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CONFLICT RESOLUTION

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INTRODUCTION

In the coming decades, the world is likely to see continuing conflict arising from the inherent tension between self-determination and territorial integrity. In the 1950's and 1960's, the world grappled with a wave of new states emerging from decolonization. In the 1990s and 2000's, the world witnessed the dissolution of the Soviet Union, Yugoslavia, Czechoslovakia, and the Sudan, as well as the separation of Eritrea from Ethiopia and East Timor from Indonesia. In the 1990's, almost half of all peace agreements failed within five years. In the 21st century, 90 percent of civil wars occurred in countries that had already endured civil war within the last 30 years. As we look toward the horizon, it is safe to say that deep-seated tension will continue to exist between groups seeking to exercise their right to internal or external self-determination, and states looking to preserve their territorial integrity. While some of these conflicts may play out peacefully, we know from experience that the clash between self-determination and territorial integrity leads in most cases to violence met by violence.

If the lessons of the past few years are any indication, it is also likely that the conflict resolution approach of earned sovereignty will be turned to as a means for bridging the impasse between self-determination and territorial integrity. Earned sovereignty is the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity under international supervision. The approach, which has its roots in the Northern Ireland and Bougainville peace agreements, among others, proved successful in structuring the separation of Montenegro from Serbia, East Timor from

Indonesia, Kosovo from Serbia, and South Sudan from the Sudan. Professor Ved Nanda's lifetime of work on the question of self-determination played a crucial role in the development of the approach of earned sovereignty.

During the course of advising numerous states and substate entities on questions of self-determination, I have invariably turned to the ideas and concepts developed by Professor Nanda. Professor Nanda has led the field in proposing specific criteria for resolving claims of self-determination. He has always resisted the temptation to adopt a "sovereignty first" or "self-determination first" approach. Rather, he has endeavored to paint a realistic picture of the effect that sovereignty-based conflicts have on the stability of our world, and to identify ways in which these conflicts may be better resolved.

This article will first discuss the significant impact that Professor Nanda's scholarship has had on the self-determination debate, setting the stage for the development of earned sovereignty. Next, it will trace the development of the earned sovereignty approach to its current status as a widely accepted conflict resolution approach that has been extensively utilized to resolve sovereignty-based conflicts throughout the world. This article will then revisit the elements that make up the earned sovereignty approach and will analyze the successful use of the approach to resolve the conflicts in Kosovo and South Sudan.

SETTING THE FOUNDATION FOR EARNED SOVEREIGNTY

Professor Ved Nanda first staked a role in the self-determination debate in the early 1970's when he wrote about East Pakistan's right to self-determination.[1] In that first piece, Professor Nanda argued that a set of criteria for self-determination should be developed, and he proposed a basic set of elements to jump-start the discussion.[2] At that time, he urged that claims to non-colonial self-determination were going to rise quickly and sharply, and that the international community would be wise to consider certain of these claims.[3] When Professor Nanda later looked back on the East Pakistani conflict, which had resulted in the birth of Bangladesh, he again argued for the extension of

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1. Ved P. Nanda, *Self-Determination in International Law—The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AM. J. INT'L L. 321 (1972).

2. *Id.* at 336 (arguing that the following factors made self-determination applicable to East Pakistan: (1) the large distance between East and West; (2) the deprivation of human rights to the majority; (3) the ethnic, linguistic, and cultural differences; (4) the economic exploitation of East Pakistan by West Pakistan; (5) the fact that there had been a majority determination by vote of the political direction of Pakistan, which had been forcibly denied; and (6) West Pakistan did not depend upon East Pakistan for its political or economic viability).

3. *Id.* at 322.

self-determination to groups "deprived of the opportunity to participate in the value processes of a body politic."[4] He reasoned that the test for evaluating a claim for self-determination should be "the nature and extent of the deprivation of human rights of the subgroup making the claim."[5]

When Professor Nanda revisited self-determination in the early 1980's after the Soviet intervention in Afghanistan and the Vietnamese intrusion in Cambodia, it was to refine the circumstances under which secession, as an exercise of the right to self-determination, might be considered justifiable.[6] To establish whether a right to secede is legitimate, Professor Nanda suggested focusing on the nature of the group seeking self-determination and its alienation from the "body politic," as well as the group's reasons for wanting to secede and the degree to which its members had been denied basic human rights.[7] His purpose in doing so was to encourage the establishment of criteria for cases in which the severe deprivation of human rights leaves no alternative to secession.[8]

Over a decade later, Professor Nanda reexamined self-determination in light of the post-Cold War environment, which included self-determination claims from the Kurds in Iraq and Turkey, the Tamils in Sri Lanka, and claims for secession in the Balkans, Caucuses, and throughout Africa.[9] This time around, he analyzed self-determination in a world that had finally caught on to what he had insisted for over two decades – that certain claims for self-determination outside the colonial situation deserve recognition.[10] While Professor Nanda reiterated that the severe deprivation of human rights may justify self-determination claims, he emphasized that there were different results of accepting such claims – "the creation of a state, a federal entity . . . a confederation of states," or "an ethnic power-sharing arrangement."[11] In order to avoid a resort to violence to resolve self-determination claims, Professor Nanda encouraged the creation of mechanisms for pursuing self-determination claims and reconciling competing claims of sovereignty.[12]

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4. Ved P. Nanda, *Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect*, 1 HOUS. J. INT'L L. 71, 93 (1978-1979).

5. *Id.* at 85.

6. Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 265 (1981).

7. *Id.* at 275.

8. *Id.* at 280.

9. Ved P. Nanda, *The New Dynamics of Self-Determination: Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, 3 ILSA J. INT'L & COMP. L. 443, 444 (1997).

10. *Id.*

11. *Id.* at 452.

12. *Id.*

In the 21st century, Professor Nanda again lent his expertise to the self-determination debate in light of Quebec's claim to secede from Canada, and the recent developments in Kosovo and East Timor.[13] He argued that the cases of Kosovo and East Timor demonstrated that the international community may be willing to accept unilateral secession claims in exceptional circumstances, particularly when an "undemocratic, authoritarian regime" has prohibited "the 'people' [from] participat[ing] effectively in the political and economic life of the state" and has followed "a pattern of flagrant violations of human rights."[14]

A GROTIAN MOMENT AT THE UNIVERSITY OF DENVER COLLEGE OF LAW

In seeking to develop the ability of lawyers to add value to sovereignty-based conflicts, Professor Nanda accepted an offer by the Public International Law & Policy Group to cooperate in organizing a day-long roundtable discussion at the DU College of Law to exchange ideas on the evolving conflict resolution approach of earned sovereignty.

At that time, earned sovereignty was an emerging concept with origins in the peace agreements relating to the state practice of Serbia and Montenegro and East Timor, the Northern Ireland and Bougainville agreements, and the proposed agreements for the Palestine Road Map and Western Sahara. However, despite the ad hoc reliance on the earned sovereignty approach by mediators and parties to conflict, there had been little effort to synthesize the concept or draw attention to its utility for resolving sovereignty-based conflicts.[15] This roundtable, and the subsequent debate that ensued,[16] began to put flesh on this emerging trend we dubbed "earned sovereignty," which came to be recognized as the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity under international supervision.

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13. Ved P. Nanda, *Holland and Hart Private International Law Award: Self-Determination and Secession Under International Law*, 29 DENV. J. INT'L L. & POL'Y 305 (2001).

14. *Id.* at 325.

15. Earned sovereignty first appeared under the name "intermediate sovereignty" in a 1998 memorandum issued by the Public International Law & Policy Group and the International Crisis Group as a proposed solution to the conflict in Kosovo. *See* International Crisis Group, *Intermediate Sovereignty as a Basis for Resolving the Kosovo Crisis*, Europe Report No°46 (Sept. 11, 1998), http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/046-intermediate-sovereignty-as-a-basis-for-resolving-the-kosovo-crisis.aspx.

16. *See* Paul R. Williams, Michael P. Scharf & James R. Hooper, *Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty*, 31 DENV. J. INT'L L. & POL'Y 349, 353 (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, 390 (2003); Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 374-75 (2003).

Much has changed since that roundtable discussion a decade ago: the concept of earned sovereignty has gained considerable traction in the public international law and conflict resolution communities, and – most significantly – earned sovereignty has proven itself as a reliable mechanism for resolving sovereignty-based conflicts. Earned sovereignty is no longer an "emerging approach," as my colleagues and I once described it; it is now a tried and tested process for resolving conflicts.

The earned sovereignty approach has now been fully realized in both Kosovo and South Sudan, ending years of armed conflict in those states. Additionally, earned sovereignty has been proposed by the Moro in the Philippines,[17] the Tamils in Sri Lanka,[18] and the government of Nagorno Karbaugh,[19] as an option for ending conflict and resolving their claims to self-determination.

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17. The Memorandum of Agreement on the Ancestral Domain (MOA-AD) that was signed by the government of the Philippines and the Moro Islamic Liberation Front (MILF) in Kuala Limpur on August 5, 2008, utilized the earned sovereignty approach in an attempt by negotiators to end the protracted conflict between MILF and government forces in the Mindanao area. However, the Philippine Supreme Court enjoined the agreement upon petition from a Christian political leader who claimed they were not represented in negotiations; after that decision, the government backed away from the agreement. The MOA-AD outlined the stages of earned sovereignty, and called upon the parties to later sign a "comprehensive compact" that would guide the transition period. *See* Eliseo "Jun" Mercado, *MOA-AD, Quo vadis?*, AUTONOMY & PEACE REV., July–Sept. 2008, at 9, 10-11 (2008), *available at* http://www.iag.org.ph/cgi-bin/publications/files/ Volume%204%20Issue%20No.%203.pdf (describing earned sovereignty as "the new paradigm as used in negotiation with MILF, beginning in December 2006" and explaining the steps of earned sovereignty as outlined in the MOA-AD). For a full text of the MOA-AD, *see* Collective, *GRP-MILF Full Text of Bangsamoro Juridical Entity (BJE) MOA*, PINOY PARA SA KALIKASAN (blog) (Aug. 16, 2008, 7:13 AM), *available at* http://usap angkalikasan.multiply.com/journal/item/55/GRP-MILF_Full_Text_of_BJE_MOA-AD. For further discussion by Musib M. Buat, a member of the MILF Peace Panel, on the MILF's continued pursuit of earned sovereignty, see Darwin Wally T. Wee, *MILF Still Upbeat on Peace Accord Despite Serious Hitches*, ZABIDA, Oct. 9, 2009, *available at* http://www.zabida.com.ph/component/content/ article/186?ed=16.

18. A statement made by the political wing of the LTTE just before the 62nd General Assembly of the UN alluded to the notion of earned sovereignty: "[W]e urge the international community   to provide appropriate opportunities to the Tamil people to express their aspirations, as have been given to the people of East Timor and Kosovo." *Tamil sovereignty, basis of peace talks – LTTE*, TAMILNET (Sept. 24, 2007, 5:37 PM), http://www.tamilnet.com/art.html?catid=13&artid=23362. U.S.-based Tamil legal adviser Visuthanathan Rudrakumaran has said that "leaving the options of 'earned sovereignty,' 'phased out sovereignty,' and 'conditional sovereignty' off the negotiation table will reduce the incentive for the Sinhala Nation to put forward a meaningful power-sharing proposal or even to take the peace process seriously." *Earned Sovereignty: East Timor, Kosovo . . . Sri Lanka?*, DEFENCEWIRE (Sept. 28, 2007, 12:11 AM), http://defencewire. blogspot.com/ 2007/09/earned-sovereignty-east-timorkosovosri.html.

19. *See* PUBLIC INT'L LAW & POLICY GRP. AND NEW ENGLAND CTR. FOR INT'L LAW & POLICY, THE NAGORNO KARABAGH CRISIS: A BLUEPRINT FOR RESOLUTION 25 (June 2000),

Earned sovereignty has also gained significant traction in the public international law and conflict resolution communities as a method for resolving sovereignty-based conflicts. While one scholar has hailed earned sovereignty as the "most promising solution in ethnically based conflicts where the prerequisites for self-determination are not met,"[20] others have described the advent of earned sovereignty as a re-conceptualization of sovereignty as a divisible entity, calling into question the strength of traditional notions of sovereignty and self-determination.[21] Some scholars focus on earned sovereignty's utility for resolving conflicts[22] or value as a tool to clarify the transition process, [23] while others focus on the connection the approach draws between dispute resolution and international territorial administration.[24] Still others, in seeking to improve upon the method for resolving conflicts, highlight potential dangers of the earned sovereignty approach, including the possibility of withholding power for too long, the need for "ownership" over the process in order to achieve sustainable peace, and the necessity for achievable standards with a clear endpoint.[25] This last point has received particular attention – and criticism – in the Kosovo context.[26]

Moreover, many scholars have thoroughly analyzed the application of earned sovereignty to the "standards before status" policy approach

available at http://www.nesl.edu/userfiles/file/center%20for%20international%20law%20 and%20policy/nagorno.pdf.

20. Karin Oellers-Frahm, *Restructuring Bosnia-Herzegovina: A Model with Pit-Falls, in* MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 179, 223 (Armin Von Bogdandy, Rudiger Wolfrum. Christiane E. Philipp, eds., 2005).

21. Kathleen Clausson & Timothy Nichol, *Reconstructing Sovereignty: The Impact of Norms, Practices and Rhetoric,* 10 BOLOGNA CENTER J. OF INT'L AFF. 21, 29 (2007), *available at* http://bcjournal.org/storage/BCJ-2007edition.pdf; Joseph Camilleri, *Sovereignty Discourse and Practice – Past and Future, in* RE-ENVISIONING SOVEREIGNTY: THE END TO WESTPHALIA? 33, 40 (Trudy Jacobsen et al. eds., 2008).

22. Nathan P. Kirschner, *Making Bread from Broken Eggs: A Basic Recipe for Conflict Resolution Using Earned Sovereignty,* 28 WHITTIER L. REV. 1131, 1136 (2007) (discussing how exactly earned sovereignty can help to resolve conflicts: "sharing sovereignty fosters dialogue between key stakeholders"; "institution building fosters competence in the substate entity and provides both the stakeholders and the international community with assurance of future competency"; and "determining final status of the substate entity . . . gives the parties an idea of an ultimate reward, a goal that parties can attempt to obtain. . . . [T]he optional elements . . . keep the parties on track by rewarding them for tasks accomplished during the implementation process.").

23. Jürgen Friedrich, *UNMIK in Kosovo: Struggling with Uncertainty, in* MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, *supra* note 20, at 225, 291.

24. RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING NATION NEVER WENT AWAY 270 (Oxford Univ. Press 2008).

25. Friedrich, *supra* note 23, at 291-92.

26. *See, e.g.* Bernhard Knoll, *From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate,* 16 EUR. J. INT'L L. 637, 641 (2005).

in Kosovo,[27] and others have evaluated its application to Bosnia,[28] South Sudan,[29] Bougainville,[30] Aceh,[31] and East Timor.[32] Still others have argued for its potential to resolve other conflicts by applying the approach to the Kashmir people,[33] the Kurds in Iraq,[34] the ethnic Armenians in Nagorno-Karabakh,[35] and the Abkhaz in Georgia.[36]

EARNED SOVEREIGNTY IN A NUTSHELL[37]

Earned sovereignty, as developed in state practice over the last decade, seeks to bridge the approaches of sovereignty and self-determination 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. 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.[38] 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. The approach seeks to promote peaceful coexistence

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27. *See* RALPH WILDE, *supra* note 24, at 238; Karen Heymann, *Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust*, 19 AM. U. INT'L L. REV. 153, 174 (2003).

28. *See* Karen Heymann, *Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust*, 19 AM. U. INT'L L. REV. 153, 186 (2003).

29. Kirschner, *supra* note 22, at 1142-50.

30. *Id.* at 1152-58.

31. *Id.* at 1158-66.

32. Heymann, *supra* note 28, at 179-80.

33. *Id.* at 195-97.

34. Philip S. Hadji, *The Case for Kurdish Statehood in Iraq*, 41 CASE W. RES. J. INT'L L. 513, 534 (2009).

35. *See* INT'L CRISIS GRP., NAGORNO-KARABAKH: A PLAN FOR PEACE, EUROPE REPORT N°167 4, 13 (Oct. 11, 2005), http://www.crisisgroup.org/en/regions/europe/caucasus/azerbaijan/167-nagorno-karabakh-a-plan-for-peace.aspx.

36. INT'L CRISIS GRP., ABKHAZIA TODAY EUROPE REPORT N°176 3 (Sept. 15, 2006), http://www.crisisgroup.org/~/media/Files/europe/176_abkhazia_today.ashx (follow link to Full PDF report) (The Abkhaz believe that they are currently earning their sovereignty.).

37. This section draws heavily from the following articles: Paul Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap between Sovereignty & Self-Determination*, 40 STAN. J. INT'L L. 347 (2004); Williams, Scharf &. Hooper, *supra* note 16; Williams, *supra* note 16, at 388-89.

38. Williams, Scharf & Hooper, *supra* note 16, at 350 ("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.").

between a state and a substate entity by establishing an equitable and acceptable power sharing agreement; it is not intended solely to promote self-determination claims.

As a conflict resolution approach, earned sovereignty has developed as an inherently flexible process implemented over a variable time period. This approach is defined by three core elements: (1) shared sovereignty, (2) institution building, and (3) a determination of final status. The process may also encompass three optional elements: (1) phased sovereignty, (2) conditional sovereignty, and (3) constrained sovereignty. These optional elements are employed to tailor the earned sovereignty approach to the unique circumstances of the conflict and to the particular needs of the parties. 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.

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.

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.

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. 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 and equally sharing any remaining authority.

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 to modify those already in existence. The substate entity also works with the international community to develop the institutional capacity for exercising increased sovereign authority.

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.

Determination of Final Status: The eventual determination of the final status of the substate entity and its relationship to the parent state is also an essential element of earned sovereignty. 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.

Phased Sovereignty: The first optional element is 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 and 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 the two.

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 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.

Conditional Sovereignty: 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.

Constrained Sovereignty: 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. 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. This threatening destabilization results either 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.

Monitoring Implementation: Frequently during the process of earned sovereignty, a monitoring mechanism is established to build confidence among the parties, to ensure coordinated implementation of the relevant 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.

EARNED SOVEREIGNTY IN PRACTICE

Kosovo: Kosovo is a recent case of the successful application of earned sovereignty to resolve a sovereignty-based conflict. Kosovo also represents the most comprehensive example of the use of the optional

element of phased sovereignty to manage the devolution of sovereign authority and functions. The Balkans had endured ten years of regional conflict and violence instigated by Yugoslav President Slobodan Milosevic when NATO airstrikes began in Kosovo on March 24, 1999. After a number of failed negotiated settlements between the warring parties, the United Nations Security Council adopted Resolution 1244 (1999) on June 10, 1999, which set the groundwork for the earned sovereignty of Kosovo.[39] Subsequent to Resolution 1244, the United Nations endorsed a Provisional Constitutional Framework for Kosovo, which provided that both the UN Mission in Kosovo ("UNMIK") and Kosovar entities would exercise most of the functions typically associated with an independent state.[40]

Resolution 1244 essentially followed the basic elements of earned sovereignty: 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 provided that the UN 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 UN was mandated to pursue a resolution of the final status of Kosovo. However, despite a robust mandate, the UN made sluggish progress and hesitated in transferring substantial sovereign responsibility to the Kosovars and pursuing a resolution of Kosovo's final status.

In 2005, the UN Secretary General appointed former President of Finland, Martti Ahtisaari, as special envoy to work toward a settlement on Kosovo's status.[41] Ahtisaari conducted direct negotiations with both Kosovo's and Serbia's negotiation teams from February to September 2006.[42] The negotiations culminated in Ahtisaari's Comprehensive Proposal for the Kosovo Status Settlement,[43] a plan to protect minority populations and achieve stable and peaceful independence in Kosovo.[44]

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39. S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

40. Special Representative of the Secretary-General, *On a Constitutional Framework for Provisional Self-Government in Kosovo*, ch. 1, art. 1, U.N. Doc. UNMIK/REG/2001/9 (May 15, 2001), *available at* http://www.unmikonline.org/regulations/2001/reg09-01.htm (last visited Nov. 21, 2011) [hereinafter *Constitutional Framework*] (noting that initially nearly all the authority and functions were designated "reserved competencies" that remained with United Nations Interim Administration Mission in Kosovo (UNMIK)).

41. *Kosovo's Independence*, INT'L CRISIS GRP., http://www.crisisgroup.org/en/key-issues/kosovos-independence.aspx (last updated Feb. 2009).

42. *Id.*

43. *Id.*

44. Bureau of European & Eurasian Affairs, *Summary of the Comprehensive Proposal for the Kosovo Status Settlement*, U.S. DEP'T ST. (Jan. 20, 2009), http://www.state.gov/p/eur/rls/fs/101244.htm.

In April 2007, Ahtisaari submitted his plan to the Security Council.[45] The plan proposed Kosovo's independence, with continued international supervision and support,[46] while focusing on "protecting the rights, identity and culture of Kosovo's non-Albanian communities, including establishing a framework for their active participation in public life."[47] The plan called for: (1) a multi-ethnic democracy protected by the constitution, (2) protection of minority rights and participation, (3) establishment of an impartial and professional justice system, (4) protection of refugee rights, and (5) economic development and security.[48] The plan also requested the Organization for Security and Cooperation in Europe (OSCE) to assist in the plan's implementation.[49]

Kosovo declared its independence on February 17, 2008, honoring the Ahtisaari plan's recommendations.[50] As planned, UNMIK's power dramatically diminished following Kosovo's independence, and the Kosovo government has since increased control over state functions.[51] Serbia, which intended to retain Kosovo, opposed Kosovo's declaration of independence[52] and sponsored a General Assembly resolution to submit the question of the declaration's legality to the International Court of Justice (ICJ).[53] As a result, the ICJ issued an advisory opinion finding that Kosovo's declaration of independence did not violate international law, or Resolution 1244.[54] Currently, over 70 states recognize Kosovo's independence,[55] including the United States,[56] United Kingdom,[57] France,[58] and Turkey.[59]

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Kosovo's Independence, supra* note 41.

52. *Id.*

53. U.N. News Centre, *Kosovo's Declaration of Independence Did Not Violate International Law – UN Court*, U.N. NEWS SERVICE (July 22, 2010), http://www.un.org /apps/news/story.asp?NewsID=35396&Cr=kosovo&Cr1=&Kw1=kosovo&Kw2=independen ce &Kw3.

54. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 84 (July 22).

55. *The World Factbook: Kosovo*, CENTRAL INTELLIGENCE AGENCY https://www.cia. gov/library/publications/the-world-factbook/geos/kv.html (follow "Introduction" hyperlink) (last updated Nov. 4, 2011).

56. *Background Note: Kosovo*, U.S. DEP'T OF STATE (NOV. 16, 2011), http://www.state.gov/r/pa/ei/bgn/100931.htm.

57. *UK to recognise independent Kosovo – PM*, NUMBER10.GOV.UK (Feb. 18, 2008), http://webarchive.nationalarchives.gov.uk/+/http://www.number10.gov.uk/Page14594.

58. *Country Files: France and Kosovo*, FRANCE DIPLOMATIE (Feb. 3, 2011) http://www.diplomatie.gouv.fr/en/country-files_156/kosovo_6154/france-and-kosovo_6155/ index.html.

The newly independent Kosovo is a case of successful earned sovereignty, though the process was not without difficulties, particularly the slow transfer of powers from UNMIK to Kosovar authorities and institutions and the lack of an initial timeframe for a referendum. Despite Kosovo's newly-won statehood, Serbian defiance persists. For instance, in May 2008, Serbian areas of Kosovo held their own local Serbian-only elections, despite UNMIK's admonition against it.[60] Additionally, Serbia continues to support Serbian parallel institutions in Kosovo, including education, health, and welfare,[61] and forbids Kosovo Serbs from receiving salaries or any other type of funding from Kosovo's government.[62]

In spite of these problems, the nearly nine-year interim period was markedly peaceful compared to the decade of violence that preceded Resolution 1244, and the over three years since independence have seen relatively little violence.

South Sudan: The new Republic of South Sudan represents the most recent successful application of an earned sovereignty approach to conflict resolution. Sudan suffered nearly 50 years of civil war between the predominantly Arab Muslim North (led by the National Congress Party (NCP)), and the predominantly Christian and animist black African South (led by the Sudan People's Liberation Movement (SPLM)). In 2005, the NCP and the SPLM reached a peace deal with the encouragement and assistance of the international community, and signed a number of agreements that form the Comprehensive Peace Agreement (CPA).[63]

The CPA provided for a six-year interim period, during which heightened political autonomy was granted to the South and a few key border areas,[64] but without an immediate grant of sovereignty or even a

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59. *Statement of H.E. Mr. Ali Babacan, Minister of Foreign Affairs of the Republic of Turkey, Regarding the Recognition of Kosovo by Turkey*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFFAIRS (Feb. 18, 2008), http://www.mfa.gov.tr/statement-of-h_e_-mr_-ali-babacan_-minister-of-foreign-affairs-of-the-republic--of-turkey_-regarding-the-recognition-of-kosovo.en.mfa.

60. *Kosovo's Independence, supra* note 41.

61. *Id.; see also Minority Issues*, EUROPEAN CENTRE FOR MINORITY ISSUES - KOSOVO, http://www.ecmi-map.com/map/index.php?option=com_content&view=category&layout=blog&id=30&Itemid=58&lang=en (last visited Nov. 23, 2011).

62. *Kosovo's Independence, supra* note 41.

63. Comprehensive Peace Agreement, Sudan-Sudan People's Liberation Movement, Jan. 9, 2005, *available at* http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf. The CPA consisted of the Machakos Protocol Power-Sharing Section, a Wealth-Sharing Section, sections on the three key border areas (Abyei, Southern Kordofan, and Blue Nile), a Security Arrangements Section, and a Ceasefire Agreement. *Id.*

64. Machakos Protocol, art. 2.2, July 20, 2002, *available at* http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf.

guarantee of sovereignty at the end of the interim period. The CPA recognized the rights of the Southerners to govern the affairs of their region, and also participate in the National Government located in the North.[65]

During the interim period, the CPA provided for the South to operate its own government, the Government of Southern Sudan, and gave the substate entity the authority to operate with increased autonomy. While the new Southern government was still accountable to the Government of Sudan in the North, it had its own legislature, executive, and judiciary.[66] The CPA also provided the South with autonomy through institutions parallel to entities in the National Government,[67] and the parties committed to forming an independent Assessment and Evaluation Commission with representatives from the North, South, and international community to monitor the implementation of the agreement.[68] However, the Government of Southern Sudan did not acquire powers equivalent to that of a sovereign state, as it could not seek international recognition or enter into international agreements,[69] and it was still subject to Sudan's ultimate sovereign authority.

The CPA recognized the right of the Southern Sudanese to self-determination, which would be exercised through a referendum vote near the end of the interim period on whether the region would remain a substate entity within the greater Sudan, or attain sovereignty as an independent state.[70] The international community supported the full implementation of the CPA, including the provision on self-determination, with only a few states expressing concern about the impact secession may have on other self-determination movements in Africa and worldwide. The Government of Southern Sudan held its referendum beginning on January 9, 2011, with elections observers from the South, North, and the international community. When the results of the referendum were released on February 7, 2011 with an overwhelming majority in favor of independence, the Government of Sudan was one of the first states to recognize the results and indicate its support for a sovereign South Sudan. At the end of the interim

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65. *Id.*

66. Protocol Between the Government of Sudan and the Sudan People's Liberation Movement on Power Sharing art. 3, May 26, 2004, *available at* http://www.goss mission.org/goss/images/agreements/power_sharing.pdf.

67. These parallel institutions included the Southern Sudan Land Commission, the Southern Sudan Reconstruction and Development Fund, and the Bank of Southern Sudan. Protocol on Wealth Sharing, Jan. 7, 2004, http://unmis.unmissions.org/Portals/UNMIS/Documents/General/cpa-en.pdf.

68. Machakos Protocol, *supra* note 64, art. 2.4.1, 2.4.2.

69. This power was allocated to the National Government only. Protocol on Power Sharing, *supra* note 66, sched. B.

70. Machakos Protocol, *supra* note 64, arts. 1.3, 2.5.

period, the Republic of South Sudan declared independence on July 9, 2011 and became a member state in the United Nations on July 14.[71]

The newly independent South Sudan represents the successful use of earned sovereignty, though the process was not without difficulties. Political relations were tense, particularly in the months leading up to the referendum, over unresolved issues in negotiations and heated rhetoric from political leaders. The dispute over the Abyei area remains unresolved, and the North and the South have recently engaged in violent clashes in the border regions.[72] The benchmarks delineated in the CPA's implementation modalities were often missed, and many key modalities were completed in the final weeks before the referendum or postponed for later resolution.

Despite these problems, the six-year interim period was remarkably peaceful in contrast to the decades of violence that preceded the CPA. The long interim period provided time for both the Government of Sudan and the SPLM to disengage from active violent conflict, operate separate governments and institutions and resolve disputes through negotiations. The CPA itself was founded upon the consent of both the NCP and the SPLM, and the exercise of self-determination was not made unilaterally, but through an internationally-recognized vote.[73] Members of the international community were involved in numerous processes during the interim period, increasing the legitimacy of both governments and the secession process itself, while maintaining pressure on the parties to uphold the agreement. When South Sudan declared independence on July 9, 2011, it was not met with renewed civil war or an illegitimate status, but instead had a quick and peaceful transition to sovereignty.

A BRIGHT FUTURE FOR EARNED SOVEREIGNTY

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, diplomats are in need of a

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71. U.N. GAOR, 65th Sess., 108th plen. mtg., at 114, U.N. Doc. 65/308 (July 14, 2011); *see e.g.* Jeffrey Gettleman, *After Years of Struggle, South Sudan Becomes a New Nation*, N.Y. TIMES, Jan. 9, 2011, http://www.nytimes.com/2011/07/10/world/africa/10 sudan.html?pagewanted=all.

72. *Sudan: Abyei at a Dangerous Tipping Point*, INT'L CRISIS GROUP (May 8, 2011), http://www.crisisgroup.org/en/publication-type/media-releases/2011/africa/sudan-abyei-at-a-dangerous-tipping-point.aspx.

73. *Sudan's Comprehensive Peace Agreement: The Long Road Ahead*, INT'L CRISIS GROUP (Mar. 31, 2006), http://protection.unsudanig.org/data/south/CPA/ICG%20-%20Sudan%20CPA-The%20Long%20Road%20Ahead%20(Mar06).pdf.

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 earned sovereignty approach has now been utilized to successfully resolve a number of sovereignty-based conflicts around the globe. Professor Nanda's lifetime of contribution to the comprehensive understanding of the principle of self-determination has played a key role in the successful development and application of the conflict resolution approach of earned sovereignty.