

EARNED SOVEREIGNTY: THE POLITICAL DIMENSION

JAMES R. HOOPER*

PAUL R. WILLIAMS*

The contemporary world is beset by conflicts and issues that seem to challenge the utility of sovereignty as conventionally understood.¹

Stephen D. Krasner

INTRODUCTION

There are currently over fifty sovereignty-based conflicts throughout the world, and nearly a third of the Specially Designated Global Terrorists listed by the United States Treasury Department are associated with sovereignty-based conflicts and self-determination movements.² To date, the “sovereignty first” international response to these conflicts has been unable to stem the tide of violence, and in many instances may have contributed to further outbreaks of violence. This article will argue that the “sovereignty first” doctrine is slowly being

* Managing Director, Public International Law and Policy Group, former Foreign Service Officer with wide experience in the Middle East and Balkans, former Washington Director, International Crisis Group, and former Executive Director, The Balkan Action Council. M.A. Columbia University, B.A. American University School of International Service. This article was prepared with the assistance of Nina Bang-Jenson, Stephanie Frease, Cassandra Cappobianca, Megan Akers, Karen Heymann, and Marc Vogtman.

* Holds the Rebecca Grazier Professorship of Law and International Relations, American University. Ph.D., Cambridge 1998; J.D., Stanford Law School 1990; B.A., UC Davis 1987. From 1991-1993 Professor Williams served as an Attorney-Advisor in the U.S. Department of State's Office of the Legal Advisor for European Affairs. During the course of his legal practice, Professor Williams has assisted nearly a dozen states and sub-state entities in international peace negotiations, and has served as a delegation member in the Dayton, Rambouillet/Paris, Key West, Lake Ohrid/Skopje, and Belgrade/Podgorica negotiations. He has also advised fifteen governments across Europe, Africa and Asia on matters of public international law.

1. Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT'L L.J. 651(1999).

2. See U.S. Department of the Treasury, Office of Foreign Assets Control, *Cumulative List of Recent OFAC Actions 2002*, available at <http://www.treas.gov/offices/enforcement/ofac/actions/2002cum.html> (last visited Oct. 16, 2002).

supplemented by a new conflict resolution approach which we dub "earned sovereignty."

This article is the first in a series of three articles prepared under the auspices of the Public International Law & Policy Group that discuss the emerging approach of earned sovereignty, and is the product of the melding of two presentations delivered at the University of Denver by the co-authors. The purpose of this article is to provide a detailed definition of earned sovereignty, and its sub-components, as well as to track the development of the approach through recent state practice. The second article sets forth the legal basis for the approach, and the third article tracks international efforts to employ the approach as a basis for structuring a long term resolution of the Kosovo conflict.

As noted in the introductory note to this series of articles, In light of recent state practice, the emerging conflict resolution approach of earned sovereignty may be characterized as encompassing six elements – three core elements and three optional elements.

The first core element is shared sovereignty. In each case of earned sovereignty the state and sub-state entity may both exercise sovereign authority and functions over a defined territory. In some instances, international institutions may also exercise sovereign authority and functions in addition to or in lieu of the parent state. In rare cases, the international community may exercise shared sovereignty with an internationally recognized state.

The second core element is institution building. This element is utilized during the period of shared sovereignty prior to the determination of final status. Here the sub-state entity, frequently with the assistance of the international community, undertakes to construct institutions for self-government and to build institutions capable of exercising increasing sovereign authority and functions.

The third core element is the eventual determination of the final status of the sub-state entity and its relationship to the state. In many instances the status will be determined by a referendum, while in others it may involve a negotiated settlement between the state and sub-state entity, often with international mediation. Invariably the determination of final status for the sub-state entity involves the consent of the international community in the form of international recognition.

The first optional element is phased sovereignty. Phased sovereignty entails the accumulation by the sub-state entity of increasing sovereign authority and functions over a specified period of time prior to the determination of final status.

The second optional element is conditional sovereignty. Conditionality may be applied to the accumulation of increasing sovereign authority and functions by the sub-state entity, or it may be applied to the determination of the sub-state entity's final status. In

either case the sub-state entity is required to meet certain benchmarks before it may acquire increased sovereignty. These benchmarks may include conditions such as protecting human and minority rights, developing democratic institutions, instituting the rule of law, and promoting regional stability.

The third optional element, constrained sovereignty, involves continued limitations on the sovereign authority and functions of the new state, such as continued international administrative and/or military presence, and limits on the right of the state to undertake territorial association with other states.

It is important to note that the approach of earned sovereignty does not perceive "sovereignty" to be a unitary right, but rather a bundle of authority and functions which may at times be shared by the state and sub-state entities as well as international institutions.³ Sovereign functions may include control over foreign relations, defense, policing, immigration, banking, currency, trade, development of natural resources, taxation, transportation, education, social welfare and judicial matters.

To further develop an understanding of the emerging approach of earned sovereignty this article will review recent state practice in which the approach has been employed to bring about or attempt to bring about a resolution of a sovereignty-based conflict. The focus of the review will be on deducing common themes and distilling key conditions for the utilization of the emerging approach. Case studies include the Road Map for Peace for the Israeli/Palestinian conflict; the Good Friday Accord for Northern Ireland; the Machakos Protocol for Sudan, the Baker Peace Plan for the Western Sahara; UN Security Council Resolution 1244 for Kosovo; the Dayton Accords for Bosnia; UN Resolution 1272 for East Timor; the Comprehensive Agreement for Bougainville; and the new constitution for the Union of Serbia and Montenegro. These examples include proposed peace agreements, successful peace agreements and unsuccessful peace agreements. As the success of an agreement is based on both its substantive provisions as well as numerous external factors, such as the political will of the parties, we have sought to reference a wide variety of agreements, and not just those deemed to be unqualified successes.

It is important to recall that the aim of this article is not to argue for the creation of a new conflict resolution approach, but rather to explore some of the ways in which earned sovereignty is already being practiced around the world. This exploration is intended to provide greater clarity regarding the most useful instruments and tools that practitioners have at their disposal to make constructive use of earned

3. See Karen D. Heymann, *Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust*, 19 AM. U. INT'L L. REV. (forthcoming Fall 2003).

sovereignty.

As such, this article seeks to contribute to a more informed debate about the circumstances in which earned sovereignty may be applied constructively. To note that earned sovereignty can be utilized in the context of particular international disputes is not to assert that it is a panacea that can be applied to resolve all international problems involving disputes over rival territorial claims, internal rebellions or self-determination movements. Many conflict resolution practitioners that have the responsibility to utilize conceptual tools in real-world situations where lives are at stake and misjudgments can have severe consequences welcome such a debate. Diplomats have recognized the need to provide a solution where the involved parties will only stop the violence upon guarantees of independence. For some time negotiators have employed the tools of earned sovereignty selectively in crisis prevention and conflict resolution situations. Their attempts to use such techniques, however, have been hindered to some extent by the unwillingness of state actors in the international system to acknowledge the utility of the concept even as it was increasingly being applied.

While the origins of the approach of earned sovereignty are uncertain, it is apparent that the crisis in the former Yugoslavia highlighted the need to develop a new conflict resolution approach to resolving sovereignty-based conflicts. In 1991 in the former Yugoslavia the international community was faced with the choice of recognizing the Yugoslav sub-state entities of Croatia and Bosnia as independent states, which was sure to lead to ethnic violence by the Serb-minority, or to continue to affirm the territorial integrity of Yugoslavia, which was sure to encourage President Milosevic's efforts to ethnically cleanse large areas of those two entities. In the end, the European Union and United States delayed for too long the recognition of the successor states, and when they did eventually recognize Croatia and Bosnia they did so without any capable preparation for the foreseeable consequences. In hindsight, had the European Union and the United States undertaken a process of earned sovereignty for Croatia and Bosnia whereby they were slowly extricated from Yugoslavia in a manner which protected the legitimate interests of the Serbian minority and created democratic institutions, the ethnic conflicts might have been avoided.

Learning from these mistakes the European Union, United States and the United Nations have increasingly sought to rely upon the approach of earned sovereignty as it provides increased flexibility for determining the timing of eventual independence and an opportunity to build functioning institutions and a track record of protecting minority and human rights prior to international recognition.

SOVEREIGNTY

While numerous peace agreements include the elements of earned sovereignty, this article will focus on the recent surge in agreements which embrace all three of the core elements and many of the optional elements. This section provides a brief description of the agreements which will be relied upon in the remainder of the article to illustrate the various elements of the approach of earned sovereignty.

The Israeli-Palestinian Roadmap was developed by the Quartet of the United States, EU, UN and Russia and involves a three-phased plan for resolving the middle east conflict through the achievement of a secure Israel, and an independent and democratic Palestine.⁴ To accomplish this objective the Roadmap provides for the creation of Palestinian institutions of self-government followed by the international recognition of an independent Palestine with provisional borders, with subsequent agreement upon final borders and issues such as refugees and the status of Jerusalem. Progression through these phases is contingent on the Palestinian authority meeting a number of conditions relating to democratization and the end to violence and terrorism. As a result of recent violence the implementation of the Roadmap has been suspended.

The Machakos Protocol seeks to initiate a resolution of the Sudanese conflict by providing for the cessation of hostilities between the Northern and Southern forces and for the opportunity of the South to determine via referendum after six years whether it wishes to remain part of Sudan. The Protocol also provides for Veto power by the South over certain legislative and executive actions. The Protocol is a precursor to a full agreement.

The UN sponsored Baker Peace Plan for the resolution of the Western Sahara conflict provides for the UN assisted creation of a institutions of self-government for the Western Sahara Authority and the devolution of numerous sovereign authorities and functions to that government. The Plan also provides for a referendum to determine the final status of Western Sahara within five years.

The Union Treaty between Serbia and Montenegro, mediated by the EU, provides for the sharing and/or devolution of all sovereign authority and functions between the two member states and for a referendum on dissolution of the Union and secession after three years. The purpose of the three year period of shared sovereignty is to permit the member states time to transform their economic and democratic

4. *U.S. and Partners Present Proposal for Mideast Peace*, N.Y. TIMES, May 1, 2003, available at www.nytimes.com (last visited May 1, 2003). *Proposal for 'Final and Comprehensive Settlement' to Middle East Conflict*, N.Y. TIMES, May 1, 2003, available at www.nytimes.com (last visited May 1, 2003).

systems into viable individual entities and to harmonize their economic and political systems with European standards.

UN Security Council Resolution 1244, with reference to the Rambouillet Agreement, provides for the interim UN administration of Kosovo with security provided by a NATO-led force.⁵ During this interim period the UN exercises near absolute executive and legislative authority within Kosovo, as it seeks to build institutions of self-government. As these institutions become functional the UN devolves certain sovereign authorities and functions to the Kosovo government. The full devolution of authority and the determination of final status will be based on Kosovo's compliance with democratic and other standards, and subject to internationally mediated negotiations with the republic of Serbia.

The Good Friday Accords, designed to bring about an end to the Northern Ireland conflict provide for the creation of Northern Ireland institutions, and the interim devolution of substantial power to those institutions so long as certain conditions are fulfilled, including the decommissioning of weapons. The Accords also provide that the people of Northern Ireland are entitled to a referendum on unification with Ireland after seven years.

UN Security Council Resolution 1272 provided for the creation of the UN Administration of East Timor after the conflict arising from East Timor's rejection by referendum of Indonesia's proposal for autonomy within Indonesia.⁶ The Resolution provided authority for a two and a half year period of shared sovereignty between the UN and East Timor during which time East Timor was able to construct the institutions necessary for independent self-government. After successfully meeting certain benchmarks East Timor was recognized as independent and admitted to the United Nations.

The Comprehensive Agreement for Bougainville signed at Arawa in August 2001 provides that within a period of ten to fifteen years Bougainville may via referendum undertake to secede from Papua New Guinea. During the interim period Papua New Guinea and Bougainville will share certain sovereign authority and functions, with Bougainville assuming increasing control over a wide range of powers,

5. See Rambouillet Agreement: Interim Agreement for Peace and Self-Government in Kosovo, ch. 2, art I, ¶ 2, available at www.state.gov/www/regions/eur/ksvo_rambouillet_text.html (last visited Oct. 8, 2002).

6. See UN Security Council Resolution 1272, and Agreement Between Indonesia and Portugal, *supra* note 137; East Timor Popular Consultation, May 5, 1999, available at http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng04.html (last visited Oct. 17th, 2002); Agreement Regarding the Modalities for the Popular Consultation of East Timor Through A Direct Ballot, May 5, 1999, available at http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng03.html (last visited Oct. 17th, 2002)

functions, personnel and resources on the basis of guarantees contained in the National Constitution and reflected in a new Bougainville constitution.

The Dayton Accords which brought an end to the Bosnian conflict provided that many of the sovereign authorities and functions of the independent state of Bosnia would be managed by an internationally appointed High Representative for an indeterminate period.⁷ The Accords also provided for the deployment of international military forces to maintain internal security. While conditionality is not explicit, the pattern of practice in Bosnia indicates that the international civilian authority will be discontinued only upon such a time as Bosnia can adequately function as an independent state.

THE FIRST CORE ELEMENT: SHARED SOVEREIGNTY

During an initial period of shared sovereignty, the state and sub-state entity may both exercise sovereign authority and functions over a defined territory. In some instances, international institutions may also exercise sovereign authority and functions in addition to or in lieu of the parent state. In rare instances, the international community may exercise shared sovereignty with an internationally recognized state. In many instances some form of regional or international institution is responsible for monitoring the parties exercise of their authority and functions.

The ability to share sovereign authority and functions between states, sub-state entities and international organizations creates an opportunity to disperse the often violent tension associated with sovereignty-based conflicts and to ease the parties onto a path for the long-term resolution of the conflict. If handled constructively, shared sovereignty affords a cooling off period during which central authorities and aggrieved peoples can each continue to pledge fidelity to their own mutually incompatible final aims while initially suspending violence.

Frequently shared sovereignty may provide the sub-state entity with sufficient elements of self-government so that the interest in outright independence is substantially lessened bringing about an end of the conflict through some perpetual autonomy. It is reasonable to assume in the Bougainville case this is the hope of the mediators and Papua New Guinea. In other cases, such as Montenegro and Northern Ireland, the period of shared sovereignty is necessary for the state and sub-state entity to establish a viable relationship that will survive the eventual independence or territorial re-association of the sub-state entity. In still others, such as Kosovo and East Timor, the period of

7. See generally General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75 (1996)

shared sovereignty is used to establish order from the chaos of an armed conflict and to create time while the international community works to help the new entity to create operational institutions of self-government.

In most instances shared sovereignty occurs between states and sub-state entities seeking autonomy or independence. The two most comprehensive cases of such shared sovereignty are the new constitution for the Union of Serbia and Montenegro, and the Northern Ireland Good Friday Accords.

The Serbia and Montenegro Agreement creates an elaborate structure of shared sovereignty between the two member states. Under the agreement the member states may maintain international relations, conclude international agreements and establish branch offices in other states, if it is not contrary to the competencies of the Union. The Member states may also assume membership in international and regional organizations that do not require international subjectivity as the condition for their membership. The president of each member state also sits on the Supreme Defense Council, which must act by consensus, thus providing each member state with shared authority for the defense policy of the Union.

The Supreme Court which is comprised of an equal number of judges from each of the member states must include judges from the Constitutional Courts of the member states whenever it is hearing a case relating to the conformity of the legislation or competencies of the member states with the legislation or competencies of the Union, or a case between the member states themselves.

While the Union government does exercise some exclusive authority and functions, they are limited to matters such as immigration, selection of flag and anthem, and working with the EU on economic harmonization. All diplomatic representatives must be appointed with the consent of the member states. To ensure the representation of the interests of the member states in the exercise of even these limited functions, the constitution creates a complicated arrangement whereby of the five cabinet positions two ministers shall be from the same member state as the President, and three shall be from the other member state. Moreover, the Foreign Minister and the Minister of Defense may not be from the same member state, and upon the completion of a two-year period (half their term), certain Ministers must exchange their functions with their Deputies, who are from different member states.

In practice the Union exercises almost no original authority and merely serves as a conduit between the member states and the international community, in particular the EU and the International Financial Institutions. Almost all sovereign authority and functions are exercised by the member states and nearly all financial resources are

controlled by the member states.

In Northern Ireland, after more than a century of tension and violence, on April 8, 1998, the Irish and British governments and eight participating parties reached a political settlement regarding the status of Northern Ireland. The Agreement provides that upon a referendum of the people of Northern Ireland the province may secede from the United Kingdom and join with Ireland. In the interim the agreement provides for the devolution of certain sovereign authorities and functions to Northern Ireland while retrenching some of the jurisdictional power of the United Kingdom, and the claimed jurisdiction of Ireland. Specifically, it calls for the British government to repeal the 1920 Government of Ireland Act which reasserted British jurisdiction over all of Ireland and requires the Irish government relinquish its constitutional claim to the Northern province.

As a result, the citizens of Northern Ireland are enjoying unprecedented levels of self-governance and democratic control. The Northern Ireland Assembly, which is the first local legislative body in the territory's history to have substantial, elected, cross-community representation, exercises significant legislative and executive authority. The Assembly is entrusted with the responsibility of electing Ministers with department responsibilities (e.g., education and health) to carry out executive functions, except as to those such as security, justice, prisons and policing that remain with the central government in the interim.

Similarly, the Bougainville Agreement provides that during the interim period Papua New Guinea and Bougainville will share certain sovereign authority and functions, with Bougainville assuming increasing control over a wide range of powers, functions, personnel and resources on the basis of guarantees contained in the National Constitution and reflected in a new Bougainville constitution. Also, in the case of the UN sponsored Baker Peace Plan for the Western Sahara, numerous powers are to be devolved to the Western Sahara Authority relating to taxation, economic development, internal security, law enforcement commerce, resource development, and social welfare. While Morocco retains the authority for the foreign relations of Western Sahara, such power is to be exercised in consultations with the Western Sahara Authority and representatives of the Authority may be included on Moroccan delegations.

While Serbia/Montenegro, Northern Ireland, Bougainville and the Western Sahara share sovereignty with a central authority, in a number of instances states and sub-state entities share sovereign authority and functions with international organizations during an interim period prior to a determination of final status. Frequently the international community exercises certain sovereign authority and functions because the state has been precluded from exercising those functions and the sub-state entity is not yet capable of doing so. As will

be discussed in the next section, the international community frequently uses this period of shared sovereignty to assist the sub-state entity in establishing the necessary institutions for self-government.

The East Timorese came under UN supervision after they rejected via referendum a proposal which would have provided for autonomy within Indonesia. In light of the violent response by Indonesian military forces and paramilitary groups in East Timor Indonesia was forced to recognize the right of East Timor to independence, and the UN replaced Indonesia as the authority responsible for the management of sovereignty during the transition to full independence for East Timor. During the period of shared sovereignty, UN officials headed the ministries of Internal Security, Justice, Political Affairs, Constitutional and Electoral Affairs, and Finance, while East Timorese headed the ministries of Internal Administration, Infrastructure, Economic Affairs, Foreign Affairs, and Social Affairs. The National Consultative Council was chaired by the UN Transitional Administrator and comprised of three UN officials and over a dozen East Timorese appointed by the UN Administrator officials.

In the case of Kosovo, UN Resolution 1244 provided for the creation of the United Nations Mission in Kosovo (UNMIK), which initially assumed responsibility for nearly all Kosovo's sovereign authority and functions, leaving only a few to be exercised by the Federal Republic of Yugoslavia. Over time the UNMIK representative worked to create a Kosovo Constitutional Framework providing for a parliament and presidency. The UN representative then embarked on a process of devolving specified powers to the Kosovo institutions and excluding the exercise of any authority by FRY institutions. Moreover, internal and external security for Kosovo is provided by a NATO-led force, and elections are conducted by the Organization for Security and Cooperation in Europe (OSCE).

The element of shared sovereignty is quite flexible with the number and nature of devolved functions varying greatly, as well as the time frame of shared sovereignty, which may range from three years as in Montenegro up to fifteen as in Bougainville. In some instances, it may be indefinite and subject to the fulfillment of certain conditions as opposed to specified timelines. Shared sovereignty also lends itself to the establishment of markers and milestones which the emerging entity must meet in order to move beyond the transition phase to final status – an optional element called conditional sovereignty, which will be discussed below.

THE SECOND CORE ELEMENT: INSTITUTION BUILDING

To create the capacity for the assumption of sovereign authority and functions necessary for the establishment of an autonomous entity, or a future independent state, it is essential during the period of shared

sovereignty to construct institutions for self-government. In most instances these institutions are constructed with the assistance of the international community.

In the case of East Timor the United Nations was authorized by the Security Council to construct all the necessary institutions to transition East Timor from a period of shared sovereignty with the UN to one of independence. East Timor was in need of substantial assistance as in response to the referendum rejecting continued association with Indonesia, its military forces in cooperation with militia groups invaded with incredible brutality, killing hundreds, deporting hundreds of thousands to West Timor, and decimating 80 percent of East Timor's infrastructure.

To implement the transition to self-governance, the Secretary General appointed a Transitional Administrator for East Timor who also served as the Special Representative to the Secretary General for East Timor. Although the Transitional Administrator retained ultimate authority over the territory, he quickly moved to establish the National Consultative Council (NCC) comprised of 15 individuals as a way to bring the East Timorese into the decision-making process early on. The same regulation that created the NCC, also created Joint Sectoral Committees to be composed of East Timorese and international experts to provide advice in the areas of agriculture, education, environment, health, human rights, infrastructure, local administration, natural resources, finance and macro-economics.

Then, in July 2000, the Administrator created eight cabinet-level positions comprised of four internationals and four East Timorese. Also in July, at the urging of East Timorese members of the NCC, the Administrator transformed that body into a larger, all-Timorese National Council composed of 33 members to serve as the nucleus of a future assembly. These two bodies provided the skeletal framework for East Timor's first nascent government, the East Timor Transitional Administration.

The Israeli-Palestinian Roadmap provides that the Quarter will assist the Palestinians in constructing a number of institutions necessary for assuming greater attributes of sovereignty. In particular the Roadmap provides for the restructuring of security services, the establishment of an Interior Ministry, the appointment of an interim prime minister or cabinet with executive decision-making capacity, the adoption of a Palestinian constitution, and the creation of an election commission.

In the case of the UN sponsored Baker Peace Plan for the Western Sahara, the UN is to assist with the creation of a Western Sahara government, including a Chief Executive, Legislative Assembly and a Supreme Court. Elections for the Assembly and the Chief Executive are to be held by the UN within one year of the adoption of the Baker

plan.

In the case of Northern Ireland, while there was no need to provide for the creation of administrative institutions, there was a need to create political institutions and to reform many of the key administrative institutions. The agreement thus provided for the creation of a Northern Ireland Assembly which would be able to absorb the sovereign functions and authority to be devolved from the United Kingdom. The agreement also provided for the creation of two consultative mechanisms to facilitate political stability during the period of shared sovereignty and the transfer of sovereign functions and authority to Northern Ireland—a North/South Ministerial Council and a British-Irish Council.

The Northern Ireland Assembly is a 108-member Assembly with executive and legislative powers. In order to prevent gridlock or dominance by the two major voting blocs (those favoring union with England and those favoring union with Ireland), the accord requires that “key decisions” taken by the Assembly receive cross-community support by a “weighted majority” or “parallel consent.”

The North/South Ministerial Council is made up of those with executive authority in Northern Ireland and the Irish Republic. The Council was required by the agreement to identify at least twelve areas for future cooperation throughout the island, including six areas where new implementation bodies will carry out joint responsibilities immediately. (In late 1998, the Council identified the latter as inland waterways, food safety, trade and business development, certain EU programs, language, and aquaculture and marine matters. The six other areas of cooperation will include transport, agriculture, education, health, environment, and tourism).

The British-Irish Council was created to deal with bilateral issues of mutual interest, with a particular focus on sensitive matters of policing, security, justice and prisons. The Accord provides that those issues remain with the Secretary of State, but indicates they could one day be transferred to the Northern Ireland Assembly. The Council includes representatives from the British government, the Irish government, the devolved administrations in Northern Ireland, Scotland and Wales, the Channel Islands and the Isle of Man.

In some instances the sub-state entity may begin to create institutions of self-government prior to the period of agreed shared sovereignty. For instance, in the case of Montenegro the Montenegrin government with support of the United States and European Union both prior to and after the signing of the Union Treaty established a Foreign Ministry with unofficial diplomatic offices abroad, a Ministry of Finance, and a Central Bank. The Montenegrin government also adopted the Deutsch Mark, and subsequently the Euro in an effort to promote integration with European monetary institutions. Throughout

this time Serbia continued to use the Yugoslav dinar.

THE THIRD CORE ELEMENT: DETERMINING FINAL STATUS

At some point during the process of earned recognition it will be necessary to determine the final status of the sub-state entity. The options for final status range from substantial autonomy to full independence. In some instances, such as East Timor the final status is determined during the initial stages of the process, whereas in others it occurs after a period of shared sovereignty and institution building. While the nature of final status is frequently determined by a referendum, it may also be determined through a negotiated settlement between the state and sub-state entity, often with international mediation. Invariably the determination of final status for the sub-state entity involves the consent of the international community in the form of international recognition.

In the case of East Timor the rejection by referendum of the proposal for autonomy within Indonesia began the process of earned sovereignty. In most instances, however, the date for a referendum is set to occur after a period of shared sovereignty and institution building. For instance, the agreement between Montenegro and Serbia for the creation of a Union of Serbia and Montenegro provides that after three years either republic may separate from the Union and become independent via a referendum. The UN's Baker Peace Plan for resolution of the Western Sahara conflict provides that the final status of Western Sahara shall be determined by referendum no earlier than four and no later than five years after the adoption of the peace plan. The Machakos protocol between Sudan and Southern Sudan provides for an internationally monitored referendum after six years by which the people of South Sudan may either confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement or vote for secession. The Bougainville Agreement provides for a referendum on the separation of Bougainville from Papua New Guinea after ten and before ten to fifteen years from the adoption of the agreement. In the case of the Bougainville agreement the results of the referendum must, however, be ratified by the parliament.

The Northern Ireland Agreement takes a more flexible approach. The agreement explicitly acknowledges that a majority of the population in Northern Ireland currently wish to remain part of the United Kingdom and that any change in that status can only come about by majority vote. The agreement requires the British Secretary of State to call for a referendum on independence every seven years if it is "likely" that the majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland. If the resulting vote favors uniting with Ireland, the Secretary of State is obligated to take such proposals as are

necessary to the British Parliament to give effect to the referendum's result.

In some instances the final status is to be determined by a negotiated settlement, which may or may not involve a non-binding referendum. In the Rambouillet Accords the final status of Kosovo was to be determined by an international conference which would take into consideration the will of the people for independence. The current efforts to determine the final status of Kosovo focus on a negotiated settlement between Kosovo and Serbia with substantial international mediation.

The Israeli-Palestinian Roadmap provides that the final status of Palestine will be determined in a two stages. The first stage will follow successful institution building and will involve an international conference convened by the Quartet at which the parties will negotiate the establishment of an independent Palestinian state with provisional borders. The second stage will involve a second conference at which the parties will conclude a permanent status agreement encompassing agreement on permanent borders, refugees, settlements and the status of Jerusalem.

THE FIRST OPTIONAL ELEMENT: PHASED SOVEREIGNTY

In order to enhance the relationship between shared sovereignty and institution building some earned sovereignty agreements have incorporated the element of phased sovereignty. Phased sovereignty involves the measured devolution of sovereign functions and authority from the parent state or international community to the sub-state entity during the period of shared sovereignty. The timing and extent of the devolution of authority and functions may be correlated with the development of institutional capacity and/or conditioned on the fulfillment of certain conditions such as democratic reform and the protection of human rights.

Kosovo presents the most comprehensive example of the use of phased sovereignty to manage the devolution of sovereign authority and functions. Subsequent to resolution 1244, the UN endorsed a Provisional Constitutional Framework for Kosovo which provided that UNMIK and Kosovo entities would exercise most of the functions typically associated with an independent state, including foreign relations. Initially nearly all the authority and functions were designated "reserved competencies" which remained with UNMIK. Since the adoption of the Provisional Constitution UNMIK has gradually transferred nearly all the local powers to Kosovo municipal authorities, and has begun a slow but steady process of transferring powers to Kosovo's central government institutions. While the power to regulate transportation has been completely transferred, only minimal powers relating to the conduct of foreign affairs have been transferred.

The degree of transfer is determined by an informal mix of institutional capacity on the part of Kosovo, the degree to which Kosovo is perceived by UNMIK to reasonably exercise the powers which it currently possesses, and the coordination of the timing of devolution with progress being made towards resolving the final status of Kosovo. With respect to the latter factor, UNMIK is concerned that it not transfer all powers to Kosovo too soon as it might prejudice the outcome of the final status talks as a complete assumption of these powers would render Kosovo a de facto independent entity.

Other agreements which include an element of phased sovereignty are the Northern Ireland Accords, the Israeli-Palestinian Roadmap, and the Bougainville Agreement. In the Northern Ireland Agreement the United Kingdom is able to manage the rate of devolution, and even to reverse the devolution by suspending parliament if the IRA fails to comply with its obligations to demobilize and decommission its weapons. The Israeli-Palestinian Roadmap provides for the phased accumulation of sovereign attributes beginning with the adoption of a new constitution and elections for a prime minister and cabinet and ending with the possible creation of an independent Palestinian state. The Bougainville Agreement also provides for the Bougainville Government to assume increasing control over a wide range of powers, functions, personnel and resources during the interim period prior to the determination of final status.

Importantly not all instances of earned sovereignty require the element of phased sovereignty. For instance, upon ratification of the agreement for the creation of the Union of Serbia and Montenegro both member states immediately assumed the sovereign authority and functions allocated to them under the agreement. In fact, Montenegro had exercised many of those functions prior to the adoption of the agreement.

THE SECOND OPTIONAL ELEMENT: CONDITIONAL SOVEREIGNTY

The approach of earned sovereignty may provide the option of conditioning the transfer of sovereign authority and functions to the sub-state entity, or the determination of final status, on its fulfillment of certain benchmarks. These benchmarks may include conditions such as protecting human and minority rights, developing democratic institutions, instituting the rule of law, and promoting regional stability.

The element of conditional sovereignty has its origins in the European approach of earned recognition of the successor states of the former Soviet Union and former Yugoslavia. In response to calls for international recognition by the republics of the Soviet Union and

Yugoslavia, on December 16, 1991, the European Community Council of Foreign Ministers developed a policy of earned recognition.⁸ Under this approach, states seeking recognition by the European Community were required to meet a set of detailed criteria. The European Community then adopted additional criteria to be applied specifically to the republics of Yugoslavia, and required that the republics seeking recognition must submit an application to the Yugoslav Peace Conference at that time being conducted by the UN and EU. The co-chairs of the Peace Conference would then seek a determination from the Arbitration Commission as to whether the applicant states fulfilled the criteria for recognition.

According to the *Declaration on Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union* the specific criteria which each applicant state was required to meet included:

- 1) 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;
- 2) Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- 3) Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- 4) Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; and
- 5) Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.

The European Community further proclaimed that it would not recognize entities which were the result of aggression, and they would take account of the effects of recognition on neighboring states.

The European Community then issued a second, more specific, *Declaration on Yugoslavia*,⁹ which added the conditions that the applicant republic 1) accept the provisions laid down in the European Community Draft Convention on Human Rights, especially those in Chapter 11 on the rights of national or ethnic groups, and 2) that the republics continued to support the efforts of the U.N. and the continuation of the Peace Conference.¹⁰ While the European

8. Council of Ministers of the European Community, *Declaration on Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union*, (December 16, 1991).

9. European Community *Declaration on Yugoslavia* (December 16, 1991).

10. The *Declaration on Yugoslavia* provided that republics seeking recognition must

Community generally recognized the determinations of the Arbitration Commission, it did not exclusively follow those recommendations. Thus, upon the recommendation of the Arbitration Panel it recognized Slovenia and Croatia, but did not recognize Macedonia despite the Commission's determination that it fully met the conditions. Similarly, upon the recommendation of the Commission it required Bosnia to hold a referendum to determine the will of the people for independence, and rejected the Federal Republic of Yugoslavia's claim to continue the international legal personality of the former Yugoslavia.

The case of Kosovo provides the most detailed example of conditional sovereignty. In 2002 the UN Security Council adopted a proposal by UNMIK identified as "standards before status." In brief, the UN had determined that before Kosovo could undertake final status negotiations to secure independence it must meet a number of standards or benchmarks. According to UNMIK, the general prerequisites of the standards before status approach were, "full compliance with and implementation of Resolution 1244 and the Constitutional Framework. Multi-ethnicity, tolerance, security, and fairness under normal conditions, without special measures."¹¹ In particular, UNMIK placed significant emphasis on the creation of a multi-ethnic society. Specifically, the benchmarks covered the areas of functioning democratic institutions, rule of law, freedom of movement, refugee returns and reintegration, economic reform and development, property rights, dialogue with Belgrade, and the responsible operation of the Kosovo Protection Corps.

For each of these categories, UNMIK set forth goals, benchmarks, and specific actions to be taken by the local community. For instance, with respect to freedom of movement, UNMIK set the goal that all

apply to the Chairmen of the Peace Conference by December 23, 1991, and the Chairmen, would pass the applications to the Arbitration Commission for a ruling as to whether the applicants met the criteria set forth in the *Guidelines* and *Declaration*. The Arbitration Commission would make its recommendation to the European Community's Council of Foreign Ministers, who would then announce its decisions on recognition by January 15, 1992. In order to carry out its task of rendering determinations on the independence of the republics of Yugoslavia, the Commission created a questionnaire which was sent on December 24, 1991, to those republics invited to apply for recognition. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992). (Introductory Note by Maurizio Ragazzi). This questionnaire was only sent to the republics of Yugoslavia, as the republics of Soviet Union were not required to formally apply to the European Community for recognition, and thus were not required to subject their requests to the review of the Arbitration Commission.

11. UN Mission in Kosovo, *Standards Before Status*, May 2002 available at http://www.unmikonline.org/pub/focuskos/apr02/benchmarks_eng.pdf. Press Release, United Nations, Highlights Of The Introductory Remarks At A Press Conference By Michael Steiner, Special Representative Of The Secretary-General In Kosovo, June 27, 2002 available at <http://www.unog.ch/news2/documents/newsen/pc020627.htm> [hereinafter *Highlights*].

communities can circulate freely throughout Kosovo, including city centers, and use their language. The benchmark for measuring the attainment of this goal was the unrestricted movement by minorities without reliance on military or police. The required local action included policy and sustained action by local institutions to promote freedom of movement publicly and unprompted condemnation by holders of public office of obstruction and violence.

Other agreements contain similar conditionality. For instance the Bougainville agreement provides that the referendum on final status will only be held if the Bougainville government ensures the decommissioning and disposal of weapons and undertakes good governance, including the development of democracy, transparency, and accountability, as well as respect for human rights and the rule of law, including the Constitution of Papua New Guinea. The Israeli-Palestine Roadmap conditions the movement from phase two (the transition phase) to phase three (the final status phase) on the completion of free and open elections in Palestine, the appointment of new cabinet officials, the creation of a new constitution, reform of the Palestinian security forces, and the designation of provisional borders. Recently, President Bush has also emphasized that progress in rooting out corruption would be explicitly linked to progress toward the establishment of a provisional Palestinian state. In the case of Northern Ireland, the continued devolution of authority was conditioned on the decommissioning of paramilitary forces and the surrender of weapons.

With East Timor, the conditions were less substantive and more related to the creation of institutions. For instance, in order for East Timor to be entitled to formally declare independence it was first required by the UN Security Council to 1) undertake a nation-wide consultation process and make decisions regarding electoral procedures and composition of the future Constituent Assembly; 2) elect members of the Constituent Assembly and draft the constitution; and 3) establish the government and hold Presidential elections if required by the Constitution.

Importantly, not all agreements contain the element of conditionality. For instance the Baker plan for Western Sahara and the Machakos Protocol for Sudan set a specific date for the devolution of sovereign authority and functions as well as the determination of final status without conditions.

THE THIRD OPTIONAL ELEMENT: CONSTRAINED SOVEREIGNTY

Constrained sovereignty involves continued limitations on the sovereign authority and functions of the new state, such as continued international administrative and/or military presence, and limits on the right of the state to undertake territorial association with other states.

In certain cases, such as Bosnia-Herzegovina a fully independent

state may be forced to share sovereign authority and functions with an international organization. The 1995 Dayton Peace agreement, which ended the Bosnian conflict with Serbia, in effect established a regime whereby the independent state of Bosnia was put within a *de facto* trustee relationship with its sovereign authority and functions shared with an international High Representative from a west European country. Security is provided by a NATO-led Force. The international civilian presence now numbers close to eight thousand. In fact, the Office of the High Representative has served as a *de facto* central governing authority in Bosnia since late 1995, with the power to veto and promulgate legislation and remove officials at any level of government from municipal to provincial to state. A United Nations office oversees police and refugee matters, and for the first several years after the agreement was signed, elections were handled by the OSCE.

East Timor also is under a soft form of constrained sovereignty as the international community, in the form of a UN follow-up mission UNMISET (United Nations Mission of Support for East Timor), which provides continued assistance in the areas of: 1) civilian administration; 2) law and order (police and development of a law enforcement agency); and 3) military security (maintaining internal and external security).¹² The administrative elements were scheduled to continue through the beginning of 2004, while continued military assistance and training would continue until the second battalion of the new East Timor Defense Force became operational (at least through 2003). Although independent, East Timor will continue to rely heavily on the UN and donor countries as it continues to progress toward ever-increasing levels of sovereignty.

NOTE ON MONITORING THE IMPLEMENTATION OF EARNED SOVEREIGNTY

Frequently during the process of earned sovereignty a monitoring mechanism is established to build confidence among the parties, to ensure coordinated implementation of the Agreement, to monitor compliance, and to assist in the resolution of any disputes. In the case of Bougainville the parties created an inter-governmental supervisory body charged with overseeing the implementation of the agreement and establishing the new Autonomous Bougainville Government. The same body was also granted competency to resolve disputes between the new Bougainville government and Papua New Guinea. The Machakos Protocol for Sudan provides for the creation of an Assessment and Evaluation Commission to monitor the implementation of the Peace

12. See Press Release: Security Council Establishes Support Mission in East Timor Unanimously Adopting Resolution 1410, U.N. SCOR, 4534th mtg., U.N. Doc. SC/7400 (2002), available at <http://www.un.org/News/Press/docs/2002/SC7400.doc.htm> (last visited Oct. 14, 2002).

Agreement and conduct a mid-term evaluation of the unity arrangements established under the Peace Agreement. The Commission is to be comprised of representatives of the parties as well as representatives from neighboring states and from the observer states of Italy, Norway, the UK and US. The Baker plan for Western Sahara provides for UN monitoring and for the right of the Secretary-General to issue binding interpretations regarding any disputes which arise with respect to the implementation of the plan.

In the case of Northern Ireland, the parties have created a series of trilateral mechanisms involving the new Northern Ireland government, the Irish government and the British government which include the North/South Ministerial Council and the British-Irish Intergovernmental Council. The Agreement also provides for the creation of a specialized Northern Ireland Human Rights Commission, the membership of which must reflect community balance. The Commission is designed to advise as to the adequacy and enforcement of human rights protections, to propose recommendations, to consider draft legislation, to bring court proceedings and otherwise to ensure that the human rights commitments under the Agreement are met.

In many instances the parties decide that objectives of a monitoring mechanism are best met when the monitors are international. In these instances, the monitoring mechanism might be the United Nations, a regional body such as the Organization of American States or the Organization for Security and Cooperation in Europe, an ad hoc group of nations, or combinations of the above. In some instances, such as Papua New Guinea domestic monitoring mechanisms may be combined with international mechanisms. In that instance, the domestic mechanisms are augmented by an international Truce Monitoring Group and the presence of a UN Political Office for Bougainville.

The Dayton Accords provided for extensive participation of international organizations in the implementation of the Bosnia peace settlement. In the military arena, the NATO-led security forces assisted in implementing the terms of the agreements regarding territory, size and disposition of forces, and in the establishment of a durable peace. The agreement tasked the OSCE with carrying out an election program for Bosnia. The Dayton Accords also required the parties to grant access to the United Nations High Commissioner for Refugees, the International Committee of the Red Cross and the United Nations Development Program, all of which thereby have acknowledged roles in the implementation of the settlement. Finally, an International Police Task Force, under the auspices of the United Nations, was established to train and monitor law enforcement personnel and their activities. Similarly, in Kosovo and East Timor substantial numbers of international civilian administrators were deployed to manage the sharing of sovereign authority and functions, and the Israeli-Palestinian Roadmap provided for extensive monitoring operations by

members of the Quartet.

CONCLUSION

Political leaders, diplomats and representatives of states and sub-state entities must deal with the tensions and confusions created by the friction between traditional notions of sovereignty and the increasing reliance on earned sovereignty. The latter has attained vitality and momentum as a result of its practical utility to those involved in peacemaking and conflict resolution. At times, however, diplomats and leaders find it difficult to combat the notion that earned sovereignty will undermine the world order by creating new levels of statehood. While this may to some extent be inevitable during periods of transition—such as the sovereignty transition existing in today's global community—much greater emphasis must be accorded to practical and theoretical efforts to identify additional circumstances where earned sovereignty can be applied constructively. Similarly, efforts should be made to draw attention to situations where it is unlikely to be of benefit. The variety of examples furnished in this presentation should contribute to that aim.