not believed to have repercussions under international law. The rule implied by after Operation Allied Force, however, would be different. A subunit of a federation, such as Kosovo, may become the object of international legal interest. At the very least, instruments defining the relationship between the subunit and federation may begin to be viewed as instruments governed by international law.

This could advance by some measure developments already underway in important states. In the United States for example, states (the subunits of the Parliamentary Assembly, Report on the Abolition of the Death Penalty in Europe (Rapporteur: Mrs. Wohlwend (Liechtenstein)) A.Doc. 7589, of June 25, 1996 (illustrating European consensus against the death penalty).

federation) have challenged the long-assumed monopoly of the federal government over foreign affairs. A Massachusetts law, for example, in promotion of the international human rights policy of the Commonwealth legislature, restricts the Commonwealth government from doing business with companies doing business in Burma (Myanmar). If this is a trend on the part of United States states, then it may be strengthened, indirectly at any rate, by action which conceives of a subunit of a country as a proper subject of international legal concern. Operation Allied Force may change the status of federal units and provinces in relation to international law and in relation to the central governments of their own countries.

In Yugoslavia, a province may well be on its way to becoming at least de facto an independent state. But a Kosovar state will in all likelihood be dependent on armed international support, both for protection against outside foes (namely, Serbia) and for domestic stability. Another result of Operation Allied Force may be a resurgence of a form of statehood that was quite common in the nineteenth century but rejected in the twentieth—the protectorate. The premise behind a protectorate was that a given state lacked the internal cohesion to govern its own affairs or to defend itself against outside forces. Foreign countries, usually European, established protectorates over many states in the nineteenth and early twentieth centuries. British India was not a unitary entity but, in essence, a series of protected states. Protectorates such as Nigeria, Malaysia, and Morocco in fact were scattered throughout the colonial empires. The protectorate by the end of World War II was

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rejected as a model of governance, however, on the grounds that it was a façade for western conquest. The post-Cold War era, remarkably, may be witnessing creation of a new version of the old form. Not a tool for conquest but a response to humanitarian crisis, the latter-day protectorate would appear to be largely divorced from the material interests of the protecting powers. Nonetheless, it would also appear to involve some of the essential elements of its precursor—on-going armed intervention, substantial external influence on constitution-making, foreign involvement in courts and other government bodies. Writers have duly noted that intervention, even when lacking the semi-permanence implied by protectorate status and when justified on humanitarian grounds, carries risks.116

The idea of a modern protectorate is arguably much in evidence in Bosnia.117 There, the constitution of the state was drafted overseas, in a language foreign to the state, and guaranteed by a “contact group” of outside states. Foreign troops, with powers similar to those of an occupying army police, draw domestic dividing lines between hostile ethnic groups and guard Bosnia against Serbia. Foreign legal experts sit on key Bosnian judicial panels. The Bosnian government depends on external financial aid. It is difficult to imagine how an independent Kosovo could survive without a similar arrangement. Instability caused by the mass exodus of Kosovar

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117 It may be that the nineteenth century logic of protectorates is inverted in the new version of the old form. Protecting powers in the nineteenth century aimed chiefly to prevent competing powers from establishing influence over the protected states in its international relations. Municipal governance was left to the inhabitants of the protected state. In the new form of protectorate, the logic is somewhat different. The protected state is free to engage in international relations in the manner its inhabitants through their own government choose; competition among potential protecting powers is not a factor. But municipal governance, rather than being left to the inhabitants, is regulated in detail. Also, the new protectorate tends to be guaranteed not by a single power but by alliances of powers. On the advent of a new form of protected state, see Thomas D. Grant, Toward a New Protectorate? Bosnia and Cyprus as Predicates for a New Nontraditional Actor in the Society of States, 8 J. Transnat’l L. & Pol’y 1 (1998).
Albanians into neighboring states might well result in the need for still further international protectorates in the region. Macedonia and Albania in particular could find themselves dependent states in much the same way Bosnia has been since the Dayton-Paris Accords. If Montenegro, the other federal unit of the Federal Republic of Yugoslavia, increases its protest and breaks with Serbia to make its own state, the hostility of the Yugoslav federal army and the Kosovar refugee crisis would probably result there too in an international protectorate, in fact if not in name.118

It may be that approaching the problem of internal ethnic minorities by extending General Assembly decolonization practice also magnifies the importance of sub-state units under international law and thus itself presents at least one of the problems that the NATO by-pass presents.119 After all, once designated an NSGT, a territory participates in a public order process that is no longer strictly municipal—the administering power has obligations to report on the territory to the UN, and the territory may choose to alter its relationship with the administering power. The territory may even, where the administering power fails grossly in its obligations, pursue by force a change in that relationship. At least two factors, however, might make extending the process of decolonization safer than the approach in fact taken toward Kosovo.

First, as noted above, declaring a sub-state unit a non-self governing territory will require concurrence by a majority of the General Assembly membership. This is no mere procedural nicety and would likely be difficult to accomplish in most cases. Yet, unlike the approach which relies on Security Council competence over use of force, extending the process of decolonization cannot be blockaded by a single state. Political problems which make the Security Council an unreliable organ for enforcement may arise in the General Assembly. However, the majority voting procedure in the General Assembly makes obstructionist tactics much less likely to succeed. The NATO by-pass promotes a rule that permits a regional security organization to decide, without reference to constituencies broader than its membership, that a sub-state unit has become an object of valid international juridical interest. The UN process of decolonization requires more than that. Assuming that it is desirable, when seeking to constitute new rules, to do so on the broadest basis possible, this procedural safeguarding makes the decolonization approach preferable to one taking place outside UN institutions.

118 That "failed states" in the Balkans are becoming "protectorates" has been suggested elsewhere. See Ruth Gordon, Saving Failed States: Sometimes a Neocolonialist Notion, 12 AM. U.J. INT'L L. & POL'Y 903 (1997).
119 See supra note 23 and accompanying text.
Second, extending decolonization makes clear to the parties most directly involved that internationalization is in progress. Before use of force is valid, an open declaration is made by the General Assembly that the ethnic minority territory has taken on a legal status distinguishing it (though not yet severing it) from the parent state. In designating the territory an NSGT, the General Assembly transforms its legal status and, in effect, puts all parties on notice that territorial integrity is no longer the paramount legal factor. Moreover, the status entails a set of obligations on the parent state. These obligations have been announced with relative clarity by the extensive practice surrounding decolonization over the past fifty years. The argument that use of force derogates the territorial integrity of the parent state—a sound one that favors the FRY in Operation Allied Force—would be largely beside the point after General Assembly action designating an ethnic minority territory like Kosovo an NSGT.

The path chosen to address Kosovo will have law-formative impact, and the exact extent and direction of the changes it effects are difficult to predict. It may well be that an extension of the process of decolonization, contained as it would be in UN institutions and regulating as it might the tension between territorial integrity and self-determination, would conserve areas of the law that the chosen path is likely to revise.

VII. CONCLUSION

Self-determination has been given practical effect in two ways. It has been given practical effect through preservation of legal orders, and it has been given practical effect through revision of legal orders. Preservation of a legal order is sufficient for groups whose right to self-determination is perfected under that order. Revision may be necessary for groups whose right is as yet unperfected.

Revision of legal order in pursuit of self-determination, in turn, has taken place essentially through two mechanisms. A process of change involving the consent of both the beneficiaries of the existing order and the party seeking revision is one mechanism. Decolonization is the other mechanism. Starting simply as a species of consensual change, decolonization was developed through UN practice into its own distinct form. Decolonization became, by the 1960s, a mechanism to achieve revisions of legal order where consent was lacking.

Kosovo presents the most difficult case. Consensual processes have failed there, so the first mechanism to revise legal order to achieve self-determination, revision through consent, is inapplicable. The second mechanism, the
UN process of decolonization, however, in its current form, would not reach a territory like Kosovo.

This article proposes that the process of decolonization developed during the UN era be extended. In particular, it proposes that the process be extended to reach territories the peoples of which have not realized self-determination yet which are contiguous to the state exercising control over them. The process so extended could address crises in self-determination in an effective manner, yet without the broad and unpredictable legal revision made likely by the NATO response to Kosovo’s troubled claims of right. Extending decolonization keeps international response within the framework of the UN yet may pose much less risk of political blockade than the Security Council approach. It puts in proper sequence the change in juridical status of the ethnic minority territory and the threat of use of force, thus clearing the air of the risk of violating the territorial integrity of a state. The approach does push the decolonization practice of the UN into a new sphere—ethnic minority territories contiguous to the powers that administer them. But this would not be the first bold step in the decolonization practice of the UN. Nor does this introduce an entirely new, and thus inherently less predictable, form of international action.

The only unambiguous successes of self-determination in achieving nonconsensual transformations of territorial situations have been in the framework of decolonization. Decolonization is, on that precedent, the logical institution in which to vest further development of self-determination. Indeed, the view is not correct that the process of decolonization has constrained self-determination; the process of decolonization has given self-determination its fullest legal effect.\(^{120}\) If it is a virtue when changing the law to leave intact as

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much of the surrounding legal system as possible while accommodating the purposes for which change is contemplated, then extending the existing process of decolonization to achieve self-determination for Kosovo may well have been an approach worth trying.

However richly textured, these applications of the principle of self-determination were confined to special cases. When statecraft affirmed the principle of self-determination, states limited its applied sphere, precluding sweeping claims of entitlement by separatist groups. But the question should not be why, how, or where did states limit self-determination; states after all had the formidable advantage of incumbency. They did not in short have any obligation to grant or permit self-determination. The real question is, why, how, or where did states allow self-determination. And the answer, at least as to "how" and "where," is the process of decolonization. Hurst Hannum gets it right. "[S]elf-determination," he writes, "except in the... context of decolonization, is not absolute... Recognizing that one has a right to self-determination does not imply that one can always exercise the right to its maximum extent." [emphasis added] Hannum, supra note 53, at 777. The notable phenomenon is not the limit on the principle. The notable phenomenon is the institution, decolonization, that has permitted its vindication in so many places.