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## Human Rights, Sovereignty, and the Final Status of Kosovo

Bartram S. Brown  
*IIT Chicago-Kent College of Law*

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# HUMAN RIGHTS, SOVEREIGNTY, AND THE FINAL STATUS OF KOSOVO

BARTRAM S. BROWN\*

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\* Professor of Law and Co-Director, Program in International and Comparative Law, Chicago-Kent College of Law, Illinois Institute of Technology; Visiting Fellow, 2004, Lauterpacht Research Centre for International Law, University of Cambridge, U.K.

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## INTRODUCTION

Kosovar Albanians, as a minority within Serbia, and Kosovo Serbs, as a minority within Kosovo, have both suffered unacceptable mistreatment in recent years. This widespread misery has transformed the situation in Kosovo into a matter of international concern<sup>1</sup> and Kosovo itself into a theatre of international involvement. The 1999 NATO bombing mission<sup>2</sup> succeeded in ending the Serbian persecution of Kosovar Albanians. In the aftermath UNMIK<sup>3</sup>, the present United Nations civil administration of Kosovo was established, and KFOR<sup>4</sup>, a UN-sponsored international security force for Kosovo, precluded the Kosovo Liberation Army from committing further acts of violence and terrorism against Kosovo Serbs. The cycle of revenge continues, as the Serbian minority in Kosovo remains the target of ethnically targeted mob violence.<sup>5</sup>

The international community's reliance upon an international administration and security force was only an interim solution leaving fundamental issues to be decided later. The tension between Serbs and Albanians in Kosovo will not be resolved until the future political status of that territory has been finally determined.

The final political status of Kosovo is ultimately a human rights issue, and a just and viable solution must balance the sovereignty and territorial integrity of Serbia with the human rights of Kosovar Albanians. At another

1. See S.C. Res. 1160, U.N. SCOR, 3868th mtg., U.N. Doc. S/RES/1160 (1998).

2. See Barrtram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1684-93 (2000).

3. UNMIK, the United Nations Mission in Kosovo, was established pursuant to Security Council Resolution 1244. See S.C. Res. 1244, U.N. SCOR, 4011th mtg. ¶ 10, U.N. Doc. S/RES/1244 (1999).

4. The Kosovo Force ("KFOR") is a NATO-led international force, authorized by the United Nations, and responsible for establishing and maintaining security in Kosovo. See <http://www.nato.int/kfor/kfor/about.htm> (Sept. 1, 2004).

5. See Nicholas Wood, *Kosovo Smolders After Mob Violence*, N.Y. TIMES, Mar. 24, 2004, at A10; Nicholas Wood & David Binder, *Treasured Churches in a Cycle of Revenge*, N.Y. TIMES, Apr. 3, 2004, at B9.

level, the challenge is how best to achieve self-determination for Kosovar Albanians while ensuring the rights of other groups and minorities within Kosovo. This legal and political puzzle exemplifies the clash between the traditional state-centered rights associated with territorial sovereignty and more modern notions of universal human rights.

This Article argues that **internal** forms of self-determination, involving a degree of self-government and the respect for minority rights, should be available as a matter of right, but that claims for **external** forms of self-determination, such as independence or the transfer of sovereignty to another state, cannot generally be satisfied and can rarely if ever be demanded as a matter of right. International law neither demands, nor excludes, the possibility of independence for Kosovo. It does, however, require an outcome consistent with the fundamental human rights of all concerned as well as with the maintenance of international peace and security.

Those who assume that an independent and sovereign Kosovo will inevitably materialize may well be disappointed. Those who assume that the territorial integrity of Serbia cannot be altered without its consent run a similar risk. Both the local need for resolution of the final status issue and the global cause of international peace and security will best be served if the broadest possible range of alternative solutions to final status is given careful consideration. Political negotiations between the interested parties themselves offer the best opportunity to balance the many legal and political factors involved.<sup>6</sup>

Failing agreement between the interested parties, the UN may be forced, however reluctantly, to decide upon a solution to final status. Ultimately, the Security Council has the authority to implement whatever solution it decides is necessary to maintain international peace and security, as well as to protect the human rights of all those concerned.<sup>7</sup> If it becomes necessary for the Security Council to determine the final status of Kosovo, the demonstrated willingness of Kosovar Albanian political leaders, Serbian leaders, and the leaders of other interested groups to engage in genuine negotiations on final status issues could be an important factor in the Council's ultimate assessment and decision.

After offering a brief background on the situation in Kosovo, this Article will examine the historical development of the idea of self-determination and consider alternative forms of self-determination and

6. The interested parties include not only Albanians and Serbs, but also a number of other smaller ethnic groups resident in Kosovo, including the Roma.

7. See U.N. CHARTER arts. 39–42 (authorizing the Security Council to decide upon whatever measures it determines are necessary to maintain or restore international peace and security).

potential paths to self-determination for Kosovo. This article will then offer a human rights-based perspective on final status and offer policy suggestions on how best to move toward a positive resolution of the issue.

### I. BASIC BACKGROUND ON KOSOVA/KOSOVO<sup>8</sup>

The Socialist Federal Republic of Yugoslavia (“SFRY”) was a multi-ethnic state under its post–World War II Communist leader Marshal Tito.<sup>9</sup> Tito successfully used federalism to ensure his control over the country by balancing the power of different ethnic groups within six republics (Serbia, Croatia, Slovenia, Montenegro, Macedonia, and Bosnia-Herzegovina) and two autonomous provinces within Serbia (Kosovo and Vojvodina), frequently playing the different nationalities against each other.<sup>10</sup> A decade after Tito died in 1980, the SFRY began to fragment.<sup>11</sup> Under the ultranationalistic leadership of Slobodan Milosevic, Serbia, as the largest and most influential republic within the federal state, sought to dominate the SFRY.<sup>12</sup> Serbian repression provoked ethnic backlash by members of other groups,<sup>13</sup> and active hostilities broke out between the Serbian dominated Yugoslav People’s Army (Jugoslovenska Narodna Armija, or JNA) and organized armed resistance in Croatia, Bosnia-Herzegovina, and, ultimately, in Kosovo. As the JNA sought to keep the country together by coercion, interethnic violence and repression spread to affect victims of all nationalities.<sup>14</sup>

In 1991, as the fighting continued, four of the constituent republics, Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina, declared inde-

8. The Albanian-language name for the territory in question is “Kosova,” and Albanian-speaking residents prefer that name. The English language name “Kosovo” follows the Serbian spelling, and this standard English spelling is used in this article.

9. Tony Barber, *The Bosnia Crisis: Serbs, Croats and Muslims: Who Hates Who and Why*, INDEPENDENT (London), Aug. 9, 1992, at 16.

10. See Opinion and Judgment, *Prosecutor v. Tadic*, Case No. IT-94-I-T, I.C.T.Y., at para. 65 (May 7, 1997).

11. *Id.* at para. 70.

12. See Tim Judah, *The Serbs: The Sweet and Rotten Smell of History*, 126 DAEDALUS 23 (1997).

13. As one article noted:

The scale of the killing in ex-Yugoslavia is disputed. But its savagery is not in doubt. In less than two years of war, many thousands—some say many tens of thousands—have died. Snipers of all sides pick off civilians, and all have murdered helpless prisoners. The Serbs have ruthlessly shelled towns, and have at times adopted rape as a method of war. Gunmen have driven countless people from their villages and seized or burned their homes.

*The Road to Ruin*, ECONOMIST, May 29, 1993, at 23.

14. Patricia M. Wald, *Punishment of War Crimes by International Tribunals*, 69 SOC. RES. 1119 (2002).

pendence from the SFRY.<sup>15</sup> All four of these republics requested diplomatic recognition as newly independent states from the European Community (“EC”) and its members.<sup>16</sup> Local authorities in Kosovo, formally classified as an autonomous province of Serbia and not as a Federal Republic, attempted to follow suit, but their declaration had little practical effect as Serbia retained control of Kosovo.<sup>17</sup> The EC, predecessor to today’s European Union (“EU”), agreed on certain “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union”<sup>18</sup> and established an Arbitration Commission, known as the “Badinter Commission,”<sup>19</sup> to assist in settling disputes concerning recognition by the EC and its member states. The Badinter Commission recommended that the EC recognize some of the former republics but not others.<sup>20</sup> Nonetheless, the EC recognized all four of the republics, effectively confirming their status as independent states.<sup>21</sup> The Badinter Commission declared the dissolution of the SFRY to be complete in an opinion issued on July 4, 1992,<sup>22</sup> and never made any recommendation on the recognition of Kosovo.<sup>23</sup> Widespread

15. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11 & July 4, 1992, 31 I.L.M. 1488, 1494 [hereinafter Arbitration Commission: Opinions].

16. *Id.* at 1490 (Introductory Note by Maurizio Ragazzi).

17. PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW 198–99* (2002).

18. European Community, Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union,” Dec. 16, 1991, 31 I.L.M. 1486 [hereinafter EC Declaration & Guidelines].

19. The “Badinter Commission” was chaired by Robert Badinter, President of the Constitutional Council in France.

20. The Badinter Commission concluded that Macedonia (Opinion No. 6) and Slovenia (Opinion No. 7) had fully satisfied the conditions for recognition set out in the EC guidelines, that Croatia had satisfied them with one minor reservation (Opinion No. 5), but that “the will of the peoples of Bosnia-Herzegovina to constitute the SRBH as a sovereign and independent State cannot be held to have been fully established.” Arbitration Commission: Opinions, *supra* note 15, at 1503 (Badinter Opinion No. 4).

21. The EC states followed Germany’s early lead and recognized Croatia and Slovenia on January 15, 1992. See Stephen Kinzer, *Europe, Backing Germans, Accepts Yugoslav Breakup*, N.Y. TIMES, Jan. 16, 1992, at A10. The EC recognized Bosnia-Herzegovina on April 7, 1992, but declined to recognize Macedonia at that time due to the Greek government’s objection to the name “Macedonia.” See Alan Riding, *Europe Nods to Bosnia, Not Macedonia*, N.Y. TIMES, Apr. 7, 1992, at A3. The United States, although initially reluctant to recognize break-away republics still fighting Serbia to establish their independence, recognized Slovenia, Croatia, and Bosnia-Herzegovina, on April 7, 1992. See David Binder, *U.S. Recognizes 3 Yugoslav Republics as Independent*, N.Y. TIMES, Apr. 8, 1992, at A10. Recognition of Macedonia was complicated by the Greek government’s objection to its use of the name “Macedonia,” said to belong solely to Greece. William D. Montalbano, *Greeks Angered, but They Have Word for It—FYROM*, L.A. TIMES, Mar. 4, 1994, at A4. Eventually, Europe and the US recognized Macedonia as “FYROM,” the Former Yugoslav Republic of Macedonia. *Id.*

22. Arbitration Commission: Opinions, *supra* note 15, at 1523 (Badinter Opinion No. 8).

23. The Badinter Commission issued opinions on the applications of four former Yugoslav republics for international recognition, but none on similar requests from Kosovo, which was formally classified as an autonomous province of Serbia and not as a constituent republic. See *infra* notes 138–41 and the accompanying text.

killings, rape, and ethnic cleansing continued in Croatia and in Bosnia-Herzegovina until ended by the 1995 Dayton Accords.<sup>24</sup>

Years later, in 1999, the cycle of violence in Kosovo reached a horrifying crescendo. The Serbians' widespread crimes against humanity and other shocking violence against Albanian Kosovars led to increasing armed resistance to Serbian rule. Additionally, groups such as the Kosovo Liberation Army committed acts of violence and terrorism against local Serbs.<sup>25</sup> In the midst of this chaos, NATO launched a massive bombing campaign in Yugoslavia to compel the Milosevic regime to stop the atrocities in Kosovo. This controversial tactic<sup>26</sup> was ultimately successful in forcing the Yugoslav government to agree to the military occupation of Kosovo by a multilateral force (KFOR) and to transitional administration of Kosovo by a United Nations Mission in Kosovo (UNMIK), headed by a Special Representative of the Secretary-General (SRSG). The missions of both KFOR and UNMIK were authorized by a binding resolution of the Security Council.<sup>27</sup> UNMIK is charged with a number of tasks including "[p]romoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo,"<sup>28</sup> and "[f]acilitating a political process designed to determine Kosovo's future status."<sup>29</sup> Thus, the issue of Kosovo's final political status was left open for future negotiation between representatives of Serbia and of the Kosovar Albanians.

## II. THE PRINCIPLE OF SELF-DETERMINATION: ISSUES AND APPLICABILITY

### A. *Historical Development of Self-Determination*

Self-determination is one of the most potent concepts in all of human rights. Its philosophical basis lies in the notion of popular sovereignty, and thus, self-determination reflects the same ideals that prompted the Ameri-

24. See General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75. These accords, negotiated in Dayton, Ohio, ended the fighting in Bosnia and set out a plan for reconstruction with the goal of maintaining peace in the region and reestablishing a multiethnic state. *Id.*

25. See S.C. Res. 1160, *supra* note 1, at 1 (condemning "the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as all acts of terrorism by the Kosovo Liberation Army or any other group or individual and all external support for terrorist activity in Kosovo, including finance, arms and training").

26. See Brown, *supra* note 2, at 1684-86.

27. S.C. Res. 1244, *supra* note 3.

28. *Id.* ¶ 11(a).

29. *Id.* ¶ 11(e).

can and French Revolutions of the late 1700s.<sup>30</sup> Democracy and self-government are the classic forms of internal self-determination.<sup>31</sup> Over a century after these revolutions, the Bolsheviks, most notably Lenin, popularized the term “self-determination.”<sup>32</sup> Subsequently, Woodrow Wilson gave new life to the concept of self-determination when he publicly endorsed the concept in 1918 as a fundamental principle linked to the equal rights of all peoples.<sup>33</sup> Although the principle of self-determination has evolved since then, its significance today is best understood in its historical context.

### 1. The Wilsonian National Model of Self-Determination

United States President Woodrow Wilson, in his former role as a professor of political science, was a longtime advocate of democracy and internal self-government.<sup>34</sup> However, Wilson’s name is more commonly associated with support for the external self-determination of peoples. Wilson’s insistence upon statehood and territorial integrity for Albania,<sup>35</sup> despite European proposals to the contrary, exemplifies the “national model” of self-determination. At a time when European powers were accustomed to creating and dismembering states as a matter of balancing power politics, the “national model” of self-determination was a very progressive notion.

Known for his political idealism, Wilson rejected the idea of balance of power politics, describing it as “discredited.”<sup>36</sup> Although Wilson is remembered for championing the cause of Albanian statehood, in practice, he often endorsed compromise on the nationalist demands of other groups.<sup>37</sup>

30. See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11 (1995).

31. See generally Hurst Hannum, *The Specter of Secession; Responding to Claims for Ethnic Self-Determination*, FOREIGN AFF., Mar./Apr. 1998, at 13.

32. Lenin viewed self-determination as “an anti-colonialist postulate,” CASSESE, *supra* note 30, at 33, and in doing so anticipated the post-World War II focus on self-determination as decolonization. See *infra* notes 47–62 and the accompanying text.

33. Max M. Kampelman, *Secession and the Right of Self-Determination: An Urgent Need to Harmonize Principle with Pragmatism*, WASH. Q., Summer 1993, at 5.

34. T.A. Parmalee, *A Biography of President Woodrow Wilson*, at <http://ball.tcnj.edu/pols370/wilson.htm> (last visited Oct. 4, 2004).

35. See JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 304 (1979).

36. Wilson stated before the US Congress in 1918 that “peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now forever discredited, of the balance of power.” Woodrow Wilson, President Wilson’s Address to Congress, Analyzing German and Austrian Peace Utterances, Delivered in Joint Session (Feb. 11, 1918), reprinted in 1 THE MESSAGES AND PAPERS OF WOODROW WILSON 472, 478 (Albert Shaw ed. 1924) [hereinafter WILSON’S 1918 ADDRESS TO CONGRESS].

37. See Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT’L L. 1, 4 (1976).



Wilson's national model of self-determination contained the seeds of the decolonization concept, which would be prevalent after the Second World War.<sup>38</sup>

Wilson saw self-determination in imperative terms:

Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. **"Self-determination" is not a mere phrase. It is an imperative principle of action which, statesmen will henceforth ignore at their peril.**<sup>39</sup>

Wilson's model of self-determination was based not only on the idea of popular sovereignty, but also on an acknowledgement of the equality of peoples; thus, in the following quotation Wilson attributed the First World War to a denial of national rights and aspirations:

This war had its roots in the disregard of the rights of small nations and of nationalities which lacked the union and the force to make good their claim to determine their own allegiances and their own forms of political life. Covenants must now be entered into which will render such things impossible for the future . . . . It has come about in the altered world in which we now find ourselves that justice and the rights of peoples affect the whole field of international dealing as much as access to raw materials and fair and equal conditions of trade.<sup>40</sup>

In Wilson's view, self-determination was both an imperative principle and a practical approach to avoiding future wars. These were powerful arguments that seem to presage the idea of self-determination as a peremptory *jus cogens* norm.<sup>41</sup> But the strength of Wilson's convictions in 1918 and thereafter were not sufficient to transform self-determination into a norm of positive international law. Prior to Wilson's time, self-determination had never before been advanced as a legal principle, and even Wilson himself seemed to be speaking more of ethical and practical principle than of strict law.<sup>42</sup> Wilson's reference to the "rights of small

38. See *infra* notes 51–62 and the accompanying text for a discussion of the post–World War II decolonization model of self-determination.

39. WILSON'S 1918 ADDRESS TO CONGRESS, *supra* note 36, at 475 (emphasis added).

40. *Id.* at 476 (emphasis added).

41. See *infra* notes 53–55 and the accompanying text for a discussion of the recognition of self-determination as a norm of *jus cogens*.

42. Without directly characterizing it as such, Wilson formulated a legal argument for the validity of some of the principles he articulated in his 1918 speech to Congress and which are cited in this Article. His assertion that these principles have been accepted and not objected to (except by extremists in Germany and Austria) could be seen as an argument that they have been accepted by states as part of positive international law.

A general peace erected upon such foundations can be discussed. Until such a peace can be secured we have no choice but to go on. So far as we can judge, **these principles that we regard as fundamental are already everywhere accepted as imperative** except among the spokesmen of the military and annexationist party in Germany. **If they have anywhere else**

nations and of nationalities” and to the “rights of peoples” anticipates the international law of human rights that was to come. Nonetheless, as befitting a former professor of jurisprudence and politics, Wilson was careful not to suggest that the ethical precept of self-determination was already part of positive international law. Instead, he described self-determination as “an imperative principle of action” not as an imperative legal principle.<sup>43</sup>

There was political opposition to Wilson’s ideas about self-determination even within his own administration. Robert Lansing, Wilson’s Secretary of State, would later go public with his extremely critical view of the idea:

It is an evil thing to permit the phrase [self-determination] to continue to dwell in the minds of men as expressing a principle having the apparent sanction of the civilized world, when it has in fact been thoroughly discredited and will always be cast aside whenever it comes in conflict with national safety, with historic political rights or with economic interests affecting the prosperity of the nation.

. . . The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late to check those who attempt to put the principle in force. What a calamity the phrase was ever uttered! What misery it will cause!<sup>44</sup>

Whatever the political debate, there was a general consensus at the time that self-determination was not a norm of positive international law. In 1920, the League of Nations established a Commission of Jurists to consider legal aspects of the Aaland Islands question.<sup>45</sup> The report of that Commission constitutes the most definitive legal analysis of self-determination issues during the post–World War I era.<sup>46</sup>

**been rejected, the objectors have not been sufficiently numerous or influential to make their voices audible.**

WILSON’S 1918 ADDRESS TO CONGRESS, *supra* note 36, at 478 (emphasis added).

43. *See id.*

44. Pomerance, *supra* note 37, at 10 (citing Robert Lansing, *Self-Determination*, SATURDAY EVENING POST, Apr. 9, 1921, at 6–7, 101–02).

45. The Aaland Islands are inhabited by primarily Swedish speaking residents who had been incorporated into Finland while it was subject to Russian rule and who took the occasion of Finland’s independence from Russia to press their claim to leave Finland to join Sweden. It emerged as an early test of how to balance the emerging principle of self-determination with state sovereignty and other interests.

46. A second political report was prepared soon thereafter by a Commission of Rapporteurs, based on their visit to the Islands in question. Report of the Commission of Rapporteurs Presented to the League of Nations Council, League of Nations Doc. B.7.21/68/106 (1921). That report focused on the historical, political, and strategic particulars of the dispute. *See* ENVER HASANI, SELF-DETERMINATION, TERRITORIAL INTEGRITY AND INTERNATIONAL STABILITY: THE CASE OF YUGOSLAVIA 87–88 (2003), available at [http://www.bmlv.gov.at/pdf\\_pool/publikationen/hasa03.pdf](http://www.bmlv.gov.at/pdf_pool/publikationen/hasa03.pdf).

After noting that “the principle of self-determination of peoples plays an important part in modern **political** thought,” the Commission pointed out that “there is no mention of it in the Covenant of the League of Nations” and stressed that even the recognition of that principle in a number of treaties of that era “cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.”<sup>47</sup> Instead, the Commission stressed repeatedly that the sovereign rights of states, as well as the need to protect the international community from the risks of instability, precluded any such right of secession.<sup>48</sup>

The Aaland Islands Commission of Jurists also stressed that many factors, other than the majority sentiment of the population, were relevant to the question of whether demands for self-determination should in fact lead to the transfer of sovereignty.<sup>49</sup> As will be discussed below, the factors identified by the Commission have continuing relevance to the application of the principle today.

Soon after the status of the Aaland Islands was resolved in 1921,<sup>50</sup> development of the international law of self-determination came to a virtual halt. It was a time when Germany, Italy, and Japan turned towards aggression or colonial expansion, or both. Only in the post-World War II era would the issue of self-determination return to center stage.

47. The Commission also noted:

Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.

*Report of the International Committee (sic) of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question*, LEAGUE OF NATIONS O.J. Spec. Supp. No. 3, at 5 (Oct. 1920) [hereinafter Commission of Jurists Report] (emphasis added).

48. In the words of the Commission of Jurists:

Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitely constituted. . . . Any other solution would amount to an infringement of sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term “State,” but would also endanger the interests of the international community.

*Id.* at 5.

49. *Id.* at 6.

50. The Aaland Islands question was resolved after the Council of the League of Nations decided that sovereignty over the Islands would remain with Finland, subject to agreement between the parties (Finland and Sweden), guaranteeing autonomy, demilitarization, and minority and language rights. See *The Aaland Islands Question*, 2 LEAGUE OF NATIONS O.J. 691, 699 (1921).

## 2. The Post-WW II Decolonization Model of Self-Determination

After the Second World War, there was a renewed focus, both legal and political, upon the principle of self-determination. Specifically, the status of the principle as part of positive international law was solidified when the UN Charter specifically referred to “respect for the principle of equal rights and self-determination of peoples” in its statement of the purposes of the UN.<sup>51</sup> Since then, self-determination has been characterized as the essential foundation of all human rights.<sup>52</sup> The International Court of Justice has recognized the principle of self-determination as “one of the essential principles of contemporary international law,”<sup>53</sup> as a peremptory norm of international law,<sup>54</sup> and as a right of an *erga omnes* character.<sup>55</sup>

Moreover, the right of self-determination was codified into positive international law in 1966 in Article 1 of both the International Covenant for Civil and Political Rights and the International Covenant for Economic, Social and Cultural Rights, thereby confirming the paramount status of that principle in the new international law of human rights.<sup>56</sup> More importantly,

51. U.N. CHARTER art. 1, para. 2. Article 1 of the UN Charter states in part: “[t]he Purposes of the United Nations are . . . [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.” *Id.* (emphasis added).

52. On this point, the Human Rights Committee stated:

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

Human Rights Committee, General Comment No. 12, Art. 1 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 12, para. 1 (1994), at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/f3c99406d528f37fc12563ed004960b4?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/f3c99406d528f37fc12563ed004960b4?Opendocument) [hereinafter Human Rights Committee General Comment No. 12].

53. Case Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 102 (June 30).

54. See also *id.*; *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session, Report of the International Law Commission: Commentary to Article 26, Compliance with Peremptory Norms*, U.N. GAOR, 56th Sess., Supp. No. 10, at 208, U.N. Doc. A/56/10 (2001) [hereinafter *Report of the International Law Commission*].

55. *East Timor*, 1995 I.C.J. at 102.

56. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *Covenant on Civil and Political Rights*]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter *Covenant on Economic Rights*]. The identical Article 1 of each of these treaties reads as follows:

1. All peoples have the right of 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.

the snowballing process of decolonization, during the course of which virtually all colonies gained independence from colonial powers, left no doubt that a new era of self-determination through decolonization had arrived.<sup>57</sup>

Once again, there were limits upon the application of the principle. Foremost among these was the tendency to limit the right of self-determination to peoples suffering under so-called "salt-water colonialism,"<sup>58</sup> i.e., those geographically separated from the colonial power by the sea.<sup>59</sup> The new states gaining independence through the process of decolonization were every bit as dedicated to preserving their sovereignty and territorial integrity as other States had been before them.<sup>60</sup> They became willing collaborators in efforts to redefine self-determination so as to preclude secession altogether, strictly limiting it to the context of decoloniza-

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.

*Id.*

57. Since the creation of the United Nations in 1945, over eighty former colonies have gained their independence from European colonial powers in a process of decolonization that has transformed the international system. Most of these new states achieved independence during the heyday of decolonization in the 1950s and 1960s. See United Nations Department of Public Information, *Historical Background on Decolonization*, at <http://www.un.org/Depts/dpi/decolonization/history.htm> (last visited Nov. 4, 2004).

58. Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial Development Discourse in Africa*, 20 WIS. INT'L L.J. 297, 304 n.28 (2002). As one commentator noted:

As a result of pressure from the United States and the then USSR, United Nations Resolution 1541 was passed which established guidelines for deeming a territory to be a colony in need of United Nations assistance to promote its right of self-determination. Under this resolution, classical decolonization applied only to territories that met the "salt water" theory of colonialism. The geographic separateness of overseas colonies, regionally and continentally distant from the metropolitan areas of the colonizing countries was a necessary condition of colonialism and therefore of a territory's status as a "colony" with a right to self-determination. During the debate on the declaration, Belgium argued that this should not be limited to colonies and protectorates separated by water.

*Id.*

59. UN General Assembly Resolution 1541 sets out the principles to be applied to determine whether reports on the status of non-self-governing territories are required to be filed under Article 73(c) of the UN Charter. The threshold consideration is defined as "[p]rima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it."

G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4651 (1960).

60. As Cassese put it:

[D]eveloping countries, with the full support of socialist States and without any opposition from Western countries, firmly believed that colonial boundaries should not be modified, lest this would trigger the disruption of many colonial countries, as well as serious disorder as a result of the carving up of old States into new. In short, the principle of *uti possidetis* was regarded as paramount . . . These geopolitical considerations led States actually to deny the right of self-determination to individual ethnic groups within colonial territories.

CASSESE, *supra* note 30, at 72-73.

tion.<sup>61</sup> This effectively prevented invocation of the principle against the territorial integrity,<sup>62</sup> or other sovereignty-based interests, of the new states emerging from decolonization.

### 3. The Post–Cold War Model

The disintegration of the Soviet Union and of the former Yugoslavia launched a new, post–Cold War era of self-determination, and it is in the context of this era that the final status of Kosovo must now be determined.

In recent years, much of the debate regarding self-determination has related to the international community's criteria for recognizing new states. Since so many new states have emerged in Europe as a result of the disintegration of the USSR and the former Yugoslavia, it is not surprising that the EC (predecessor to today's EU) took the lead in setting these policies on recognition. In 1991, the EC decided to convene a peace conference on Yugoslavia, and established an Arbitration Commission (the "Badinter Commission") to help resolve differences relating to the Yugoslav crisis.<sup>63</sup>

Soon thereafter, in a Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," the EC and its Member states "confirm[ed] their attachment to the principles of the Helsinki Final Act . . . in particular the principle of self-determination."<sup>64</sup> At the same time, respect for human rights, especially minority rights, was set out as a fundamental prerequisite for recognition by the EC.<sup>65</sup> The Badinter Commission proceeded to issue opinions on a number of legal questions relating to the dissolution of the former Yugoslavia and the recognition of its former federal units, all of which applied EC guidelines requiring, as a condition of recognition of new states, "guarantees for the

61. As one commentator has noted:

Secession was thought to have enormous disruptive potential in the emerging post-colonial states. Thus, the definition of self-determination evolved so as to preclude secession, one of its own natural outcomes. Secession's perceived threat to peace and security, as well as to the integrity of individual states meant that it had to be distinguished from the more general right of self-determination.

Second, the developing definition of self-determination became inextricably intertwined with the decolonization movement. Self-determination, a concept recognized as a fruitful avenue through which the independence of colonies might be achieved, soon came to be identified exclusively with the process of decolonization.

Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age*, 32 STAN. J. INT'L L. 255, 264–65 (1996).

62. According to the Canadian Supreme Court, "[T]he exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states." Reference re Secession of Quebec, [1998] S.C.R. 217, 282.

63. Arbitration Commission: Opinions, *supra* note 15, at 1488–89 (Introductory Note by Maurizio Ragazzi).

64. EC Declaration & Guidelines, *supra* note 18, at 1486–87.

65. *Id.* at 1487.

rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.”<sup>66</sup>

From the beginning, the need to protect minority rights has been a critical factor in the application of the principle of self-determination. Today, in the postcolonial era of human rights, this issue looms larger than ever. The formal linkage of diplomatic recognition to guarantees about the rights and treatment of minorities<sup>67</sup> is evidence of this trend, and is highly relevant to both the legal and the political aspects of Kosovo’s claim for self-determination.

## B. *Ambiguities Inherent in the Concept of Self-Determination*

### 1. Defining a People

Perhaps the greatest confusion concerning the principle of self-determination concerns the fundamental question of to whom it applies. According to the two International Covenants, “[a]ll peoples have the right of self-determination.”<sup>68</sup> The question is who qualifies as a “people.” The meaning of this term remains uncertain even after years of state practice with claims of self-determination and the incorporation of this concept into numerous international conventions.<sup>69</sup>

66. *Id.*; see *infra* notes 128–37 and the accompanying text (further discussing this Commission and its opinions).

67. The EC explicitly linked recognition of new Balkan states to a number of factors:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new states, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- **guarantees for the rights of ethnic and national groups and minorities** in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement.

EC Declaration & Guidelines, *supra* note 18, at 1486–87 (emphasis added).

68. Covenant on Civil and Political Rights, *supra* note 56, at art. 1; Covenant on Economic Rights, *supra* note 56, at art. 1.

69. As the Supreme Court of Canada stated “as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of ‘peoples’, the result has been that the precise meaning of the term ‘people’ remains somewhat uncertain.” *Reference re Secession of Quebec*, [1998] S.C.R. at 281.

There are clear reasons for this uncertainty. If the right of self-determination were to be applied broadly to every conceivable group and subgroup, it might destabilize and even threaten to fragment every state, hastening the calamity feared by US Secretary of State Robert Lansing in 1921.<sup>70</sup> In a more recent, and moderate, expression of this same concern, former UN Secretary-General Boutros Boutros-Ghali declared that:

The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.<sup>71</sup>

While it is easy to understand the need to limit the application of the concept, it is important not to limit it too much. Too narrow and concrete a definition of a "people" would rob the concept of self-determination of any effective value, a real concern in the present postcolonial era when little salt-water colonialism is left to remedy. It would be a shame to vitiate what has been described as "the only right with any real prestige or legitimacy in international law that might be usefully employed to protect group rights,"<sup>72</sup> (as opposed to the individual rights of minority group members).<sup>73</sup>

One commentator has described the entire doctrine of self-determination as "ridiculous because the people cannot decide until somebody decides who are the people."<sup>74</sup> This is no small point. As the following two examples illustrate, on those rare occasions when courts or international bodies have been asked to decide whether a group truly constituted a "people" with the right of self-determination, they have often avoided the issue. When asked if the Serbian population of Croatia and

70. See Pomerance, *supra* note 37, at 10 (citing Robert Lansing, *Self-Determination*, SATURDAY EVENING POST, Apr. 9, 1921, at 6-7, 101-02).

71. Boutros Boutros-Ghali, *An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-keeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992*, U.N. Doc. A/47/277-S/24111, ¶ 17 (1992), at <http://www.un.org/Docs/SG/agpeace.html>.

72. Simpson, *supra* note 61, at 258 n.17.

73. Most internationally recognized human rights, such as rights to life, liberty, security, freedom of thought and speech, and freedoms from torture and arbitrary arrest, detention, or exile, are held by individuals. See *Covenant on Civil and Political Rights*, *supra* note 56, at arts. 6, 7, 9, 17, 18, 19. In contrast, the right of self-determination is held not by individuals, but by "peoples." *Id.* at art. 1.

74. As Sir Ivor Jennings noted:

Nearly forty years ago a Professor of Political Science who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.

Pomerance, *supra* note 37, at 16 (quoting SIR IVOR JENNINGS, *THE APPROACH TO SELF-GOVERNMENT* 55-56 (1956)).



Bosnia-Herzegovina had the right to self-determination, Europe's Badinter Commission issued an opinion that conceded the uncertainty surrounding the scope and meaning of that right under positive international law,<sup>75</sup> and stressed that the more straightforward rights of minorities under international human rights law must surely apply.<sup>76</sup> That opinion offered no direct answer to the question of whether the right of self-determination itself applied.<sup>77</sup> When asked whether Quebec had a unilateral right of secession under national or international law, the Supreme Court of Canada, in a similar evasion, answered that it did not, without offering any conclusion on whether the population of Quebec could be legally characterized as a people.<sup>78</sup>

## 2. Does a "People" really have a right to external self-determination?

One major concern is that the idea of self-determination raises such high and often unrealistic expectations. If designation as a people implies the right to independence and statehood, then extending that status too broadly could indeed threaten international peace and stability.

In practice, the principle of self-determination has never guaranteed an automatic right to statehood or other forms of external self-determination. Both of the international human rights covenants define self-determination in terms attainable within the framework of an existing state,<sup>79</sup> and in practice that right will usually be fulfilled through such an internal framework.<sup>80</sup> The default availability of internal self-determination is the effective core of the right, leaving independence, secession, or other external forms of self-determination as an extraordinary remedy. The right to

75. Arbitration Commission: Opinions, *supra* note 15, 1498 ("The Commission considers that international law as it currently stands does not spell out all the implications of the right to self-determination." (Badinter Opinion No. 2)).

76. *Id.*

77. *Id.* at 1497-99.

78. The court decided only the narrow issue of the right to secession while noting:

While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

*Reference re Secession of Quebec*, [1998] S.C.R. at 281-82.

79. *Id.* at 284.

80. *Id.* at 282.

internal self-determination should be applied to as many groups as possible, but there can be no right to external self-determination where it would threaten fundamental human rights or undermine international peace and security. Thus, an array of factors must be considered on a case-by-case basis when evaluating any claim of a right to external self-determination.

As briefly discussed earlier,<sup>81</sup> one case in which a right to external self-determination is generally recognized involves cases of colonial peoples breaking away from an imperial power.<sup>82</sup> Another special case in which the right to self-determination may be claimed is "where a people is subject to alien subjugation, domination or exploitation outside a colonial context."<sup>83</sup> A case could perhaps be made that this second situation applies to Kosovo, but both the principle and its application to Kosovo are disputable. There are, however a number of other more compelling arguments to be made for the independence of Kosovo. These will be examined a bit later.

### C. Possible Forms of Self-Determination for Kosovo

Let us assume, for now, that the population of Kosovo, in whole or in part, does consist of a people possessed of the right to self-determination. There can be no question in this case of denying them this right. The principle of self-determination stands at the top of the normative hierarchy as it has been recognized by the International Court of Justice as a peremptory norm of international law.<sup>84</sup> The question that remains, and that must now be considered, is how that right might be satisfied.<sup>85</sup>

81. See *supra* notes 58–60 and the accompanying text.

82. See *Reference re Secession of Quebec*, [1998] S.C.R. at 285 ("The right of colonial peoples to exercise their right to self-determination by breaking away from the 'imperial' power is now undisputed, but is irrelevant to this Reference.").

83. *Id.*

84. See also *East Timor*, 1995 I.C.J. at 102; *Report of the International Law Commission, supra* note 54, at 208.

85. Although a full discussion of this topic is beyond the scope of this paper, it is clear that in realizing the right of self-determination of a group such as the Albanian majority in Kosovo, minority rights must be provided for as well. Minority rights have emerged as being of particular concern after the many troubling instances of crimes against humanity and even genocide seen around the world in recent years. In many ways, the issue of minority rights is not fundamentally different from that of other human rights. Those in the minority, like those in the majority, have unalienable human rights *erga omnes*, which the state, the government, the majority, and others must respect. Regardless of whether Kosovo gains independence, autonomy, or some other status, international norms will demand respect for the rights of minorities in Kosovo.

### 1. Independence and Sovereignty

The formation of an independent state would, of course, constitute the most complete realization of external self-determination for Kosovo. Another external possibility, less likely and rarely discussed, would be the union of Kosovo with Albania. As there appears to be little if any political support for directly proceeding with this solution, we can dismiss this possibility.<sup>86</sup> If the people of Kosovo are to achieve full external self-determination it will come first in the form of independence and sovereignty.

But sovereignty for Kosovo can only be obtained at the expense of the sovereignty and territorial integrity of Serbia. Given that the Security Council has called for a solution based on “the sovereignty and territorial integrity of the Federal Republic of Yugoslavia [including Serbia],”<sup>87</sup> this will be a difficult goal to achieve regardless of the merits of Kosovo’s case for independence. The likelihood of achieving this goal through decision of the Security Council is less than that of achieving it through direct negotiation with Serbia.<sup>88</sup>

### 2. Reintegration of Kosovo into Serbia

At the opposite and minimal extreme, self-determination for Kosovars might, in theory, be achieved solely within the internal framework of Serbia. Considering the past fifteen years of violence between Serbia and the Albanians who constitute the majority population of Kosovo, the possibility of full reintegration of Kosovo into Serbia seems to have little practical viability. Not only would Kosovar Albanians find this to be unacceptable, it would be equally difficult, in practice, for Serbia to implement and accept such a development.

### 3. Intermediate Possibilities, Including Autonomy and the Status Quo

Between the extremes of independence and reintegration into Serbia, any number of intermediate arrangements might be possible. One of the principal alternatives would be a special regime of autonomy for Kosovo.

86. There has been some concern around the world that independence for Kosovo might eventually lead to the creation of a “Greater Albania” joining Albania, Kosovo, and other Albanian-inhabited areas into one state. This is regarded by many Balkan Slavs, such as Serbs and Macedonians, as a nightmare scenario to be avoided at all costs. See Carlotta Gall, *Crisis in the Balkans: The Separatists: Rebels Describe an Officer’s Life in the Struggle Over Kosovo*, N.Y. TIMES, Apr. 19, 1999, at A10.

87. S.C. Res. 1244, *supra* note 3, ¶ 1, Annexes 1–2. The FRY changed its name to “Serbia and Montenegro” on February 4, 2003. See Daniel Simpson, *Yugoslavia is Again Reinvented, in Name and Structure*, N.Y. TIMES, Feb. 5, 2003, at A3.

88. See discussion of the politics of the Security Council *infra* notes 113–23.

Security Council resolutions on Kosovo have repeatedly expressed support for “an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration.”<sup>89</sup> If a decision of Kosovo’s status is left to the Security Council, it might endorse autonomy as the best apparent compromise simply because it could thereby appear to address Albanian demands for self-determination without compromising the territorial integrity of Serbia. But since autonomy is a fairly broad concept, much would depend upon the specific details. In the best-case scenario, autonomy might represent a lesser or partial model of external self-determination in the sense that Kosovo could become *de facto* independent without gaining formal independence. In the worst or weakest case, autonomy for Kosovo might not be substantially different from reintegration into Serbia. The international community established a successful regime of autonomy as a key part of the solution to the Aaland Islands question in 1921, averting a possible war between Sweden and Finland.<sup>90</sup> Accordingly, the Aaland Islands model might be of some use in exploring options for Kosovo.

Another possibility might be the continued administration of Kosovo as an international protectorate moving towards self-government. UNMIK, the international administration established by Security Council Resolution 1244, has made progress in its stated goals of providing transitional administration, ensuring conditions for a peaceful and normal life for all inhabitants of Kosovo, and overseeing the development of democratic provisional institutions of self-government.<sup>91</sup> It has made little progress, however, in facilitating a political process to determine Kosovo’s future status,<sup>92</sup> and after five years of UN interim administration, there has been some disappointment and disillusionment on all sides.<sup>93</sup>

Although transitional administration has helped to prepare Kosovo for self-government, it will be impossible to realize the Security Council’s

89. S.C. Res. 1160, *supra* note 1, ¶ 5; see also S.C. Res. 1199, U.N. SCOR, 3930th mtg., U.N. Doc. S/RES/1199 (1998); S.C. Res. 1203, U.N. SCOR, 3937th mtg., U.N. Doc. S/RES/1203 (1998); S.C. Res. 1244, *supra* note 3 (reaffirming in the preambular paragraphs the language from Security Council Resolution 1160).

90. See MICHAEL EMERSON, THE WIDER EUROPE AS THE EUROPEAN UNION’S FRIENDLY MONROE DOCTRINE 3 (Ctr. for Eur. Policy Studies Policy Brief No. 27, Oct. 27, 2002), at <http://www.ipp.md/publications/Emerson.doc>.

91. S.C. Res. 1244, *supra* note 3, ¶¶ 10, 11(a), 11(c).

92. *Id.* ¶ 11(e).

93. Misha Glenny, *The Forgotten Land: Violence is Bound to Escalate if the U.N.’s New Representative in Kosovo Fails to Get the International Community to Deliver Support*, GUARDIAN (London), June 22, 2004, at 17 (“[I]n the past three years, Albanian joy has turned into resentment. Serb bitterness has deepened. The UN, with a creditable record in peace-keeping, has proved hopelessly inadequate at governing a complex society like Kosovo.”).

stated goal of "autonomy and meaningful self-administration"<sup>94</sup> so long as UNMIK retains ultimate authority over Kosovo's Provisional Institutions of Self-Government. Generally speaking, interim administration should be kept to a minimum, but if the parties cannot reach agreement on final political status, the UN might fall back on continued international administration as an even more extended interim solution.

A rather bizarre possibility, once reportedly favored by the US government, would be to transform Kosovo into a separate republic within a Yugoslav Federal Republic.<sup>95</sup> This solution would likely be opposed by Serbia, as an interference in its domestic jurisdiction, and by Montenegro, which would find itself more tightly tied to Serbia.<sup>96</sup> The only real appeal of such an arrangement to Kosovar Albanians is that it might be a step towards eventual independence following the model of former Yugoslav republics Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina, which have effectively seceded.

Many of the intermediate possibilities discussed here, if implemented in the short term, might possibly lead, in the long term, to the formal independence of Kosovo.

### III. CAN ANYONE SOLVE THE PROBLEM?: PATHS TO THE REALIZATION OF SELF-DETERMINATION FOR KOSOVO

#### A. *The Possibility of a Negotiated Solution*

While it is tempting to conclude that only international institutions can settle the issue of Kosovo's final status, there is another, potentially simpler, path to a solution: if the parties involved, most importantly, Serbia and Kosovar Albanians, can reach a negotiated agreement on final status, there will be no need for the UN Security Council to decide the question. With

94. See S.C. Res. 1160, *supra* note 1, ¶ 5.

95. According to an Associated Press report focusing on US policy towards the region, a senior Western diplomat suggested that "the Western plan for Kosovo . . . would make Kosovo, a southern Serbian province, into a full-fledged third Yugoslav republic. 'Kosovo does not want to remain part of Serbia, that is clear,' said a senior Western diplomat. 'But Kosovo could become part of a new Yugoslavia.'" See *U.S. Removes Support for Independent Montenegro*, CHI. TRIB., Oct. 16, 2000, at 7.

96. Montenegro itself aspires to independence from union with Serbia, and any restored union of Serbia, Kosovo, and Montenegro would have the opposite effect of tying it once again to Serbia. See *World Briefing Europe: Montenegro: The New (Old) Flag Is Unfurled*, N.Y. TIMES, July 16, 2004, at A4 (noting that "in 2002, Montenegro agreed to shelve plans for independence and for at least three years stay with Serbia in the loose union that became the successor to Yugoslavia. But Montenegrin leaders say they intend to go ahead with a referendum on independence, possibly in 2006.").

this in mind, the Council has repeatedly called upon the parties to negotiate the issue without preconditions.<sup>97</sup> So far, negotiations have failed.<sup>98</sup>

Kosovar Albanians reject the idea of reintegration into Serbia and tend to insist that only external self-determination, in the form of an independent and sovereign Kosovo, will satisfy them. But only Serbia, as the *de jure* sovereign in Kosovo, has the unquestioned power to authorize the necessary transfer of sovereignty. Serbia is naturally reluctant to cede sovereignty or control, but if the independence or autonomy of Kosovo must eventually be accepted, Serbs may demand territorial adjustments that would alter the boundary between Kosovo and the rest of Serbia. Kosovar Albanians generally oppose this idea because they want self-determination for Kosovo within its historical boundaries. Traditionally, historical borders have been considered to be sacrosanct, according to the principle of *uti possidetis*. If, as is likely, the Security Council adheres to this view, compromise on the border will be possible only with the agreement of both parties, and of the local populations that would be affected.<sup>99</sup> Unless one assumes that the Security Council will take responsibility for imposing compromise (which it is understandably reluctant to do), each party's consent and cooperation remains essential to achieving some of the most fundamental objectives of the other.

97. See S.C. Res. 1160, *supra* note 1, ¶ 4. Security Council Resolution 1160 “[c]alls upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues, and notes the readiness of the Contact Group to facilitate such a dialogue.” *Id.*; see also S.C. Res. 1199, *supra* note 89, ¶ 3 (reaffirming language); S.C. Res. 1203, *supra* note 89, ¶ 5 (reaffirming language); EC Declaration & Guidelines, *supra* note 18.

98. The following description of what passes for “negotiations” between Kosovo and Serbia indicates why there has been no progress so far.

The actual meeting may have been something of an anticlimax. But substantive talk was not the real point of this week's encounter in Vienna between the Serbian government and leaders of the breakaway province of Kosovo. . . . Getting Kosovo's president, Ibrahim Rugova, in the same room as Serbia's prime minister, Zoran Zivkovic, was a big step. The UN billed the meeting as a “direct dialogue”, but Mr. Zivkovic commented sharply that “there was no dialogue, especially not a direct one.” The three-hour meeting produced some agreements: to set up bilateral working groups on transport and communications, on the return of (mostly Serb) refugees, on missing people (mostly ethnic Albanians) and on energy.

Although the meeting was held behind closed doors, an aide to the Kosovo delegation reported later that the two sides had simply read out prepared statements. . . . The Serbs also asserted that Kosovo was a province of Serbia and Montenegro; the Kosovo delegation retorted that “the independence of Kosovo is an irreversible process.”

*Serbia and Kosovo: Unfriendly Fire*, ECONOMIST, Oct. 18, 2003, at 52–53.

99. Cassese notes that the principle of *uti possidetis* trumps the principle of self-determination when it comes to the demarcation of borders. Nonetheless, he notes that there is an exception where “two former colonial countries or secessionist States decide to modify their borders by mutual arrangement. If this happens, the agreement must be consonant with the wishes of the population concerned.” See CASSESE, *supra* note 30, at 193.

Furthermore, the two possible means of achieving progress on the final status issue, i.e., direct negotiations and mobilization of international support, should be viewed together rather than as separate alternative approaches. The world is watching and will evaluate whether each side has made sincere efforts to come to an agreement. The nature and depth of international support for the alternative Albanian Kosovar and Serbian positions on final status will depend upon whether each is seen to be engaging in a meaningful dialogue on political status issues. If one party is seen as setting unrealistic preconditions precluding meaningful dialogue on the issue, that party risks losing support among the permanent members of the Security Council who may ultimately be called upon to decide the issue.

It is undeniably true that sovereignty is a notoriously difficult matter to negotiate, but, as will be discussed immediately below, Kosovo's chances of achieving independence and statehood through decision of the Security Council are no greater than the chances of achieving it through direct negotiation with Serbia. As James Crawford has noted, during the twentieth century, more states were created with the consent of the former sovereign than through forced secession.<sup>100</sup>

*B. Does the Security Council have the legal authority to award sovereignty to Kosovo?*

There is nothing in the UN Charter that anticipates that the Security Council, or any other UN body, might take territory from one sovereign state and award it to a new one. Quite to the contrary, the UN Charter affirms the sovereign equality of states, prohibits the threat or use of force against their territorial integrity, and affirms that, as a general rule, the UN is not to intervene in matters that are essentially within the domestic jurisdiction of any state.<sup>101</sup> There is, of course, one important exception: the rule banning the UN from interfering in the domestic jurisdiction of states "shall not prejudice the application of enforcement measures under Chapter VII"<sup>102</sup> of the UN Charter. Under Chapter VII, the Security Council has the power to determine the existence of any threat to the peace, breach of the peace or act of aggression, and to make such decisions as are necessary to maintain or restore international peace and security.<sup>103</sup> The decisions of the

100. CRAWFORD, *supra* note 35, at 247 ("Until this century, secession was certainly the most conspicuous, as well as the most usual, method of the creation of new States. . . . In this century, new States have been more often created with the consent of the former sovereign, especially of course in the colonial situation.")

101. U.N. CHARTER art. 2, para. 1, 4, 7.

102. *Id.* at art. 2, para. 7.

103. Articles 39-42 of the U.N. Charter provide as follows:

Security Council under the Charter are binding upon its member states.<sup>104</sup> Does the UN Charter therefore give the Security Council what may be called “international dispositive powers,” i.e., the right to decide upon territorial changes, statehood, and sovereignty and to award independence to Kosovo?<sup>105</sup>

Historical precedents from the nineteenth and early twentieth centuries suggest that the great powers have often assumed international dispositive powers, although they may, in some cases, simply have been exercising their powers of persuasion to bring about a settlement between the parties, and, in others, were acting extralegally.<sup>106</sup> Judge McNair once suggested that great power intervention in matters of territory or status is simply something that happens from time to time.<sup>107</sup>

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

*Id.* at arts. 39–42.

104. *Id.* at art. 25 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”).

105. James Crawford defines these international dispositive powers as “certain international powers or capacities to bring about territorial change, and to create new States or entities approximating to States, with effects extending beyond the immediate contracting parties.” CRAWFORD, *supra* note 35, at 301.

106. For the most comprehensive treatment of these historical cases, see *id.* at 301–34.

107. He candidly observed that:

From time to time it happens that a group of great Powers, or a large number of States both great and small, assume a power to create by a multipartite treaty some new international regime or status, which soon acquires a degree of acceptance and durability extending beyond the limits of the actual contracting parties, and giving it objective existence. This power is used when some public interest is involved, and its exercise often occurs in the course of the peace settlement at the end of a great war.



Sweeping prerogatives were exercised in the nineteenth century by the great powers of that time acting within the loose framework of the Concert of Europe.<sup>108</sup> Their use of these powers often showed only minimal regard for the rights of smaller states.<sup>109</sup> No one would argue today for a return to such practices because they are inconsistent with the purposes and principles of the UN Charter.<sup>110</sup> Nonetheless, should negotiations fail, the power to address the situation in Kosovo must be sought elsewhere. When acting to maintain or to restore international peace and security, the Security Council has very broad authority.<sup>111</sup> This authority could potentially be used to confer sovereignty upon the Kosovar people in the territory of Kosovo, if applied consistently with the right to self-determination and other principles of the UN Charter.<sup>112</sup>

*C. Political Aspect: The Reluctance of UN Members to Impose External Decisions on Issues of Sovereignty and Territorial Integrity*

1. Historical Perspectives

James Crawford's comprehensive survey of UN practice involving international dispositive powers led him to the following conclusion:

No other significant powers of territorial administration or disposition have been delegated to United Nations organs since 1945. The record, such as it is, demonstrates that **the difficulties with such delegations derive not from any assumed incompetence of the United Nations to exercise dispositive powers, but from the political feasibility of the particular situation.**<sup>113</sup>

Undeniably, the key impediments to a Security Council decision establishing the independence of Kosovo are political rather than legal, but that does not make them any less formidable. The great powers, such as the

International Status of South-West Africa, 1950 I.C.J. 128, 153 (July 11) (separate opinion of Judge McNair).

108. See INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* 26 (4th ed. 1971).

109. Speaking of the nineteenth century Concert of Europe Inis Claude, Jr. noted that "[t]his hegemony of the powerful had its seamy side, as all dictatorships must. If it is true of individuals, it is surely even more true of states, that possession of extraordinary power and authority leads to abuse and selfish exploitation." *Id.* at 25-26.

110. See U.N. CHARTER art. 1, para. 2. One of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." *Id.* The Charter also states that "[t]he organization is based on the principle of the sovereign equality of all its Members." *Id.* at art. 2, para. 1.

111. See Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadic, Case No. IT-94-I, A.C., at para. 31 (Oct. 2, 1995) [hereinafter Appeals Decision on Jurisdiction].

112. CRAWFORD, *supra* note 35, at 329.

113. *Id.* at 333 (emphasis added).

permanent members of the Security Council, have historically avoided directly imposing dispositive territorial solutions. They much prefer to persuade disputing parties to consent to settle their differences. Crawford's review of the nineteenth century Concert of Europe's dispositions concludes with a very relevant political observation:

In general, the dispositions referred to above, though concluded under the aegis of the "Concert of Europe," were consented to by parties affected: the actual exercise of authority by the powers—with certain exceptions—did not in fact extend beyond negotiation, conciliation and the exercise of political influence between disputants.<sup>114</sup>

This pattern has continued to hold even in the most politically charged circumstances.<sup>115</sup> The independence of East Timor and its secession from Indonesia followed a popular consultation on August 30, 1999, in which the East Timorese voted overwhelmingly for independence, and was based on the decision of the Indonesian People's Consultative Council to accept that independence.<sup>116</sup> A subsequent Security Council resolution established the UNTAET (the UN Transitional Administration in East Timor) as a transitional mechanism, but did not impose a UN solution.<sup>117</sup>

The ultimate political status of Kosovo will likely be determined by negotiation, conciliation, and the exercise of political influence upon and between the disputants rather than by a decision imposed by the Security Council. This political process has already begun, as evidenced by the decisions of both the UN Security Council and the EU discussed in the following section.

## 2. Politics of the Current Security Council

The Security Council operates within the legal framework of the UN Charter and the political framework of its other organs, including the Gen-

114. *Id.* at 305 (emphasis added).

115. Iraq's Saddam Hussein invoked a territorial dispute to justify the invasion of Kuwait, which led to the 1991 Gulf War. After that war, the Security Council called for a technical demarcation of the agreed boundary between the two countries, but did not, as is sometimes suggested, impose territorial concessions upon Iraq. The technical demarcation was conducted based on a 1963 boundary treaty between the two parties and was therefore not a dispositive decision. *See* S.C. Res. 687, U.N. SCOR, 2981st mtg. at pmb., ¶ 3, U.N. Doc. S/RES/687 (1991) (calling for the U.N. Secretary-General to create what would become the U.N. Iraq-Kuwait Boundary Demarcation Commission); S.C. Res. 833, U.N. SCOR, 3224th mtg. at ¶ 4, U.N. Doc. S/RES/833 (1993) (reaffirming that the decisions of the Commission regarding the demarcation of the boundary are final). In this case, the Council did impose a particular method of dispute settlement between two sovereign states.

116. *Free At Last*, SYDNEY MORNING HERALD, Oct. 21, 1999, at 16.

117. *See* S.C. Res. 1272, 4057th mtg. at pmb., ¶¶ 4, 12, U.N. Doc. S/RES/1272 (1999) (establishing the U.N. Transitional Administration in East Timor). This resolution welcomes "the decision of the Indonesian People's Consultative Assembly" to accept East Timor's independence, and reaffirms "respect for the sovereignty and territorial integrity of Indonesia." *Id.* at pmb.; *see also* Christopher S. Wren, *U.N. Creates an Authority to Start Governing East Timor*, N.Y. TIMES, Oct. 26, 1999, at A8.

eral Assembly. Because of this formalized legal structure, the Security Council will be much more reluctant to impose a solution than were the great powers acting as the Concert of Europe. It would be extremely controversial for the Security Council to grant statehood to Kosovo at the expense of the sovereignty and territorial integrity of Serbia. There would inevitably be legal questions about whether such an action was consistent with the principles set out in Article 2 of the UN Charter, questions about whether other members of the UN agreed with the precedent being set, and debates about whether the consequences of the decision would truly promote international peace and security.

Other than the general requirement that Security Council decisions be consistent with the Charter and its principles, the UN Charter itself recognizes few limits upon the Chapter VII powers of the Security Council.<sup>118</sup> A practical and political constraint lies in the Security Council's desire to maintain the support of its members and of the other organs of the UN. An international decision to compromise the territorial integrity of a state might well be viewed as illegitimate unless it was based on principles<sup>119</sup> supported by a broad international consensus. That consensus will not be easy to come by. UN members are all territorially defined sovereign states themselves, and are naturally reluctant to compromise a fundamental aspect of the sovereignty they enjoy. Insofar as these attitudes reflect *opinio juris*, they are relevant to the development of the applicable international law as well.

Security Council Resolution 1244 speaks of what is to be done "pending a final settlement" and of "facilitating a political process designed to determine Kosovo's future status,"<sup>120</sup> but the Resolution carefully avoids endorsing any particular form of final status. This directly reflects the reluctance of the Security Council to decide the issue.<sup>121</sup>

Much the same attitude is reflected in UN Security Council resolutions on Kosovo, which call for a political dialogue on political status issues leading to a solution based on the territorial integrity of the Federal Republic of Yugoslavia,<sup>122</sup> and by the repeated references to "the sover-

118. U.N. CHARTER arts. 39–42.

119. President Woodrow Wilson stressed that territorial settlements should not be based merely on political expediency: "every territorial settlement involved in this war must be made in the interest and for the benefit of the populations concerned, and not as a part of any mere adjustment or compromise of claims amongst rival states." WILSON'S 1918 ADDRESS TO CONGRESS, *supra* note 36, at 478 (emphasis added).

120. S.C. Res. 1244, *supra* note 3, ¶¶ 11(a), 11(e).

121. *Id.* ¶ 11(a).

122. *See id.* at ¶ 5, Annexes 1–2; S.C. Res. 1160, *supra* note 1, ¶ 1.

eighty and territorial integrity of the Federal Republic of Yugoslavia” found in the Rambouillet Agreement.<sup>123</sup>

Kosovo has supporters on the Security Council but so does Serbia.<sup>124</sup> In light of the Russian veto, Kosovo’s chances of achieving independence and statehood through decision of the Security Council may be no greater than the chances of achieving it through direct negotiation with Serbia.<sup>125</sup>

### 3. The Evolving Practice of New State Recognition and its Relevance to Kosovo’s Final Political Status

The recognition of new states raises issues of both international law and politics. The principles of public international law establish the essential conditions of statehood, namely a defined territory and a permanent population, with both subject to an organized government with effective control.<sup>126</sup> Whether these conditions have been met is a question of fact. The prevailing view is that recognition by other states is merely evidence that they presumably believe those conditions have been met.<sup>127</sup> In principle, recognition by other states is only declaratory and is not a formal and separate condition of statehood.<sup>128</sup>

In the past, recognition, or nonrecognition, has been dependent upon the recognizing state’s assessment both of whether the above conditions have been met *de facto*, and of whatever political considerations it might

123. See Interim Agreement for Peace and Self-Government in Kosovo, art. 1, ¶ 2, Feb. 23, 1999, U.N. Doc. S/1999/648 (June 7, 1999), at [http://www.state.gov/www/regions/eur/ksvo\\_rambouillet\\_text.html](http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html) [hereinafter Rambouillet Accords]. The Rambouillet Accords were a three-year interim agreement on Kosovo, brokered by the US, Russia, and the EU. *Id.* They were intended to provide democratic self-government, peace, and security for everyone living in Kosovo. *Id.* These Accords were signed by representatives of the Kosovar Albanian community in February of 1999, but Serbia refused to sign them, triggering the NATO bombing of Serbia. *Id.*

124. The US, the UK, and France demonstrated their support for Kosovo by participating in the NATO bombing of Serbia. Russia’s sympathies lie with their Slavic brethren, the Serbs. See Michael R. Gordon, *U.S. Warns Russia: Don’t Provide Help to Serbian Military*, N.Y. TIMES, Apr. 10, 1999, at A1 (“Russian nationalist and Communist politicians have expressed support for the Serbs and little sympathy for the plight of the Kosovar Albanians, whom they view as Muslim separatists.”).

125. Russia and China have both threatened to use the veto to defend Serbia in the past. See Steven Erlanger, *Yugoslavs Demand a Role in U.N. Kosovo Settlement*, N.Y. TIMES, May 22, 1999, at A7 (“NATO began its air attacks on Yugoslavia without a Security Council resolution, insisting that its actions were legally founded in the right of ‘humanitarian intervention.’ But NATO officials knew that they could not get such a Security Council resolution, because Russia and China said they would veto one.”).

126. “Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986).

127. *Id.* § 201 cmt. h.

128. Arbitration Commission: Opinions, *supra* note 15, at 1495 (Badinter Opinion No. 1).

also care to consider.<sup>129</sup> No state is required to accord formal recognition to any other state.<sup>130</sup> Traditionally, recognition of a new state on territory still claimed by another existing state would only be justified if effective control had passed from one to the other.<sup>131</sup>

The EU's recent practice concerning recognition of the new Balkan states indicates that, increasingly, an emergent state's compliance with various legal obligations in the past and its willingness to uphold international legal and political obligations in the future are considered relevant to decisions regarding recognition.<sup>132</sup> The EC's 1991 Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" set the tone for these changes.<sup>133</sup>

The Badinter Commission's opinions reveal much about the views of the EU on matters related to Kosovo's final status. In particular, these opin-

129. The failure of Arab states to recognize the state of Israel, for example, is based on purely political considerations, unrelated to the *de facto* existence of that state.

130. RESTATEMENT (THIRD) OF THE FOREIGN LAW OF THE UNITED STATES, *supra* note 126, § 202.

131. Recognition may be withheld for political reasons, but should not be granted for any reason when the qualifications of statehood have not been met.

Treating an unqualified entity as a state will ordinarily affect the interests of another state. For example, accepting as a state an entity that seeks to secede from another state, but has not yet succeeded in achieving complete control of its territory, is an improper interference in the internal affairs of the parent state, and if the seceding entity is given military support, may constitute the threat or use of force against the territorial integrity of the parent state in violation of Article 2(4) of the United Nations Charter.

*Id.* at § 202 cmt. f.

132. *Reference re Secession of Quebec*, *supra* note 62, at 289.

The process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms. . . . [A]n emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition.

*Id.*

133. The common position of the EC states sets the following requirements:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.

The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring states.

The commitments to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements.

EC Declaration & Guidelines, *supra* note 18, at 1487.

ions demonstrate the EU's commitment to the principle that the external frontiers of Serbia and of other former Yugoslav republics must be respected and may not be altered, except by freely negotiated agreement.<sup>134</sup> Consistent with this view, the Commission declined even to consider Kosovo's request for diplomatic recognition.<sup>135</sup>

The Badinter Commission found that the former Yugoslavia was in the process of dissolution as of November 29, 1991.<sup>136</sup> The Commission also found that as of July 4, 1992, that process was complete and the old Socialist Federal Republic of Yugoslavia could no longer be said to exist.<sup>137</sup> Since a federal state was deemed to have dissolved, this opened the door to the recognition of former federal units Croatia, Slovenia, Macedonia, and Bosnia-Herzegovina without violating the sanctity of external frontiers.

The fact that four former Yugoslav republics have already achieved independence and statehood might suggest that Kosovo can expect the same. Leaping to such a conclusion, however, would be both naïve and simplistic. Specific historical circumstances distinguish these territories from Kosovo. In the early 1990s, when the former Yugoslav republics had already gained a degree of *de facto* independence from the SFRY and were recognized as independent states, Kosovo was part of Serbia, still effectively under Serbian rule, and therefore was not in a position to claim recognition as a state.

Kosovo's status within the SFRY has long been a source of tension. Formally classified as a Serbian Province, Kosovo was never granted full status as a republic within the SFRY, even though it enjoyed a high degree of functional autonomy by the 1970s.<sup>138</sup> Amendments to Serbia's constitution in 1989 and 1990 effectively negated that autonomy, prompting Kosovo's provincial assembly to issue a declaration of independence from Serbia on July 2, 1990, and another declaration of independence from the SFRY on October 18, 1991.<sup>139</sup> Kosovo's request for recognition by the EC

134. When asked "Can the internal boundaries borders between Croatia and Serbia and between Bosnia-Herzegovina and Serbia be regarded as frontiers in terms of public international law?" the Badinter Commission answered "First—All external frontiers must be respected . . . . Second—The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly between other adjacent independent States may not be altered except by agreement freely arrived at." Arbitration Commission: Opinions, *supra* note 15, at 1499–1500 (Badinter Opinion No. 3).

135. See *infra* notes 140–41 and the accompanying text.

136. Arbitration Commission: Opinions, *supra* note 15, at 1497 (Badinter Opinion No. 1).

137. *Id.* at 1523 (Badinter Opinion No. 8).

138. RADAN, *supra* note 17, at 196.

139. *Id.* at 198–99.

was never considered on the formal grounds that the EC would recognize only republics,<sup>140</sup> not autonomous provinces within republics.<sup>141</sup>

The EC's rigid insistence that all of the borders of the republics of the SFRY be preserved as international borders has been criticized as a misapplication of the principle of *uti possidetis*, and as an inappropriately inflexible doctrine.<sup>142</sup> Indeed, a more human rights based approach would seem to be appropriate now that the right to self-determination has been recognized as the essential foundation of all human rights.<sup>143</sup>

#### IV. A HUMAN RIGHTS-BASED PERSPECTIVE ON SELF-DETERMINATION FOR KOSOVO

In the twenty-first century, self-determination should be viewed more as a question of human rights than of national rights. As used here, the term "national rights" refers both to the sovereign rights of the state and to attempts by a nation group to claim these sovereign rights in a new state through the process of external self-determination.

There is an inherent tension between the traditional sovereign rights of states and the development and realization of an international law of human rights.<sup>144</sup> The potential for this conflict is greatest when it involves the

140. The December 16, 1991, EC Declaration on Yugoslavia, which was the basis for the Badinter Commission's work, declares that "[t]he Community and its member States agree to recognise the independence of all the **Yugoslav Republics** fulfilling all the conditions set out below" and invited "all **Yugoslav Republics** to state by 23 December whether . . . they wish to be recognised as independent States." EC Declaration & Guidelines, *supra* note 18, at 1485 (emphasis added).

141. As Peter Radan describes it:

In the light of decisions by Slovenia and Croatia in early October 1991 to proceed with secession, Kosovo declared its independence on 18 October 1991 and began to seek international recognition, especially from the EC. This was not forthcoming. Given that the EC was only prepared to grant recognition to republics of Yugoslavia, and not its autonomous provinces, Kosovo's application for recognition was not even accepted by the EC for consideration by the Badinter Commission.

RADAN, *supra* note 17, at 199–200.

142. See Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50, 66–76 (2000).

143. Human Rights Committee General Comment No. 12, *supra* note 52, at para. 1. The Human Rights Committee noted:

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

*Id.*

144. Bartram S. Brown, *The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 204 (1992). The development of international law is still deeply constrained by its "state-centric" origins.

According to the prevailing positivist conception of international law, that law derives its binding force from the consent of sovereign states. . . . This is one important sense in which

claim of a minority for external self-determination. Self-determination is a fundamental right of “peoples” and as such, it is the human rights counterpart of the rights of sovereignty and territorial integrity held by the states in which those peoples live. Thus the full realization of the right of a people to “freely dispose of their natural wealth and resources,”<sup>145</sup> for example, requires maintaining sovereignty over the territory in which those resources are located.

Almost a century ago, both the 1920 Commission of Jurists and the 1921 Commission of Rapporteurs recognized that a failure to provide just and effective guarantees for the rights of minorities might justify extraordinary derogations from state sovereignty.<sup>146</sup> More recently,<sup>147</sup> the EU has formally required commitment to guarantees for the rights of minorities as a precondition to diplomatic recognition by the EC/EU and its member states.<sup>148</sup> This criterion was applied not merely as a political standard, but was based on the view that peremptory norms of international law require states to ensure respect for the rights of minorities.<sup>149</sup>

The Security Council has also reaffirmed that the rights of minorities in Kosovo must be respected.<sup>150</sup> It is therefore clear that the issue of Kosovo’s final political status cannot be separated from the imperative need to

international law is centered on states, or “state-centric.” In addition, international law was traditionally thought to create rights and obligations only for states. According to this view international law was a law by and for states, in which the rights of individuals had no place.

An important step beyond state-centrism is implicit in the idea of an international law of human rights, since the rights concerned are those of individuals, or groups of individuals rather than those of states. The very concept of internationally recognized human rights is in derogation of state sovereignty, while traditional “state-centric” approaches to international law insist upon a very broad definition of state sovereignty and a formalistic defense of it from any external intrusion. This traditional concept of international law is inherently inadequate to the task of protecting the human rights and fundamental freedoms which the UN system is pledged to promote.

*Id.*

145. See Covenant on Civil and Political Rights, *supra* note 56, at art. 1; Covenant on Economic Rights, *supra* note 56, at art. 1.

146. See *infra* notes 163–65 and the accompanying text.

147. See *supra* notes 132–34 and the accompanying text.

148. The EC/EU standard for recognition requires “guarantees for the rights of ethnic and national groups and minorities in accordance with commitments entered into in the CSCE framework.” Arbitration Commission: Opinions, *supra* note 15, at 1514 (Badinter Opinion No. 7).

149. The Badinter Commission has noted that “the—now peremptory—norms of international law require States to ensure respect for the rights of minorities. This requirement applies to all the Republics vis-a-vis the minorities on their territory.” *Id.* at 1498 (Badinter Opinion No. 2). Additionally, “the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession.” *Id.* at 1496 (Badinter Opinion No. 1).

150. The Security Council has called for the determination of Kosovo’s future status taking into account the Rambouillet Accords. See S.C. Res. 1244, *supra* note 3, ¶ 11(e). The Rambouillet Accords contain repeated references to the rights of national communities within Kosovo. See Rambouillet Accords, *supra* note 123.



protect the rights of minorities. A national movement for self-determination that does not fully address minority rights can no longer expect the full support of the international community.

How does this new legal and political reality affect claims for external self-determination? As discussed above, the principle of self-determination, despite its status as a *jus cogens* norm, does not appear to establish a true right of external self-determination, other than in cases of so-called salt-water colonial domination.<sup>151</sup> Nonetheless, under certain circumstances, external self-determination may be justified based on consideration of all the relevant factors. The Commission of Jurists on the Aaland Island Question did not even classify the principle of self-determination as part of positive law. Nonetheless, the Commission identified one special circumstance in which external self-determination might be appropriate and suggested the possibility of another.<sup>152</sup>

Both involve unusual shifts in the balance between the national rights of existing sovereign states and the human rights of minority populations. In the first, the national rights of a sovereign state have been undermined by circumstances leading to its transformation or dismemberment. In the second, the failure to protect the fundamental rights of minorities requires an extraordinary remedy, even if it is at the expense of traditional sovereign rights.

#### A. *Sovereign Rights in Context: The Transformation and Dismemberment of a State*

The 1920 Aaland Islands Commission of Jurists, even more than today's Security Council, placed a very high value on the rules protecting state sovereignty and territorial integrity.<sup>153</sup> At the same time, the Commis-

151. See *supra* notes 58–61 and the accompanying text.

152. These two circumstances, i.e., the transformation and dismemberment of a state, and a failure of just and effective guarantees for minority rights, are discussed in the next section of this article. See *infra* notes 153–65 and the accompanying text.

153. In the words of the Commission of Jurists:

[I]n the absence of express provisions in international treaties, **the right of disposing of national territory is essentially an attribute of the sovereignty of every State.** Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation.

... Any other solution would amount to **an infringement of sovereign rights of a State** and would involve the risk of creating difficulties and a lack of stability which **would not only be contrary to the very idea embodied in the term "State" but would also endanger the interests of the international community.**

Commission of Jurists Report, *supra* note 47, at 5 (emphasis added).

sion also acknowledged that there are special situations in which the normal rules do not apply:

It must, however, be observed, **that all that has been said concerning the attributes of the sovereignty of a State, generally speaking, only applies to a nation which is definitively constituted as a sovereign State and an independent member of the international community and so long as it continues to possess these characteristics.** From the point of view of both domestic and international law, **the formation, transformation and dismemberment of States as a result of revolutions and wars create situations of fact which, to a large extent, cannot be met by the application of the normal rules of positive law.** . . .

**Under such circumstances, the principle of self-determination of peoples may be called into play.** New aspirations of certain sections of a nation, which are sometimes based on old traditions or on a common language and civilisation, **may come to the surface and produce effects which must be taken into account in the interests of the internal and external peace of nations.**<sup>154</sup>

Secession and independence are not a right or entitlement, but it is undeniable that that the former Socialist Federal Republic of Yugoslavia was dismembered as Croatia, Slovenia, Bosnia-Herzegovina, and Macedonia declared themselves independent and achieved both international recognition by other states and admission to the United Nations. The UN Security Council declared in a 1992 resolution that “the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist”<sup>155</sup> and recommended to the UN General Assembly that it decide that the Federal Republic of Yugoslavia<sup>156</sup> (Serbia and Montenegro) should apply for membership in the United Nations and that it should not participate in the work of the General Assembly.<sup>157</sup> The UN General Assembly agreed and decided accordingly.<sup>158</sup> This conclusively establishes that, subsequent to 1991, there was a complete transformation and dismemberment of the state in the SFRY. The Aaland Islands Commission of Jurists has noted that under these very circumstances, “the principle of self-determination of peoples may be called into play.”<sup>159</sup> It is true that Kosovo’s status and circumstances were different from those of the republics that gained their independence and recognition in the 1990s. But even though the EC’s Badinter Commission declared that the dissolution of the SFRY was com-

154. *Id.* at 5–6 (emphasis added).

155. S.C. Res. 777, U.N. SCOR, 47th Sess., 3116th mtg., U.N. Doc. S/RES/777 (1992).

156. Yugoslavia, now reduced to only two republics, is known today as Serbia and Montenegro.

157. *Id.*

158. G.A. Res. 47/1, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/471 (1992).

159. Commission of Jurists Report, *supra* note 47, at 6. See the full quotation in the text above associated with note 154, *supra*.

pleted over a decade ago,<sup>160</sup> that conclusion seems false in light of subsequent developments in Kosovo. It could be argued that the transformation and dismemberment of the former SFRY will continue until the final status of Kosovo has been determined. Equally plausible is the view that Serbia itself is still undergoing a process of transformation and potential dismemberment.

The standard set by the 1920 Commission of Jurists was as follows:

[I]f the essential basis of these rules, that is to say, territorial sovereignty, is lacking, either because the state is not yet fully formed or because it is undergoing transformation or dissolution, **the situation is obscure and uncertain from a legal point of view and will not become clear until the period of development is completed and a definite new situation, which is normal in respect to territorial sovereignty, has been established.**

**This transition from a *de facto* situation to a normal situation *de jure* . . . tends to lead to readjustments** between the members of the international community and to alterations in the territorial and legal status; consequently, this transition interests the community of States very deeply both from political and legal standpoints.<sup>161</sup>

UNMIK's stated purpose is to provide "transitional administration" for Kosovo "pending a final settlement."<sup>162</sup> Undoubtedly then, Kosovo and Serbia are still caught in a "transition from a *de facto* situation to a normal situation *de jure*." Applying the standard above would leave open the door to a broad situational analysis of Kosovo's claim to external self-determination.

#### B. *When Sovereign Rights Must Yield: A Failure of Just and Effective Guarantees for Minority Rights*

The 1920 Commission of Jurists and the 1921 Commission of Rapporteurs both raised the question of whether clear evidence of government-sponsored atrocities and other repression of a local minority, or any other failure to provide adequate guarantees for minority rights, could justify international scrutiny and possibly international action in derogation of state sovereignty.<sup>163</sup> The Commission of Jurists largely sidestepped the

160. Arbitration Commission: Opinions, *supra* note 15, at 1523 (Badinter Opinion No. 8).

161. Commission of Jurists Report, *supra* note 47, at 6 (emphasis added).

162. See S.C. Res. 1244, *supra* note 3, ¶¶ 10, 11(a).

163. The specific issue being addressed by the Commission of Jurists was that part of Article 15 of the League of Nations Covenant which barred the League's Council from discussing anything "found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party." LEAGUE OF NATIONS COVENANT art. 15. A similar rule appears in Article 2(7) of the

question, noting that it was not directly raised by the case under consideration:

The Commission, in affirming these principles, does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would, if such circumstances arose, give to an international dispute arising therefrom, such a character that its object should be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the sphere of action of the League of Nations. Such a supposition clearly does not apply to the case under consideration, and has not been put forward by either of the parties to the dispute.<sup>164</sup>

The second commission that addressed the Aaland Islands case, the 1921 Commission of Rapporteurs, went much further in stating that external self-determination could be considered where just and effective guarantees for minority rights were not available:

What reasons would there be for allowing a minority to separate itself from the State to which it is united, if this State gives it the guarantees which it is within its rights in demanding, for the preservation of its social, ethnical or religious character? Such indulgence, apart from every political consideration, would be supremely unjust to the State prepared to make these concessions.

**The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.**<sup>165</sup>

Such was the view of the League's Commission of Rapporteurs in 1921. The balance between the rights of state sovereignty and what we now call human rights has shifted dramatically since then. The Council of the League of Nations was barred from acting on any matter it found to be "solely within the domestic jurisdiction"<sup>166</sup> of a state, whereas the UN Security Council can now act on any matter it determines to constitute a threat to international peace and security.<sup>167</sup> So, although the Council of the

UN Charter. See *supra* notes 101–02 and the accompanying text. The issue of whether such atrocities come within the sphere of international authorities is relevant to the delimitation of Security Council prerogatives with regard to Kosovo.

164. Commission of Jurists Report, *supra* note 47, at 5.

165. CASSESE, *supra* note 30, at 31 n.58 (quoting Report Presented to the Council of the League by the Commission of Rapporteurs, League of Nations Doc. B.7.21/68/106 (1921)) (emphasis added).

166. The Covenant of the League of Nations provides:

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

LEAGUE OF NATIONS COVENANT art. 15.

167. U.N. CHARTER arts. 39–42.

League of Nations might hypothetically have been able to address Kosovo's final status, the present Security Council's authority to do so is unambiguous.<sup>168</sup> It seems equally clear that the "altogether exceptional solution" of external self-determination must remain an option where necessary for the protection of minority rights.

The minority rights argument does not establish Kosovo's right to independence and sovereignty, although it does open the door for that possibility. Minority rights considerations do support the Security Council's authority to decide on Kosovo's final status if ultimately called upon to do so.

### C. *Compromise May Be Necessary to Preserve Minority Rights*

If left to the Security Council, it is difficult to predict what the decision on Kosovo's final status would be. Kosovo's historical, cultural, and political case for external self-determination (independence) may be a strong one, but it is only one of many factors to be considered. Geographical and economic factors must be weighed,<sup>169</sup> and, of course, the protection of minorities (and potentially of minorities within the minority) must be addressed.

Woodrow Wilson, so historically identified with advancing the cause of self-determination, recognized the need to balance that principle with the requirements of a lasting peace. In the same speech to Congress in which he declared self-determination to be "an imperative principle of action," Wilson stressed practical and situational limits in the interests of peace.<sup>170</sup> The equally pragmatic conclusion of the Aaland Islands Commission of Jurists was that "[u]nder such circumstances, a solution in the nature of a compromise, based on an extensive grant of liberty to minorities, may appear necessary according to international legal conception and may even be dictated by the interests of peace."<sup>171</sup>

168. See *supra* notes 101-12 and the accompanying text.

169. According to the Commission of Jurists, many factors must be balanced in deciding the issue:

The fact must, however, not be lost sight of that the principle that nations must have the right of self-determination is not the only one to be taken into account. Even though it be regarded as the most important of the principles governing the formation of States, geographical, economic and other similar considerations may put obstacles in the way of its complete recognition.

Commission of Jurists Report, *supra* note 47, at 6.

170. Even for Wilson, the idealist, world peace had to come first: "fourth, that all well defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world." WILSON'S 1918 ADDRESS TO CONGRESS, *supra* note 36, at 478 (emphasis added).

171. Commission of Jurists Report, *supra* note 47, at 6.

On the final status issue as well, both legal and political considerations may require compromise. Somewhat paradoxically, international support for the independence of Kosovo may well be diminished if Kosovar Albanian leaders are perceived to be insisting on that result solely on the grounds of narrow national rights. The most cogent arguments on final political status will be those that stress an overall balance of considerations, including not only state sovereignty and human rights but also other matters affecting international peace and security.

#### V. OBSERVATIONS AND CONCLUSIONS RELEVANT TO FINAL STATUS ISSUES

Contemporary legal and political standards increasingly reverse traditional priorities to stress human rights and the interests of the international community, rather than state-centered national rights and interests. The principle of self-determination has a dual aspect, with one foot in each of these two worlds. It is grounded in the human rights of a people and may potentially culminate in the sovereign national rights of a state.

The principle of self-determination must be applied to Kosovo, but in what form? Independence and sovereignty are not rights that Kosovo can automatically claim as a matter of law. International law does not compel any particular solution for Kosovo, not independence nor any other; however, international law does demand effective protections for minority rights. Independence for Kosovo might be a solution, but if it were to leave minorities feeling as persecuted, excluded, and disempowered within the new Kosovo as Kosovar Albanians felt within Serbia, Kosovo's independence could potentially create as many problems as it resolves.

Kosovar Albanian leaders can make their best and most effective case for independence in terms of postcolonial human rights-based standards. To do so, they must acknowledge that their national right to external self-determination is no more absolute than Serbia's state-centered right to territorial integrity. Each must yield as necessary to considerations of human rights and international peace and security.

Determining Kosovo's final political status will be inherently difficult. No one relishes the prospect of compromise on sensitive issues of sovereignty. But only negotiations without unrealistic preconditions can fully explore the possibilities for compromise and agreement. If representatives of Serbia refuse to discuss Kosovo's independence or to consider any compromise to the territorial sovereignty of Serbia, and if representatives of Kosovo refuse to discuss proposals for autonomy or adjustments to the

existing boundaries, meaningful negotiations will be impossible. Neither party will benefit from such an impasse.

It is unrealistic to expect that the Security Council or some other international body will inevitably grant Kosovo independence. The traditional sovereign right to territorial integrity remains a powerful and relevant value both for states in general and for the UN Security Council. After all that has happened, it is equally unrealistic to expect that the Council will unconditionally restore the entire territory of Kosovo to Serbia.

The Serbian government and the Kosovar Albanian leadership should seek an agreement on final status accommodating not only their own interests, but also taking into account those of the international community as a whole. It will not be easy. Resolution will require outside political intervention by the Security Council and key states. So far that intervention has come principally in the form of mediation and political guidance. The message in that guidance, both for Kosovo and for Serbia, is that both groups should engage in a realistic and meaningful dialogue.<sup>172</sup>

If the parties cannot agree, the Security Council, acting to protect international peace and security, may eventually have to assume responsibility for deciding upon Kosovo's final political status. The members of the Security Council do not relish this prospect and neither should the parties.

If the Security Council, on its own, must concoct a Solomonic compromise on sovereignty, the results will be both unpredictable and of uncertain effect. Such a solution could be long in coming and even then might not prove to be viable in the long term. There is certainly no guarantee that such a solution would satisfy Albanians, Serbs, or any of the other parties. For their own self-interest, these parties should accept responsibility for negotiating their own future.

172. See S.C. Res. 1160, *supra* note 1, ¶ 4; S.C. Res. 1199, *supra* note 89, ¶ 3; S.C. Res. 1203, *supra* note 89, ¶ 5; *see also* EC Declaration & Guidelines, *supra* note 18.