

# Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination

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## I. INTRODUCTION

Since 1984, over 65,000 people have been killed as a result of the Government of Sri Lanka's attempt to preserve its territorial integrity and secure its sovereign interests against the competing efforts of the Tamil rebels to exercise their right of self-determination and establish a self-governing region within Sri Lanka. In Sudan, nearly two million people have been killed during the war of secession. In Bosnia, 250,000 civilians were killed and over one million displaced in a campaign of genocide carried out by Serbia in response to Bosnia's declaration of independence from the former Yugoslavia.

In the period between 1956 and 2002, there were seventy-five instances of states involved in some form of self-determination or sovereignty-based conflict. By 2002, only twelve of these conflicts had been resolved through uncontested agreements. Another twelve had been resolved through military victory. The remainder were ongoing (twenty-two), or were merely "contained" (twenty-nine), usually as a result of the deployment of international peacekeepers. The average duration of these continuing conflicts is nearly thirty years.<sup>1</sup>

There are four disturbing characteristics of these sovereignty-based conflicts. First, as evidenced by the preceding statistics, they are exceedingly difficult to resolve. Only ten sovereignty-based conflicts have been settled

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<sup>1</sup> CENTER FOR INTERNATIONAL DEVELOPMENT AND CONFLICT MANAGEMENT, PEACE AND CONFLICT 2003: A GLOBAL SURVEY OF ARMED CONFLICTS, SELF-DETERMINATION MOVEMENTS AND DEMOCRACY 26–30 (2003), available at <http://www.cidcm.umd.edu/inscr/pc03print.pdf> (last visited Mar. 9, 2004) [hereinafter PEACE AND CONFLICT 2003].

through mutual agreement since 1965,<sup>2</sup> with five of these being settled by granting independence to the substate entity.<sup>3</sup>

Second, sovereignty-based conflicts frequently give rise to terrorism. Over one third of the Specially Designated Global Terrorists identified by the United States Department of Treasury are associated with self-determination movements.<sup>4</sup> Of increasing concern is the globalization of terrorism arising from sovereignty-based conflicts in terms of methods, mission, and cooperation. For instance, while the Tamil Tigers have limited their attacks to the island of Sri Lanka, they are credited with the dubious accomplishment of perfecting a method of suicide bombing that has been widely replicated in other conflicts.<sup>5</sup> The chronic status of the Israel/Palestine conflict has fostered a wave of “mission solidarity,” resulting in the proliferation of dangerous Islamic groups who readily resort to terrorism as a means of political expression.<sup>6</sup> In the Mindanao region of the Philippines, global terrorists, such as Jemaah Islamiyah, are cooperating with Moro rebels in their fight against the Philippine government in exchange for the use of territory for training and logistical purposes.<sup>7</sup>

Third, sovereignty-based conflicts often involve the commission of massive human rights violations. For instance, reports indicate that Indonesian forces seeking to suppress separatist forces in the province of Aceh have killed over five thousand civilians.<sup>8</sup> In the Western Sahara, over fifty thousand refugees have lived for twenty years in refugee camps in neighboring Algeria. As a result of the Nagorno-Karabakh conflict between Armenia and Azerbaijan, nearly one million refugees have spent the last ten years in refugee camps near their former homes.<sup>9</sup>

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 28, 57–62.

<sup>4</sup> OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPARTMENT OF THE TREASURY, SPECIALLY DESIGNATED AND BLOCKED PERSONS (Mar. 22, 2004), available at <http://www.treas.gov/offices/eotffc/ofac/actions/2004cuma.html> (last visited Apr. 4, 2004). Some of the groups on the list are the Islamic International Brigade and the Special Purpose Islamic Regiment in Chechnya, Abu Nidal and Hamas in Palestine, Abu Sayaf and the Moro Liberation Front in the Philippines, Basque Fatherland and Liberty in the Basque Region of Spain, and both the Ulster Freedom Fighters and the Continuity IRA in Northern Ireland.

<sup>5</sup> Thomas L. Friedman, *Lessons from Sri Lanka*, N.Y. TIMES, Aug. 7, 2003, at A17.

<sup>6</sup> David Ucko & Christopher Langton, *Suicide Attacks: A Tactical Weapon System*, PRESS REVIEW 95, Apr. 24, 2002, available at <http://www.mafhoum.com/press3/96P8.htm>. (last visited Mar. 9, 2004).

<sup>7</sup> See *Philippines tightens surveillance in Mindanao amid reports of JI training*, BBC MONITORING ASIA PACIFIC, May 22, 2004, available at 2004 WL 78281572.

<sup>8</sup> See generally HUMAN RIGHTS WATCH, INDONESIA: THE WAR IN ACEH (2001), available at <http://www.hrw.org/reports/2001/aceh/> (last visited Mar. 15, 2004) (providing an overview of the conflict and detailing the human rights concerns and civilian casualties associated with it).

<sup>9</sup> There are numerous reports and literature describing the particularly violent nature of sovereignty-based conflicts. See generally, HUMAN RIGHTS WATCH, BOSNIA-HERZEGOVINA: SARAJEVO (1994), available at <http://www.hrw.org/reports/1994/bosnia3> (last visited Mar. 15, 2004); HUMAN RIGHTS WATCH, CHECHNYA-MEMORANDUM TO THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS ON HUMAN RIGHTS SITUATION IN CHECHNYA (2002), available at <http://www.hrw.org/un/unchr-chechnya.htm> (last visited Mar. 15, 2004); HUMAN RIGHTS WATCH, CIVILIAN DEVASTATION: ABUSES BY ALL PARTIES IN THE WAR IN SOUTHERN SUDAN (1994), available at <http://www.hrw.org/reports/1993/sudan> (last visited Mar. 15, 2004); HUMAN RIGHTS WATCH, INDONESIA: HUMAN RIGHTS AND PRO INDEPENDENCE ACTIONS IN PAPUA 1999–2000 (2000), available at <http://www.hrw.org/reports/2000/papua> (last visited Mar. 15, 2004); HUMAN

Fourth, existing international legal norms and principles are often of little practical relevance to parties and mediators seeking to resolve these conflicts. The principle of sovereignty is frequently relied upon by states to prevent other states or international organizations from taking an active role in resolving a sovereignty-based conflict, as in the case of the Russian response to the Chechnya conflict. Similarly, groups seeking independence from a state frequently rely on the doctrine of self-determination to support their claim for independence, as in the case of Western Sahara and Nagorno-Karabakh.

The intensity and severity of sovereignty-based conflicts, their relationship to increasing levels of terrorism, and the lack of effective legal norms and principles have given rise to the need for a new approach to resolving sovereignty-based conflicts. This need is increasingly being met by the emerging conflict resolution approach of earned sovereignty. In seven recent peace agreements concerning sovereignty-based conflicts, the parties have relied upon the approach of earned sovereignty.<sup>10</sup> In two of the major outstanding conflicts, earned sovereignty forms the basis of the proposed agreement.<sup>11</sup> The approach of earned sovereignty has been aided in its development by the increasing efforts of international organizations and powerful states to undertake global conflict management, including a willingness to aid states in conflict resolution and undertake institution building in conflict-affected areas.<sup>12</sup>

Despite the increasing ad hoc reliance on the approach of earned sovereignty by mediators and parties to conflict, there is scant scholarly commentary as to the precise nature of the approach, the political debate

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RIGHTS WATCH, INDONESIA: IMPUNITY VERSUS ACCOUNTABILITY FOR GROSS HUMAN RIGHTS VIOLATIONS (2001), available at <http://www.crisisweb.org/home/index.cfm?id=1460&l=1> (last visited Mar. 15, 2004); HUMAN RIGHTS WATCH, INDONESIA/EAST TIMOR: DETERIORATING HUMAN RIGHTS IN EAST TIMOR (1995), available at <http://www.hrw.org/reports/1995/indonesi.htm> (last visited Mar. 15, 2004); HUMAN RIGHTS WATCH, ISRAEL/PALESTINE, PALESTINIAN AUTHORITY: HUMAN RIGHTS UNDER THE PALESTINIAN AUTHORITY (1997), available at <http://www.hrw.org/reports/1997/palestina/Israel.htm> (last visited Mar. 15, 2004); AMNESTY INTERNATIONAL, PAPUA NEW GUINEA-BOUGAINVILLE: THE FORGOTTEN HUMAN RIGHTS TRAGEDY (1997), available at <http://www.web.amnesty.org/library/index/Engasa340011997?open&of=ENG-PNG> (last visited Mar. 16, 2004); HUMAN RIGHTS WATCH, SRI LANKA: STOP KILLINGS OF CIVILIANS (1995), available at <http://www.hrw.org/reports/1995/Srilanka.htm> (last visited Mar. 15, 2004); HUMAN RIGHTS WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO (2001), available at <http://www.hrw.org/reports/2001/kosovo> (last visited Mar. 15, 2004); INTERNATIONAL CRISIS GROUP, VIOLENCE IN KOSOVO: WHO'S KILLING WHOM? (1999), at <http://www.crisisweb.org/home/index.cfm?id=1581&l=1> (last visited Mar. 15, 2004); HUMAN RIGHTS WATCH, YUGOSLAVIA (SERBIA AND MONTENEGRO): PERSECUTION PERSISTS: HUMAN RIGHTS VIOLATIONS IN KOSOVO (1996), available at <http://www.hrw.org/reports/1996/Serbia.htm> (last visited Mar. 15, 2004).

<sup>10</sup> The seven territories are Serbia and Montenegro, East Timor, Northern Ireland, Bougainville, Bosnia, Kosovo, and Sudan.

<sup>11</sup> The two territories are Israel/Palestine and Western Sahara.

<sup>12</sup> Since the end of the Cold War, the international community has demonstrated an ever-increasing role in conflict resolution. First, the internationalization of human rights led to a progressive increase in the number of interventions to end conflicts involving massive human rights violations. This phenomenon indicates the progressive erosion of the subject of human rights from the domestic jurisdiction of states and its inclusion in matters of international concern. Additionally, since the nineties, the international community has embarked on the new and more complex task of responding to conflict by transforming the distressed territories into a favorable environment to realize stable democracies. See generally Samuel H. Barnes, *The Contribution of Democracy to Postconflict Societies*, 95 AM. J. INT'L L. 86 (2001) (exploring the successes and failures of post-conflict transitions to democracy).

surrounding its use, and its utility for resolving sovereignty-based conflicts.<sup>13</sup> To initiate the debate, the Public International Law & Policy Group, in cooperation with the Denver University School of Law, hosted a day long roundtable discussion focused on the emerging trend of earned sovereignty and its potential utility for resolving ongoing sovereignty-based conflicts. The Denver Journal of International Law and Policy published the preliminary observations presented during the roundtable.<sup>14</sup> This Article draws from that series of papers in an effort to further refine the understanding of the approach of earned sovereignty.

In particular this Article extends the debate by parsing out and clearly defining the various elements of the earned sovereignty approach as they have been developed and employed in previous peace agreements. A clear understanding of the elements of the approach and how they have been employed to facilitate the peaceful resolution of previous conflicts will enhance the ability of peace negotiators and parties to effectively apply the approach in future conflicts where relevant. To facilitate a comprehensive understanding of the earned sovereignty approach and its potential utility in future conflict resolution efforts, this Article also seeks to provide a sense of the political debate surrounding the advantages and risks associated with the approach.

Earned sovereignty, as developed in recent state practice, entails the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity under international supervision. Earned sovereignty most naturally develops within a peace process as a multi-stage approach to address the issue of the final political status of the substate entity. As an emerging conflict resolution approach, earned sovereignty is defined by three core elements: shared sovereignty, institution building, and a determination of final status. To increase the flexibility necessary to deal with the political fragilities of peace processes, and with the historical diversity of different conflicts, earned sovereignty may also encompass three additional elements: phased sovereignty, conditional sovereignty, and constrained sovereignty. These optional elements further enhance the applicability of earned sovereignty to the circumstances of a particular conflict and allow for the modification or development of the approach as necessary to meet the needs of the parties.

The emergence of earned sovereignty has occurred within the larger political debate concerning the most appropriate means for resolving sovereignty-based conflicts. On both sides of the debate are states, substates, diplomats, and policy analysts who prefer either sovereignty or self-determination as the guiding principle for resolving sovereignty-based conflicts. Those who prefer an approach based on the priority of sovereignty are likely to perceive earned sovereignty as potentially destabilizing to the

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<sup>13</sup> See generally Karen Heymann, *Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust*, 19 AM. U. INT'L L. REV. 153 (2003) (analyzing the approach of earned sovereignty when applied to a specific conflict).

<sup>14</sup> See generally James R. Hooper & Paul R. Williams, *Earned Sovereignty: The Political Dimension*, 31 DENV. J. INT'L L. & POL'Y 355 (2003); Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict Over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387 (2003).

current international order by promoting the separation of substate entities from their parent states. Those who prefer an approach based on the primacy of the right of self-determination are likely to perceive earned sovereignty as a means for raising the bar for independence. In fact, earned sovereignty seeks to bridge these two approaches by providing a mechanism whereby some substate entities may be guided through a process of transition to statehood or heightened autonomy in such a way so as not to undermine the legitimate interests of parent states and of the international community.

Given that the use of the earned sovereignty approach generally requires the consent of the state and substate entity that are parties to a conflict, the precise dimensions of the approach as applied to a particular conflict are shaped by the political concerns of each party involved. For instance, concerns may relate to the protection of majority group members who might become a minority within the former substate entity. They may also relate to the impact that heightened autonomy or independence for the substate entity may have on the democratic and economic reform process in the parent state. These concerns may affect the conditions employed during the process, as well as the length of the process.

To structure an inquiry into the emerging approach of earned sovereignty, this Article is divided as follows: Part II briefly discusses the fundamental legal principles of sovereignty and self-determination which underlie the conflict resolution approaches of “sovereignty first” and “self-determination first.” Reference will be made to a number of current conflicts to illustrate the ongoing tension between these two approaches and their increasing lack of utility for resolving sovereignty-based conflicts. Part III draws upon recent final and proposed peace agreements to illustrate the three core and three optional elements of earned sovereignty. Included are the agreements reached in Serbia and Montenegro, East Timor, Northern Ireland, Bougainville, Bosnia, Kosovo, and the Sudan, as well as the proposed agreements introduced in Israel and the Western Sahara. Finally, Part IV examines the progressive development of the earned sovereignty approach as a means for resolving the sovereignty-based conflict between Kosovo and Serbia. Particular attention will be paid to the political considerations which have shaped the parameters of the earned sovereignty approach as applied to Kosovo.

It is important to clarify that earned sovereignty is not perceived by the authors to be a panacea for sovereignty-based conflicts. As such, this Article does not argue that earned sovereignty should be used as the exclusive approach to resolving sovereignty-based conflicts, but instead seeks only to promote the more effective utilization of the approach.

#### I. THE TRADITIONAL APPROACHES TO RESOLVING SOVEREIGNTY-BASED CONFLICTS: SOVEREIGNTY VS. SELF-DETERMINATION

Traditional approaches to resolving sovereignty-based conflicts may be characterized as falling within the spectrum of the “sovereignty first” approach, based primarily upon the principles of sovereignty, territorial

integrity, and political independence, or the “self-determination first” approach, based upon the legal principles relating to self-determination and the protection of human rights.

The predominant “sovereignty first” approach is generally relied upon by states wishing to preserve their territorial integrity, or by third-party states that fear that the creation of too many new states may undermine international stability or set a precedent that may be used by secessionist movements within their state. In this approach, sovereignty is regarded as the essential element of the political existence of a state, and forms the basis for international relations.<sup>15</sup> A core attribute of sovereignty is the exclusive jurisdiction of a state to exercise political power and authority within its own borders and to exercise all rights necessary to preserve its territorial integrity from external and internal threats.<sup>16</sup> Mediators adopting the “sovereignty first” approach often find themselves in a position of accommodating, and in some instances appeasing, aggressor regimes.<sup>17</sup>

The “self-determination first” approach is frequently relied upon by secessionist movements, and has been sympathetically received by small states without significant minority populations. This approach, which evolved within

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<sup>15</sup> The literature on sovereignty is vast. For some recent contributions, see generally HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* (rev. ed. 1996); HIDEAKI SHINODA, *REEXAMINING SOVEREIGNTY: FROM CLASSICAL THEORY TO THE GLOBAL AGE* (2000); Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 513 (2002); Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT'L L. & POL. 417 (1999); Ronald A. Brand, *The Role of International Law in the Twenty-First Century: External Sovereignty and International Law*, 18 FORDHAM INT'L L.J. 1685, 1687–88 (1995); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA J. INT'L L. 1 (2002); Jianming Shen, *National Sovereignty in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 420–22 (2000); Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 321–443 (1991). For an in-depth analysis on sovereignty in contemporary international law, see also Ruth Lapidot, *Redefining Authority: The Past, Present and Future of Sovereignty in International Law*, HARV. INT'L REV., Summer 1995, at 8.

<sup>16</sup> See generally CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979) (postulating that a theory of international politics should include a revised principle of state autonomy based on the justice of a state's domestic institutions and a principle of international distributive justice). Specifically, the U.N. Charter recognizes the centrality of sovereignty through its principle of non-interference, by virtue of which states are considered independent in all matters of internal politics and free to determine their political life without undue interference by other states. U.N. CHARTER art. 2, para. 7. The U.N. Charter expresses the principle of non-interference in relation with the domestic jurisdiction of member states and as a corollary of principle of sovereign equality of all members of the United Nations. *Id.*

Despite its perceived value, absolute sovereignty is more the exception than the rule in state practice. As detailed by Stephen Krasner, there are numerous examples of quasi-sovereign states through the last two centuries, and many examples of states that have exercised only partial sovereignty. Moreover, since World War II the principle of sovereignty has been progressively eroded. In particular, the multilateral trend of the international community to pursue some of its goals collectively and through international institutions results in states frequently ceding portions of their sovereign powers. For an extensive analysis of sovereignty in contemporary international law, see generally STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

<sup>17</sup> See Jane M. O. Sharp, *Appeasement, Intervention and the Future of Europe*, in *MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 49 (Lawrence Freedman ed., 1994); Ed Vulliamy, *Bosnia: The Crime of Appeasement*, INT'L AFF., Jan. 1998, at 80. For a review of the preference of the U.N. Secretary-General for a negotiated outcome and his aversion to the use of force against aggression in the former Yugoslavia, see Georgie Anne Geyer, *How the Conscience of the West Was Lost*, in *THE CONCEIT OF INNOCENCE: LOSING THE CONSCIENCE OF THE WEST IN THE WAR AGAINST BOSNIA* 107–08 (Stjepan G. Mešovic & Akbar S. Ahmed eds., 1997).

the context of decolonization,<sup>18</sup> is based upon the principle that dependent peoples are entitled to exercise self-government.<sup>19</sup> Under this approach, all self-identified groups with a coherent identity and connection to a defined territory are entitled to collectively determine their political destiny in a democratic fashion and to be free from systematic persecution.<sup>20</sup> Self-government is generally attained through the creation of an autonomous province within the parent state, although it may in some limited circumstances be attained through secession.<sup>21</sup>

Increasingly, these two approaches fail to offer satisfactory options for structuring the peaceful resolution of sovereignty-based conflicts, as they frequently result in political gridlock and continued violence. The “sovereignty first” approach is relied upon by the parent state, and frequently the international community, to argue for the retention of the substate entity within the parent state and to justify the use of force to accomplish that objective. For instance, the mantra of sovereignty has been used by states to shield themselves from international action resulting from human rights abuses committed as part of their attempts to stifle self-determination movements. Examples of this include the Iraqi Anfal campaigns against the Kurds, the violation of Kurdish human rights in Turkey, the Russian campaign in Chechnya,<sup>22</sup> the targeting of Christians in southern Sudan, and Indonesia’s

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<sup>18</sup> To facilitate and justify the process of independence of former colonies, the 1966 International Covenant on Civil and Political Rights (“ICCPR”) enshrined the right to external self-determination, reinforcing the concept that emerged in the U.N. Charter. Thus, the ICCPR recognized the right of dependent territories to achieve independent statehood from foreign colonial rule and affirmed an obligation of member states to refrain from interfering with the independence of other nations. The ICCPR also enshrined a limited right to internal self-determination, providing the right of all the people to freely choose rulers and governments. International Covenant of Civil and Political Rights, Mar. 23, 1976, art. 1, para. 2, 999 U.N.T.S. 171.

In addition to treaty law, the right to self-determination is also widely considered to be part of customary international law. As evidence of *opinio juris*, a series of resolutions adopted by the U.N. General Assembly can be recalled. General Assembly Resolutions 1514 and 1541, as well as the Declaration on Friendly Relations adopted in 1970, all expressed the principle of self-determination by calling for the right of non-self governing territories to freely choose their international status and the manner in which their right to (external) self-determination should be implemented. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/Res/1514 (XV) (1960); G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/Res/1541 (XV) (1960); G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (XXV) (1970) [hereinafter “Declaration on Friendly Relations”]. Finally, the International Court of Justice has in limited circumstances recognized self-determination as a rule of customary international law, applicable to and binding on all states. *See, e.g.*, East Timor Case (Port. v. Austl.) 1995 I.C.J. 90, ¶ 29 (June 30).

<sup>19</sup> Although its interpretation has been long debated and contested, the principle of self-determination is mentioned in the U.N. Charter. U.N. CHARTER art. 1, art. 55, art. 73; *see also*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 111–13 (1994). Self-determination has been further codified in a number of international instruments. *See, e.g.*, International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, art. 1(1), U.N. Doc. A/RES/2200A (XXI) (1966) (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

<sup>20</sup> Declaration on Friendly Relations, *supra* note 18, at 121.

<sup>21</sup> Despite its wide recognition, the principle of self-determination does not necessarily guarantee independence to those substate entities seeking to secede from an internationally recognized state. The response of the international community to these entities’ demands has varied considerably. Indeed, the perceived legitimacy of self-determination claims bears a relationship to the degree of representative government in the state. *See* Frederic L. Kirgis, Jr., *The Degrees Of Self-Determination In The United Nations Era*, 88 AM. J. INT’L L. 304, 308 (1994).

<sup>22</sup> For an analysis of the conflict, see generally Lester W. Grau & Jacob W. Kipp, *Chechen*

brutal occupation of East Timor,<sup>23</sup> as well as its recent campaign in Aceh.<sup>24</sup> Despite the nonabsolute nature of sovereignty, the international community also frequently clings to the misconception of absolute sovereignty in the context of sovereignty-based conflicts—with dire consequences.<sup>25</sup>

The “self-determination first” approach is relied upon by the substate entity to support a claim for heightened autonomy or secession, and to justify the use of force to defend its people against the national army or police force. For instance, the mantra of self-determination has been used to justify the use of armed force, and frequently terrorism, by groups such as the Tamil Tigers, the Free Aceh Movement, the Moro Islamic Liberation Front, and the Jammu Kashmir Liberation Front in their efforts to achieve greater autonomy within or independence from the parent state.

Given the rather exclusive nature of the two primary approaches, their utility has been reduced to little more than legal and political shields behind which states and substate entities justify their actions. The approach of earned sovereignty is an attempt to bridge the impasse between the two approaches of “sovereignty first” and “self-determination first,” and to create an opportunity to resolve the conflicts and reduce the accompanying human rights violations and spread of terrorism.

## II. EARNED SOVEREIGNTY: AN EMERGING CONFLICT RESOLUTION APPROACH

Earned sovereignty is designed to create an opportunity for resolving sovereignty-based conflicts by providing for the managed devolution of sovereign authority and functions from a state to a substate entity.<sup>26</sup> In some instances, the substate entity may acquire sovereign authority and functions sufficient to enable it to seek international recognition, while in others the substate entity may only acquire authority to operate within a stable system of heightened autonomy.

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*Nationalism and the Tragedy of the Struggle for Independence*, 10 NAT’L STRATEGY F. REV. 1 (2000); Thomas de Waal, *Chechnya’s Endless War*, BBC NEWS EUROPE, Apr. 23, 2001, available at <http://news.bbc.co.uk/1/hi/world/europe/1292799.stm> (last visited Mar. 9, 2004).

<sup>23</sup> For a general background on the conflict, see HUMAN RIGHTS WATCH, INDONESIA/EAST TIMOR: DETERIORATING HUMAN RIGHTS IN EAST TIMOR (1995), *supra* note 8..

<sup>24</sup> See generally HUMAN RIGHTS WATCH, ACEH UNDER MARTIAL LAW: INSIDE THE SECRET WAR (2003), available at <http://www.hrw.org/reports/2003/indonesia1203/> (last visited Mar. 16, 2004). The report details human rights abuses and Indonesia’s largely successful attempt to control information by prohibiting human rights and humanitarian organizations from entering Aceh, and by preventing international news organizations from moving beyond the provincial capital, Banda Aceh.

<sup>25</sup> The most significant example of this “sovereignty first” response to a sovereignty-based conflict was the approach of the European Union and the United States toward the conflict in the former Yugoslavia. The extreme support for the sanctity of Yugoslavian territorial integrity worsened and prolonged the conflict. Only after Serbian forces embarked upon a campaign of genocide, killing over 250,000 Bosnians and displacing one million, did NATO resolve to use force in a once “internal” matter. In the Kosovo conflict only a few years later, NATO was forced to act without U.N. approval to prevent another attempted genocide by Serbian forces. See PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 63–87 (2002).

<sup>26</sup> The authority and functions may include the power to collect taxes, control the development of natural resources, conduct local policing operations, maintain a local army or defense force, enter into international treaties on certain matters, maintain representative offices abroad, and participate in some form in international bodies.

Earned sovereignty seeks to promote peaceful coexistence between a state and a substate entity by establishing an equitable and acceptable power sharing arrangement; it is not intended solely to promote self-determination claims. Earned sovereignty is a neutral approach that attempts to end conflicts by re-establishing security and promoting democracy and institution building in war-torn territories.

As a conflict resolution approach, earned sovereignty has developed as an inherently flexible process implemented over a variable time period. As noted in the introduction, this approach is defined by three core elements: shared sovereignty, institution building, and a determination of final status. The process may also encompass three optional elements: phased sovereignty, conditional sovereignty, and constrained sovereignty. These optional elements are employed to tailor the earned sovereignty approach to the unique circumstances of each conflict and to the particular needs of the parties.

#### *A. The Elements of Earned Sovereignty*

The first core element is shared sovereignty. Each case of earned sovereignty is characterized by an initial stage of shared sovereignty, whereby the state and substate entity may both exercise some sovereign authority and functions over a defined territory. Sometimes 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. In almost all instances, an international institution is responsible for monitoring the parties' exercise of their authority and functions.

The second core element is institution building. During the period of shared sovereignty, prior to the determination of final status, the substate entity, frequently with the assistance of the international community, undertakes to construct new institutions for self-government, or modify those already in existence. The substate entity also works with the international community to develop the institutional capacity for exercising increased sovereign authority.

The third core element is the eventual determination of the final status of the substate entity and its relationship to the parent state. In many instances the status will be determined by a referendum. In others, it may involve a negotiated settlement between the state and substate entity, often with international mediation. Invariably, the determination of final status for the substate entity is conditioned on 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 substate entity of increasing sovereign authority and functions over a specified period of time prior to the determination of final status. The accumulation of sovereign authority and functions may be correlated with the ability of the substate entity to assume these powers, as a reward for responsible state behavior, or a combination of both.

The second optional element is conditional sovereignty. Conditional sovereignty may be applied to the accumulation of increased sovereign authority by the substate entity, or it may be applied as a set of standards to be achieved prior to the determination of the substate entity's final status. These benchmarks vary depending on the characteristics of the conflict and generally include conditions, such as protecting human and minority rights, halting terrorism, developing democratic institutions, instituting the rule of law, and promoting regional stability. In most cases, the relationship between the attainment of certain benchmarks and the devolution of authority is not automatic—it is subject to evaluation by a monitoring authority that often involves international institutions. Such evaluation allows for a margin of discretion to determine when and how to successfully push forward the process of devolving authority.

The third optional element, constrained sovereignty, consists of applying limitations on the sovereign authority and functions of the new state. Constrained sovereignty is often required as a guarantee for the parent state and the international community. For instance, the new entity may be placed under a continued international administrative and/or military presence, or its sovereign authority may be limited with respect to the right of undertaking territorial association with other states.

The state and substate entities almost always adopt the elements of earned sovereignty by mutual agreement, but in some cases the international community may support or initiate one or more of the elements of earned sovereignty against the preferences of the state or substate entity, as in the case of Kosovo.

### B. *Earned Sovereignty in Recent International Practice*

Recent international practice demonstrates that states involved in sovereignty-based conflicts are increasingly adopting the earned sovereignty approach. The following section provides a brief overview of the peace processes that are attempting—more or less uniformly and without necessarily encompassing all the outlined elements—to implement earned sovereignty. Since the degree of actual implementation of earned sovereignty is not equal in all of these cases (in some cases earned sovereignty has only been proposed), the following enumeration begins with those cases where the degree of implementation achieved is greatest, and then proceeds progressively to those cases where earned sovereignty forms the basis for a proposed agreement.

**East Timor:** U.N. Security Council Resolution 1272 provided for the creation of the U.N. Administration of East Timor after conflict resumed<sup>27</sup> as a

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<sup>27</sup> Indonesia occupied East Timor for twenty-five years following the withdrawal of Portugal, subduing the population and fighting the insurrections of guerrillas fighting for East Timorese independence. Indonesia allowed a referendum in 1999, permitting a choice between independence and autonomy. Following a vote calling for independence, loyalists to Indonesia began killing rampages, prompting the intervention of an Australian-led international peacekeeping force (International Force East Timor, or Interfet) and leading to governance by a United Nations transitional administration until East Timor was granted independence in May 2002. See IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT AND INTERNATIONAL INTERVENTION 15 (2001); Tania Voon, *Closing the Gap Between Legitimacy and*

consequence of East Timor's rejection by referendum of Indonesia's proposal for autonomy within Indonesia.<sup>28</sup> The Resolution provided authority for a two and a half year period of shared sovereignty between the United Nations 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 was admitted to the United Nations.

**Serbia and Montenegro:** The Union Treaty between Serbia and Montenegro, brokered by the European Union, provides for the sharing and/or devolution of all sovereign authority and functions between the two member states of Serbia and Montenegro.<sup>29</sup> After three years of shared sovereignty, the final status of Serbia and Montenegro will be determined through a referendum on the dissolution of the union. The purpose of the three-year period of shared sovereignty is to permit the member states time to transform their economic and democratic systems into viable individual entities and to harmonize them with European standards.

**Northern Ireland:** The Good Friday Agreement,<sup>30</sup> designed to end the conflict in Northern Ireland, provides for the creation of Northern Irish institutions and the interim devolution of substantial power to those institutions, so long as certain conditions are fulfilled, including the decommissioning of weapons. The Good Friday Agreement also provides the people of Northern Ireland with the right to decide the issue of unification with the Irish Republic through a referendum to be held in seven years.

**Bougainville and Papua New Guinea:** The Comprehensive Agreement for Bougainville ("Bougainville Agreement"), signed at Arawa in August 2001, establishes an autonomous interim arrangement for Bougainville during which the two entities will share sovereign authority and certain sovereign functions. The agreement provides that Bougainville will assume increasing control over a wide range of powers, functions, personnel, and resources based

*Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31 (2002).

<sup>28</sup> S.C. Res. 1272, U.N. Doc. S/RES/1272 (1999); East Timor Popular Consultation, May 5, 1999, Indon.-Port., U.N. SCOR, 53rd Sess., U.N. Doc. S/1999/513, Annex III (1999). *available at* [http://www.un.org/peace/etimor99/agreement/agreeFrame\\_Eng04.html](http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng04.html) (last visited Mar. 16, 2004); Agreement Regarding the Modalities for the Popular Consultation of the East Timorese Through Direct Ballot, May 5, 1999, Indon.-Port., U.N. SCOR, 53rd Sess., Annex II, at 24, U.N. Doc. S/1999/513 (1999) *available at* [http://www.un.org/peace/etimor99/agreement/agreeFrame\\_Eng03.html](http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng03.html) (last visited Mar. 16, 2004).

<sup>29</sup> The Socialist Republic of Yugoslavia broke apart during the 1990s. PEACE AND CONFLICT 2003, *supra* note 1, at 57–58. The secession of Slovenia, Macedonia, Croatia, and Bosnia-Herzegovina left Serbia and Montenegro as the only remaining areas to comprise the Federal Republic of Yugoslavia after 1992. SERB. & MONT. CONST. (Constitutional Charter of State Union, signed Feb. 4 2003), *available at* [http://www.mfa.gov.yu/Facts/const\\_scg](http://www.mfa.gov.yu/Facts/const_scg) (last visited Feb. 17, 2004).

<sup>30</sup> Northern Ireland Peace Agreement, Apr. 10, 1998, Ir.-U.K., *available at* <http://www.taoiseach.gov.ie/upload/publications/223.pdf> (last visited Mar. 9, 2004) [hereinafter Good Friday Agreement]. Mainly Protestant unionists desired to remain a part of the United Kingdom, while mostly Catholic communities wanted to join the Republic of Ireland. The conflict started as a civil rights movement for Catholics and developed into a violent campaign involving paramilitaries such as the Irish Republican Army (IRA), government police, and the army. Attempts at reconciliation and power sharing were undermined until the 1998 Good Friday Agreement provided for more autonomy in exchange for concessions from the separatist republicans. For a general history of the conflict, see DAVID MCKITTRICK & DAVID MCVEA, MAKING SENSE OF THE TROUBLES: THE STORY OF THE CONFLICT IN NORTHERN IRELAND (2002).

on guarantees contained in the national constitution and reflected in a new Bougainville constitution.<sup>31</sup> The assumption of sovereign authority and functions is conditioned, however, on the progressive implementation of a weapons disposal plan and on the achievement of good governance standards. Within a period of ten to fifteen years, and after the completion of the weapons disposal plan, Bougainville may undertake to secede from Papua New Guinea via referendum.<sup>32</sup>

**Bosnia:** The Dayton Accords, which brought an end to the Bosnian conflict, provide that many of the sovereign authorities and functions of the independent state of Bosnia are to be managed by an internationally appointed High Representative for an indeterminate period.<sup>33</sup> The Accords also provide for the deployment of international military forces to maintain internal security.<sup>34</sup> While conditional sovereignty is not explicit, the pattern of practice in Bosnia indicates that the international civilian authority will be discontinued only upon a showing that Bosnia can adequately function as an ethnically integrated state.

**Kosovo:** U.N. Security Council Resolution 1244 (“Resolution 1244”), with reference to the Rambouillet Agreement, provided for the interim United Nations administration of Kosovo with security provided by a NATO-led force.<sup>35</sup> During this interim period, the United Nations exercises near absolute executive and legislative authority within Kosovo, seeking to build institutions that will allow for autonomous governance for Kosovo. As these institutions become more capable of exercising their own authority, the United Nations is to devolve certain sovereign authorities and functions to the Kosovar

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<sup>31</sup> Bougainville Peace Agreement, Aug. 30, 2001, Papua N.G.-Bougainville, *available at* [http://www.usip.org/library/pa/bougainville/bougain\\_20010830.html](http://www.usip.org/library/pa/bougainville/bougain_20010830.html) (last visited Mar. 9, 2004) [hereinafter Bougainville Agreement].

The 1998 Lincoln Agreement brought an end to a nine-year battle between Bougainville rebel forces and the government of Papua New Guinea. The conflict first started as a dispute over the Pangua copper mine, but evolved into a fight for independence. Approximately twenty thousand people were killed and thousands more displaced during the conflict. Following the ceasefire, an agreement was signed in 2001 to establish an autonomous interim arrangement for the island. *Id.* at Introduction and Outline, para. 1.

<sup>32</sup> *Id.* sec. C, paras. 309–312.

<sup>33</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 (1996), *available at* <http://www.state.gov/www/regions/eur/bosnia/bosagree.html> (last visited Mar. 16, 2004) [hereinafter Dayton Agreement]. The Bosnian war waged between 1992 and 1995 cost approximately 250,000 lives. The conflict was fought between Bosnians who called for an independent Bosnia with the retention of initial boundaries, Croats who desired to join the independent Croat state, and Serbs who wished to remain a part of Serb-controlled Yugoslavia following the break-up of the state. The Dayton Agreement brought an end to the conflict which was plagued by numerous human rights abuses, separating the country into two distinct entities: a Croat/Bosniak area and the Serb-controlled Republika Srpska.

<sup>34</sup> *Id.* at Annex 1.

<sup>35</sup> Rambouillet Agreement: Interim Agreement for Peace and Self-Government in Kosovo, ch. 2, art. I, para. 2, *available at* [http://www.state.gov/www/regions/eur/ksvo\\_rambouillet\\_text.html](http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html) (last visited Mar. 9, 2004) [hereinafter Rambouillet Agreement]. Violence erupted in 1998 in the Serbian region of Kosovo as the Kosovo Liberation Army (“KLA”), supported by the majority ethnic Albanians, rebelled against Serbian rule. Kosovo had been an autonomous region until this status was revoked in 1990 amid a wave of Serbian nationalism. Yugoslavian President Milosevic’s harsh response to the KLA and the general population prompted NATO air strikes against Yugoslavia in 1999. WILLIAMS & SCHARF, *supra* note 25, at 203–04. The United Nations now administers the region following the Rambouillet Agreement and UNSC Resolution 1244, which kept Kosovo a part of Yugoslavia, but provided for U.N. administration. *See* S.C. Res. 1244, U.N. Doc. S/RES/1244 (1999).

government. The full devolution of authority and the determination of final status will depend on Kosovo's compliance with standards of democracy and good governance.

**Sudan:** The Machakos Protocol provided for the cessation of hostilities between the Muslim forces of northern Sudan and southern Sudanese Christian forces. The Protocol also provides an opportunity for the South to determine its political status, as an independent entity or as part of the Sudan, via referendum after six years.<sup>36</sup> Following the agreement on basic principles, the parties agreed on a Memorandum of Understanding concerning numerous aspects of the structures of government, including aspects of power sharing, the judiciary, and human rights.<sup>37</sup> Additionally, in September 2003, the government of Sudan and the Sudan People's Liberation Army signed a framework agreement on security arrangements to facilitate humanitarian relief operations.<sup>38</sup>

**Israel/Palestine:** The Roadmap for Middle East Peace ("Roadmap") was developed by the United States, the European Union, the United Nations, and Russia ("the Quartet"). It involves a three-phase plan designed to resolve the conflict in the Middle East by providing for the security of Israel and by creating a process for the establishment of an independent democratic Palestine.<sup>39</sup> To accomplish these objectives, the Roadmap provides for the creation of Palestinian institutions of self-government, followed by the international recognition of an independent Palestine with provisional borders. In addition, there will be a subsequent agreement upon final borders and issues

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<sup>36</sup> The Machakos Protocol was signed on July 20, 2002 between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army. Machakos Protocol, Jul. 20, 2002, at pt. B, para. 2.5, *available at* [http://www.usip.org/library/pa/sudan/sudan\\_machakos07202002\\_toc.html](http://www.usip.org/library/pa/sudan/sudan_machakos07202002_toc.html) (last visited Mar. 9, 2004). Civil war has been waged between the mainly Muslim North and Animist and Christian South in Sudan since its 1956 independence except for an eleven-year period of peace. The war has at times included Sudan's neighbors, including Uganda, Libya, and Egypt, while the war has greatly reduced living standards throughout the country. The Machakos Protocol provided an end to hostilities and laid the groundwork for further reconciliation. For further reference on the Sudanese conflict, see generally INTEGRATED REGIONAL INFORMATION NETWORKS (IRIN), U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, *SUDAN: PEACE TALKS, HUMANITARIAN ACTION* (2002), at <http://www.irinnews.org/webspecials/sudan/default.asp> (last visited Mar. 9, 2004).

<sup>37</sup> See Memorandum of Understanding between Sudan and the SPLM/A on Aspects of Structures of Government, November 18, 2002, *available at* <http://www.reliefweb.int/w/rwb.nsf/vID/BEC9263F8C34B20AC1256C7D004FB4A2?OpenDocument> (last visited May 13, 2004).

<sup>38</sup> See Agreement on Security Arrangements During the Interim Period, Sep. 25, 2003, *available at* [http://www.usip.org/library/pa/sudan/sudan\\_security\\_09252003.html](http://www.usip.org/library/pa/sudan/sudan_security_09252003.html) (last visited Mar. 29, 2004).

<sup>39</sup> James Bennett, *U.S. and Partners Present Proposal for Mideast Peace*, N.Y. TIMES, May 1, 2003, at A1; *Proposal for "Final and Comprehensive Settlement to Middle East Conflict"*, N.Y. TIMES, May 1, 2003, at A7.

A 1947 U.N. plan for distinct states in the former British Palestine Protectorate for both Israeli Jews and Palestinian Arabs fell apart and resulted in Israeli control of 77% of the territory. See Kathleen A. Cavanaugh, *Selective Justice: The Case of Israel and the Occupied Territories*, 26 *FORDHAM INT'L L. J.* 934, 937-38 (2003). Confrontation and violence between the parties for control of the entire area has been common since, and the 1967 war in which Israel seized the remaining Arab areas of Palestine is of particular importance. Since then, numerous outbreaks of violence have occurred, and several attempts at peace have proven unsuccessful. The Oslo agreement initiated steps towards greater Arab autonomy in the West Bank and Gaza Strip. The Arabs, led by the Palestinian Liberation Organization, have largely abandoned their claim to the entire region, requesting instead statehood in the occupied areas. See Nahda Y. Sh'hada, *Gender and Politics in Palestine: Discourse Analysis of the Palestinian Authority & Islamists*, 11 *U. Miami Int'l & Comp. L. Rev.* 3, 7 (2003).

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 an end to violence and terrorism. As a result of recent violence, the status of the Roadmap is uncertain.

**Western Sahara:** The U.N.-sponsored Baker Peace Plan for the resolution of the Western Sahara conflict provides for the creation of self-governing institutions under the auspices and with the assistance of the United Nations.<sup>40</sup> The Baker Peace Plan calls for the devolution of numerous sovereign powers and functions to the Western Sahara Authority, with a determination of the final status by a referendum to be held within five years. As of the date of publication, the Polisario Front has agreed to the plan, and it is awaiting the approval of the Moroccan government.

### III. EARNED SOVEREIGNTY: DEFINING THE ELEMENTS THROUGH RECENT STATE PRACTICE

#### A. *Shared Sovereignty*

During the initial stage of shared sovereignty, a provisional framework may be created within which states, substate entities, and international organizations share sovereign authority and functions. If managed constructively, shared sovereignty affords a cooling-off period during which central authorities and aggrieved people can each continue to pledge fidelity to their own, mutually incompatible final aims, while initially suspending violence. The framework for shared sovereignty may vary according to the duration of the sharing period, the substantive division of authority, the parties involved, and the goals to be addressed.

While Serbia and Montenegro, Northern Ireland, Bougainville, and the Western Sahara share sovereignty with a central authority, in the cases of Kosovo and East Timor, the substate entity shares sovereign authority and functions with international organizations during an interim period prior to a determination of final status. The international community may exercise certain sovereign authority and functions because the state has been precluded from exercising those functions and the substate entity is not yet capable of doing so.<sup>41</sup>

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<sup>40</sup> *Report of the Secretary General on the Situation Concerning Western Sahara*, Annex II, at 14–18, U.N. Doc. S/2003/565 (May 23, 2003), available at <http://www.un.org/Depts/dpko/missions/minurso/reports.html> (last visited Mar. 9, 2004) [hereinafter Baker Plan]. Despite an International Court of Justice ruling in 1973 that said self-determination in the area was of paramount importance and a U.N. Commission which reported the vast majority of Sahrawis in the area supported independence, Spain split their territory between Morocco and Mauritania in 1975. Since 1976, exiled Sahrawis known as the Polisario Front have fought with Morocco for self-determination rights. Mauritania renounced its claim in 1978 after defeat by the Polisario. A ceasefire was signed in 1991, and a U.N. monitoring force has remained to administer the territory. Kofi Annan sent James Baker as special envoy to the region to offer a new U.N.-brokered peace plan to bring about this referendum. See generally Yahia H. Zoubir, *The West Saharan Conflict: A Case Study in Failure of Prenegotiation and Prolongation of Conflict*, 26 CAL. W. INT'L L.J. 173 (1996).

<sup>41</sup> In the case of Kosovo, U.N. Resolution 1244 provided for the creation of the United Nations Mission in Kosovo (“UNMIK”), which initially assumed responsibility for nearly all of Kosovo’s

Frequently, shared sovereignty may provide the substate entity with substantial elements of self-government, so as to considerably lessen the interest in outright independence and eliminate the causes of conflict through some form of perpetual autonomy. This possibility seems to be the assumption of Papua New Guinea and that of international mediators as reflected in the Bougainville Agreement, which provides for a ten to fifteen-year period before a referendum on independence.<sup>42</sup>

The period of shared sovereignty may also be designed merely as a way-station to independence, with the substate entity exercising nearly all the power and authority of an independent state<sup>43</sup> and equally sharing any remaining authority.<sup>44</sup> In the case of the Union Treaty of Serbia and Montenegro, the Union exercises almost no original authority and merely serves as a conduit between the member states and the international community, in particular the European Union and the international financial institutions.<sup>45</sup>

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sovereign authority and functions, leaving only a few functions 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 a president. The U.N. 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"). *Constitutional Framework for Provisional Self Government*, U.N. Mission in Kosovo, May 15, 2001, U.N. Doc. UNMIK/REG/2001/9 (2001), available at <http://www.unmikonline.org/constframework.htm> (last visited Jan. 10, 2004) [hereinafter *Constitutional Framework*]; S.C. Res. 1244, *supra* note 35.

<sup>42</sup> The Bougainville Agreement provides a very high degree of autonomy for Bougainville through a complex set of power sharing and institutional arrangements that are constitutionally guaranteed. The constitutional provisions establishing Bougainville's autonomy are protected from unilateral changes by the Papua New Guinea Parliament since they can only be amended with the consent of Bougainville. Bougainville's local government operates under a homegrown Bougainville Constitution. Bougainville has the right to gradually acquire most powers and functions currently within the competence of the Papua New Guinea Government, such as creating its own revenue through taxes and establishing separate Bougainville courts, public service, and police. For a full list of competencies related to devolution and autonomy, see Bougainville Agreement, *supra* note 31, sec. B, arts. 1-15. See *id.* sec. B, art. 3, paras. 10-27 for specifics relating to the Bougainville Constitution.

<sup>43</sup> The new constitution for the Union of Serbia and Montenegro creates an elaborate structure of shared sovereignty between the member states of Montenegro and Serbia. 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 a 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. See SERB. & MONT. CONST., *supra* note 29, art. 56. The Supreme Court, which comprises 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. *Id.* art. 49.

<sup>44</sup> While the Union government does exercise some exclusive authority and function, they are limited to matters such as immigration, selection of flag and anthem, and working with the European Union 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. *Id.* arts. 35, 42.

<sup>45</sup> *Id.*

However, the period of shared sovereignty is sometimes also intended to build confidence and promote institutional reconciliation between the parties. For instance, in Northern Ireland shared sovereignty has been considered necessary for the state and substate entity to establish a viable relationship that will survive the eventual independence or territorial re-association of the substate entity.<sup>46</sup> The period of shared sovereignty in some cases may also be used to normalize the unstable environment resulting from an armed conflict, and to assist the substate entity in establishing the necessary institutions for self-government.<sup>47</sup>

In other cases the power is more divided than shared. For instance in the case of the 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 will retain authority over the most basic sovereign functions, such as foreign relations.<sup>48</sup>

The time frame of shared sovereignty also differs in distinct circumstances. In nearly all cases, the peace agreements or constitutions provide a specified time period for shared sovereignty. The range extends from two years in East Timor and three years for the Union of Serbia and Montenegro, to ten to fifteen years for Papua New Guinea and Bougainville.<sup>49</sup>

As a component of the earned sovereignty approach, shared sovereignty is quite flexible, and is tailored to support the implementation of related components. Thus, in some instances, the time frame is set at a specified period of time, such as three years in Montenegro, while in other cases, such as Kosovo, the time frame may be indefinite and subject to the fulfillment of

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<sup>46</sup> 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 to relinquish its constitutional claim to the Northern Province. The Northern Ireland Assembly ("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 those pertaining to areas such as security, justice, prisons, and policing, which remain with the central government in the interim. Good Friday Agreement, *supra* note 30, sec. 2.

<sup>47</sup> After the East Timorese rejected via referendum a proposal which would have provided for autonomy within Indonesia, they came under supervision of the United Nations. In light of the violent response by Indonesian military forces and paramilitary groups in East Timor, Indonesia was forced to recognize East Timor's right to be independent. The United Nations 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, U.N. 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 ("NCC") was chaired by the U.N. Transitional Administrator and comprised of three U.N. officials and over a dozen East Timorese appointed by the U.N. administrator. The National Consultative Council and Joint Sectoral Committees were established on December 2, 1999 by the U.N. Transitional Administration in East Timor ("UNTAET") and enacted by U.N. transitional administrator Sergio Vieira de Mello. UNTAET, Reg. No. 1999/2, at sec. 1, 5 (1999), available at <http://www.un.org/peace/etimor/untaetR/etreg2.htm> (last visited Mar. 9, 2004).

<sup>48</sup> Baker Plan, *supra* note 40, sec. 3, para. 8b.

<sup>49</sup> Other timeframes include four to five years for Western Sahara, six years for the Sudan, the possibility of seven years in Northern Ireland, and a flexible three phase approach for Israel, with a target of three years.

certain conditions, as opposed to specified timelines. Shared sovereignty also lends itself to the establishment of markers and milestones that the emerging entity must meet in order to move beyond the transition phase to final status. This is an optional element called conditional sovereignty, which is discussed below.

### *B. Institution Building*

Because functioning democratic institutions are considered the most effective guarantee to prevent renewed conflict in the long term, promoting the development of democratic institutions has become an essential element of modern peace building. In the short term, institution building is intended to create the capacity for the assumption of sovereign authority and the functions necessary for the establishment of an autonomous entity, or a future independent state. This process usually begins during the initial period of shared sovereignty, and may be addressed by a range of domestic and international actors.

The increasing role of the international community in erecting domestic institutions in substate entities is reflective of the international community's willingness to undertake global conflict management. As such, the international community is no longer involved in the peace process as only a diplomatic actor,<sup>50</sup> but rather, as a substantive participant, endorsing a variety of tasks. These tasks include disarmament and demobilization, capacity building, promotion and monitoring of elections, human rights monitoring and transitional justice, refugee return, and the related settlement of land disputes.

In limited cases, such as East Timor and Kosovo, the international community is called upon to create the foundation for nearly all political and security institutions to allow the substate entity to effectively operate as an independent state.<sup>51</sup> This may even entail creating and appointing cabinet-level posts, which may then be transformed into an interim governing council.<sup>52</sup> In other cases, such as the Israeli-Palestinian Roadmap and the

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<sup>50</sup> See generally GIOVANNI CELLAMMARE, *LE OPERAZIONI DI PEACE-KEEPING MULTIFUNZIONALI* (1999).

<sup>51</sup> In East Timor, the Security Council authorized the United Nations to construct all the necessary institutions to transition East Timor from a period of shared sovereignty with the United Nations to one of independence. To implement the transition to self-governance, the Secretary General appointed a Transitional Administrator for East Timor (the "Administrator") who also served as the Special Representative to the Secretary General for East Timor. Although the Administrator retained ultimate authority over the territory, he quickly moved to establish the National Consultative Council ("NCC") comprised of fifteen individuals as a way to bring the East Timorese into the decisionmaking 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 macroeconomics. UNTAET, Reg. No. 1999/2, *supra* note 47, sec. 5.

<sup>52</sup> 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 thirty-three 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. United Nations, Office of the Secretary General, Report of the Secretary-General on the United Nations Transitional Administration in East Timor, U.N. Doc. S/2001/42 (2001), *available at* <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/213/11/IMG/N0121311.pdf?OpenElement>.

Baker Peace Plan for Western Sahara, specific members of the international community are called upon in a more limited capacity to create and monitor a limited number of key institutions necessary for democratic development<sup>53</sup> and the provision of security.<sup>54</sup>

In rare instances, the focus is on the creation of institutions that can assume the transfer of administrative functions from the parent state, a process from which the international community may be excluded. For example, in the case of Northern Ireland, while there was no need to provide for the creation of new administrative institutions, there was a need to create political institutions, and to reform many of the key existing administrative institutions. The Good Friday Agreement thus provided for the creation of the Northern Ireland Assembly, which would be able to absorb the sovereign functions and authority to be devolved from the United Kingdom.<sup>55</sup> The Agreement also provided for the creation of two consultative mechanisms, a North/South Ministerial Council<sup>56</sup> and a British-Irish Council, intended to facilitate political stability during the period of shared sovereignty and the transfer of sovereign functions and authority to Northern Ireland.<sup>57</sup>

Finally, the substate entity may also begin to create institutions of self-government prior to the period of agreed shared sovereignty. For example, the Montenegrin government, with support from the United States and the European Union both prior to and after the signing of the Union Treaty,

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<sup>53</sup> The Baker Peace Plan for the Western Sahara allows for the United Nations to assist with the creation of a Western Sahara government that includes a Chief Executive, a Legislative Assembly, and a Supreme Court. Elections for the Assembly and the Chief Executive are to be held by the United Nations within one year of the adoption of the Baker Plan. Baker Plan, *supra* note 40, sec. 3, para. 15, sec. 4, para. 21.

<sup>54</sup> The Israeli-Palestinian Roadmap provides that the United States, the United Nations, the European Union, and Russia 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 decisionmaking capacity, the adoption of a Palestinian constitution, and the creation of an electoral commission. *A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, Apr. 30, 2003, available at <http://www.un.org/News/dh/mideast/roadmap122002.pdf> (last visited Mar. 9, 2004) [hereinafter *Roadmap*]. See also U.S. President George W. Bush, Address at the Rose Garden (June 24, 2002), available at <http://www.whitehouse.gov/news/releases/2002/06/20020624-3.html> (last visited Mar. 22, 2004) (announcing an intent to work towards development of this roadmap).

<sup>55</sup> 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 Good Friday Agreement requires that “key decisions” taken by the Assembly receive cross-community support by a “weighted majority” or “parallel consent.” Good Friday Agreement, *supra* note 30, sec. 3, para. 5d.

<sup>56</sup> The North/South Ministerial Council consists of members with executive authority in Northern Ireland and the Irish Republic. The Good Friday Agreement required the Council 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 European Union programs, language, and aquaculture and marine matters. The six other areas of cooperation will include transport, agriculture, education, health, environment, and tourism. *Id.* sec. 4 (Strand 2), para. 8 (referencing the Annex for a list of these areas).

<sup>57</sup> 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 Good Friday Agreement provides that those powers remain with the Secretary of State, but indicates that 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. *Id.* sec. 5 (Strand 3), para. 2.

established a Foreign Ministry with unofficial diplomatic offices abroad, a Ministry of Finance, and a Central Bank.<sup>58</sup>

### C. *Determination of Final Status*

At some point during the conflict resolution process it will be necessary to determine the final status of the substate entity. The options for final status range from substantial autonomy to full independence. This decision is generally made through either some sort of referendum or in structured negotiations, but invariably involves the political consent of the international community in the form of international recognition or support.

With certain exceptions,<sup>59</sup> the date for a referendum will be set to occur after a period of shared sovereignty and institution building. The agreement for the creation of a Union of Serbia and Montenegro, for example, provides that, after three years, the republic may separate from the Union and become independent via a referendum.<sup>60</sup> The Baker Peace Plan 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.<sup>61</sup> The Machakos Protocol provides for an internationally monitored referendum after six years by which the people of Southern 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.<sup>62</sup> The Bougainville Agreement provides for a referendum on the separation of Bougainville from Papua New Guinea after ten and before fifteen years from the adoption of the agreement.<sup>63</sup>

The Good Friday Agreement takes a more nuanced approach. The Agreement provides that the British Secretary of State will call for a referendum on independence in seven year intervals 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.<sup>64</sup>

The nature of final status may also be determined through a negotiated settlement between the state and substate entity, often with international mediation. When final status is to be determined by a negotiated settlement, it 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

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<sup>58</sup> 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.

<sup>59</sup> Sometimes the final status is determined during the initial stages of the process, as in the case of East Timor, where the rejection by referendum of the proposal for autonomy within Indonesia initiated the process of earned sovereignty.

<sup>60</sup> SERB. & MONT. CONST. art. 60.

<sup>61</sup> Baker Plan, *supra* note 40, sec. 2, para. 2.

<sup>62</sup> Machakos Protocol, *supra* note 36, pt. B, para. 2.5.

<sup>63</sup> In the case of the Bougainville Agreement, the outcome of the referendum must, however, be ratified by the parliament. Bougainville Agreement, *supra* note 31, sec. C, para. 312(a).

<sup>64</sup> If the resulting vote favors unification with Ireland, the Secretary of State is obligated to take such measures as are necessary for the British Parliament to give effect to the referendum’s result. Good Friday Agreement, *supra* note 30, sec. 2, annex, nos. 1, 2.

conference, which would consider the will of the people for independence.<sup>65</sup>

As with the other elements of the earned sovereignty approach, the determination of final status must be tailored to the particular nuances of the situation on the ground. Thus, in another example, the Israeli-Palestinian Roadmap provides that the final status of Palestine be determined in 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 consensus on permanent borders, refugees, settlements, and the status of Jerusalem.<sup>66</sup>

#### *D. Phased Sovereignty*

Depending upon the nature and characteristics of the conflict, it may not always be possible to achieve even preliminary power sharing arrangements. Thus, 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 substate entity during the period of shared sovereignty. Phased sovereignty can be useful to promote a smooth transition in those contexts where the adversarial claims of the parties do not allow for immediate devolution of powers. 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 benchmarks, 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 United Nations endorsed a Provisional Constitutional Framework for Kosovo, which provided that both the U.N. Mission in Kosovo (“UNMIK”) and Kosovar entities would exercise most of the functions typically associated with an independent state, including foreign relations.<sup>67</sup> Since then, UNMIK has gradually transferred nearly all the local powers to Kosovar municipal authorities, and has begun a slow but steady process of transferring power to Kosovo’s central government institutions. The degree of transfer is determined by an informal mix of institutional capacity on the part of Kosovo, and the coordination of the timing of devolution with progress being made towards resolving the final status of Kosovo.<sup>68</sup>

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<sup>65</sup> Rambouillet Agreement, *supra* note 35, ch. 8, art. 1, para. 3.

<sup>66</sup> Roadmap, *supra* note 54, secs. 5–6.

<sup>67</sup> *Constitutional Framework*, *supra* note 41, ch. 1, art. 1. Initially nearly all the authority and functions were designated “reserved competencies” that remained with UNMIK. *Id.*

<sup>68</sup> With respect to the latter factor, UNMIK is concerned that rapidly transferring powers to Kosovo might prejudice the outcome of the final status talks since a complete assumption of these powers would render Kosovo a de facto independent entity.

Other agreements that include an element of phased sovereignty are the Good Friday Agreement, the Israeli-Palestinian Roadmap, and the Bougainville Agreement. In the Good Friday Agreement, the United Kingdom is able to manage the rate of devolution, and even reverse the devolution by suspending parliament, if the Irish Republican Army fails to comply with its obligations to demobilize and decommission its weapons.<sup>69</sup> 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.<sup>70</sup> The Bougainville Agreement also provides that the Bougainville Government will assume increased control over a wide range of powers, functions, personnel, and resources during the interim period prior to the determination of final status.<sup>71</sup>

It is worth noting that not all instances of earned sovereignty require the element of phased sovereignty. For example, 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.

#### *E. Conditional Sovereignty*

To promote effective implementation of power sharing through functioning democratic institutions, the transfer of sovereign authority to the substate entity, or the determination of final status, may be conditioned upon the fulfillment of certain benchmarks. Some peace agreements condition the development of the process of earning sovereignty on the achievement of a satisfactory level of good governance and legal guarantees. This includes protection of human and minority rights, disarmament and demobilization, development of democratic institutions, institution of the rule of law, and promotion of regional stability.

The element of conditional sovereignty originated in the European approach of earned recognition of the successor states of the former Soviet Union and the 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.<sup>72</sup> 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 submit an application to the Yugoslav Peace Conference being conducted by the United Nations and European Union at that time. The co-chairs of the Peace Conference would then seek a determination from the

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<sup>69</sup> Good Friday Agreement, *supra* note 30, sec. 7.

<sup>70</sup> Roadmap, *supra* note 54, at 34.

<sup>71</sup> Bougainville Agreement, *supra* note 31, sec. 7.

<sup>72</sup> Danilo Türk, *Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,"* 4 EUR. J. INT'L L. 72, 72 (1993).

Arbitration Commission as to whether the applicant states fulfilled the criteria for recognition.<sup>73</sup>

Within the approach of earned sovereignty, the conditions will necessarily vary depending on the context of the conflict, and will particularly aim to eradicate what is identified as the major obstacle to peace. For example, the Roadmap for Peace in the Middle East is conditioned on the cessation of terrorism.<sup>74</sup> In the case of Northern Ireland, the continued devolution of authority was conditioned on the decommissioning of paramilitary forces and the surrender of weapons.<sup>75</sup> In Kosovo, the United Nations adopted an approach of “standards before status,” which provided that before Kosovo could undertake final status negotiations to secure independence, it must meet a number of standards or benchmarks,<sup>76</sup> with an emphasis on the protection of human rights and the return of refugees. 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.<sup>77</sup> However, not all phased agreements contain the element of conditional sovereignty. For instance, the Baker Peace Plan for Western Sahara and the Machakos Protocol in the Sudan set specific dates for the devolution of sovereign authority and functions, as well as the determination of final status without conditions.<sup>78</sup>

Some authors have regarded conditional sovereignty coupled with shared sovereignty, as in the case of Kosovo, as a new model of international

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<sup>73</sup> *Id.*

<sup>74</sup> See *Roadmap*, *supra* note 54, secs. 2–3. Additionally, 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. *Id.* sec. 5. 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. See President George W. Bush, Speech at Whitehall Palace, London (Nov. 19, 2003), available at <http://www.whitehouse.gov/news/releases/2003/11/20031119-1.html> (last visited Feb. 24, 2004).

<sup>75</sup> See Good Friday Agreement, *supra* note 30, sec. 7.

<sup>76</sup> 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. U.N. MISSION IN KOSOVO, STANDARDS BEFORE STATUS (May 2002), available at [http://www.unmikonline.org/pub/focuskos/apr02/benchmarks\\_eng.pdf](http://www.unmikonline.org/pub/focuskos/apr02/benchmarks_eng.pdf) (last visited Mar. 11, 2004) [hereinafter STANDARDS BEFORE STATUS]; 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> (last visited Mar. 9, 2004) [hereinafter Highlights]. 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 communities can circulate freely throughout Kosovo, including city centers, and use their own 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 of obstruction and violence by holders of public office. *Id.*

<sup>77</sup> See Bougainville Agreement, *supra* note 31, sec. C, para. 312b.

<sup>78</sup> Baker Plan, *supra* note 40, sec. 3; Machakos Protocol, *supra* note 36, pt. B, para. 2.2.

trusteeship,<sup>79</sup> since its most important characteristic is the establishment of an interim international administration with political authority attributed to a representative of the international community.<sup>80</sup> Apart from the legal classification, the most relevant aspect of the global conflict management trend is that it may indicate the emergence of a binding new set of values perceived as essential by states.<sup>81</sup> The values shaping and inspiring the contemporary commitments of the international community include ending ethnic violence, stopping human rights atrocities, promoting democracy, and encouraging the rule of law. Recent post-conflict operations—like those in East Timor and Kosovo—could be seen as a practical reflection of the endorsement by the international community of such values. From a functional perspective, such operations represent the effort of the international community to fulfill what is perceived as a collective obligation to pursue peace and stability throughout the world, even at the cost of overriding the traditional interpretation of sovereignty.

#### F. *Constrained Sovereignty*

Because the emergence of new states may be destabilizing to the immediate region, the sovereignty of the new state may sometimes be constrained by the international community. The potential for destabilization may arise either from the fact that because the state, even after a lengthy period of institution building, remains incapable of exercising effective authority, or because the new state's existence in and of itself creates a destabilizing political dynamic.

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

In some cases, such as Bosnia-Herzegovina, an independent state may be forced to share sovereign authority and functions with an international organization. The 1995 Dayton Peace Accords, which ended the Bosnian conflict with Serbia, in effect established a regime whereby the independent state of Bosnia was put in a de facto trustee relationship with the international community. The Bosnian government shared functions with an international High Representative from a western European country and with a NATO-led force to ensure security.<sup>82</sup> In this case, the international community

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<sup>79</sup> See generally RICHARD CAPLAN, *A NEW TRUSTEESHIP? THE INTERNATIONAL ADMINISTRATION OF WAR-TORN TERRITORIES* (2002) (analyzing the emergence of neo-trusteeships in post-conflict settings).

<sup>80</sup> Both in the case of Kosovo and East Timor, the transitional administration was headed by the Special Representative of the Secretary General of the U.N., endowed with a wide executive and legislative power over the concerned territories.

<sup>81</sup> Paolo Picone, *Interventi delle Nazioni Unite e Obblighi Erga Omnes*, in *INTERVENTI DELLE NAZIONI UNITE E OBBLIGHI ERGA OMNES* 517 (Paolo Picone ed., 1995) (arguing that recent practice in global conflict management has provided the foundation for the emergence of a new customary norm of international law).

<sup>82</sup> 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

determined that constrained sovereignty was necessary to ensure the territorial integrity of Bosnia. Without an international presence, the Republica Srpska would have sought to secede.

East Timor also remains under a soft form of constrained sovereignty, as the international community—in the form of the United Nations Mission of Support for East Timor (UNMISET), a U.N. follow-up mission—provides continued assistance in the areas of civilian administration, law and order (police and development of a law enforcement agency), and military security (maintaining internal and external security).<sup>83</sup>

### G. *A 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. Although not a substantive component of the earned sovereignty approach, the establishment of credible monitoring mechanisms can often be a critical procedural element in safeguarding the legitimacy and effectiveness of the approach.

In the case of Bougainville, the parties created an intergovernmental supervisory body charged with overseeing the implementation of the agreement and establishing the new Autonomous Bougainville Government.<sup>84</sup> The Machakos Protocol for the Sudan provides for the creation of an Assessment and Evaluation Commission to monitor the implementation of the peace agreement and conduct a mid-term evaluation of the unity arrangements established under the peace agreement.<sup>85</sup> The Baker Peace Plan for Western Sahara provides for U.N. monitoring and for the right of the Secretary-General to issue binding interpretations regarding any disputes that may arise with respect to the implementation of the Plan.<sup>86</sup> In the case of Northern Ireland, the parties have created a specialized Northern Ireland Human Rights

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1995, with the power to veto and promulgate legislation and remove officials at any level of government from municipal to provincial to state. A U.N. office oversees police and refugee matters, and for the first several years after the agreement was signed, elections were handled by the OSCE. See Dayton Agreement, *supra* note 33, Annex 1A, art. I. For an analysis of recent experience in international administration of post-conflict areas, see generally CAPLAN, *supra* note 79.

<sup>83</sup> Press Release, United Nations, 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 Mar. 15, 2004). 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 United Nations and donor countries as it continues to progress toward ever-increasing levels of sovereignty. *Id.*

<sup>84</sup> The same body was also granted competency to resolve disputes between the new Bougainville government and Papua New Guinea. Bougainville Agreement, *supra* note 31, sec. 11, paras. 263–64.

<sup>85</sup> 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 United Kingdom and the United States. Machakos Protocol, *supra* note 36, sec. B, paras. 2.4, 2.4.1, 2.4.2.

<sup>86</sup> Baker Plan, *supra* note 40, sec. 4, para. 22.

Commission, the membership of which must reflect a community balance.<sup>87</sup>

In many instances the parties decide that the objectives of a monitoring mechanism are best met when the monitors are international. When this happens, the monitoring mechanism might be the United Nations, a regional body such as the African Union, European Union, or OSCE, an ad hoc group of nations, or a combination of the above. In some cases, domestic monitoring mechanisms may be combined with international mechanisms.<sup>88</sup>

The Dayton Accords provided for extensive participation of international organizations in the implementation of the Bosnian 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.<sup>89</sup> The agreement tasked the OSCE with carrying out an election program for Bosnia.<sup>90</sup> Similarly, in Kosovo and East Timor, substantial numbers of international civilian administrators were deployed to manage the sharing of sovereign authority and functions, while the Israeli-Palestinian Roadmap provided for extensive monitoring operations by members of the Quartet.<sup>91</sup>

### III. THE POLITICAL DIMENSION OF EARNED SOVEREIGNTY: THE CASE OF KOSOVO

This Part tracks and analyzes the application of the approach of earned sovereignty to the crisis in Kosovo. The purpose of this discussion is to provide insight into the way in which earned sovereignty might serve as a bridge between the “sovereignty first” and “self-determination first” approaches to conflict resolution. Moreover, the Kosovo crisis provides a useful case study to examine how the political debate shapes the precise contours of the earned sovereignty approach and how it may be adopted to incorporate the specific circumstances of a particular conflict.<sup>92</sup>

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<sup>87</sup> The Commission is designed to advise on the adequacy and enforcement of human rights protections, to propose recommendations, to consider draft legislation, to instigate court proceedings, and to otherwise ensure that the human rights commitments under the agreement are met. Good Friday Agreement, *supra* note 30, sec. 6, para. 5.

<sup>88</sup> For example, in Papua New Guinea, the domestic mechanisms are augmented by an international Truce Monitoring Group and the presence of a U.N. Political Office for Bougainville. U.N. POLITICAL OFFICE IN BOUGAINVILLE: BACKGROUND, *available at* [http://www.un.org/Depts/dpa/prev\\_dip/asia\\_pacific/bougainville/fr\\_bougainville\\_background\\_3.htm](http://www.un.org/Depts/dpa/prev_dip/asia_pacific/bougainville/fr_bougainville_background_3.htm) (last visited Mar. 15, 2004).

<sup>89</sup> Dayton Agreement, *supra* note 33, annex 1A, art. I.

<sup>90</sup> *Id.* annex 3, art. 2. The Dayton Accords also required the parties to grant access to the U.N. High Commissioner for Refugees, the International Committee of the Red Cross, and the U.N. 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. *Id.*, annex 11.

<sup>91</sup> *Roadmap*, *supra* note 54, at 3.

<sup>92</sup> For a history of the conflict in Kosovo, see WESLEY K. CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* 68 (2001); IVO H. DAALDER & MICHAEL E. O'HANLON, *WINNING UGLY* 28 (2000). For a more general history of Kosovo, see generally NOEL MALCOLM, *A SHORT HISTORY OF KOSOVO* (1998).

The initial approach by the international community to the conflict in Kosovo reflected its earlier approach to the Bosnian conflict—that of accommodation and appeasement.<sup>93</sup> Guided by the “sovereignty first” approach, the international community sought to accommodate, and at times appease, the Milosevic regime,<sup>94</sup> as it sought to resolve the conflict by providing for some degree of autonomy for Kosovo within the Federal Republic of Yugoslavia<sup>95</sup> (“FRY”).<sup>96</sup> Milosevic, invoking the claim of sovereignty, relied upon military force to terrorize the civilian population in order to keep Kosovo within the former Yugoslavia. Eventually, Milosevic sought to simply expel the two million Albanian residents of Kosovo. Conversely, the Kosovars invoked the principle of self-determination, held a referendum on independence, and sought a negotiated outcome, while also pursuing armed resistance.<sup>97</sup>

The gridlock created by the hardened positions of the parties and ineffective international intervention led to increasingly violent crimes against civilians by Serbian forces, strained the credibility of NATO, nearly destroyed the credibility of the European Union, and substantially increased the levels of support for Kosovar armed resistance.<sup>98</sup> Within this context, earned sovereignty was put forward as a means to bridge the competing interests of sovereignty and self-determination and to provide a focal point for the development of a more effective international approach. The approach was not immediately accepted by the parties or by the international community as the preferred approach to resolving the conflict. Rather, it competed with the other primary approaches and only gradually emerged as the approach of choice, though in a modified form.

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<sup>93</sup> For a review of the European approach to the conflict in Bosnia, see generally MARK ALMOND, *EUROPE'S BACKYARD WAR: THE WAR IN THE BALKANS* (1994); JANE M.O. SHARP, *BANKRUPT IN THE BALKANS: BRITISH POLICY IN BOSNIA* (1993); JANE SHARP, *HONEST BROKER OR PERFIDIOUS ALBION? BRITISH POLICY IN FORMER YUGOSLAVIA* (1997); BRENDAN SIMMS, *UNFINEST HOUR: BRITAIN AND THE DESTRUCTION OF BOSNIA* (2001); DANIEL VERNET & JEAN-MARC GONIN, *GUERRE DANS LES BALKANS: LE MIROIR BRISÉ YOUGOSLAVE* (1994); Olivier Lepick, *French Perspectives, in INTERNATIONAL PERSPECTIVES ON THE YUGOSLAV CONFLICT* 76 (Alex Danchev & Thomas Halverson eds., 1996). For a review of the American approach, see generally WARREN ZIMMERMANN, *ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS—AMERICA'S LAST AMBASSADOR TELLS WHAT HAPPENED AND WHY* (1996).

<sup>94</sup> Interview with Madeleine K. Albright, Secretary of State, *PBS Frontline: The War in Europe*, at <http://www.pbs.org/wgbh/pages/frontline/shows/kosovo/interviews/albright.html> (last visited Mar. 12, 2004) [hereinafter Albright Interview].

<sup>95</sup> On February 4, 2003, the Federal Republic of Yugoslavia officially changed its name to Serbia and Montenegro. See Vesna Peric Zimonjic, *Politics—Yugoslavia: A Country Disappears*, INTER PRESS SERVICE, Feb. 4, 2003. For purposes of clarity, however, the former name will be used in this Article.

<sup>96</sup> See, Press Release, Contact Group Foreign Ministers, Statement on Kosovo (Sep. 24, 1997), available at <http://www.ohr.int/other-doc/contact-g/default.asp?content-id=3543> (last visited Mar. 8, 2004); Press Release, Contact Group Foreign Ministers, Statement on Kosovo (Jan. 8, 1998), available at [http://www.ohr.int/other-doc/contact-g/default.asp?content\\_id=3547](http://www.ohr.int/other-doc/contact-g/default.asp?content_id=3547) (last visited Mar. 19, 2004).

<sup>97</sup> WILLIAMS & SCHARF, *supra* note 25, at 57–61.

<sup>98</sup> See generally Paul R. Williams & Karina M. Waller, *Coercive Appeasement: The Flawed International Response to the Serbian Rogue Regime*, 36 NEW ENG. L. REV. 825 (2002) (assessing the American and European approach to resolving the Kosovo conflict).

*A. Earned Sovereignty—An Initial Proposal*

Throughout the summer of 1998, the United States and European Union, guided by the sovereignty first approach, undertook shuttle diplomacy between Serbia and Kosovo, seeking to craft a regime of heightened autonomy for Kosovo within the former Yugoslavia. In response to the failure of these efforts, and increasing violence, the Public International Law & Policy Group (“PILPG”) put forward a proposal for earned sovereignty.<sup>99</sup> The key elements of the 1998 PILPG approach involved the creation of a process whereby the people of Kosovo, through legitimate political bodies, would be entitled to exercise certain sovereign rights, while simultaneously retaining specified links to the FRY, thereby sharing sovereignty.<sup>100</sup> As a condition for attaining greater sovereign authority and functions, the people of Kosovo and their political institutions would be required to: (1) guarantee the protection of the rights of all minority populations within Kosovo; (2) respect the territorial integrity of neighboring states such as Macedonia and Albania; (3) renounce any intention of political or territorial association with Albania; and (4) accept Kosovo’s borders as confirmed by the 1974 Yugoslav Constitution. After a three to five-year transitional period, the final status of Kosovo would be determined via an internationally conducted referendum within Kosovo.<sup>101</sup> Once Kosovo earned international recognition, its sovereignty would be constrained by obligations to protect minority rights, maintain its current borders, and reject any political or territorial association with Albania.<sup>102</sup>

The rationale for the 1998 PILPG proposal was based on the assumption that the people of Kosovo had, to a certain degree, earned a right to increased sovereignty because of the long history of human rights violations perpetrated against them by the Serbian regime.<sup>103</sup> Given the circumstances of their situation, it appeared that the only means for adequately protecting those rights would be some form of international status for Kosovo.<sup>104</sup>

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<sup>99</sup> While the concept of earned sovereignty was originally articulated as “intermediate sovereignty,” and subsequently referred to as “conditional independence,” the most descriptive reference to the concept is “earned sovereignty.” See PUB. INT’L LAW & POL’Y GROUP INTERMEDIATE SOVEREIGNTY AS A BASIS FOR RESOLVING THE KOSOVO CRISIS, at i (1997), available at <http://www.crisisweb.org/home/index.cfm?id=1596&l=1> (last visited Mar. 20, 2004) [hereinafter INTERMEDIATE SOVEREIGNTY]. This memorandum was developed by the PILPG in conjunction with a working group composed of former U.S. Department of State lawyers and pro bono counsel from the Washington, D.C. law firm Wilmer, Cutler & Pickering.

<sup>100</sup> INTERMEDIATE SOVEREIGNTY, *supra* note 99, at i.

<sup>101</sup> *Id.* at 38.

<sup>102</sup> *Id.*

<sup>103</sup> The PILPG memorandum argued that the legal basis underlying the earned sovereignty approach for Kosovo was the principle of self-determination in international law, which provided that all self-identified groups with a coherent identity and connection to a defined territory are entitled to collectively determine their political destiny in a democratic fashion, and to be free from systematic persecution. Additionally, in cases where self-identified groups are effectively denied their right to democratic self-government and are consequently subjected to gross violations of their human rights, the most reasonable course of action is for the international community to support international status for the substate entity in order to ensure the protection of those rights. *Id.* at ii.

<sup>104</sup> The 1998 PILPG proposal also drew legal support from several factors. First, the legal and factual similarity between Kosovo and the other republics of the former Yugoslavia were deemed by the international community to be entitled to international recognition. *Id.* at 28–29. Secondly, the element of conditional sovereignty had already been employed by the international community in recognizing Slovenia, Croatia, Bosnia-Herzegovina and Macedonia after they met specific conditions,

Despite Kosovo's perceived right to independence, it was necessary to ensure that Kosovo's attainment of international status did not have negative consequences in the region or lead to additional violations of human rights. Therefore, the proposal included a process whereby the international community could manage the emergence of an independent Kosovo in such a way as to ensure regional stability. The corollary element was that the Kosovars—while entitled to some degree of sovereignty because of past abuses by the Serbian regime—would be required to earn full sovereignty at the end of an interim period by demonstrating their commitment to democratic self-government, the protection of human rights, and the promotion of regional security. While not explicitly stated in the 1998 PILPG memorandum, the proposal provided support for the notion that certain specified limits on sovereignty might continue after Kosovo had attained international recognition.<sup>105</sup>

The proposal for earned sovereignty was initially greeted with skepticism: It seemed to provide for the devolution of too much sovereign authority. There was also concern that the prospect of an independent Kosovo, no matter how intensively managed by the international community, might destabilize the region by providing an impetus for a greater Albania consisting of Kosovo, Albania, and part of Macedonia. This latter concern would influence the development of the earned sovereignty approach throughout the conflict.

### B. Adopting the Earned Sovereignty Approach

Within two months of the release of the report, the failure of current diplomatic efforts and the necessity of a new approach became apparent when Serbian security forces massacred over forty civilians in the Kosovo village of Racak.<sup>106</sup> The head of the unarmed international monitoring team in Kosovo, Ambassador William Walker, publicly declared the massacre to be a crime against humanity.<sup>107</sup> Public reaction in the United States and Europe to the massacre forced key American foreign policymakers to push for the convening of peace negotiations backed by the threat of the use of force.<sup>108</sup> The massacre also added greater legitimacy to Kosovar claims for independence.

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forming a precedent of earned recognition. *Id.* at 29–32. Additionally, from a legal point of view, Yugoslavian sovereignty had already been discarded with the dissolution of Yugoslavia, and the international community had rejected Serbia/Montenegro's claim to continue its international legal personality. *Id.* at 33–35. Moreover, the historical fact that Kosovo—while legitimately part of Yugoslavia—had never been legitimately incorporated into Serbia strengthened the argument in favor of earned sovereignty for Kosovo. *Id.* at 33. Finally, at the time the recent precedent set by the Russian/Chechen Accords and the Northern Ireland Peace Agreement provided a favorable trend to support the earned sovereignty approach for Kosovo. *Id.* at 36–38.

<sup>105</sup> See generally *id.* (suggesting that once recognized by the international community, Kosovo would remain bound by prior commitments, such as protecting the rights of all minority populations within its territory, respecting the territorial integrity of Macedonia and Albania, rejecting any political or territorial association with Albania, and maintaining the status of its borders).

<sup>106</sup> See R. Jeffrey Smith, *Serbs Tried to Cover Up Massacre; Kosovo Reprisal Plot Bared by Phone Taps*, WASH. POST, Jan. 28, 1999, at A1.

<sup>107</sup> BBC News Online, *Racak Killings: "Crime Against Humanity"* (Mar. 17, 1999), at <http://news.bbc.co.uk/2/hi/europe/298131.stm> (last visited Mar. 12, 2004). See also HUMAN RIGHTS WATCH, *YUGOSLAV GOVERNMENT WAR CRIMES IN RACAK* (1999), available at <http://www.hrw.org/press/1999/jan/yugo0129.htm> (last visited Mar. 12, 2004).

<sup>108</sup> Radio Netherlands, *Walker: "Racak Massacre Was Not Faked,"* (Jun. 14, 2002), at

During the course of the Rambouillet/Paris negotiations, the Serbian delegation sought a document which would grant them the authority to exercise absolute control over Kosovo political institutions and maintain a security presence.<sup>109</sup> The American and European negotiators sought to create a regime of shared sovereignty, with some international involvement in providing security. Seeing an opportunity to move forward, the Kosovar delegation<sup>110</sup> proposed an approach of earned sovereignty.

The intense involvement of the American delegation, coupled with the moral authority held by the Kosovar delegation as victims of crimes against humanity, led to a draft agreement, known as the Rambouillet Accords, which drew heavily on the approach of earned sovereignty.<sup>111</sup> The Accords provided for shared sovereignty among the FRY, Kosovo, and the international community. The FRY would be limited to exercising only the most essential sovereign functions<sup>112</sup> and would be required to withdraw nearly all its security forces.<sup>113</sup> Kosovo would accumulate a number of sovereign functions<sup>114</sup> and establish institutions to effectively administer these functions.<sup>115</sup> The international community would then provide security and aid Kosovo in exercising its sovereign functions.<sup>116</sup> The Accords also envisioned the international community assisting Kosovo with the creation of necessary institutions.

The Rambouillet Accords set forth a process for determining final status. Pursuant to the Accords, three years after the agreement entered into force, an international meeting would be convened to determine a mechanism for a final settlement for Kosovo.<sup>117</sup> Invoking the notion of conditional sovereignty, the mechanism was to take into consideration, among other criteria, whether the

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<http://www.rnw.nl/hotspots/html/icty020613.html> (last visited Mar. 12, 2004).

<sup>109</sup> See Marc Weller, *The Rambouillet Conference on Kosovo*, 75 INT'L AFF. 211, 233 (1999) (providing an inside account of the Rambouillet negotiations).

<sup>110</sup> Which now included one of the authors of the PILPG memorandum, and of this Article, on its delegation as a legal advisor.

<sup>111</sup> Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, U.N. Doc. S/1999/648 (Jun. 7, 1999), available at [http://www.un.org/peace/kosovo/99648\\_1.pdf](http://www.un.org/peace/kosovo/99648_1.pdf) (last visited Jan. 2, 2003) [hereinafter Rambouillet Accords].

<sup>112</sup> Under the Rambouillet Accords, the FRY institutions would be entitled to ensure the territorial integrity of the FRY, maintain a common market, operate the customs services, establish monetary policy, provide for defense, and conduct foreign policy. *Id.* ch.1, art. 1(3).

<sup>113</sup> The Accords provided for the complete withdrawal of all Yugoslav Army forces and the substantial reduction of Serbian police forces in Kosovo, as well as the transformation of the Kosovo Liberation Army into the Kosovo Protection Corps modeled after the American National Guard. Security was to be provided by the deployment of an extensive international force. The international force would be responsible for providing both internal and external security. *Id.* art. 2(2).

<sup>114</sup> The Constitution provided for a full range of powers to be exercised by the Kosovo government, including taxation, economic regulation and development, property rights, social policy, environmental protection, local self-government, and the power to conduct foreign relations in specified areas. *Id.* ch. 1, arts. 2–4.

<sup>115</sup> The Rambouillet Accords sought to promote Kosovar democratic self-government by creating a comprehensive Constitution under the authority of which there would be the democratic election of a President and an Assembly and the subsequent appointment of a prime minister and government. *Id.*

<sup>116</sup> For instance, three international judges were to sit on the Kosovar Supreme Court. *Id.* ch. 1, art. 5(9).

<sup>117</sup> *Id.* ch. 8, art. 1(3)

Kosovar Albanians had fulfilled obligations to establish democratic institutions and to protect human and minority rights.<sup>118</sup> An assessment of the will of the people, presumably through a referendum, would also guide the decision on final status.

The draft Accords were agreed to by the Kosovar Albanians, but rejected by Slobodan Milosevic, then President of Yugoslavia, who sought to resolve the competition over sovereignty by ethnically cleansing Kosovo of its Albanian population. Milosevic, along with the two co-chairmen of the Serbian delegation to Rambouillet, was subsequently indicted and prosecuted by the International Criminal Tribunal for Yugoslavia for the crimes committed by Serbian forces in Kosovo.<sup>119</sup> To stop the campaign of ethnic aggression, NATO launched an air campaign that was lifted only<sup>120</sup> when Milosevic agreed to transfer de facto sovereign control over Kosovo to the United Nations and NATO.

The requirement for a strong U.N. role in institution building was necessitated by the fact that, during the NATO air campaign, Milosevic had expelled over 1.2 million Kosovars and had destroyed nearly all the existing public institutions.<sup>121</sup> Thus, to provide a framework for the interim administration of Kosovo by the United Nations, the U.N. Security Council adopted Resolution 1244.<sup>122</sup> While retaining the core elements of the earned sovereignty approach reflected in the Rambouillet Accords, Resolution 1244 gave a primary role to the U.N. mission in overseeing the development of democratic institutions (an added and now necessary element to the approach of earned sovereignty).<sup>123</sup> The United Nations was then to devolve sovereign authority and functions to these new institutions and to facilitate a political process designed to determine Kosovo's future status based on the process described in the Rambouillet Accords.

The substance of Resolution 1244 focused on: (1) displacing FRY sovereignty from Kosovo;<sup>124</sup> (2) replacing it with interim United Nations and NATO sovereign responsibilities;<sup>125</sup> (3) establishing substantial autonomy and

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<sup>118</sup> To prevent future atrocities against the Kosovar Albanians, and to protect the Serbs from acts of retribution, the Accords included numerous provisions on the protection of human rights. The cornerstone of the protections for human rights was the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its Protocols, directly into Kosovar law. *Id.* ch. 1, art. 6(2). Additional protections included the creation of an Ombudsman office with extensive authority to monitor the protection of minority and human rights and fundamental freedoms throughout Kosovo. *Id.* ch. 6, art. 1. The Accords also provided explicit protection for such rights as the use of national community symbols, language, cultural and religious association, and the right to be free from discrimination. *Id.* ch. 1, art. 7. To ensure the participation of minority representatives in the government, the Accords established a quota system for such representatives in the Assembly and for the adequate inclusion of minority representatives in government positions. *Id.* ch. 1, arts. 2–4.

<sup>119</sup> For the International Criminal Tribunal for the former Yugoslavia's indictment detailing Milosevic's ethnic cleansing campaign, see *The Prosecutor of the Tribunal v. Milosevic et al.*, 2002 I.C.T.Y IT-99-37 (July 19).

<sup>120</sup> See *Radio Netherlands*, *supra* note 108.

<sup>121</sup> WILLIAMS & SCHARF, *supra* note 25, at 57–61.

<sup>122</sup> See S.C. Res. 1244, *supra* note 35.

<sup>123</sup> *Id.* para. 10.

<sup>124</sup> *Id.* paras. 3, 4, 9.

<sup>125</sup> *Id.* paras. 5–11, 17–19.

democratic self-governance for the people of Kosovo;<sup>126</sup> (4) “facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords,”<sup>127</sup> and (5) preparing in the final stage to oversee “the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement.”<sup>128</sup> To carry out the responsibility of reconstructing the political institutions of Kosovo, the U.N. Secretary-General created the UNMIK and appointed a Special Representative of the Secretary-General (“SRSG”).<sup>129</sup> UNMIK, under the SRSG, displaced the FRY’s ability to exercise sovereign authority and functions in Kosovo and began the process of building Kosovar institutions.

Resolution 1244 essentially followed the basic themes of earned sovereignty articulated in the 1998 proposal and the Rambouillet Accords: It displaced Yugoslav sovereignty, created mechanisms for establishing democratic self-government and the protection of minority rights, and mandated the resolution of Kosovo’s final status.

Resolution 1244, however, created a substantial addition to the earned sovereignty approach by providing for the exercise of sovereign functions by the United Nations.<sup>130</sup> The original articulation of the approach and its design in the Rambouillet Accords provided for a transfer of sovereignty to the people of Kosovo and an evaluation of the final status of Kosovo based in part on its compliance with the specific provisions of the Accords. Resolution 1244 provided that the United Nations initially would assume control of sovereign functions and negotiate a constitutional framework, and then begin the transfer of sovereign functions to Kosovar institutions. Simultaneously, the United Nations was mandated to pursue a resolution of the final status of Kosovo.<sup>131</sup>

However, despite a robust mandate, the United Nations made sluggish progress, and hesitated in transferring substantial sovereign responsibility to the Kosovars. The failure of the United Nations to effectively erect Kosovar political institutions, and to transfer authority to those institutions while pursuing the resolution of Kosovo’s final status, was influenced by a number of related factors. The inertia of an eight thousand-strong U.N. bureaucracy, combined with substantial U.N. institutional corruption and a relative lack of necessary competence in certain key areas, simply slowed any efforts to transfer control to the Kosovar institutions. Moreover, the necessity of holding municipal and Kosovo-wide elections delayed the opportunity for creating effective Kosovar institutions.

The relative disengagement of the United States after the air campaign and the resumption of a leadership role by the European Union also presented the European Union with an opportunity to scale back the approach of earned sovereignty and return to a more comfortable approach, guided by its interest in resisting the creation of new states. While the European Union was morally

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<sup>126</sup> *Id.* para. 11(a).

<sup>127</sup> *Id.* para. 11(e).

<sup>128</sup> *Id.* para. 11(f).

<sup>129</sup> S.C. Res. 1244, *supra* note 35, paras. 6–11.

<sup>130</sup> *Id.* para. 5, 6, 9–11.

<sup>131</sup> *Id.* para. 11(a).

precluded from arguing for a return of sovereignty to Serbia, it was able to argue for a halt to the transfer of sovereignty to Kosovo—in part based on the fact that some armed Kosovars had undertaken acts of retribution against Serbian civilians in Kosovo immediately after the NATO humanitarian intervention.

This lack of coordination on the part of the international community, particularly the hesitation on the part of the United Nations to transfer authority to the Kosovars and undertake a process for determining final status as required by Resolution 1244 effectively derailed the approach of earned sovereignty, leaving Kosovo with an undefined and stagnant status.

### *C. Reviving the Earned Sovereignty Approach*

In response to the perceived failure of the United Nations to articulate a clear plan for transferring sovereign authority and functions to Kosovo as required under Resolution 1244, the Swedish government supported the creation of an international commission (the “Commission”) under the chairmanship of Richard Goldstone, the former Chief Prosecutor for the Yugoslav Tribunal and member of the South African Supreme Court. The Commission undertook a series of international meetings and consultations with the major international policymakers and interested constituencies. The Commission then crafted a report calling for the revival of earned sovereignty, in the form of conditional independence, for the people of Kosovo (the “Goldstone Proposal”).<sup>132</sup>

The key elements of the Goldstone Proposal included a referendum to ascertain the will of the people, U.N.-sponsored talks between the Kosovar Albanians and the Kosovar Serbs, mechanisms to protect minority and human rights, arrangements for the continued presence of international security forces, and phased sovereignty in the form of the steady transfer of effective administration from the United Nations to Kosovar institutions.<sup>133</sup> The Proposal emphasized the element of phased sovereignty, arguing that Kosovo should be able to assume sovereign authority in proportion to the Kosovar institutions’ ability to provide internal and external security.<sup>134</sup>

In response to the Goldstone Proposal and efforts by influential former policymakers, the United States began to re-engage, arguing for the necessity of crafting province-wide institutions capable of absorbing the transfer of sovereign authority from the United Nations to the people of Kosovo. These efforts met stiff resistance by the European Union and some European states, who had come to believe that an independent Kosovo might further destabilize the region and promote increased separatism in Europe.

As a result of the American pressure, the Europeans agreed to join in a project for drafting a framework for provisional self-government (the

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<sup>132</sup> INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 284 (2000), available at <http://www.reliefweb.int/library/documents/thekosovoreport.htm> (last visited Oct. 14, 2002) [hereinafter THE KOSOVO REPORT].

<sup>133</sup> See generally *id.*

<sup>134</sup> *Id.* at 274.

“Constitutional Framework”). The Constitutional Framework, which was promulgated by the United Nations with little input from the Kosovar political leadership,<sup>135</sup> provided for the development of a unique dual key system to allocate governing responsibility between the SRSG authority and Kosovar institutions.<sup>136</sup> With the adoption of the Constitutional Framework, Kosovo entered a period of shared sovereignty between the United Nations and the Kosovar political institutions.

*D. A Change in Political Circumstances and the Retrenchment of Earned Sovereignty*

As the international community moved back onto the path of earned sovereignty for Kosovo, a number of changes occurred within Serbia itself that rejuvenated the E.U. claims for delaying the transfer of sovereignty from the United Nations to Kosovo. With the collapse of Milosevic’s authoritarian, nationalist rule and its replacement with a more Western-focused government, the European Union became increasingly concerned that efforts to increase Kosovar self-governance could destabilize Serbia. The election of a pro-independence government in Montenegro also dampened the willingness of the European Union to support further devolution of sovereign authority and functions to Kosovo. Moreover, although the Serbian public became increasingly aware of the atrocities committed by Serbian forces against Kosovar civilians, there was no abatement in the nationalist pull to retain Kosovo within Serbia. Growing political violence in southern Serbia and Macedonia reinforced the Serbian desire to retain Kosovo and the fear of the

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<sup>135</sup> See generally *On a Constitutional Framework for Provisional Self-Government*, U.N. Reg. 2001/9, U.N. Interim Administration Mission in Kosovo, 56th Sess., U.N. Doc. UNMIK/REG/2001/9 (2001), available at <http://www.unmikonline.org/regulations/2001/reg09-01.htm> (last visited Mar. 11, 2003). The Constitutional Framework set forth three sets of guiding principles for the future governance of Kosovo. First, it required the domestic institutions of Kosovo to “exercise their authorities consistent with the provisions of Security Council Resolution 1244 and the terms set forth in this Constitutional Framework.” *Id.* ch. 2, para. a. Second, it required those institutions to “promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation.” *Id.* ch. 2, para. b. To ensure the protection of human rights throughout Kosovo, the Constitutional Framework required that the provisions on rights and freedoms set forth in a number of international human rights treaties and instruments would be directly applicable in Kosovo as part of the Constitutional Framework. *Id.* ch. 3, para. 2. Finally, the Constitutional Framework provided that the Kosovar institutions must “promote and respect the principle of the division of powers between the legislature, the executive and the judiciary.” *Id.* ch. 2, para. c. These principles represent an expansion of the core themes of earned sovereignty relating to the protection of human rights and the basic principles of democratic governance.

The Constitutional Framework then enumerated the responsibilities of the provisional institutions. These include economic policy, trade, administrative and operational customs, education, health, environmental policy, infrastructure, agriculture and forestry, tourism, and “good governance, human rights and equal opportunity.” *Id.* ch. 5, para. 1. The institutions also possess specific duties in the fields of local administration, judicial affairs, mass media, and emergency preparedness. The Constitutional Framework further stipulated that any external relations conducted by the provisional institutions must be conducted with the coordination of the SRSG, and that the powers must be exercised in alignment with international standards. *Id.* ch. 5.

<sup>136</sup> With respect to the allocation of authority, the Constitutional Framework set the foundation for the implementation of a process of phased sovereignty, as suggested in the Goldstone Report, by creating democratic institutions for the governance of Kosovo, while initially retaining most of the authority for decisionmaking within the purview of the SRSG. The Constitutional Framework was clear that, consistent with Resolution 1244, the powers retained by the SRSG should be increasingly turned over to the people of Kosovo as the new institutions mature and become effective. *Id.* chs. 6, 14.2.

European Union and the United States that an increasingly sovereign Kosovo could lead to greater instability in the Balkan region.<sup>137</sup>

The Goldstone Commission was concerned that the increasing willingness of some European Union and U.N. officials to treat Kosovar capacity for self-rule with “imperial condescension” and “pervasive distrust”<sup>138</sup> would create a situation where the Kosovar authorities would have little or no incentive to behave in a responsible manner toward neighboring states.<sup>139</sup> The Goldstone Commission argued that an indefinite protectorate would not, as some claimed, allay tension in the region by ruling out independence. Rather, the protectorate would increase tension between the people of Kosovo and the U.N. administrators. Moreover, by maintaining the undefined nature of Kosovo’s status, the international protectorate model would encourage both nationalist hopes for a greater Albania—or for a greater Yugoslavia—and was in fact already serving as a catalyst for ethnic violence, both within and outside Kosovo.

In light of the dangers posed by a halt to the process of earned sovereignty for Kosovo, the Goldstone Commission issued a second, more detailed, proposal for conditional independence.<sup>140</sup> The basic elements of the proposal included the rapid devolution of authority to Kosovar institutions,<sup>141</sup> and substantial limiting of SRSB authority to include only protecting minorities, guaranteeing of human rights, and guaranteeing border integrity. The SRSB powers were to be exercised only when the locally elected officials failed to meet their obligations. The Goldstone Commission again emphasized the desirability of phased sovereignty, arguing that the presence of the international community should be diminished and the sovereign authority of Kosovo should continue to grow as the government and people of Kosovo proved themselves capable of meeting the above commitments.<sup>142</sup> The

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<sup>137</sup> The primary policy objective of the European Union in 2002 was to maintain the existence of the Yugoslav federation in the face of Montenegrin desire for independence and growing indifference on the part of Serbians toward the future of Yugoslavia. Believing that Kosovo’s exit would be guaranteed if Montenegro were to depart Yugoslavia, the European Union secured an agreement that preserved Yugoslavia in a very loose confederacy for another three years before referendums on independence, if so desired, could be launched. Maintaining the stability through accommodation is the core of the European Union’s Balkan policy in preserving Yugoslavia and in avoiding determination of Kosovo’s future political status.

<sup>138</sup> THE KOSOVO REPORT, *supra* note 132, at 20–21.

<sup>139</sup> *Id.* at 26.

<sup>140</sup> See generally INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE FOLLOW-UP OF THE KOSOVO REPORT: WHY CONDITIONAL INDEPENDENCE? (2001).

<sup>141</sup> The Goldstone Commission argued for the rapid devolution of important powers from the SRSB to the Kosovar government, relating to such matters as customs, the judiciary, the police, public and state owned property, transportation, civil aviation, housing and property matters, and regulation of municipal boundaries. *On a Constitutional Framework for Provisional Self-Government*, *supra* note 135, at 25. The Goldstone commission also argued that the undefined residual powers of Chapter 12 of the Constitutional Framework should also be exercised by the Kosovar government. *Id.*

<sup>142</sup> Coupled with the devolution of power, the Goldstone Commission proposed that the relevant Kosovar institutions be permitted to negotiate with the NATO-led Kosovo Force (KFOR) international security presence in Kosovo, and that they be empowered to enter into negotiations with international agencies and foreign governments, and presumably be entitled to establish some form of foreign mission. In particular, the Goldstone Commission thought it necessary for the Kosovar government to be able to enter into relations with neighboring states. Absent such authority, it was feared the Kosovar authorities would have little or no incentive to behave in a responsible manner toward its neighboring states. *Id.* at 26.

Goldstone Commission concluded that when Kosovo was fully able to meet these commitments, the international community should recognize it as an independent state. The Goldstone Commission also reintroduced the element of constrained sovereignty found in the original PILPG memorandum.<sup>143</sup>

The second Goldstone Proposal also sought to rebut the three main arguments presented by the European Union against moving forward with the earned sovereignty approach. First, the Goldstone Commission addressed the concern that the nascent democracy in Serbia would be jeopardized by reopened discussions about Kosovo's future, which could fuel extremist sympathy. The Commission argued that postponing the resolution would actually increase the difficulty of resolving the issue in the future, once support for the new democratic administration had subsided.<sup>144</sup>

Next, the Goldstone Commission reviewed the concern that permitting earned sovereignty for Kosovo could set off similar demands in Montenegro and other regions. The Goldstone Commission argued that this concern was overstated because the specific conditions for Kosovo's earned sovereignty ruled out spillover effects, that earned sovereignty would eliminate many of the current uncertainties in the region, that none of the other substate entities possessed the same legal argument for independence (i.e., a history of systematic human rights abuses), and that earned sovereignty was not any more likely than the other proposed scenarios to generate domino effects.<sup>145</sup>

Seeking to support this renewed initiative for earned sovereignty, while recognizing the slow nature of political institution building in Kosovo, the ICG, led by the former Australian Foreign Minister, rejoined the debate and put forth a detailed proposal for a mixing of international trusteeship and earned sovereignty for Kosovo.<sup>146</sup> The cornerstone of the proposal was a call for immediate negotiations on final status, with UNMIK to then transfer increasing sovereign authority and functions to Kosovar institutions, retaining only limited veto power in certain areas.<sup>147</sup>

The ICG proposal, which was based in the PILPG and Goldstone precedents, extended the concept and argued for a renewed international trusteeship.<sup>148</sup> The ICG argued that Kosovo's final status should be settled in conjunction with the running of the international trusteeship of Kosovo. At the point where an international presence was no longer needed, Kosovar

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<sup>143</sup> *Id.* at 27–28.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> INTERNATIONAL CRISIS GROUP, ICG BALKANS REPORT NO. 124, A KOSOVO ROADMAP (I): ADDRESSING FINAL STATUS, iii–iv, 12–14 (2002), available at [http://www.crisisweb.org/library/documents/report\\_archive/A400561\\_01032002.pdf](http://www.crisisweb.org/library/documents/report_archive/A400561_01032002.pdf) (last visited Mar. 11, 2004).

<sup>147</sup> *Id.* at i.

<sup>148</sup> With respect to the nature of the proposed trusteeship, the International Crisis Group (“ICG”) argued it should be less intrusive than the current SRSG arrangement, with the trustee simply exercising veto powers either at large or in specifically defined areas. The ICG argued that the Kosovo government should be permitted to exercise immediate responsibility for foreign policy, the budget and matters of law and order. *Id.* at 12–13.

institutions would be able to assume relevant sovereign powers and then step into whatever status Kosovo possessed.<sup>149</sup>

The ICG proposal argued that a resolution of Kosovo's final status was crucial to stability in the region. It believed that the uncertain process for determining a final status was a significant obstacle to the normalization of relations between the Albanian and Serb communities, and that it prolonged each group's view that the other was a threat. The proposal further argued that continued uncertainty threatened the political investment of the international community in Kosovo and caused the unnecessary extension of the peacekeeping presence.<sup>150</sup>

Like the Goldstone proposal, the ICG proposal sought to refute the main arguments that the European Union and others often made for postponing a determination of Kosovo's final status. First, the ICG argued that the initiation of final status talks would not set back Serbia's transition, as it was in fact the lack of definition of Kosovo's final status which was beginning to undermine Serbian stability and slow the transition to a non-nationalist state. Second, the ICG argued that a determination of Kosovo's final status would not jeopardize regional stability by encouraging other separatist movements in the region as Kosovo's case was dissimilar to other regional groups, given its history as a defined state within the former Yugoslavia and its status as a U.N. protectorate. Finally, the ICG observed that, while some argued international consensus on Kosovo was not strong enough to withstand reopening the issue, in fact, "the international consensus has become a recipe for inertia."<sup>151</sup>

The ICG argued that conditional independence, or earned sovereignty, was the only final status option that satisfied all the key ingredients necessary for a stable final status. While the ICG recognized that Kosovo was not yet prepared to exercise full sovereignty, it reasoned that through a process of earned sovereignty it would be able to earn this right and gradually prove itself capable of full independence. According to the ICG, earned sovereignty would also solidify Kosovo's status as an entity outside the sovereign control of the FRY. International aid and investment—currently discouraged by the uncertainty in Kosovo—would increase with a certain final status, and would remain in Kosovo, since it would be unimpeded by fears that a fledgling nation might prove itself unworthy of such inflow. The ICG also argued that by "remaining on probation, Kosovar Albanians would have a strong incentive to ensure that Kosovo would cease to be a factor of regional instability."<sup>152</sup>

The ICG then addressed a number of arguments that had been presented against the approach of earned sovereignty. First, the ICG disputed the notion that maintaining an uncertain prospect for independence preserved stability. Rather, in the view of the ICG, it was the lack of certainty over Kosovo's future that was a major contributing factor to regional instability. The ICG also argued that the fear of retaliation from the Serb community, which was frequently invoked as an argument against earned sovereignty, was unfounded

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<sup>149</sup> *Id.* at i.

<sup>150</sup> *Id.* at i.

<sup>151</sup> *Id.* at ii.

<sup>152</sup> *Id.* at 14.

because a democratically elected Serbian government was unlikely to call for mass emigration in the face of final status. Another argument often presented regarding Serbia was that final status for Kosovo would lead to an increase in nationalist sentiment in Serbia, at the expense of moderates and stability. The ICG rebutted this claim by noting that, if the goal was long-term stability, preservation of an unstable entity and, with it, the possibility of another change to Serbia's geography and demographics would only prolong the transition to a stable democracy. Finally, the ICG refuted the claim that Kosovo would set a precedent for other separatist movements in the region by presenting the key difference between Kosovo and other areas: "Kosovo's interim status is underpinned by a U.N. Resolution that leaves the question of final status open."<sup>153</sup>

#### *E. Earned Sovereignty in the Form of Standards Before Status*

Under increasing international pressure to adopt a clear approach for resolving the crisis over Kosovo's final status, the U.N. SRSG adopted a strategy referred to as Standards Before Status.<sup>154</sup> This approach reflected the core tenets of earned sovereignty, by calling for the measured devolution of sovereign authority and functions to Kosovar institutions as they demonstrated their capacity to operate effectively and meet select criteria. The approach deviated from the earlier efforts of earned sovereignty in that it suspended the discussion of final status until after certain standards were met.<sup>155</sup> Earlier manifestations of earned sovereignty had conditioned the transfer of authority to the Kosovar institutions and the nature of its final status upon meeting certain standards. The Standards Before Status proposal conditioned the commencement of final status negotiations on meeting these standards.

The Standards Before Status approach represented an effort by the U.N. to reach a compromise between the European Union's desire to delay a determination of final status, and others who sought to move Kosovo towards independence so long as it met certain conditions. The SRSG argued that it was necessary to condition the initiation of the talks on meeting certain conditions, as discussions on final status would generate political instability, which would undermine efforts to build Kosovar institutions. However, the SRSG also attempted to soften the imposition of conditionality by stating that if Kosovo were able to meet the standards set forth under its proposal, it would be all but guaranteed independence as an outcome of the final status talks.<sup>156</sup>

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<sup>153</sup> *Id.* at 9.

<sup>154</sup> Press Release, U.N. Mission in Kosovo, Address to Security Council by Michael Steiner, Special Representative of the Secretary-General (July 30, 2002), available at <http://www.unmikonline.org/press/2002/pressr/pr792.htm> (last visited Mar. 11, 2004).

<sup>155</sup> 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. STANDARDS BEFORE STATUS, *supra* note 76, available at [http://www.unmikonline.org/pub/focuskos/apr02/benchmarks\\_eng.pdf](http://www.unmikonline.org/pub/focuskos/apr02/benchmarks_eng.pdf) (last visited Mar. 11, 2004).

<sup>156</sup> As explained by the SRSG, the rationale behind this approach was that "Kosovo can only advance towards a fair and just society when these minimum preconditions are met." Press Release, U.N. Mission in Kosovo, *supra* note 154. Moreover, Steiner argued, these standards also mirrored those that were required to be considered for integration into Europe: "I offer this to you as an 'exit strategy' which is, in reality, an 'entry strategy' into the European integration process. The

The establishment of clear standards, while somewhat utopian in nature, was welcomed as a means of moving forward on the development of Kosovar institutions and on the question of final status. However, the conditioning of final status talks on meeting these standards was met with substantial criticism.<sup>157</sup> Under this approach, a date would be set for the beginning of final status talks, with the conditions applicable to the rate of devolution of sovereign authority and functions and to the nature of the final status, not to the initiation of the final status talks.

In response to the increasing demands of democratically elected Kosovar leaders, in December 2003 the United Nations released a Kosovo Standards Implementation Plan which detailed precise criteria for determining whether the standards were met.<sup>158</sup> This document coincided with a joint declaration made in Kosovo by Undersecretary of State Marc Grossman and the SRSB setting spring 2005 as the time for beginning the process for making a final status determination.<sup>159</sup> The Grossman declaration had the effect of delinking the conditions from the timing of the final status talks, and linking them to the nature of the final status to be determined. To prepare for spring 2005, the SRSB immediately began a process of devolving substantial powers and authority to the Kosovar institutions.

#### CONCLUSION

The conflict resolution approach of earned sovereignty has emerged as a response to the increasingly limited utility of the “sovereignty first” and “self-determination first” approaches to resolving sovereignty-based conflicts. As self-determination movements become increasingly intertwined with global terrorist networks, and as “local conflicts” increasingly undermine regional stability, as in the case of Kashmir, diplomats are in need of a larger tool kit of approaches for resolving sovereignty-based conflicts. Moreover, as international human rights norms take on increasing salience, governments, pushed by public opinion, are less willing to permit sovereignty-based conflicts to be resolved through the unrestrained use of force, which frequently leads to massive human rights violations.

The approach of earned sovereignty as developed in recent state practice seeks to bridge the “sovereignty first” and “self-determination first”

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benchmarks complement the preconditions that Kosovo needs to meet to qualify for the Stabilisation and Association process.” *Id.*

<sup>157</sup> For instance, the Center for Strategic and International Studies, together with PILPG, undertook to persuade international policymakers that a more appropriate approach would be standards *with* status. J. BUGAJSKI, R. HITCHNER & P. WILLIAMS, *ACHIEVING A FINAL STATUS SETTLEMENT FOR KOSOVO* 9 (CSIS Monograph, Apr. 2003), available at [http://www.csis.org/ee/kosovo\\_final\\_status.pdf](http://www.csis.org/ee/kosovo_final_status.pdf) (last visited Mar. 11, 2001).

<sup>158</sup> See U.N. MISSION IN KOSOVO, *KOSOVO STANDARDS IMPLEMENTATION PLAN* (December 2003), available at <http://www.unmikonline.org/pub/misc/KSIP-Eng.pdf>.

<sup>159</sup> Press Release, United States Department of State, *United Nations Mission In Kosovo Press Conference With Special Representative of the Secretary General Harri Kolkari* (Nov. 5, 2003) (quoting Undersecretary Grossman as stating, “[t]he Contact Group, and I know that the Secretary General’s Special Representative agrees, that there would then be the evaluation of Kosovo’s progress toward these U.N. standards by mid 2005 and even earlier if progress is sufficient.”).

approaches and draw on their strengths while minimizing their disadvantages. In particular, earned sovereignty seeks to permit the legitimate realization of a people's right to self-determination in a manner which protects the interests of the parent state and can be accomplished in a way which minimizes local and regional instability. Additionally, this approach may offer lessons for a broad array of conflict resolution situations, beyond the classic scenario involving the breakup or secession of states. The current situation in Iraq differs in important ways from the cases described in this Article; most importantly the final status of the territory (i.e. Iraq as a sovereign nation) is not in question. However, the process thus far has included significant elements of phased sovereignty, and the continued security presence of the U.S. military represents an undeniable constraint on Iraq's sovereignty. In administering the ongoing process of transition in that country, the elements of earned sovereignty may offer valuable lessons. And in evaluating progress in Iraq from an earned sovereignty perspective, the approach may be refined further.

By following a measured process for the resolution of a sovereignty-based dispute, the earned sovereignty approach creates an opportunity for states to minimize many of the destabilizing factors associated with immediate secession. The application of conditions to the increased assumption of sovereign authority and functions by a substate entity creates a highly effective means for influencing the behavior of the substate entity in order to ensure the protection of legitimate interests of the parent state and the international community.

The ability to determine the final status of the substate entity years after the initial peace agreement provides an opportunity for the parties to make a decision on final status at a time when passions are not inflamed by an ongoing armed conflict. The approach also permits a more rational, deliberative process, which may involve the international community in some form. Similarly, the involvement of the international community in institution building benefits the state and substate entity by enabling the creation of institutions necessary to ensure the stable operation of the substate entity, either as a new state or as a province with heightened autonomy. The creation of domestic institutions also provides the state and the international community with an additional point of contact to pressure the substate entity, which facilitates the protection of legitimate interests, such as the protection of minority rights, and responsible regional behavior.

Like any approach to conflict resolution, there are risks associated with earned sovereignty. The approach may create an irreversible expectation of independence on the part of the substate entity, as reflected in experiences in Northern Ireland, southern Sudan and Montenegro. In addition, the conditions may not be taken seriously and may only be minimally met. Alternately, the conditions may be so difficult to attain that a substate entity finds itself locked in an unending effort to meet unachievable goals, with the consequence that tensions are exacerbated rather than relieved. This dynamic describes in part the unstable, yet politically adaptive, developments in Kosovo, and may even offer insight into the difficulties moving ahead in the Israel/Palestine negotiations. These concerns may be effectively managed, however, by the good faith involvement of international actors and by a precise drafting of the peace agreement. In the end, the approach of earned sovereignty provides an

additional tool for parties and mediators to structure the resolution of sovereignty-based disputes in a manner that promotes regional stability, minimizes human rights violations, and removes an impetus for the further spread of increasingly destructive terrorist organizations.