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COMMENTARY

Self-Determination: Chechnya, Kosovo, and East Timor

*Jonathan I. Charney**

Hindsight always appears better than foresight. Hopefully, the reexamination of past events will provide lessons for the future. Recent media reports have analyzed the genocide in Rwanda and blamed France, the United States, and the UN Security Council for their failures to take steps that might have prevented or stopped the atrocities.¹ Academic studies also argue how the atrocities in Chechnya, Kosovo, and East Timor may have been prevented or stopped by the United Nations or others in the international community.² Such analyses are for international relations authorities and military experts. As an international lawyer, I am reluctant to tread in those domains. For me, the question is whether changes in international law might modify the behavior of major international actors such as states, intergovernmental organizations, and nongovernmental organizations. In the future they might be better prepared if situations like Chechnya, Kosovo, or East Timor were to arise. Certainly, there is no lack of international law condemning the atrocities that took place in those territories. The existence of the International Criminal Tribunal for the Former Yugoslavia (ICTY)—with authority to prosecute persons who committed international crimes in Kosovo—did not appear to deter Slobodan Milosevic and his supporters in their drive to crush the

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1. Barbara Crossette, *Report Says U.S. and Others Allowed Rwanda Genocide*, N.Y. TIMES, July 8, 2000, at A4.

2. See generally Thomas D. Grant, *Extending Decolonization: How the United Nations Might Have Addressed Kosovo*, 28 GA. J. INT'L & COMP. L. 9 (1999); Gail W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, INT'L SECURITY, Summer 1998, at 5; Paul C. Szasz, *The Irresistible Force of Self-Determination Meets the Impregnable Fortress of Territorial Integrity: A Cautionary Fairy Tale About Clashes in Kosovo and Elsewhere*, 28 GA. J. INT'L & COMP. L. 1 (1999).

Kosovo independence movement and ethnically cleanse the region.³ No international criminal tribunal had jurisdiction over the Russian actions in Chechnya. While some hope that the establishment of the permanent International Criminal Court (ICC)⁴ will deter the commission of international crimes, its efficacy remains unproven. Samuel Huntington might chalk these events up to the inevitable clashes of civilizations during the “multipolar and multicivilizational” period he argues we have entered.⁵ While fate may be on the side of continuing and escalating conflicts of this nature, it is incumbent upon us to seek ways to minimize or eliminate recurrences of these events anywhere in the world.

Chechnya and Kosovo have many parallels. Not only did the events take place in the same general time frame but both involved ethnic minorities seeking a degree of autonomy or independence from relatively non-democratic and dictatorial regimes.⁶ East Timor, albeit slightly different, provides interesting similarities.

At the legal heart of these matters is the law of self-determination. In its classical incarnation after the establishment of the United Nations, self-determination seemed to be only the vehicle

3. See *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, in *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, U.N. SCOR, 48th Sess., Annex, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1163, 1192 (1993) [hereinafter ICTY Statute]. In fact, the ICTY Prosecutor considered that the ICTY had jurisdiction over international crimes committed in Kosovo during the period of the NATO actions and investigated whether NATO had committed such violations. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 13, 2000), at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited Feb. 3, 2001); *Introductory Statement by Justice Louise Arbour, Prosecutor ICTY and ICTR at the Launch of the ICC Coalition's Global Ratification Campaign*, The Hague Appeal for Peace, May 13, 1999, ICTY Press Release JL/PIU/401-E, at <http://www.un.org/icty/pressreal/p401-e.htm> (last visited Feb. 3, 2001). The jurisdiction of the ICTY includes “violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. . . .” ICTY Statute, *supra*, art. 1, at 1192.

4. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) (as corrected by the procès-verbaux of Nov. 10, 1998 and July 12, 1999), available at <http://www.un.org/law/icc/statute/rome.htm> [hereinafter ICC Statute]. For the uncorrected version, see United Nations, Rome Statute of the International Criminal Court, 37 I.L.M. 999 (1998).

5. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 19-29 (1996).

6. For chronologies of the conflicts in Kosovo and Chechnya, see, respectively, JULIE A. MERTUS, *KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR* 285-309 (1999); Lapidus, *supra* note 2, at 15-24.

for decolonization, resulting in a multitude of independent states.⁷ More difficult is the arguable application of this doctrine to the post colonial period.⁸ Some argue that it has no application outside of decolonization. Others argue that it may, but does not permit secession from an established state outside of the colonial context.⁹ These authorities and others might recognize so-called internal self-determination that would allow a minority group the protection of group rights and certain autonomy within the established state but no right of secession.¹⁰ At the far other extreme, it might be argued that a territorially-centered coherent group has the inherent right to decide for itself whether to remain part of the state in which it is located or to choose independent statehood. Debates have raged among international lawyers and diplomats over the right of self-determination in the non-colonialist context. One might even argue

7. See U.N. CHARTER arts. 1, 55; American Convention on Human Rights, Nov. 22, 1969, arts. 33, 52-73, O.A.S. Treaty Series No. 36, O.A.S. Official Records OEA/Ser. A/16, reprinted in 9 I.L.M. 673 (1970); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5; Western Sahara, 1975 I.C.J. 12 (Oct. 16); MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOCS. C, D, E, F, No. 95-2 (1978); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, at 121, U.N. Doc. A/8028 (1971) [hereinafter Declaration on Friendly Relations]; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, paras. 2, 6, U.N. Doc. A/4684 (1961).

8. See generally LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); Kwaw Nyameke Blay, *Self-Determination Versus Territorial Integrity in Decolonization Revisited*, 25 INDIAN J. INT'L L. 386 (1985); Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287 (1991); Kate Greene, *International Responses to Secessionist Conflicts*, 90 AM. SOC'Y INT'L L. PROC. 296 (1996); Hurst Hannum, *The Right of Self-Determination in the Twenty-First Century*, 55 WASH. & LEE L. REV. 773, 776-77 (1998); Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT'L L. 255 (1996).

9. E.g., James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, in SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED paras. 10, 63-67, at 31, 36, 59-60 (Anne F. Bayefsky ed., 2000), available at <http://canada.justice.gc.ca/en/news/nr/1997/factum/craw.html> (last modified Dec. 9, 1997); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 465 (1971); Hannum, *supra* note 8, at 776-77; Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1, 4 (1998).

10. E.g., Crawford, *supra* note 9, para. 62, at 58; Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 59 (1992); Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 VA. J. INT'L L. 115, 180 (1999); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 66-69 (1993).

that this uncertainty has itself contributed to many human tragedies the world has witnessed in the post-World War II period by giving false hope to minority groups that they have rights to autonomy or independence against the states in which they are found, even absent a colonial history. That assertion may fail to take into account the many other factors that contribute to minority unrest and hopes for autonomy or independence. It is likely, however, that this legal uncertainty has encouraged minority group claims and other difficulties that have been left to fester by the international community. The rise of the general international law of human rights and the consequential erosion of the UN Charter Article 2.7 limitations on matters of domestic concern have provided further expectations of international support for minority group claims.¹¹

Thus, one task of the international community should be to clarify the right of self-determination in non-colonial situations. The clearer the law on the subject, the less likely groups will assert unfounded claims or engage in risky provocations. Reciprocally, legally supported claims of self-determination may deter egregious actions by the mother state and will encourage other states to lend appropriate support to such lawful claims of self-determination.

Although it is for the international community to develop the international law in this area, one may find the seeds of a solution in recent developments. It is interesting to compare the international community's reactions to the events in Chechnya and Kosovo. While in Kosovo the international community essentially endorsed the Albanian Kosovar's claims to self-determination,¹² in Chechnya the

11. The U.N. Charter provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, para. 7.

12. The UN Security Council explicitly addressed the Kosovo crisis in the several resolutions adopted under Chapter VII of the U.N. Charter, both prior and subsequent to the Spring 1999 NATO attack. *See generally* S.C. Res. 1160, U.N. SCOR, 53d Sess., 3868th mtg., U.N. Doc. S/RES/1160 (1998); S.C. Res. 1199, U.N. SCOR, 53d Sess., 3930th mtg., U.N. Doc. S/RES/1199 (1998); S.C. Res. 1203, U.N. SCOR, 53d Sess., 3937th mtg., U.N. Doc. S/RES/1203 (1998); S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999). Moreover, statements of the UN Secretary General after the commencement of the NATO campaign, fell short of criticism of the NATO actions. Likewise, the Security Council refused to pass a resolution, proposed by Russia, that would have demanded an immediate cessation of the use of force by NATO against Yugoslavia. UNITED NATIONS, SECURITY COUNCIL REJECTS DEMAND FOR CESSATION OF USE OF FORCE AGAINST FEDERAL REPUBLIC OF YUGOSLAVIA, U.N. Doc. SC/6659 (Mar. 26, 1999). *See also* Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 32 VAND. J. TRANSNAT'L L. 1231, 1246 (1999) (suggesting that the actions of the Security Council as well as statements

reactions were more muted, essentially focusing on opposition to the violence used by the Russians against the Chechens without reference to their possible right to self-determination, within or without Russia.¹³

This distinction may be easily dismissed by experts in international relations due to the fact that the Federal Republic of Yugoslavia (FRY) is a relatively poor country that was run by a person already indicted by the ICTY for international crimes—Slobodan Milosevic—and his supporters.¹⁴ On the other hand, Russia despite its troubles was a significant military power with substantial economic resources. Its government was ostensibly democratic, albeit at the margins. Furthermore, it is a permanent member of the UN Security Council, holding the veto right.¹⁵ These distinctions are powerful and may suffice. In the past the admitted power of the Soviet Union, however, did not immunize it from severe pressure by the international community to open its society. This pressure substantially contributed to its disintegration and the formation of several independent states out of its empire.¹⁶ Thus, despite differences founded in power politics, the distinction between the situations in Kosovo and Chechnya may be worth examination.

One can make historical arguments to justify conclusions about the legality or illegality under international law of the larger states' sovereignty over these two territories. Both populations have long histories of serious violent conflicts with the states within which they were situated.¹⁷ Both involve minority populations with major

of the UN Secretary General might have been perceived as the acquiescence of the United Nations in the NATO intervention in Kosovo); Judith Miller, *The Secretary General Offers Implicit Endorsement of Raids*, N.Y. TIMES, Mar. 25, 1999, at A13.

13. OSCE High Commissioner on National Minorities, *The Joint Statement of the High Commissioner on National Minorities of the Organization for Security and Co-operation in Europe (OSCE)*, Max van der Stoep, the Secretary-General of the Council of Europe, Walter Schwimmer, and the United Nations High Commissioner for Human Rights, Mary Robinson, *Concern Expressed Over Civilian Situation in Chechnya* (Dec. 8, 1999), at http://www.osce.org/news/generate.php3?news_id=379 (last visited Feb. 21, 2001); OSCE, *Annual Report 1999 on OSCE Activities* (Nov. 17, 1999), at <http://www.osce.org/docs/english/misc/anrep99e.htm> (last visited Feb. 21, 2001) (containing a survey of OSCE Missions and other OSCE Field Activities).

14. Int'l Criminal Tribunal for the Former Yugoslavia, *Indictment of the Prosecutor of the Tribunal Against Slobodan Milosevic et al.*, May 24, 1999, at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm> (last visited Feb. 21, 2001).

15. U.N. CHARTER art. 23, para. 1, art. 27.

16. *Agreements Establishing the Commonwealth of Independent States*, Minsk, Dec. 8, 1991 and Alma Alta, Dec. 21, 1991, 31 I.L.M. 138 (1992).

17. On Kosovo, see, for example, 2 BARBARA JELAVICH, *HISTORY OF THE BALKANS* 86-88 (1983); NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* 240-48 (discussing a series of armed revolts by Kosovo Albanians against the Ottoman government between 1909 and 1912), 251-58 (discussing the 1912 conquest of Kosovo by the Serbian army and the ensuing violence against ethnic Albanians by Serbian and

distinctions that would classify them as a separate people.¹⁸ There are other distinctions, however, and they may be significant in the law of self-determination, if it is applicable.

In the case of Kosovo, the Albanian Kosovars had obtained a degree of autonomy in their province within the Socialist Federal Republic of Yugoslavia (SFRY). After the demise of the SFRY, the FRY took unilateral steps to eliminate that autonomy and took draconian steps against the Albanian Kosovars.¹⁹ For several years,

Montenegrin forces), 334-37 (discussing student demonstrations) (1998); Hugh Poulton & Miranda Vickers, *The Kosovo Albanians: Ethnic Confrontation with the Slav State*, in MUSLIM IDENTITY AND THE BALKAN STATE 139, 151-52 (Hugh Poulton & Suha Taji-Farouki eds., 1997) (discussing a wave of mass demonstrations by Kosovo Albanians and a subsequent surge of violence and persecution by Yugoslav authorities in the early 1980s).

On Chechnya, see, for example, JOHN B. DUNLOP, RUSSIA CONFRONTS CHECHNYA ROOTS OF A SEPARATIST CONFLICT 24-28 (discussing the continuous warfare from the mid-1820s to the mid-1850s between Chechens and Russians over the control of the region), 40-51 (discussing armed resistance by Chechens against both White Russian and Bolshevik forces during the civil war in Russia in the 1920s and during the 1929-30 insurrection in Chechnya against the Soviet government) (1998); ANATOL LIEVEN, CHECHNYA: TOMBSTONE OF RUSSIAN POWER 306-10 (1998).

18. Both the Kosovo Albanians and Chechens can fairly be characterized as distinct from their mother countries' majority populations in terms of language, ethnicity, religion, culture, and social organization. For a relevant discussion with respect to Kosovo Albanians, see MALCOLM, *supra* note 17, at 10-40. For a corresponding discussion regarding ethnic Chechens, see CARLOTTA GALL & THOMAS DE WAAL, CHECHNYA: A SMALL VICTORIOUS WAR 20-36 (1997); LIEVEN, *supra* note 17, at 324-68. Both ethnic Albanians and Chechens constituted ethnic majorities in Kosovo and Chechnya, respectively, at the time the present conflicts with the mother countries arose. Before the displacements prior to and during the NATO airstrike campaign, the population of Kosovo amounted to almost two million people, with ethnic Albanians constituting more than 80% of the population (10% Serbs and 8% other minorities). MERTUS, *supra* note 6, tbl. 8, at 316; MILAN VUCKOVIC & GORAN NIKOLIC, STANOVNIŠTVO KOSOVA U RAZDOBLJU OD 1918 DO 1991 GODINE 108-09 (1996), *cited in* MALCOLM, *supra* note 17, at 330. According to the 1989 Soviet census, the total population of the Chechen-Ingush Republic was 1.29 million, with Chechens comprising 57% (30% Russian and 13% Ingush). LIEVEN, *supra* note 17, at 100. At the time of the 1989 census, the Chechen-Ingush Republic was apparently one of only three autonomous Russian republics, out of twenty-one of such constituent republics within Russia, in which the so-called "titular nationality," a non-Russian ethnic group denoted in the republic's name, formed the majority of that republic's population. THE CHECHEN TRAGEDY: WHO IS TO BLAME? 5 (Yu. V. Nikolaev ed., 1996); Lapidus, *supra* note 2, at 10. Finally, in both cases, the contested territories constitute quite easily identifiable physical units within the larger mother country territory. For general overviews of the geographies of Kosovo and Chechnya, see, respectively, MALCOLM, *supra* note 17, at 1-10 and Grant, *supra* note 10, at 120-21 & n.11.

19. The long history of serious conflicts between Kosovo Albanians and Serbs notwithstanding, the genesis of the recent crisis in Kosovo can most directly be traced back to the 1989 amendments to the constitutions of the republic of Serbia and the Yugoslav federation. HELSINKI WATCH, INT'L HELSINKI FEDERATION FOR HUMAN RIGHTS, YUGOSLAVIA: CRISIS IN KOSOVO 10 (1990). Under the 1974 Constitution of Yugoslavia, which was in force until the final break-up of the Socialist Federal Republic of Yugoslavia, Kosovo enjoyed the status of an autonomous province. While

nevertheless, the Albanian Kosovars tried all peaceful means at their disposal to seek an accommodation. These efforts were rewarded only with greater suppression by the Serbs in control of the FRY.²⁰ The nonviolent Kosovar actions during this period also demonstrated that there existed deep and widespread support among the Albanian Kosovars for efforts to preserve their self-determination.²¹ This led ultimately to the foundation of the Kosovo Liberation Army (KLA) that only then sought independence from the FRY and used violence to seek that goal.²² Those efforts were met with violence and greater

Article 1 of the 1974 Constitution stated that the two autonomous provinces of Kosovo and Vojvodina were "constituent parts of the Socialist Republic of Serbia," the two provinces had their own direct representation on the federal level, their own constitutions, and broad autonomy in the economic sphere. Constitution of the Socialist Federal Republic of Yugoslavia, Feb. 21, 1974, *reprinted in YUGOSLAVIA THROUGH DOCUMENTS: FROM ITS CREATION TO ITS DISSOLUTION* 224, 225 (Snezana Trifunovska ed., 1994). For a comprehensive discussion of the evolution of Kosovo's provincial autonomy status and a detailed analysis of the 1974 constitutional provisions related to the status of Kosovo, see Sami Repishti, *The Evolution of Kosova's Autonomy Within the Yugoslav Constitutional Framework*, in *STUDIES ON KOSOVA* 195 (Arshi Pipa & Sami Repishti eds., 1984). The 1989 constitutional amendments authored by Serbia effectively stripped Kosovo of its autonomous status. Prior to the adoption of the amendments, the government of Serbia and the federal government of Yugoslavia initiated a sweeping purge of ethnic Albanians in the province, involving mass arrests and detentions, political and economic intimidation, and widespread police violence. For an account of serious human rights abuses perpetrated by the government of Serbia and the Yugoslav federal government prior to the formal ratification of the constitutional amendments, see HELSINKI WATCH, *supra*, at 17-41.

20. From 1989 onward, the Serbian and Yugoslav governments carried out a policy of brutal and systematic suppression of the remnants of Kosovo's provincial autonomy in the political, economic, social, and cultural spheres. The execution of that policy involved widespread and significant human rights abuses. MALCOLM, *supra* note 17, at 344-53.

21. In 1991 Kosovo Albanians managed to organize a referendum on the status of Kosovo in which a reported 87% of voters took part, 99% of whom voted in favor of declaring Kosovo a sovereign and independent republic. MALCOLM, *supra* note 17, at 347. In the May 24, 1992, elections for the Kosovo republican parliament and government, which were deemed illegal by the Serbian government, a reported 721,534 out of 821,588 registered voters participated. MERTUS, *supra* note 6, at 301.

Since the eruption of the crisis precipitated by the constitutional crisis in 1989, the political culture mobilized the Kosovo Albanians to take increasingly sophisticated actions involving boycotts of official elections, the emergence of political parties, and the establishment of "shadow" institutions of a separate republic under the leadership of Ibrahim Rugova and the Democratic League of Kosovo (LDK). *E.g.*, MALCOLM, *supra* note 17, at 347-48; Poulton & Vickers, *supra* note 17, at 155-56. For an overview of the institutions of the parallel Albanian system in the spheres of education, health care, taxation, and information services, see Veniamin Karakostanoglou, *The Kosovo Question: Starting & Concluding the Yugoslav Crisis?*, in *BALKAN CURRENTS: STUDIES IN THE HISTORY, CULTURE AND SOCIETY OF A DIVIDED LAND* 47, 55-58 (Lawrence A. Tritle ed., 1998).

22. Commentators generally date the emergence of the KLA as a significant player in the Kosovo crisis to the 1996-1997 incidents that included shooting and bombing of Serb officials and police when the previously unidentified Kosovo Liberation Army (KLA) openly claimed responsibility. *E.g.*, MALCOLM, *supra* note 17.

suppression by the FRY.²³ After efforts by the United Nations and NATO appeared to fail to resolve the crisis,²⁴ NATO unilaterally took action to protect the Albanian Kosovars.²⁵ This ultimately resulted in a UN Security Council sanctioned occupation and administration of Kosovo that operated as if Kosovo was de facto independent of the FRY.²⁶

In contrast, Chechnya's path to the declaration of independence was a unilateral process, devoid of any efforts aimed at some negotiated accommodation.²⁷ It might be plausible to conclude that Chechnya managed to secede, de facto, without a major use of force between the time that the Soviet Union collapsed and a relatively

at 354-55; MERTUS, *supra* note 6, at 307. Initially, both the membership and the public support of the KLA were limited. By the summer of 1998, however, the KLA forces exercised control over approximately one-third of Kosovo and appeared to have gained strong popular support among the Kosovo Albanians. R. Jeffrey Smith, *Kosovo Rebel Leaders Hard to Find; U.S. Efforts to Get Them to Peace Talks Unsuccessful*, WASH. POST, June 28, 1998, at A25.

23. According to the U.S. Department of State, the organized counterinsurgency operations by the Milosevic regime against the KLA began in early 1998. U.S. DEP'T OF STATE, ERASING HISTORY: ETHNIC CLEANSING IN KOSOVO 5 (May 1999). In March 1999 the policy of the Milosevic regime shifted from selective targeting of localities suspected of supporting the KLA toward a more systematic effort to "ethnically cleanse" the entire province. *Id.* at 5-6. See also Charney, *supra* note 12, at 1245-46 & n.44.

24. Charney, *supra* note 12, at 1233 (discussing the involvement of the UN Security Council in the Kosovo matter prior to the NATO intervention). See also the sources cited *supra* in note 12.

25. The NATO airstrike campaign commenced on March 24, 1999 without the Chapter VII authorization by the UN Security Council. For a discussion of the legal implications of the NATO intervention under established public international law, see Charney, *supra* note 12, at 1232-38.

26. In its Resolution 1244, the UN Security Council authorized the United Nations Interim Administration Mission in Kosovo to administer the territory on behalf of the international community. S.C. Res. 1244, *supra* note 12, para. 10.

27. Chechnya unilaterally declared itself independent from both the Russian Federation and the still-existing Soviet Union on November 1, 1991, following a Dudayev-orchestrated coup and the republican presidential and parliamentary elections of October 27, 1991. GALL & DE WALL, *supra* note 18, at 98-99. The elections were chaotic and their legitimacy was questioned by some commentators. DUNLOP, *supra* note 17, at 113-15; GALL & DE WALL, *supra* note 18, at 99; Emil A. Payin & Arkady A. Popov, *Chechnya—From Past to Present*, at <http://www.amina.com/article/history.html> (last visited Feb. 3, 2001). Subsequently, the Russian parliament issued a resolution declaring the elections in Chechnya invalid, but a haphazard military operation by Russian Interior Ministry troops ended in a humiliating withdrawal from Chechnya on November 9, 1991. DUNLOP, *supra* note 17, at 115-21; GALL & DE WALL, *supra* note 18, at 101. By the end of December 1991 the Soviet Union had officially dissolved. For the next two years, Chechnya was essentially left to its own devices, making it possible—at least for practical purposes—to secede de facto. See generally Lapidus, *supra* note 2 (discussing the evolution of the Russian response to the crisis in Chechnya).

stable Russian government emerged two years later.²⁸ During this period of de facto independence, the Chechen government failed to build any viable institutions of an independent state, and instead turned to criminal sources of support.²⁹ During that period, Chechnya became a center of criminal activities of extraordinary proportions.³⁰ In the end, it is even hard to conclude that the positions of the regime represented the popular will of the Chechen people.³¹ The Russian response was indeed violent and violations of international humanitarian law can easily be attributed to both sides.³² While there was international condemnation of the armed force used, especially by the Russian military,³³ no serious international support for Chechen self-determination is evident to date. One has the sense that the international community accepted the view that Chechnya should remain a part of Russia. Even the

28. For an account of the major developments in the "Chechen Revolution" of 1991, see DUNLOP, *supra* note 17, at 85-123; GALL & DE WAAL, *supra* note 18, at 76-102. While Dudayev's National Guard played a key role in the insurrection, it appears that the Chechen de facto secession without a significant use of force was really the result of a power vacuum created during the collapse of the Soviet Union. In actuality, Chechnya took advantage of the chaos resulting from the intense power struggle between Yeltsin and Gorbachev and the political turmoil in Russia on the eve of the dissolution of the Soviet Union. *E.g.*, DUNLOP, *supra* note 17, at 91-92, 100-102, 115-20; Payin & Popov, *supra* note 27, at <http://www.amina.com/article/history.html>.

29. *E.g.*, DUNLOP, *supra* note 17, at 120-34; GALL & DE WAAL, *supra* note 18, at 124-36.

30. *Id.*

31. While it is arguable whether the November 1991 elections truly reflected the will of the people, it is apparent that the surge in anti-Russian sentiment following the November 8-9 abortive intervention dramatically contributed to the rise of the popular support of Dudayev. Any initial public support for the Dudayev regime, however, dramatically dissipated between 1992 and 1994. DUNLOP, *supra* note 17, at 114-15 (commenting on the official results of the October 1991 elections in Chechnya); GALL & DE WAAL, *supra* note 18, at 101 (noting the increase in popular support behind Dudayev as the result of the Russian military threat), 103-09 (noting the widespread dissent against the Dudayev regime); Lapidus, *supra* note 2, at 16.

32. For a discussion of serious human rights violations by both sides of the conflict, see Svante E. Cornell, *International Reactions to Massive Human Rights Violations: The Case of Chechnya*, EUR.-ASIA STUD., Jan. 1, 1999, at 85, 1999 WL 31681742.

33. See *supra* note 13 and accompanying text. See also Steve Goldstein, *Russia's Crushing Attack Brings a Stern Rebuke from Christopher*, PHILADELPHIA INQUIRER, Jan. 13, 1995, at A1, LEXIS, News Library, PHI File; Steven Greenhouse, *U.S. Human Rights Study Turns Heat on Russia*, INT'L HERALD TRIB., Feb. 2, 1995, LEXIS, News Library, IHT File; Norman Kempster, *U.S. Finds Way to Criticize Russian Acts in Chechnya Diplomacy*, L.A. TIMES, Jan. 12, 1995, at A9; Taras Lariokhin, *Russia's Moves in Chechnya Lawful Yet Wrong, Denmark Says*, TASS (Moscow), Dec. 14, 1994, LEXIS, News Library, TASS File; Alessandra Stanley, *Russia Delivers Mixed Signals on its Military Campaign*, N.Y. TIMES, Dec. 30, 1994, at A12; Craig R. Whitney, *Europeans Offer to Help Russia Seek Peace in Secessionist War*, N.Y. TIMES, Jan. 4, 1995, at A6.

issue of Chechen minority rights has not surfaced as an international issue.

Perhaps there are distinctions between these two situations of legal significance that, in part, guided the behavior of the international community. On the one hand, the Albanian Kosovar's actions assured the international community that all efforts at peaceful settlement of the disputes had been exhausted and that, to the extent possible, the claims of self-determination represented the will of the majority of Albanian Kosovars. Furthermore, independence was sought after all other solutions proved unavailable and armed force was used only as a last resort. In contrast, the situation in Chechnya quickly escalated to the use of force and a claim to independence without significant evidence that the Chechen forces represented the will of the Chechen people.

While it is indeed possible that the facts recounted above are distorted due to limited access to information, they represent the facts generally understood by the international community.³⁴ These facts thus provide the operative information that may have contributed to different reactions by this community to these superficially parallel situations.

If this is true, information may be derived from these two events that reflect developments in international law that enable a people to attain the support of the international community for actions based on a claim of self-determination in the non-colonial context:

1. a bona fide exhaustion of peaceful methods of resolving the dispute between the government and the minority group claiming an unjust denial of internal self-determination, including efforts to use the good offices of other states and intergovernmental organizations;
2. a demonstration that the persons making the group's self-determination claim represent the will of the majority of that group; and
3. a resort to the use of force and a claim to independence is taken only as a means of last resort.

This is not to say that the Chechens do not deserve the benefits of the law of self-determination, but absent the above evidence it appears unlikely that the international community generally will recognize such efforts and support the claim. This may be one of the

34. See *supra* notes 17, 18, 27. See also Jeff Berliner, *Breakaway Chechen Republic Wracked by Protests in Southern Russia*, UPI, Apr. 1, 1992, LEXIS, News Library, UPI File; Richard D. Lyons, *Explosive Mix in Chechnya: History, Hatred and Oil*, N.Y. TIMES, Dec. 14, 1994, at A14; Inga Saffron, *Gangster Style Reigns in Breakaway State: Lawlessness a Matter of National Pride in Chechnya*, DALLAS MORNING NEWS, Nov. 30, 1994, at 35A; Vladimir Yemelyanenko, *Russia-Chechnya: A Forced Love Affair*, MOSCOW NEWS, Nov. 18, 1992, 1992 WL 8382124.

lessons to be learned from the concurrent events in Chechnya and Kosovo. If these lessons become better known, others seeking self-determination may be guided by them. Since the bona fide exhaustion of all means to find a resolution of the dispute and democratic values is critical, it may help to avoid the escalation of the dispute to violence and undesirable injuries to persons and property.

With these conclusions in mind, we might examine the somewhat different situation in East Timor. While Indonesia was not a distant colonial state in the classical sense, the situation has close parallels to the colonial past. In that situation, Indonesia recently had obtained control over East Timor by conquest.³⁵ International disapprobation was severe and continuing.³⁶ On these grounds alone perhaps, the doctrine of self-determination based on decolonization might apply directly. Nevertheless, if we view East Timor through the lens used for Kosovo and Chechnya, we find that a territorially-based identifiable population sought self-determination.³⁷ While violence was used by some to obtain their goals shortly after the Indonesian conquest,³⁸ the most salient efforts were through domestic and international means in an effort to reach the goal of self-

35. See generally Thomas D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law*, 33 VAND. J. TRANSNAT'L L. 273 (2000); Natalie S. Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case*, 21 YALE J. INT'L L. 305 (1996); Manooher Mofidi, *Prudential Timorousness in the Case Concerning East Timor (Portugal v. Australia)*, 7 J. INT'L L. & PRAC. 35 (1998); Jani Purnawanty, *Various Perspectives in Understanding the East Timor Crisis*, 14 TEMP. INT'L & COMP. L.J. 61 (2000).

36. S.C. Res. 389, U.N. SCOR, 31st Sess., 1914th mtg., paras. 1-2, at 18, U.N. Doc. S/INF/32 (1977) (urging all States to "respect the territorial integrity of East Timor" and calling upon Indonesia to withdraw). See also Grant, *supra* note 35, at 276-78 (reporting that the United Nations never recognized Indonesia's claim over East Timor). Australia and the United States arguably acquiesced in Indonesian control over East Timor. Purnawanty, *supra* note 35, at 65; Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L & COMP. L. REV. 323, 325 n.10 (1994).

37. See Mark Dodd, *Revolutionary Front Turns Back to Mainstream*, SYDNEY MORNING HERALD, May 16, 2000, 2000 WL 21023300 (noting the plan of FRETILIN, the Revolutionary Front for an Independent East Timor, to reform into a "properly constituted political party" with an estimated 15,000 members); Jill Jolliffe, *A Government in the Bush*, AUST. FIN. REV., Sept. 24, 1999, at 12 (providing a history of East Timor's resistance fighters); Dom Rotheroe, *Rebels With a Cause*, GEOGRAPHICAL MAG., Dec. 1, 1999, at 34 ("With a huge local support, for 24 years FRETILIN's guerrillas—FALINTIL[,] or the Armed Forces of the National Liberation of East Timor[—]relentlessly fought for freedom and in 1988 the National Council of Maubere Resistance (CNRM) formed, gathering together all those opposed to the occupation.").

Prior to the Indonesian invasion there were attempts by the East Timorese to secure their independence from Portugal. Some of the political groups remained active while Indonesia occupied East Timor. Roger S. Clark, *East Timor, Indonesia, and the International Community*, 14 TEMP. INT'L & COMP. L.J. 75, 79-80 (2000); Purnawanty, *supra* note 35, at 63.

38. See generally Rotheroe, *supra* note 37.

determination, not necessarily full independence.³⁹ The appeals were denied by Indonesia but they finally bore fruit through UN efforts during the period after President Suharto was overthrown for unrelated reasons.⁴⁰ As a consequence, a plebiscite was held resulting in an overwhelming vote for independence from Indonesia.⁴¹ The massive violence committed by Indonesian backed militia forces on East Timor hardened the international community's support for East Timor's independence and resulted in UN administration of the territory and substantial support from other countries.⁴² The claim of self-determination was indeed successful in a situation paralleling that of Kosovo and consistent with the three factors present there: exhaustion of peaceful methods of resolution, demonstrated support

39. Concerning East Timor (Port. v. Aust.), 1995 I.C.J. 90 (June 30); Michael Creadon & Michael Shari, *Prize Before Peace: A Priest and a Rebel Get the Nobel, But the Conflict in East Timor is Still Unresolved*, TIME INT'L, Oct. 21, 1996, at 30, 1996 WL 12731876; *Facts About East Timor*, AGENCE FRANCE-PRESSE, Sept. 20, 1999, 1999 WL 25109316 ("East Timor's demands for independence gained momentum with the 1996 award of the Nobel Peace Prize jointly to independence campaigner Jose Ramos-Horta and the bishop of Dili, Carlos Felipe Ximenes Belo.").

40. See Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor (May 5, 1999), at http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng01.html (last visited Feb. 3, 2001) (allowing the Secretary-General to organize and conduct a popular consultation to determine whether the East Timorese accepted or rejected a special autonomy for East Timor within the Republic of Indonesia); S.C. Res. 1246, U.N. SCOR, 54th Sess., 4013th mtg. para. 1, U.N. Doc. S/RES/1246 (1999) (establishing the United Nations Mission in East Timor (UNAMET) to oversee the popular consultation); S.C. Res. 1262, U.N. SCOR, 54th Sess., 4038th mtg. para. 1, U.N. Doc. S/RES/1262 (1999) (extending the mandate of UNAMET).

41. "UNAMET registered 451,792 potential voters among the population of over 800,000 in East Timor and abroad. On voting day, August 30, 1999, some 98 per cent of registered voters went to the polls deciding by a margin of 94,388 (21.5 per cent) to 344,580 (78.5 per cent) to reject the proposed autonomy and begin a process of transition towards independence." United Nations, East Timor—UNTAET Background, at <http://www.un.org/peace/etimor/UntaetB.htm> (last visited Feb. 3, 2001). See also UNITED NATIONS, PEOPLE OF EAST TIMOR REJECT PROPOSED SPECIAL AUTONOMY, EXPRESS WISH TO BEGIN TRANSITION TO INDEPENDENCE, SECRETARY-GENERAL INFORMS SECURITY COUNCIL, U.N. Doc. SG/SM/7119 SC/6722 (Sept. 3, 1999).

42. S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg. para. 3, U.N. Doc. S/RES/1264 (1999) (authorizing the establishment of a multinational force); S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/RES/1272 (1999) (establishing the United Nations Transitional Administration to East Timor (UNTAET)); S.C. Res. 1319, U.N. SCOR, 55th Sess., 4195th mtg. pmb., U.N. Doc. S/RES/1319 (2000) (expressing concern about the large number of East Timor refugees in West Timor); *Report of the Secretary-General, Transitional Administration in East Timor*, U.N. Doc. S/2000/53 (Jan. 26, 2000) (discussing the activities of UNTAET and developments in East Timor), at <http://www.un.org/peace/etimor/docs/0026162e.htm> (last visited Feb. 3, 2001); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 102, 105-08 (2000); John R. Schmertz, Jr. & Mike Meier, *EU Imposes Sanctions on Indonesia Because of East Timor Situation*, INT'L L. UPDATE, Oct. 1999, LEXIS, News Library, ILAWUP File (noting how the European Union imposed restrictive measures on Indonesia).

of the population for independence, and force used as a last resort—in this case by outside forces to prevent the Indonesian-backed militia from thwarting the peacefully asserted will of the East Timorese population.

This approach is very much in line with the views of the Canadian Supreme Court when it was called upon to examine the doctrine of self-determination in regard to the potential claim to secede from the Canadian Confederation by Quebec Province.⁴³ Since the opinion was written in the context of the Canadian constitutional structure and the Supreme Court is an organ of the central government it may not be considered completely neutral on the subject. Nevertheless, the Court resorted to international law authorities and produced an opinion that closely tracks the behavior of third states in the Chechnya, Kosovo, and East Timor situations discussed above.⁴⁴ This opinion provides further support for the view that the doctrine of self-determination has a role in the post colonial period and that exhaustion of peaceful settlement efforts, demonstrated representation of the minority group's will, and the use of armed force as a last resort are prerequisites to such claims outside of the decolonization context.

43. Reference re Secession of Quebec, [1998] S.C.R. 217.

44. [1998] S.C.R. 293-96.

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