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## Seeking Reconciliation of Self-Determination, Territorial Integrity, and Humanitarian Intervention (Introduction to Special Project: Humanitarian Intervention and Kosovo)

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**SPECIAL PROJECT**  
**HUMANITARIAN INTERVENTION AND KOSOVO**

**INTRODUCTION: SEEKING RECONCILIATION OF SELF-  
DETERMINATION, TERRITORIAL INTEGRITY, AND  
HUMANITARIAN INTERVENTION**

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The whirl of debate over the Kosovo crisis often made reference to the “competing” norms of self-determination and territorial integrity, of humanitarian intervention and prohibitions on force except in self-defense. The Essays that follow grapple with humanitarian intervention on its face and as applied, as constitutional law scholars would say. Professor Bartram Brown explores the legitimacy of humanitarian intervention as a norm of international law against the difficult backdrop of its justification in the Kosovo crisis.<sup>1</sup> Professor Julie Mertus faces the monumental problems of unleashing the doctrine, struggling to find its limitations on the application of force.<sup>2</sup>

The murky legal pedigree of humanitarian intervention is muddled even more by the humanitarian causes on which the intervention depends. The new world order seems to have a love-hate relationship with the concept of statehood: everyone wants one but no one wants to be a part of the ones that already exist. The demise of colonialism and apartheid have made the villains and the victims more difficult to identify. We are left only with those competing norms: the U.N. Charter’s prohibition on the use of force except as a last resort and in self-defense;<sup>3</sup> the pres-

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1. See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1697-1741 (2000).

2. See Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743, 1752-87 (2000).

3. See U.N. CHARTER art. 2, para 4; *id.* art. 51.

ervation of the territorial integrity of states;<sup>4</sup> the exaltation of peoples' right of self-determination in the U.N. Charter,<sup>5</sup> the international covenants,<sup>6</sup> and myriad other human rights documents;<sup>7</sup> the right of self-determination that encompasses the right of a state to determine its own government, free of outside interference; and the right of peoples to seek and receive support in pursuit of their self-determination.

The pertinent question undertaken in this Special Project is where does humanitarian intervention, or the use of force more generally, fit into this convoluted puzzle of competing norms of international law. If humanitarian intervention has no place in this paradigm, it becomes even more suspect as a norm that has survived the post-Charter prohibition on the individual or collective use of force outside of the context of self-defense.

Secession from a state is itself a confrontational act. It inevitably invites a counterresponse from the established state in terms of force. The norms of international law that recognize the territorial integrity of an established state and the use of force by a state in self-defense are elevated to the status of *jus cogens*. Secession cannot be equated with self-determination. Otherwise, international law would be encouraging provocation or use of force under the umbrella of self-determination and yet be condemning the established state's likely, even inevitable, response of self-preservation.

If there is any proposition that clearly emerges from the legal regime of the U.N. Charter, it is that force is available only as a last resort.<sup>8</sup> That proposition must apply equally to the seces-

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4. *See id.* at art. 2, para. 7.

5. *See id.* at art. 1, para. 2.

6. *See* International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, 993 U.N.T.S. 171.

7. *See, e.g.,* U.N. CHARTER arts. 1, 55, 73 76(b); Universal Declaration of Human Rights, Dec. 10, 1948, arts. 1, 37, U.N. GAOR, 3d Sess., pt. I, at 71, U.N. Doc. A/810 (1948); Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

8. *See* U.N. CHARTER art. 2, para 4; *id.* art. 51.

sionist movement and the established state or else the rules inevitably will favor one side over the other and one right over the other (self-determination versus territorial integrity) in their authorization of the ultimate response. If there is any aspect of self-determination that is clear and widely accepted, it is the autonomy of the population of a state to determine that state's government. They may choose that government through violence or civil war and not violate international law, *so long as the government they are determining is to govern over the established state. When the force is directed toward secession, in contrast it must be justified as a measure of last resort to ensure the self-determination of a people.*

Acceptance of these premises leads to a possible reconciliation of the norms of self-determination for national minorities on the one hand, and preservation of territorial integrity on the other. Individual human rights apply to all of the individuals within a state. The more these rights are denied, the greater the denial may be of the collective right of self-determination that the population of a state as an entity is free to choose its own government, even by force. If the denial of individual human rights disproportionately affects or targets a national minority, or infringes protected rights for an ethnic, religious, or linguistic minority under Article 27 of the International Covenant on Civil and Political Rights<sup>9</sup> or protected rights of an indigenous group, the minority's group rights as well as their individual rights are being denied.

That does not necessarily mean, however, that the minority is being denied its right of self-determination separate and apart from the right of the population of the established state to choose the state's government. The population of the state as a whole is given the right to determine the government, *even through the use of force, at any time and under any circumstances.* The national minority or targeted group does not have the right to choose its own government for the state, and certainly not through the use of force. Only when the denial of individual or group rights, or both, is so severe that the targeted "people" can-

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9. See International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 27, 999 U.N.T.S. 171, 179.

not "freely determine their political status and freely pursue their economic, social and cultural development"<sup>10</sup> does a separate and distinct violation of the right of self-determination exist. Then and only then would force be available to effectuate self-determination, because, by definition, political processes and the mechanisms of civil society are not available to them to rectify the situation. If even force cannot bring about the changes necessary for the people to seek freely these two ends within the established state, then secession is the method of last resort.

This paradigm suggests some necessary limits on humanitarian intervention if the doctrine is to be recognized. Whatever the debate over the legitimacy of the doctrine, there is agreement that, as with any unilateral or collective use of force by states, the force must be necessary and proportional. As long as the derelict state's structures allow for the oppressed people to seek an adequate remedy for their oppression through peaceful means, there is no violation of the people's right of self-determination, justifying their resort to force. If the victims themselves have no justification to resort to force, certainly the individual or collective states should not be permitted to do so under the auspices of "humanitarian intervention."

The proposed paradigm can be summarized as follows. In the exercise of self-determination, the population of an established state may choose its own government, even through force. Any subgroups or "peoples" of that population may resort to force only when the state's denial of their individual or group rights, or both, is tantamount to a denial of their right of self-determination, that is, their right "to freely determine their own political status and freely pursue their economic, social and cultural development, and peaceful means are unavailable or ineffective."<sup>11</sup> If self-determination cannot be effectuated within the established state, then secession may be necessary as a last resort. Humanitarian intervention by a state or group of states is justified only when a "people" is being deprived of its right of self-determination under circumstances that warrant use of force. Intervention is not justified whenever the population of a state is entitled to

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10. U.N. CHARTER art. 1, para. 1.

11. *Id.*

use force to choose the government, as that would in fact violate the U.N. Charter's prohibition on intervention in the internal affairs of a state and violate that aspect of self-determination.

The paradigm is tested, as every international rule of law seems to be, by the Kosovo situation, but it withstands the challenge. Viewing the definition of "established state" from the perspective most favorable to the alleged transgressor state, Kosovo would be part of the established state of the Federal Republic of Yugoslavia. The population of the state of Yugoslavia is free to overthrow Milosevic whenever it chooses to do so, through force or otherwise, but no outside state could intervene simply to overthrow his government. The Albanian majority in Kosovo could support that overthrow, with force in the case of a state-wide civil war, or through other nonforcible means. If deprivation of their rights as a group within Yugoslavia were so infringed by Milosevic's measures that they were denied their right to pursue their economic, social, and cultural rights or determine their political status, and peaceful means proved ineffective or unavailable, then the Albanians were entitled to resort to force against the Milosevic government. As a legitimate self-determination movement, other states would be free to support them, even through force, under the rubric of humanitarian intervention. If reconciliation sufficient to guarantee their right to self-determination turns out to be impossible within the established state, then secession would be a solution of last resort rather than a matter of right.

A few other examples suggest how the model could be utilized. As the death penalty becomes more widely outlawed, the imposition of death sentences become increasingly suspect as a violation of international law. The unlawful taking of life is the most grave of human rights violations, and statistics on its disproportionate use against African Americans in the United States are compelling.<sup>12</sup> Yet, use of the death penalty in the United States would not in and of itself justify the use of force by the dispropor-

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12. See, e.g., Evan Tsen Lee & Ashutosh Bhagwat, *The McCleskey Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 161-70; Symposium, *The Capital Jury Project*, 70 IND. L.J. 1033 (1995).

tionately impacted racial group or justify humanitarian intervention by other states so long as the racial group was not being denied its right of self-determination within the established state and had available to it meaningful mechanisms to challenge the death penalty. Similarly, widespread use of torture itself would not be grounds for humanitarian intervention unless the intent or the effect of the torture was to suppress the right of the population to choose its own government or the right of a state subgroup or "people" to exercise its right of self-determination.

This proposal does not address whether humanitarian intervention itself is lawful, or the limits on its exercise. As noted above, these issues are left to the distinguished scholars in their commentaries that follow.<sup>13</sup> It does suggest, however, that there may be a suitable place for humanitarian intervention in the global legal framework that complements, rather than undermines, the accepted norms of international law.

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13. See Brown, *supra* note 1, at 1697-1741; Mertus, *supra* note 2, at 1752-87.