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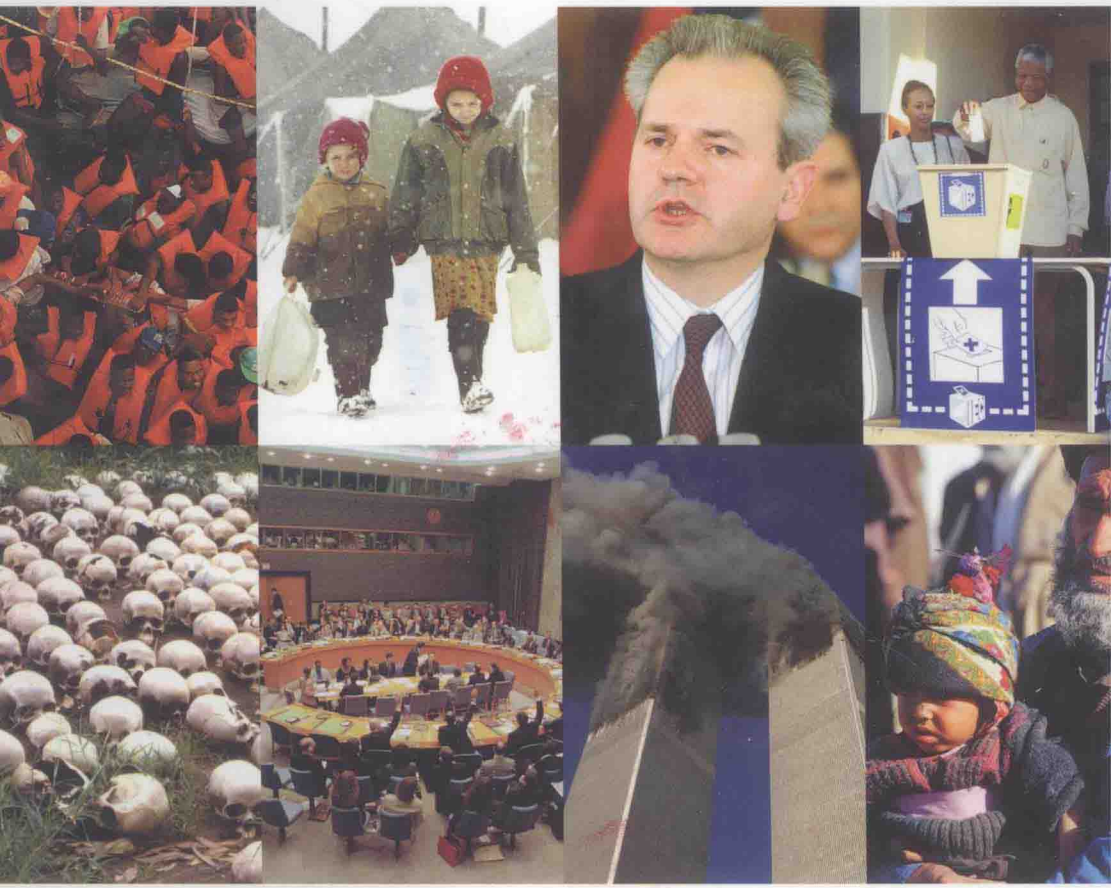

Justice, Legitimacy, and Self-Determination

Moral Foundations for International Law

OXFORD

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Bangkok Buenos Aires Cape Town Chennai
Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata
Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi
São Paulo Shanghai Taipei Tokyo Toronto
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2004

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
ISBN 0-19-829535-9
1 3 5 7 9 10 8 6 4 2
Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India
Printed in Great Britain
on acid-free paper by
T.J. International Ltd, Padstow, Cornwall

ACKNOWLEDGMENTS

In the long process of writing this book I have incurred many debts. I have learned a great deal relevant to this project from my former graduate students, Avery Kolers, Kristen Hessler, Cindy Holder, Stefan Sciaraffa, and Kit (Christopher) Wellman, all of whom provided excellent comments on drafts of this book. My Arizona colleague Tom Christiano has taught me much about democratic theory and Political Philosophy generally; I hope this is evident in the chapters that follow. I also thank David Miller and Will Kymlicka, co-editors of the series in which the present volume appears, and Margaret Moore, who provided insightful comments on the typescript.

I especially want to thank Kit Wellman for stimulating me to think harder about the nature of political legitimacy and for organizing a workshop in which he and the following scholars generously commented on a draft of the typescript: Andrew Altman, Andrew I. Cohen, William Edmundson, Peter Lindsay, Larry May, George Rainbolt, Andrew Valls, and Clark Wolf. The comments I received from the participants in this workshop were invaluable. They helped me focus the typescript on and the most important points I wish to make, enabling me to correct a number of errors to eliminate several unclarities. I am extremely grateful to Kit for taking the initiative to devise this generous gift to me and to all the participants for their constructive and gracious comments. Special thanks are due to Larry May, whose expertise in international law and philosophical acumen enabled him to make several key suggestions for improving the typescript, and to Andy Altman whose remarks resulted in a clearer and more direct presentation of my central argument concerning the nature of political legitimacy. Those who are interested in the moral foundations of international law should look forward with keen anticipation to May's forthcoming book on international criminal law.

My thinking on international legal reform and on humanitarian intervention has benefited from stimulating conversations with Jeff Holzgrefe, Bob Keohane, and Jane Stromseth. Holgrefe also provided probing comments on a draft of the typescript.

I also wish to thank Richard T. DeGeorge for inviting me to participate in a lecture series on international justice at the University of Kansas. DeGeorge and the students of his graduate seminar provided me with many useful comments on an early draft of this volume.

David Luban read through a draft of the entire book and gave me the benefit of many constructive criticisms. As a result, every chapter was improved.

I hope my debt to David Golove is apparent from the frequent references to his thinking in footnotes scattered throughout the book. My work with him on an earlier co-authored paper on the Philosophy of International Law encouraged me to go further and deeper.

To Hurst Hannum and Fernando Teson I owe perhaps the greatest debt of all. In responding to my 1991 book on secession, Teson encouraged me to draw the implications of my view for the question of intervention. Doing so eventually led me beyond the confines of thinking about secession as a two-party conflict to a systematic consideration of the moral foundations of international law. I hope that my book will complement Teson's work. He is in fact a leading exponent of the general approach taken in this volume, having argued passionately for many years that the international legal system should above all serve to protect human rights, not the interests of states.

Hurst Hannum is a model of sensitive, informed, and critical thinking about international law. With characteristic generosity he made me feel like a valuable contributor to the issues he had thought long and hard about at a time when I was just becoming aware of them. His combination of theoretical insight and dedicated human rights activism exemplifies the best in the community of international lawyers.

I am also grateful for the kind and constructive criticism I have received from other prominent members of the community of international legal scholars as well, when I presented papers that explored issues addressed in this book at a number of law schools. Instead of regarding me as an interloper, they have shown remarkable patience with my ignorance of their areas of expertise and done much to help me ameliorate it.

I have benefited from the warm encouragement of Christopher Maloney of the University of Arizona. I cannot imagine a more

supportive department head. Sandy Arneson provided constant support and exceptional research and editing expertise.

I also wish to acknowledge several institutional debts. I thank the Udall Center for Public Policy at the University of Arizona for awarding me a fellowship to work on the issue of indigenous peoples' rights. The Earhart Foundation generously sponsored research leaves, for the writing of this volume and my earlier book on secession as well. The National Humanities Center, where I had the honor of being awarded the John Medlin, Jr. Senior Fellowship for 2001–2, provided the ideal environment for working through the entire manuscript and adding significant new material on humanitarian intervention. I am grateful to the Center's Director, Bob Connor, to the Fellows Program Director, Kent Milliken, and to the entire staff of the Center who made my stay there so enjoyable and productive.

This volume draws on previously published articles and book chapters. Some material from Chapter 1 comes from "The Philosophy of International Law," co-authored with David Golove. This chapter also draws on the argument of "The Internal Legitimacy of Humanitarian Intervention," which appeared in *The Journal of Political Philosophy*. Chapter 3 contains material from "Justice, Legitimacy, and Human Rights," which appeared in *The Idea of Political Liberalism*, edited by Victoria Davion and Clark Wolf. Chapter 5 draws on my article "Political Liberalism and Democracy," which appeared in *Ethics*. Chapter 6 includes material from "Recognitional Legitimacy and the State System," in *Philosophy and Public Affairs*. Chapter 8 utilizes material from "What's So Special About Nations?" in *Rethinking Nationalism*, edited by Jocelyne Couture, Michel Seymour, and Kai Nielsen. Chapter 11 is based in part on "From Nuremburg to Kosovo: The Morality of Illegal Legal Reform," which appeared in *Ethics*, and on "Reforming the International Law of Humanitarian Intervention," in *Humanitarian Intervention: Ethics, Law and Policy*, edited by Jeffrey Holzgrefe and Robert O. Keohane.

The foregoing articles and book chapters were written over a period of over a decade, during which time my views changed considerably. Consequently the material from them that appears in this book is considerably modified and integrated with new material.

CONTENTS

Synopsis

This book is an attempt to develop moral foundations for international law. The existing international legal system, like any domestic legal system, can and ought to be evaluated from the standpoint of moral principles, including, preeminently, principles of justice. Legal institutions and for that matter all institutions that deeply affect the life prospects of human individuals must be designed to function in conformity with principles of justice, because principles of justice specify the most basic moral rights and obligations that persons have. It does not follow, of course, that the same moral principles will be valid for international and domestic legal systems. And even when the same principles do apply, different institutions may be needed to realize them, depending upon whether they are applied domestically or internationally.

Initially my aim in writing this volume was to supplement and strengthen my earlier work on secession, in particular by making explicit and justifying my tacit assumption that the state's claim to territory ultimately depends upon its protection of human rights. But eventually it became clear to me that the topic of secession could not be effectively addressed in isolation. A more inclusive moral theory of international law was required.

Beginning with the problem of secession and working back toward more foundational issues has advantages. It is valuable to devote as much space as I do to issues of secession for two reasons. First, at present state-breaking is a prominent feature of the international landscape and is likely to continue to be so for some time. Second, working out a principled view on secession requires coming to grips with the right of self-determination, the recognition of which is surely one of the most important and perilous developments

in international law in the last half-century. Third, working out a theory of the right to secede requires the theorist to take a stand on a number of core issues, including those of political legitimacy and intervention. Nevertheless, I am sure that approaching the larger topic of the moral theory of international law via this route has its costs.

From time to time in this book I refer to "the international legal order" or "the international legal system." Sometimes I refer to the whole international legal system as an institution, meaning that it is a super-institution including many institutions within it. So let me clarify here at the outset what I mean: An institution is a kind of organization, usually persisting over some considerable period of time, that contains roles, functions, procedures, and processes, as well as structures of authority.

Institutions also embody, and sometimes formally proclaim, principles. More specifically, a description of the institution of international law will include a list of its legal principles. But international law taken as a whole also consists of institutions in a more tangible sense. For example, the existing international legal order includes the United Nations, with its many constitutive institutions, including the Security Council, the General Assembly, the World Health Organization, various bureaucracies, committees, and commissions, and so on.

For the most part in this book I will focus on evaluating some of the most important principles of the existing international legal order and proposing new principles or modifications of existing ones that are more consonant with the demands of justice. But I will also attend to the implications of the simple fact that principles must be embodied in appropriate institutions. In some cases I will make fairly concrete suggestions for institutional reform, not just in the sense of incorporating new principles into old processes and structures, but also in the sense of changing some of the processes and structures themselves. My enterprise, then, is to articulate a set of moral principles that should guide the design and reform of international law as an institution in the broad sense that includes not only principles but also roles, processes, and structures.

Some will be skeptical of such a project. Unfortunately, it is still common for theorists of international relations to dismiss the very idea of moral reasoning about international institutions, assuming that the contest for dominance leaves little room for morality. Yet even

those who eschew moral argumentation about international law often unwittingly take a moral position on it. Because they avoid moral argumentation, their moral judgments are unsupported. But they are moral judgments nonetheless.

For instance, many international relations theorists as well as international lawyers and diplomats say that whether a state grants recognition or withholds recognition from a new political entity created by secession is purely a political matter. This is false if it implies that a state's behavior in recognizing another entity as a state or refusing to do so is not subject to moral evaluation. Recognition is not morally neutral even though it is true that under current international law states have the right to grant or withhold recognition as they see fit.

The choice to recognize or not recognize has moral implications and can be made rightly or wrongly. To recognize an entity as a state is to acknowledge that it has an international legal right of territorial integrity and this in turn lends strong presumptive support to its territorial claims and thereby presumes the illegitimacy of claims on its territory that others may make. For the same reason, simply continuing the current practice of recognizing the legitimacy of existing states is not a morally neutral activity. Recognizing an entity as a legitimate state empowers certain persons, those who constitute its government, to wield coercive power over others, for better or worse.

To participate without protest in a practice of recognition that empowers governments that engage in systematic violations of human rights is to be an accomplice to injustice. Once we take seriously the moral implications of granting or withholding recognition, we must examine the arguments for and against rival proposals for what the practice of recognition should be like, and this examination inevitably requires an attempt to develop a moral theory that integrates prescriptions for a just practice of recognition with a principled approach to other important issues that arise in an international legal system. To know what criteria an entity must satisfy to warrant recognition as a legitimate state, we must know what values the international legal order should serve and what role the practice of recognition is to play in serving them. This requires a moral theory of international law.

In contrast to international relations theorists, many of whom think that the ubiquity of competition for power leaves little or no

room for morality, international lawyers tend to be uncomfortable with moral thinking about international law for another reason: They fear that it will detract from a scientific study of the law. This fear is unfounded. The moral evaluation of existing international law and the articulation of proposals for reforming it need not involve the confusion between law and morality that legal positivists vigorously condemn.

My project is to evaluate certain fundamental aspects of the existing international legal order and, on the basis of the same moral principles that inform this evaluation, propose legal norms and practices which, if implemented with reasonable care, would make the system more just. My concern, then, is with what the law should be. For example, I evaluate several alternative conceptions of what an international legal right to secede should be like.

In the past few years there have been several valuable attempts at moral theorizing about various issues in international law, including global distributive justice, secession, immigration, and humanitarian intervention. But these issues have been addressed separately, each in isolation from the others. In the chapters that follow I take a holistic approach, criticizing existing international law and arguing for proposals to reform it in a more systematic fashion, offering a normative framework that links issues too often dealt with in isolation from one another. I make the case for an integrated approach to secession, the recognition of new states, international support for limited self-government for minorities within states, coercive diplomacy, and armed intervention.

More specifically, I argue that a principled, human rights-based approach to the problem of secession would reduce the need for armed humanitarian intervention by providing constructive alternatives to secession and the massive violations of human rights that almost always accompany it. In addition, my analysis makes it clear that without a morally defensible, consistent international legal framework for responding to secessionist conflicts, states run the risk of intervening unjustly when secessions occur.

The architecture of my approach is simple and is conveyed by the title of this book. Part One develops the case for grounding the international legal system in principles of justice, understood primarily as principles that ascribe basic and relatively uncontroversial rights to all persons as such. There I argue that the moral foundation

for the international legal order is the (limited) obligation to help ensure that all persons have access to institutions that protect these basic human rights. Part Two constructs an account of legitimacy according to which political entities are legitimate only if they achieve a reasonable approximation of minimal standards of justice, again understood as the protection of basic human rights. This account of legitimacy is then adapted so as to encompass both the legitimacy of individual states within the international legal system and the legitimacy of the international legal system itself. Part Three uses the justice-based conception of a legitimate state presented in Part Two to construct a position on how the international legal order should respond to the problems of self-determination and secession, arguing that international law should recognize a unilateral right to secede—as distinct from a negotiated or constitutional right—only as a remedy of last resort against grave injustices.

These three parts, on Justice, Legitimacy, and Self-Determination, comprise the theoretical core of the volume. Part Four, Reform, includes two chapters. The first summarizes the central argument of the book and the main proposals for reform that I derive from it, and then explores some of the changes in legal doctrine and institutional structures regarding intervention that would be needed to realize them. The second chapter examines the feasibility and morality of alternative paths for getting from where we are to where we should be, focusing on the problem of how to reform the international law of intervention.

So, in addition to being more holistic, this volume differs in another respect from other works that include the moral evaluation of international legal principles and practices. I not only propose what I believe would be moral improvements in the system, but also explore some of the moral issues of the enterprise of reform. Unless proposals for reform can be implemented in morally acceptable ways, they are worse than useless.

The moral theory of international law I begin to develop in this volume is in many respects quite radical. It represents a fundamental challenge not only to some central features of the existing legal order, but also to the dominant ways in which theorists conceive of international law and international relations. I offer a sustained, principled argument for rejecting the almost universally accepted assumption that the international legal order not only is but ought to

be a society of equal sovereign states, governed by laws grounded in the consent of states. I also argue systematically against the dogma that the proper goal for the international legal system is peace among states, not justice.

First, I argue for abandoning the traditional international legal principle of effectivity, according to which an entity is a state, entitled to all the powers, rights, privileges, and immunities ascribed to states in international law, if it has a stable population and controls a determinate territory. I develop a normativized conception of what it is to be a legitimate state, arguing that unless an entity meets certain minimal standards of justice, it ought not to be regarded as a primary member of international society. So I deny that some existing entities that are now accorded the title of state deserve the attributes of sovereignty. Moreover, I argue that the decision whether to recognize a new entity as a legitimate state should not be a matter of discretion. I advance a proposal for a justice-based practice of recognition, supported by enforceable international legal principles that require states to recognize new entities that meet the appropriate minimal standards of justice and that would forbid them to recognize entities that do not meet those standards. This proposal clearly represents a serious erosion of sovereignty—a diminution of the powers traditionally accorded to states under international law.

I reject the unreflective, or at least poorly argued, assumption that all states should wield equal political power in the making, application, and enforcement of international law. I argue that it is a mistake to think that the principle of democracy and the commitment to the fundamental equality of individual persons that grounds it imply that all states, regardless of how just or unjust they are and independently of the size of their populations, ought to have an equal say in the creation, application, and enforcement of international law. I also argue that although "state majoritarianism"—equal political power for all states in the making and application of international law—has some attractions as a device for restraining more powerful states, there may be other safeguards that are less costly to the cause of moral progress in international law.

As to the idea that international law is and ought to be created by the consent of states, I show that the state-consent model is neither an accurate description of the way international law comes into being nor an ideal worth aspiring to. The key point is that so long as many

states do not represent the interests or preferences of all their citizens, the consent of state leaders does not carry anything like the moral weight of the informed, voluntary consent of individual persons.

Third, I reject the unitary state paradigm that still dominates thinking about international law and international relations. I argue that in most cases the impulse to secede from an existing state betrays a fundamental lack of political imagination—that paradoxically secession is the most conservative of political acts. The secessionist tends to assume that his problems are due to the state in which he finds himself and that the solution is to get his own state. The anti-secessionist tends to be equally unimaginative, seeing in every demand for autonomy a threat to the state's existence. The imaginations of both the secessionist and the anti-secessionist are cramped by the narrow horizons of the statist paradigm.

What the usual rhetoric of both parties overlooks is that sovereignty can be "unbundled" in many ways—that the only choices are not "stay in this state as it is" or "get your own state." Once we take seriously the indefinitely large range of possible regimes of political differentiation within what we now regard as state borders—the rich menu of intrastate autonomy arrangements—we liberate ourselves from the confining assumption that we must choose between honoring aspirations for self-determination and order. What is novel and perhaps even radical about my discussion of various intrastate autonomy regimes as ways of coping with or avoiding secessionist conflicts is that I propose a role for international legal institutions in efforts to support and in some cases even to mandate intrastate autonomy regimes. This too represents a significant curtailment of the traditional powers of sovereignty.

A final distinctive feature of my view is that I argue that critical engagement with the system of international law—the effort to create and support a just system of international legal institutions—is not simply permissible, but morally obligatory. On this view, participation in an international legal order is not simply a matter of discretion; it is a requirement that derives from a rather fundamental moral obligation, the (limited) obligation to help ensure that all persons have access to institutions that protect their most basic human rights.

In the last chapter I argue that progress toward a more just international legal system will probably require changes in the

international law of humanitarian intervention, and that this in turn may require abandonment of the assumption that the UN-based law of humanitarian intervention is sacrosanct, along with the development of a less inclusive, treaty-based, law-governed regime for intervention consisting of the most democratic, rights-respecting states.

By arguing that the state's posture toward international law should be shaped by a commitment to protecting the basic human rights of all persons, I am plainly rejecting the dominant view in international relations, namely, that state policy should or at least may exclusively pursue "national interest." According to the conception of justice I lay out in Part One, the state is not merely an instrument for advancing the interests of its own citizens; it is also a resource for helping to ensure that all persons have access to institutions that protect their basic human rights. This is not to deny that state leaders are obligated to accord priority to the interests of their own citizens, of course, but it is to insist that this priority is not without limits.

The national interest view is pervasive among diplomats and state leaders and also endorsed by many international relations scholars. Legal absolutism, the view that it is virtually never morally justifiable to violate the more basic norms of international law for the sake of morality, seems to be pervasive among international legal theorists. (Sometimes this view is misleadingly called 'legal positivism', but the more common usage of the latter term is to denote a thesis about the nature of law, namely, that whether a norm is a law does not depend upon its satisfying any moral criteria.)

This book is a sustained critique of both the national interest and legal absolutist positions. Regarding the thesis that states should or may exclusively pursue the national interest in all their foreign relations, I proceed as follows. First, I argue that if there are any human rights, then there is a heavy burden of argument to be borne by those who endorse the national interest thesis. Next, I articulate and show to be unsound what I take to be the two most promising attempts to provide the needed justification: the Fiduciary Realist Argument, according to which it follows from the nature of the state and the character of international relations that state leaders should act exclusively in the national interest, and the Instrumental Argument, which holds that the risks of states attempting to promote moral values directly in their foreign policies are so great that it is better for humanity if each pursues only the national interest.

I argue that Legal Absolutism rests either on: (1) the empirically unsubstantiated prediction that unless compliance with the basic norms of existing international law is perfect, the whole system of international order will unravel in a rapid descent into violent chaos, or upon (2) an unsupported and unsupportable assumption that those who violate basic norms of international law for the sake of morality are guilty of moral hubris, a willingness to impose their own "subjective values" on others. In brief, I show how respect for the rule of law in international relations, far from precluding illegality for the sake of legal reform, may even make it obligatory under certain exceptional circumstances.

Because the national interest and legal absolutist positions are pervasive and uncritically endorsed, they warrant the title of dogmas. So, quite apart from the other distinctive features of my approach sketched above, the fact that I reject both of these positions makes this book radical (if not heretical).

Yet from one perspective my position is not radical. All of my proposals for reform, like my rejection of the dominant understanding of what the international legal system should be and my critique of the national interest view, are grounded in the idea of basic human rights. In Part One I show that if one takes basic human rights seriously there is no alternative to a justice-based approach to the international legal system. The rest of the book is an attempt to work out the implications of a justice-based approach.

Although my enterprise is theoretical and to that extent inevitably abstract in some respects, its relevance is eminently practical. As I write this Synopsis the United States is waging a "war against terrorism" in response to the attack on the Pentagon and the World Trade Center on September 11, 2001. One especially problematic aspect of this "war" is the policy of sending American troops to aid other states in suppressing insurgent groups that the states in question have labeled as terrorists. American troops have been posted to the Philippines, Yemen, and Georgia. President Putin of Russia has affirmed his willingness to cooperate in the war against terrorism, undoubtedly in part because he believes that if he does so the United States will be more likely to continue to accept the Russian claim that Chechen secessionists are simply terrorists.

By branding the Chechens as terrorists, the Russian government hopes to divert attention from both the question of whether

their attempt to secede is justified and from the grave breaches of the humanitarian law of war committed by Russian troops in Chechnya. (The Russian failure to discriminate between combatants and noncombatants has been so severe that it might be said that for the Russian army a "smart bomb" is any explosive projectile that lands somewhere in Chechnya.) Furthermore, it is also highly likely that the training given by the U.S. military to Georgian troops will not be put to use primarily to combat Chechen terrorists, but to suppress secession in Abkhazia.

The post-September 11th U.S. policy of global military involvement poses strategic and moral risks that should be familiar to even the most casual student of U.S. policy during the Cold War. For the sake of combating communism, the United States became enmeshed in internal conflicts in many states, in some cases supporting colonial regimes against national liberation movements, and frequently supporting regimes that engaged in large-scale violations of human rights.

The danger that similar wrongs will be committed in the global military dimension of the war against terrorism is greatly exacerbated by the fact that the United States, like the international community as whole, has failed to develop a coherent, principled framework for responding to—or, better yet, preventing—secessionist conflicts. Lacking such a framework, the United States and its allies in the war against terrorism are likely to fail to discriminate between insurgent groups that have legitimate grievances and those that do not.

The sad fact is that when self-determination conflicts are allowed to degenerate into violent secessions, both the secessionists and the state in its efforts to suppress them usually engage in terrorism. Given that the Kosovo Liberation Army engaged in terrorism against Serbs in Kosovo in the months preceding the NATO intervention, one wonders what the attitude of the United States toward that secessionist group would have been if the attacks on the Pentagon and World Trade Center had occurred in early 1999 rather than in September of 2001.

The current danger is that the United States will too readily accept the label "terrorists" as the essential or exclusive characterization of what are primarily secessionist groups, and in some cases groups that are justified in seceding. In the absence of a coherent normative framework for evaluating secessionist claims, the United States may