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RESOLVING SOVEREIGNTY-BASED CONFLICTS: THE EMERGING APPROACH OF EARNED SOVEREIGNTY

PAUL R. WILLIAMS

MICHAEL P. SCHARF

JAMES R. HOOPER

Today there are nearly fifty sovereignty-based conflicts throughout the world. Nearly all of these conflicts entail a high degree of violence with state security forces engaged in active combat or aggressive policing operations against armed rebel forces.[1] In many instances the rebel forces have resorted to terrorism. In fact, at least a third of the Specially Designated Global Terrorists listed by the United States Treasury Department are associated with sovereignty-based conflicts.[2] In addition, a number of non-violent sovereignty-based conflicts undermine regional stability and prospects for political and economic development.[3]

Until recently, most efforts to resolve sovereignty-based conflicts have faltered due to the limited legal and political tools available to policy makers. The two most applicable principles, sovereignty and self-determination have been reduced to little more than legal and political shields behind which states and sub-state entities justify their actions.

While these two basic principles of international law may sometimes be reconciled to create a lasting settlement of a sovereignty-based conflict, more frequently they are a recipe for political gridlock and violence.

Given that the international community of nations is structured around the principle of sovereignty, any effort to dilute the principle or to expand the notion of self-determination to more readily facilitate the secessionist ambitions of numerous minority or ethnic groups will have serious consequences. The fear that too loose a re-definition of sovereignty might lead to a spiraling of self-determination claims and calls for independence is genuine. So to is the fear that the global community will become populated with unstable mini-states which

1. Countries involved in violent sovereignty-based conflicts include for example India, Pakistan, Sri Lanka, Russia, Spain, Macedonia, Sudan, the United Kingdom, Israel, Indonesia, Papua New Guinea, France, Turkey, Mexico, Morocco, the Philippines, and China.

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

3. Countries involved in non-violent, but nevertheless destabilizing sovereignty-based conflicts include Montenegro, Canada, Bosnia, and Cameroon.

breed yet more conflict ridden mini-states.

Different, yet equally destabilizing consequences arise from the hierarchical relationship between sovereignty and self-determination. Given that under the prevailing conceptualization of sovereignty a state is generally entitled to near absolute discretion to deal with self-determination movements, many states freely opt for the aggressive use of force. The over-reliance on the use of force is inherently destabilizing and tends to radicalize self-determination movements, which then often turn to terrorism. Even in instances where states embark upon campaigns of attempted genocide, as in the case of the Serbian campaign against Kosovo Albanians, the principle of sovereignty prohibits international intervention, leading to surreal situations such as where the NATO humanitarian intervention designed to stop the atrocities was dubbed "illegal" but "legitimate."

All too frequently the mantra of sovereignty is used by states to shield themselves from international action to prevent them from violating human rights and committing atrocities in their attempts to stifle self-determination movements, as in the case of the Iraqi Anfal campaigns against the Kurds, the Turkish suppression of Kurdish human rights, the Russian campaign in Chechnya, the targeting of Christians in Southern Sudan, and Indonesia's brutal occupation of East Timor and its recent campaign in Aceh.

Recent state practice, however, has evidenced a growing creativity among states and policy makers which has led to the emergence of a more elastic approach to resolving sovereignty-based conflicts. The new approach, the seeds of which can be found in a number of recent peace proposals and peace agreements, can be termed "earned sovereignty."[4]

As developed in recent state practice, the approach of 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 sub-state entity. 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. In some instances the sub-state entity may acquire sufficient sovereign authority and functions which will then enable it to seek international recognition, while in others the sub-state entity may only acquire sufficient authority and functions to enable it to operate within a stable system of internal autonomy.

The instances of recent state practice evidencing the development of this new approach include the following:

The Israeli/Palestinian conflict: where the Road Map for Peace provides for the continued devolution of specific sovereign authorities and functions to the

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4. As an emerging concept, the approach of earned sovereignty has been referred to by many names, including intermediate sovereignty, provisional statehood, conditional recognition, and earned recognition.

Palestinian Authority, such as the right to maintain independent security forces and to operate an international airport so long as it meets certain conditions, such as preventing terrorist attacks against Israel, removing Chairman Arafat from effective control over the Palestinian Authority, and implementing the rule of law. The Road Map then envisions eventual statehood for Palestine if it fulfills the conditions and if it demonstrates itself capable of effectively exercising its acquired sovereign authority and functions.

The Northern Ireland conflict: where the Good Friday Accord provides for the creation of Northern Ireland institutions, and the devolution of substantial power to those institutions so long as the IRA fulfills its obligation to decommission weapons. The Accords also provide that the people of Northern Ireland are entitled to a referendum on unification with Ireland within seven years.

The Sudan conflict: where the Machakos Protocol provides for the substantial devolution of central government authorities, and the opportunity for Southern Sudan to hold a referendum within six years on the question of secession from Sudan.

The Western Sahara conflict: where the UN sponsored Baker Peace Plan provides for the UN assisted creation of a Western Sahara government and the devolution of numerous sovereign authorities and functions to that government. The Plan then provides for a referendum on self-determination to determine the final status of Western Sahara within five years.

The Kosovo conflict: where UN Security Council Resolution 1244 provides for the near total displacement of Yugoslav sovereignty from Kosovo and its replacement with interim UN and NATO sovereign responsibilities, the creation of local institutions of self-government, the creation of a process for determining Kosovo's final status, and the eventual transfer of authority from the UN administering institutions to the institutions to be established under a political settlement.

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

The East Timor conflict: where after a referendum rejecting continued association with Indonesia, the United Nations managed a two and a half year transition process during which time East Timor was able to construct the institutions necessary for independent self-government.

The Serbia/Montenegro dispute: where the new constitution transforming the Federal Republic of Yugoslavia into the Union of Serbia and Montenegro provides for the devolution of nearly all the sovereign authority and functions to the two member states. The remaining authority and functions are jointly managed by representatives of the member states. At the end of a three year period, the

member states are entitled to hold a referendum on independence.

The growing willingness of states and sub-state entities to consider a process of earned sovereignty for resolving self-determination disputes is matched by the increasing ability of the international community to aid states in institution building and to help manage the transfer of sovereign powers and authority. The OSCE for instance now possesses significant experience in monitoring and conducting elections, while the European Union is experienced with the creation of new state institutions, and the United Nations with the creation of mechanisms to ensure the protection of human and minority rights, and implementation of the rule of law.

In light of recent state practice, the emerging conflict resolution approach of earned sovereignty may be characterized as encompassing six elements – three core elements and three optional elements.

The first core element is shared sovereignty. In each case of earned sovereignty the state and sub-state entity may both exercise sovereign authority and functions over a defined territory. In some instances, international institutions may also exercise sovereign authority and functions in addition to or in lieu of the parent state. In rare cases, the international community may exercise shared sovereignty with an internationally recognized state. 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. This element is utilized during the period of shared sovereignty prior to the determination of final status. Here the sub-state entity, frequently with the assistance of the international community, undertakes to construct institutions for self-government and to build institutions capable of exercising increasing sovereign authority and functions.

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

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

The second optional element is conditional sovereignty. Conditionality may be applied to the accumulation of increasing sovereign authority and functions by the sub-state entity, or it may be applied to the determination of the sub-state entity's final status. In either case the sub-state entity is required to meet certain benchmarks before it may acquire increased. These benchmarks may include conditions such as protecting human and minority rights, developing democratic institutions, instituting the rule of law, and promoting regional stability. While the relationship between the attainment of certain benchmarks and the devolution of authority, or recognition as an independent state may be formally expressed, there

may often be an informal relationship.

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

In almost all instances the state and sub-state entities adopt the elements of earned sovereignty by mutual agreement, but in some instances the international community may support or initiate one or more of the elements of earned sovereignty against the interests of the state or sub-state entity.

To better understand the potential utility of the emerging conflict resolution approach of earned sovereignty, the Public International Law & Policy Group has undertaken a Carnegie Corporation of New York supported project to map the development of the approach and to identify ways in which the approach may be better used to promote the resolution of sovereignty-based conflicts. The three articles which follow this introductory note are part of the initial phase of the project and are produced in cooperation with the Denver University Law School. The ideas expressed in the articles were refined during a day long roundtable held at the University.

The purpose of the first article is to provide a detailed definition of earned sovereignty, and its sub-components, as well as to track the development of the doctrine through recent state practice. The second article sets forth the legal basis for the doctrine, and the third article tracks international efforts to employ the doctrine as a basis for structuring a long term resolution of the Kosovo conflict.

In addition to initiating a scholarly debate as to the development and utility of the approach of earned sovereignty, the Public International Law & Policy Group is also sponsoring a series of roundtable discussions with former peace negotiators in order to better understand the political bargaining process which results in the use of an earned sovereignty approach, and will be running a series of diplomacy gaming scenarios to test the applicability of the concept to as yet unresolved sovereignty-based conflicts.

It is important to conclude with a reminder the purpose of the project is not to argue that the approach of earned sovereignty has evolved into a customary international legal principle, or that it is a one-size fits all solution to sovereignty-based conflicts. The focus of the following articles, and the project as a whole is to help state and sub-state entities involved in sovereignty-based conflicts, as well as future peace negotiators to identify an emerging approach which may be well suited to assist them in the resolution of their particular conflict.

EARNED SOVEREIGNTY:

THE POLITICAL DIMENSION

JAMES R. HOOPER*

PAUL R. WILLIAMS*

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

Stephen D. Krasner

INTRODUCTION

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

This article is the first in a series of three articles prepared under the auspices

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

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

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

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

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

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

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

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

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

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

The second optional element is conditional sovereignty. Conditionality may be applied to the accumulation of increasing sovereign authority and functions by the sub-state entity, or it may be applied to the determination of the sub-state entity's final status. In either case the sub-state entity is required to meet certain benchmarks before it may acquire increased sovereignty. These benchmarks may include conditions such as protecting human and minority rights, developing democratic institutions, instituting the rule of law, and promoting regional stability.

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

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

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

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

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

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

state actors in the international system to acknowledge the utility of the concept even as it was increasingly being applied.

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

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

RECENT PRECEDENT FOR THE EMERGING APPROACH OF EARNED SOVEREIGNTY

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

The Israeli-Palestinian Roadmap was developed by the Quartet of the United States, EU, UN and Russia and involves a three-phased plan for resolving the middle east conflict through the achievement of a secure Israel, and an independent and democratic Palestine.[4] To accomplish this objective the Roadmap provides for the creation of Palestinian institutions of self-government followed by the international recognition of an independent Palestine with provisional borders, with subsequent agreement upon final borders and issues such as refugees and the status of Jerusalem. Progression through these phases is contingent on the

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

Palestinian authority meeting a number of conditions relating to democratization and the end to violence and terrorism. As a result of recent violence the implementation of the Roadmap has been suspended.

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

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

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

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

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

UN Security Council Resolution 1272 provided for the creation of the UN Administration of East Timor after the conflict arising from East Timor's rejection by referendum of Indonesia's proposal for autonomy within Indonesia.[6] The

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

6. *See* UN Security Council Resolution 1272, and Agreement Between Indonesia and Portugal, *supra* note 137; East Timor Popular Consultation ,May 5, 1999, *available at*

Resolution provided authority for a two and a half year period of shared sovereignty between the UN and East Timor during which time East Timor was able to construct the institutions necessary for independent self-government. After successfully meeting certain benchmarks East Timor was recognized as independent and admitted to the United Nations.

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

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

THE FIRST CORE ELEMENT: SHARED SOVEREIGNTY

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

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

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http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng04.html (last visited Oct. 17th, 2002); Agreement Regarding the Modalities for the Popular Consultation of East Timor Through A Direct Ballot, May 5, 1999,
available at http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng03.html (last visited Oct. 17th, 2002)

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

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

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

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

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

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

In practice the Union exercises almost no original authority and merely serves as a conduit between the member states and the international community, in

particular the EU and the International Financial Institutions. Almost all sovereign authority and functions are exercised by the member states and nearly all financial resources are controlled by the member states.

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

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

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

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

The East Timorese came under UN supervision after they rejected via

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

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

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

THE SECOND CORE ELEMENT: INSTITUTION BUILDING

To create the capacity for the assumption of sovereign authority and functions necessary for the establishment of an autonomous entity, or a future independent state, it is essential during the period of shared sovereignty to construct institutions for self-government. In most instances these institutions are constructed with the assistance of the international community.

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

infrastructure.

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

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

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

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

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

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

The North/South Ministerial Council is made up of those with executive

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

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

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

THE THIRD CORE ELEMENT: DETERMINING FINAL STATUS

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

In the case of East Timor the rejection by referendum of the proposal for autonomy within Indonesia began the process of earned sovereignty. In most instances, however, the date for a referendum is set to occur after a period of shared sovereignty and institution building. For instance, the agreement between Montenegro and Serbia for the creation of a Union of Serbia and Montenegro provides that after three years either republic may separate from the Union and become independent via a referendum. The UN's Baker Peace Plan for resolution of the Western Sahara conflict provides that the final status of Western Sahara shall be determined by referendum no earlier than four and no later than five years

after the adoption of the peace plan. The Machakos protocol between Sudan and Southern Sudan provides for an internationally monitored referendum after six years by which the people of South Sudan may either confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement or vote for secession. The Bougainville Agreement provides for a referendum on the separation of Bougainville from Papua New Guinea after ten and before ten to fifteen years from the adoption of the agreement. In the case of the Bougainville agreement the results of the referendum must, however, be ratified by the parliament.

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

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

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

THE FIRST OPTIONAL ELEMENT: PHASED SOVEREIGNTY

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

Kosovo presents the most comprehensive example of the use of phased sovereignty to manage the devolution of sovereign authority and functions.

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

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

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

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

THE SECOND OPTIONAL ELEMENT: CONDITIONAL SOVEREIGNTY

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

The element of conditional sovereignty has its origins in the European

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

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

1) Respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;

2) Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;

3) Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;

4) Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; and

5) Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.

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

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

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

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

10. The *Declaration on Yugoslavia* provided that republics seeking recognition must apply to the Chairmen of the Peace Conference by December 23, 1991, and the Chairmen, would pass the applications to the Arbitration Commission for a ruling as to whether the applicants met the criteria set forth in the *Guidelines* and *Declaration*. The Arbitration Commission would make its recommendation to the European Community's Council of Foreign Ministers, who would then announce its decisions on

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

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

For each of these categories, UNMIK set forth goals, benchmarks, and specific actions to be taken by the local community. For instance, with respect to freedom of movement, UNMIK set the goal that all communities can circulate freely throughout Kosovo, including city centers, and use their language. The benchmark for measuring the attainment of this goal was the unrestricted movement by minorities without reliance on military or police. The required local action included policy and sustained action by local institutions to promote freedom of movement publicly and unprompted condemnation by holders of public office of obstruction and violence.

Other agreements contain similar conditionality. For instance the Bougainville agreement provides that the referendum on final status will only be

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recognition by January 15, 1992. In order to carry out its task of rendering determinations on the independence of the republics of Yugoslavia, the Commission created a questionnaire which was sent on December 24, 1991, to those republics invited to apply for recognition. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M. 1488 (1992). (Introductory Note by Maurizio Ragazzi). This questionnaire was only sent to the republics of Yugoslavia, as the republics of Soviet Union were not required to formally apply to the European Community for recognition, and thus were not required to subject their requests to the review of the Arbitration Commission.

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

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

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

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

THE THIRD OPTIONAL ELEMENT: CONSTRAINED SOVEREIGNTY

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

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

East Timor also is under a soft form of constrained sovereignty as the international community, in the form of a UN follow-up mission UNMISET

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

NOTE ON MONITORING THE IMPLEMENTATION OF EARNED SOVEREIGNTY

Frequently during the process of earned sovereignty a monitoring mechanism is established to build confidence among the parties, to ensure coordinated implementation of the Agreement, to monitor compliance, and to assist in the resolution of any disputes. In the case of Bougainville the parties created an inter-governmental supervisory body charged with overseeing the implementation of the agreement and establishing the new Autonomous Bougainville Government. The same body was also granted competency to resolve disputes between the new Bougainville government and Papua New Guinea. The Machakos Protocol for Sudan provides for the creation of an Assessment and Evaluation Commission to monitor the implementation of the Peace Agreement and conduct a mid-term evaluation of the unity arrangements established under the Peace Agreement. The Commission is to be comprised of representatives of the parties as well as representatives from neighboring states and from the observer states of Italy, Norway, the UK and US. The Baker plan for Western Sahara provides for UN monitoring and for the right of the Secretary-General to issue binding interpretations regarding any disputes which arise with respect to the implementation of the plan.

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

In many instances the parties decide that objectives of a monitoring mechanism are best met when the monitors are international. In these instances, the monitoring mechanism might be the United Nations, a regional body such as

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

the Organization of American States or the Organization for Security and Cooperation in Europe, an ad hoc group of nations, or combinations of the above. In some instances, such as Papua New Guinea domestic monitoring mechanisms may be combined with international mechanisms. In that instance, the domestic mechanisms are augmented by an international Truce Monitoring Group and the presence of a UN Political Office for Bougainville.

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

CONCLUSION

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

EARNED SOVEREIGNTY:

JURIDICAL UNDERPINNINGS

MICHAEL P. SCHARF*

Sovereignty either is or is not.

— Stephen Leacock[1]

It is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory.

— Boutros Boutros-Ghali[2]

I. INTRODUCTION

It has often been said that "the defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of borders."[3] Today, there are some 140 self-determination movements world-wide.[4] Those aspiring to obtain self-determination often resort to terrorism or armed conflict. Most of the groups on the United States (U.S.) Department of State's list of terrorist organizations are self-determination movements.[5] Meanwhile, there are currently secessionist conflicts under way in numerous countries including Anjouan, Azerbaijan, Bougainville, Chechnya, Georgia, Iraq, Israel, Kashmir, Moldova, Northern Ireland, Somaliland, Southern Sudan, Spain, Sri Lanka, Tibet, the island of Mindanao in the Philippines, and West Irian in Indonesia.

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* Professor of Law and Director of the Frederick K. Cox International Law Center, Case Western Reserve University School of Law; formerly Attorney-Adviser for United Nations Affairs, U.S. Department of State.

1. G. C. FIELD, POLITICAL THEORY 60 (1956).

2. INTERNATIONAL LAW: CASES AND MATERIALS 18 (Louis Henkin et al. eds., 3d ed. 1993).

3. Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination "Into Practice" and "Into Peace,"* 6 ILSA J. INT'L & COMP. L. 455, 465 (2000).

4. Halim Moris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 ILSA J. INT'L & COMP. L. 201, 201 (1997).

5. U.S. Department of State, Office of Counterterrorism Fact Sheet: Foreign Terrorist Organizations (Aug. 9, 2002), *available at http://www.state.gov/s/ct/rls/fs/2002/12389.htm* (last visited Oct. 22, 2002).

This piece is the second in a trilogy of three simultaneously published articles in the *Denver Journal of International Law* that examine the emerging doctrine of "earned sovereignty," a concept that seeks to reconcile the principles of self-determination and humanitarian intervention with the principles of sovereignty and territorial integrity. This article sets forth the legal underpinnings for the doctrine, while the other two articles in the trilogy provide its policy foundations, and apply the doctrine to several modern case studies. Together, the three articles are the product of the Public International Law and Policy Group's "Intermediate Sovereignty Project," sponsored by a grant of the Carnegie Corporation.[6]

Traditionally, international lawyers have adhered to a rigid notion of sovereignty. Under this view, sovereignty is "monolithic" and "possessed in full or not at all:"[7] As one author has stated, "'sovereign,' like 'unique,' cannot take certain qualifying adverbs.'"[8] An entity either was or was not sovereign.

This unyielding conception has hindered diplomats in their effort to craft creative means for resolving conflicts involving attempts at self-determination or secession. For example, "[t]here is little doubt that the collective inability of the Western powers to see beyond the statist/secessionist models was partly responsible for the collapse of Bosnia and the war in Krajina."[9] The adoption of extreme positions, dictated by the conventional view of sovereignty, from support for the sanctity of Yugoslavia to the recognition of the secession of its federal republics, was a recipe for disaster.[10] Conversely, where diplomats experimented with new conceptions of sovereignty without legal sanctification, the rule of law and role of international lawyers in the policy making process suffered.[11]

To remedy this, it is necessary for international lawyers to adopt a new view of sovereignty existing as a spectrum, and recognize a range of intermediate sovereign statuses as part of that spectrum. Intermediate sovereignty and the associated concepts of deferred sovereignty, conditional independence, and provisional statehood may take the form of heightened autonomy for a group, earned recognition, or phased recognition. The term is meant to describe an entity that is something less than a fully sovereign state, but more than a sub-state entity.

This article begins with an examination of the history of the concept of sovereignty, revealing that numerous states are in fact less than fully sovereign. Next, it analyzes the evolving principle of self-determination, focusing in

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6. Bridging Self-Determination and Sovereignty: The Intermediate Sovereignty Project, *available at* www.intermediatesovereignty.org (last visited Oct. 25, 2002).

7. INIS L. CLAUDE, JR., NATIONAL MINORITIES: AN INTERNATIONAL PROBLEM 32 (The Pa. State Univ. Press 1995).

8. Steven Lee, *A Puzzle of Sovereignty: Sovereignty Either is or is Not*, 27 CAL. W. INT'L L.J. 241, 241 (1997).

9. Gerry J. Simpson, *The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age*, 32 STAN. J. INT'L L. 255, 282 (1996).

10. *Id.*

11. At a workshop on "Failed States and the Collapse of Sovereign Authority" sponsored by the U.S. Department of State on May 17, 2002, one State Department official suggested that as a result of perceived narrow thinking on the part of Department's Office of the Legal Adviser, the members of the Office have been excluded from meetings in which they traditionally had participated.

particular on the emerging notion of a remedial right to secession. The concluding section explains how recognition of a more flexible and pragmatic conception of sovereignty and a remedial right to secession lays the legal foundation for application of the earned sovereignty concept.

II. THE MEANING OF SOVEREIGNTY

There are several different meanings of the term sovereignty.[12] In the context of this article, sovereignty is concerned with establishing the status of a political entity in the international system. Under the conventional view, an entity qualified as a sovereign state if it had a territory, a population, a government and formal juridical autonomy.[13] If an entity did not qualify as a sovereign state, it was deemed a dependent or subordinate territory of a sovereign state. Thus, an entity was either sovereign or it was not. There was no such thing as an in between status such as "earned sovereignty."

Sovereignty is perceived as a "ticket of general admission to the international arena."[14] A sovereign state is accepted as a juridical equal of other States. It is entitled to political independence, territorial integrity, and virtually exclusive control and jurisdiction within that territory.[15] Its sovereign acts are generally immune from civil suit in other states, its representatives are entitled to diplomatic immunity from both civil and criminal actions, and its ruler is entitled to absolute head of state immunity.[16] It can enter into agreements with other States.[17] It can be a member of international organizations.[18] Dependent or subordinate territories, in contrast, do not customarily possess any of these rights in the international system.[19]

Contrary to the conventional view, since the dawn of the state system 355 years ago with the Peace of Westphalia, very few states have actually possessed full juridical autonomy.[20] Rather, most states in the world might more accurately

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12. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 9-25 (1999) (of the four meanings of sovereignty that Krasner describes, we are concerned here with what Krasner labels "International Legal Sovereignty").

13. *Id.* at 14-15.

14. MICHAEL ROSS FOWLER & JULIE MARIE BUNK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 12 (1995).

15. KRASNER, *supra* note 12, at 20-21.

16. *Id.* at 17.

17. *Id.* at 16.

18. *Id.* at 17.

19. *Id.* at 16.

20. Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT'L L.J. 651, 652 (1997). The state system, characterized as an association of sovereign states, is widely believed to have originated with the Peace of Westphalia, which ended the thirty years war in 1648. The Peace of Westphalia was composed of two separate agreements: (1) the Treaty of Osnabruck concluded between the Protestant Queen of Sweden and her allies on the one side, and the Holy Roman Habsburg Emperor and the German Princes on the other; and (2) the Treaty of Munster concluded between the Catholic King of France and his allies on the one side, and the Holy Roman Habsburg Emperor and the German Princes on the other. The Conventional view of the Peace of Westphalia is that by recognizing the German Princes as sovereign, these treaties signaled the beginning

be characterized as quasi-sovereigns.

History is replete with examples of quasi-sovereign states, including the member states of the Federal State of Germany before the First World War, each of which retained the right to send and receive diplomats.[21] The reigning monarchs of these several component states of Germany were treated by foreign states as if they were the monarchs of fully independent entities.[22]

Several quasi-sovereign states were permitted to ratify treaties and participate alongside sovereign states as full members of international organizations. India, for example, was a member of the League of Nations and a signatory of the Versailles Treaty even though it was still a colony of Britain.[23] Later, both India and the Philippines were permitted to serve as founding members of the United Nations (U.N.) even though they did not become formally independent from Britain and the United States until 1946 and 1947 respectively.[24] Andorra, which is a tiny territory nestled in the Pyrenees between France and Spain, became a member of the United Nations in 1993 and the Council of Europe in 1994 even though France and Spain have control over its security affairs and retain the right to appoint two of the four members of its Constitutional Tribunal.[25] The "freely associated states" of Micronesia, the Marshall Islands, and Palau have each attained U.N. membership although the United States continues to maintain control of their national security policy.[26] And Hong Kong, at the time a British Colony and currently part of China, became a founding member of the World Trade Organization.[27]

On the other side of the spectrum are states that have ceded away portions of their juridical autonomy through treaties. Thus, the member states of the European Union can be deemed quasi-sovereign, in that the decisions of the European Court of Justice and the European Court of Human Rights have supremacy and direct effect within their territory. Similarly, any state that borrows money from an international financial institution such as the International Monetary Fund or the

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of a new era. But in fact, the power to conclude alliances formally recognized at Westphalia was not unqualified, and was in fact a power that the German Princes had already possessed for almost half a century. Furthermore, although the treaties eroded some of the authority of the Habsburg Emperor, the Empire remained a key actor according to the terms of the treaties. For example, the Imperial Diet retained the powers of legislation, warfare, and taxation, and it was through Imperial bodies, such as the Diet and the Courts, that religious safeguards mandated by the Treaty were imposed on the German Princes. *See* Stephane Beaulac, *The Westphalian Legal Orthodoxy - Myth orReality?* 2 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 148 (2000). For the full text of the Osnabruck and Munster Treaties, in both their Latin and English versions, see C. Parry (ed.), Consolidated Treaty Series, Vol. 1 (Dobbs Ferry, U.S.: Oceana Publications, 1969), at 119 and 270.

21. OPPENHEIM'S INTERNATIONAL LAW 250 n.9 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

22. OPPENHEIM, *supra* note 21, at 250 n. 9.

23. KRASNER, *supra* note 13, at 15.

24. *Id.* at 15.

25. *Id.* at 229-30.

26. *See* United Nations Web Site, List of Member States at http://www.un.org/overview/unmember.html (last visited Jan. 27, 2003).

27. KRASNER, *supra* note 13, at 16.

World Bank is subject to conditionality requirements that involve issues of what the World Bank terms "good governance."[28] Although these international commitments may be viewed as a manifestation of the exercise of sovereignty, the ultimate effect is in fact a diminution of the traditional attributes of sovereignty.

Also relevant are states that have been stripped of their autonomy at the conclusion of international armed conflict. For instance, under the terms of the occupation statute that created the West German state in 1949, the allied powers retained authority over foreign trade and exchange, demilitarization, and foreign affairs including international agreements made on behalf of Germany.[29] The German state established in 1949 did not attain independent status until 1955, and even then it did not exercise full autonomy.[30] Similarly, after the Second World War, the basic constitutional structures and policies of the eastern European states, with the exception of Yugoslavia and Albania, were determined by the Soviet Union.[31] Through force or threat of force, Soviet Premier Joseph Stalin imposed dependent communist regimes throughout Eastern Europe, transforming a dozen states in the region into Soviet controlled satellites, which were nonetheless granted membership in the United Nations.[32] Most recently, in 2003 the United States and United Kingdom invaded Iraq, overthrew the regime of Saddam Hussein, and established an occupation government to administer the country during a phased transition to sovereignty.

While the proposed recognition of the status of intermediate sovereignty has not yet been extensively accepted in international law, the quasi-sovereign character of many of the states in the contemporary international system and many states in the past, suggests that solutions to issues of self-determination should not require rigid conformity with the principles that are conventionally and misleadingly associated with sovereignty.

III. EVOLVING NOTIONS OF SELF-DETERMINATION

A. *International Recognition of the Principle of Self-Determination*

Traditionally, international law viewed the formation of new sovereign entities as purely a political matter. International law came into play only after the *de facto* existence of the new state.[33] During the period of decolonization (in which more than 100 new sovereign countries were recognized), however, the creation of states was for the first time subject to international law in the form of the principle of self-determination.

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28. *Id.* at 225-26.

29. *Id.* at 210.

30. *Id.* at 210 (of the four meanings of sovereignty that Krasner analyzes, we are concerned here with what Krasner labels "International Legal Sovereignty.").

31. KRASNER, *supra* note 21, at 212.

32. *Id.*

33. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 47-48 (1979).

President Woodrow Wilson was responsible for elevating the principle of self-determination to the international level when, in 1916, he included it in his Fourteen Points.[34] But President Wilson's call for self-determination was not so much intended to apply to the global empires of the victorious European powers as it was an effort to ensure that the vanquished empires of Europe did not rise again and to extend American commercial interests to new parts of the world.[35]

The principle of self-determination is included in Articles 1, 55, and 73 of the United Nations Charter.[36] The right to self-determination has also been repeatedly recognized in a series of resolutions adopted by the U.N. General Assembly, the most important of which is Resolution 2625 (XXV) of 1970.[37] While these resolutions are not in themselves binding, they do constitute an authoritative interpretation of the U.N. Charter and may represent *opinio juris* respecting customary international law.[38] In a series of cases, including the *Namibia Case* in 1970,[39] the *Western Sahara case* in 1975,[40] the *Frontier Dispute case* in 1986,[41] and the *Case Concerning East Timor* in 1995,[42] the International Court of Justice held that the principle of self-determination crystallized into a rule of customary international law, applicable to and binding on all states.

The principle of self-determination was further codified in the Universal Declaration on Human Rights,[43] the International Covenant on Civil and Political Rights, and in the International Covenant on Economic, Social, and Cultural Rights, which together are considered to constitute the international "Bill of Rights."[44] The vast majority of countries of the world are party to the two

34. President Woodrow Wilson, Address before the League of Nations to Enforce Peace (May 27, 1916), *in* 53 CONG. REC. 8854 (May 29, 1916) ("We believe these fundamental things: First that every people have a right to choose the sovereignty under which they shall live. . .").

35. C. Lloyd Brown-John, *Self-Determination, Autonomy and State Secession in Federal Constitutional and International Law*, 40 S. TEX. L. REV. 567, 572 (1999).

36. U.N. Charter art. 1, para. 2; *See also* U.N. Charter arts. 55, 73 (while the term "self-determination" does not occur within Article 73 of the U.N. Charter, the terms "self-government" and self-government. . .political aspirations. . . and progressive development of. . .free political institutions" do occur).

37. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter G.A. Res. 2625].

38. HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 45 (1990).

39. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31-32 (June 21).

40. Western Sahara, 1975 I.C.J. 12, 31-33 (Oct. 16).

41. Concerning the Frontier Dispute (Burk. Faso v. Rep. of Mali), 1986 I.C.J. 554, 566-567 (Dec. 22) [hereinafter Frontier Dispute Case].

42. Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90, 265-68 (June 30).

43. Universal Declaration of Human Rights, Dec. 10, 1948, art. 22.

44. Article 1, common to both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights reads:

> 1. 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;
> 2. The States Parties to the present Covenant. . . shall promote the realization of the right of self-determination, and shall respect that right, in conformity with

Covenants, which constitute binding treaty law.

Under the principle of self-determination, 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.[45] For such groups, the principle of self-determination may be effectuated by a variety of means, including self-government, substantial autonomy, free association, or arguably, in certain circumstances, outright independence/full sovereignty.[46]

B. *Who is Entitled to Self-Determination?*

For a group to be entitled to a right to collectively determine its political destiny, it must possess a focus of identity sufficient for it to attain distinctiveness as a people.[47]

The traditional two-part test examines first "objective" elements of the group to ascertain the extent to which its members share a common racial background, ethnicity, language, religion, history and cultural heritage.[48] Another important objective factor is the territorial integrity of the area the group is claiming.[49]

The second "subjective prong" of the test requires an examination of the extent to which individuals within the group self-consciously perceive themselves collectively as a distinct "people."[50] It necessitates that a community needs to explicitly express a shared sense of values and a common goal for its future. Another subjective factor is the degree to which the group can form a viable political entity.[51]

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the provisions of the Charter of the United Nations.

International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 171, 173; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 993 U.N.T.S. 3, 5.

45. G.A. Res. 2625, *supra* note 37, at 123-124.

46. *Id.*

47. The United Nations Economic and Social Cooperation Organization (UNESCO) defines "people" as individuals who relate to one another not just on the level of individual association, but also based upon a shared consciousness, and possibly with institutions that express their identity. UNESCO considers the following indicative characteristics in defining people: (a) a common historical tradition; (b) religious or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and (g) common economic life. *See* Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism, in* MODERN LAW OF SELF-DETERMINATION 101-104 (Christian Tomuschat ed., 1993).

48. Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257, 276 (1981).

49. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 178-79 (1991).

50. *See* Nanda, *supra* note 48, at 276.

51. *Id.*

C. Does Self-Determination Create a Right to Secession and Independence?

All nations carry within their territories other nations, and since secession is synonymous with the dismemberment of states, the international community understandably views it with suspicion. "If each group within a state can claim the right to self-determination and succeed, self-destruction of virtually every state could result."[52] Thus, at the time the U.N. Charter was formed, the drafters made it clear that the right to self-determination did not give rise to a right to secession under any circumstances.[53] In this regard, one may note the 1970 statement of U.N. Secretary-General U. Thant to justify the inactivity of the U.N. during the secessionist conflict in Biafra:

> As far as the question of secession of a particular section of a State is concerned, the United Nations attitude is unequivocable. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member States.[54]

Traditionally, the right to pursue independence as an exercise of the principle of self-determination was applied only to people under "colonial domination," "alien domination," or "racist oppression," and under the principle known as *uti possidetis* states were permitted to become independent only within their former colonial boundaries.[55] This was not characterized as an exception to the general rule rejecting the right of secession because the independence of a colony was not considered "a secession," as that term was reserved for situations involving the separation from a State of a portion of its domestic territory.[56]

Until recently, the international community subscribed to a theory of "salt-water colonialism," under which self-determination could only apply to territories which were separated from their metropolitan parent by oceans or high seas. In this way, overland acquisitions such as those made by China and the Soviet Union were excluded from consideration. Also excluded were the ethnic groups within a colonial territory who regarded the majority rule as alien or oppressive. Thus, it is said that in the post-colonial world, "the right to self-determination is rarely recognized until it is won through a bloody conflict."[57]

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52. Ediberto Roman, *Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. MIAMI L. REV. 943, 958-959 (1999).

53. The United Nations Conference on International Organization, UNCIO Doc. 343, Vol. VI, at 296 (1945) (during the works of the Committee I/1 at the Conference of San Francisco, it was agreed that "the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right to secession.").

54. Secretary-General's Press Conferences, *in* 7 U.N. MONTHLY CHRONICLE 36 (Feb. 1970).

55. *See* Frontier Dispute Case, *supra* note 41, at 565. In the *Frontier Dispute Case*, the International Court of Justice acknowledged an "apparent contradiction" between the principles of *uti possidetis* and self-determination. *Id.* at 567. But the Court did not elaborate on this statement because it was limited by an agreement of the parties to resolve their dispute on the basis of the "principle of intangibility of frontiers inherited from colonization." *Id.* at 565.

56. *Id.* at 565.

57. *See* Simpson, *supra* note 9, at 263.

However, the modern trend, evidenced by the writing of numerous scholars,[58] U.N. General Assembly resolutions,[59] declarations of international conferences,[60] judicial pronouncements,[61] decisions of international arbitral tribunals,[62] and some state practice supports the right of non-colonial "people" to secede from an existing state when the group is collectively denied civil and political rights and subject to egregious abuses. This has become known as the "remedial" right to secession.

The remedial right to secession has its origin in the advisory opinion given by the second Commission of Rapporteurs in the 1920 *Aaland Islands Case*.[63] After excluding the existence of a general right to secede, the Commission observed that "[t]he separation of a minority from the State of which it forms part and its incorporation into another State may only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees [for the protection of minorities]."[64]

The denial of the exercise of the right of democratic self-government as a precondition to the right of a non-colonial people to dissociate from an existing state is supported most strongly by the United Nations' 1970 Declaration on Principles of International Law Concerning Friendly Relations, which frames the

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58. *See* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 79 n.88 (1992); Deborah Z. Cass, *Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21 (1992); Antonio Cassese, *The Self-Determination of Peoples*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 101 (Louis Henkin ed., 1981); Thomas M. Franck, *Postmodern Tribalism and the Right to Secession*, *in* PEOPLES AND MINORITIES IN INTERNATIONAL LAW 2, 13-14 (Catherine Brolmann et al., eds., 1993); Otto Kimminich, *A "Federal" Right of Self-Determination?*, *in* MODERN LAW OF SELF-DETERMINATION 83 (Christian Tomuschat, ed., 1993); Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994); W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 181-190 (1977); Gerry J. Simpson, *Judging the East Timor Dispute: Self-Determination at the International Court of Justice*, 17 HASTINGS INT'L L. & COMP. L. REV. 323, 340 (1994); Christian Tomuschat, *Self-Determination in a Post-Colonial World*, *in* MODERN LAW OF SELF-DETERMINATION 1, 2-8 (Christian Tomuschat, ed., 1993).

59. *See* G.A. Res. 2625, *supra* note 37, at 121-124.

60. *Vienna Declaration and Programme of Action*, World Conference on Human Rights, U.N. Doc. A/CONF.157/23 (1993), *reprinted in* 32 ILM 1661 (1993) [hereinafter Vienna Declaration and Programme of Action].

61. *See, e.g.*, Decision of the Supreme Court of Canada in the Matter of Section 53 of the Supreme Court Act, and in the matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated September 30, 1996, [1998] 2 S.C.R. 217, para. 154 [hereinafter Decision of the Supreme Court of Canada].

62. *See, e.g.*, Conference on Yugoslavia Arbitration Commission Opinion No. 1, Opinions on the Questions Arising from the Dissolution of Yugoslavia, Nov. 1992, 31 I.L.M. 1488, 1494-1497 [hereinafter Conference on Yugoslavia].

63. Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, LEAGUE OF NATIONS O.J. Spec. Supp. 3 (1920).

64. *Id.*

proper balance between self-determination and territorial integrity as follows:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity of political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.[65]

By this declaration, the General Assembly indicated that the right of territorial integrity takes precedence over the right to self-determination only so long as the state possesses "a government representing the whole people belonging to the territory without distinction as to race, creed or color."[66] Reasoning *a contrario*, where such representative government is not present, "peoples" within existing states are entitled to exercise their right to self-determination through secession.

A similar clause was included in the 1993 Vienna Declaration of the World Conference on Human Rights, which was accepted by all United Nations member states.[67] However, unlike the 1970 Declaration on Friendly relations, the Vienna Declaration did not confine the list of impermissible distinctions to those based on "race, creed, or color," indicating that distinctions based on religion, ethnicity, language or other factors would also trigger the right to secede.[68]

Further references by U.N. bodies to the right to "remedial secession" can be found in the 1993 Report of the Rapporteur to the U.N. Sub-Commission Against the Discrimination and the Protection of Minorities on *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*,[69] and in General Recommendation XXI adopted in 1996 by the Committee on the Elimination of Racial Discrimination.[70]

Most recently, in considering whether Quebec could properly secede from Canada, the Canadian Supreme Court found that:

> A right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.[71]

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65. G.A. Res. 2625, *supra* note 37, at 124.

66. *Id.*

67. *See* Vienna Declaration and Programme of Action, *supra* note 61, at para. 2.

68. *See Id.*

69. *Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, Commission on Human Rights: Sub-commission on Prevention and Protection of Minorities, 45th Sess., Agenda Item 17, at para. 84, U.N. Doc. E/CN.4/Sub.2/1993/34 (1993).

70. Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 51st Sess., Supp. No. 18 at 125-26, para.11, U.N. Doc. A/51/18 (1996).

71. *See* Decision of the Supreme Court of Canada, *supra* note 62, at para. 154.

The Court then went on to declare:

> A state, whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have the territorial integrity recognized by other states.[72]

The Court found that because the people of Quebec were not "denied meaningful access to government to pursue their political, economic, cultural and social development, they were not entitled to secede from Canada" without the agreement of the Canadian government.[73] Implicit in this decision, however, is the proposition that had the Court found that the people of Quebec were denied any such right of democratic self-government and respect for human rights, unilateral secession from Canada would have been permissible under international law.

As for actual State practice, the existence of a right to remedial secession is supported by the 1971 secession of Bangladesh from Pakistan (with the aid of India), which was justified on the ground that the Bengali population was victim of massive economic and political discrimination as well as violence and repression.

Another development that lends credence to the idea that a new post-colonial right to remedial secession may be on the point of crystallizing is the U.N.-sanctioned intervention on behalf of the Kurds in May 1991.[74] The rationale for this intervention was that the Kurds in northern Iraq were suffering massive human rights deprivations inflicted by the Iraqi government.[75] Subsequent to the intervention, the Kurds enjoyed the benefits of de facto intermediate sovereignty from Baghdad's harsh rule as a consequence of the U.S.- and British-enforced no-fly zone over northern Iraq.

More recently, in the case of the dissolution of the former Yugoslavia, the republics of Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia were deemed entitled to secede on the basis that they were denied the proper exercise of their right of democratic self-government, they possessed clearly defined borders within the umbrella state, and, in some cases, they were subject to ethnic aggression and crimes against humanity committed by the forces of the central government of Belgrade.[76] Notably, the international community did not consider that the Bosnian Serb entity known as Republika Srpska was entitled to disassociate from Bosnia-Herzegovina because, although it possessed a right of political autonomy, it was not denied the proper exercise of its political rights, and it did not possess historically defined borders.[77] On the contrary, in the case of the Serb autonomous region of Kosovo, the international community (through North Atlantic Treaty Organization (N.A.T.O) action) supported the effort of the Albanian Kosovars to

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72. *Id.*
73. *Id.* at 222.
74. *See* Simpson, *supra* note 9, at 284.
75. *Id.*
76. *See* Conference on Yugoslavia, *supra* note 62, at 1494-1497.
77. *Id.* at 1498.

attain a status that was characterized as "intermediate sovereignty" within Kosovo's regional borders in the face of ethnic cleansing and repression by the central government of Serbia.[78]

These authorities suggest that if a government is at the high end of the scale of representative government, the only modes of self-determination that will be given international backing are those with minimal destabilizing effect and achieved by consent of all parties. If a government is extremely unrepresentative and abusive, then much more potentially destabilizing modes of self-determination, including independence, may be recognized as legitimate.[79] In the latter case, the secessionist group would be fully entitled to seek and receive external aid, and third-party states and organizations would have no duty to refrain from providing support.[80]

D. Rules for Achieving Independence

Where a people are entitled to resort to remedial secession, international law may provide guidance on how independence may be achieved. As Professor Franck, one of the "five experts" consulted in the 1992 Opinion on the consequences of a secession of Quebec from Canada, recalls, "so we were able to say to the Quebec government, international law does not tell you whether you have a right to secede or not, but it does tell you that unless you do it according to [certain] rules you are likely to run into a lot of flak from the international community."[81]

Recent state practice indicates that as a precondition to the legitimate attainment of international status, a self-identified group seeking to disassociate itself from the parent state must first affirmatively demonstrate that it was denied the ability to exercise its right of democratic self-government and that its people were denied basic human rights.[82] Second, it must respect the principle of *uti possidetis*, whereby states become independent within their colonial or administrative boundaries and may not seek to obtain territory held by third states.[83] Third, the new state must commit itself to the respect for the rule of law,

78. Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Kosovo Conflict over Final Status*, 31 DENVER J. INT'L L. 387 (2004).

79. *See* Kirgis, *supra* note 58, at 304. Some commentators have taken the position that the right of a people to secede must further be based on a "balancing of conflicting principles," considering such factors as "the nature of the group, its situation within its governing state, its prospects for an independent existence, and the effect of its separation on the remaining population and the world community in general. LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 217 (1978); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 73-74 (1982).

80. *Cf.* G.A. Res. 6(1), U.N. GAOR, 31st Sess., Supp. No. 39, at 10, 15, U.N. Doc. A/31/39 (1976) (appealing to member states "to provide all assistance required by the oppressed people of South Africa and their national liberation movements during their legitimate struggle").

81. Thomas M. Franck, Remarks at the Proceedings of the 87th Annual Meeting, *in* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Mar.-Apr. 1993, at 261.

82. European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of the New States, 31 I.L.M. 1485, 1486-1487 (1992).

83. *Id.*

democracy and human rights, including the need for guarantees for the rights of minorities, the inviolability of all frontiers, and all commitments with regard to disarmament and nuclear non-proliferation.[84]

As described in more detail in the other two articles in this series, intermediate sovereignty and phased/earned recognition can be a particularly useful mechanism for the international community to employ to facilitate the responsible exercise of the right of remedial secession consistent with the preconditions set forth above. It would involve an initial period of heightened autonomy and self-government, the interim maintenance of territorial association with the parent state, international monitoring, and the possibility of attaining full sovereignty after meeting a series of benchmarks over time. The intermediate sovereignty approach can be employed with the parent state's consent (albeit obtained under threat of sanction or force) or in the absence of its consent (e.g., as a result of humanitarian intervention).

IV. CONCLUSION

The maintenance of territorial integrity is vital in light of the disruptive consequences of breaches of that integrity. But since its ultimate purpose is to safeguard the interests of the peoples of a territory, it follows that "[t]he concept of territorial integrity is meaningful only so long as it continues to fulfill that purpose to all the sections of the people."[85]

The modern trend is to treat territorial integrity as a rebuttable presumption, which can be invoked only by states that act in accordance with the principle of self-determination. International support for transitional independence in the form of phased sovereignty must be recognized as a valid remedy when the state's actions extinguish that presumption, thus resolving the tension between territorial integrity and self-determination.

This article has illustrated that sovereignty was never as absolute in practice as in theory. Consequently, earned sovereignty may be no more than an old wine in a new bottle. But its value to diplomats is that this new bottle may be attractive enough to sell to those seeking to exercise the newly recognized right of remedial secession, who have grown unsatisfied with the prospect of simple autonomy. At the same time this less potent vintage (which carries with it the possibility of permanent intermediate sovereign status) may, with a little coaxing, prove palatable to parent states, which oppose complete secession.

As described in the other two articles in this trilogy, developments in Bosnia, Kosovo, Montenegro, East Timor and Iraq suggest that the time has come to embrace *de jure* the new reality of earned sovereignty that is emerging from diplomatic practice.

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84. *Id.*

85. *See* Simpson, *supra* note 10, at 283, quoting Umozurike Oji Umozurike, *in* SELF-DETERMINATION IN INTERNATIONAL LAW 3 (1972).

EARNED SOVEREIGNTY:

THE ROAD TO RESOLVING THE CONFLICT OVER KOSOVO'S FINAL STATUS

PAUL R. WILLIAMS*

The classic nineteenth-century concept of sovereignty, even if it rarely pertained in practice, was a concept of absolute territorial sovereignty. In the twenty-first century, sovereignty is necessarily shared and dependent on agreements with a range of international actors.[1]

– Independent International Commission on Kosovo

Chaired by Justice Richard Goldstone

INTRODUCTION

This article is the third in a series of three articles which discuss the emerging doctrine of "earned sovereignty."[2] The first article provided a detailed definition of earned sovereignty, and its sub-components, and explained the historical and political basis for the doctrine. The second article set forth the legal basis for the doctrine. This article explores the competition between self-determination and sovereignty in the conflict between Kosovo and Serbia, and tracks the efforts of the international community to rely on the doctrine of earned sovereignty to resolve the conflict.

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

1. INTERNATIONAL COMMISSION ON KOSOVO, THE FOLLOW-UP REPORT: WHY CONDITIONAL INDEPENDENCE? 3 (2001), *available at* http://www.kosovocomission.org/reports/followup.pdf (last visited Mar. 22, 2003) [hereinafter THE FOLLOW-UP OF THE KOSOVO REPORT].

2. For the first and second articles in this series as well as an introduction to earned sovereignty *see* Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373 (2004) and James R. Hooper & Paul R. Williams, *Earned Sovereignty: The Political Dimension*, 31 DENV. J. INT'L L. & POL'Y 355 (2004).

The purpose of this article is to promote a more complete understanding of the approach of earned sovereignty by examining in detail its role in efforts to resolve the Kosovo conflict. To accomplish this purpose, the article explains how the approach of earned sovereignty shaped the international community's response to the conflict in Kosovo, and how, if properly applied, it may help to bring about a resolution of this particularly vexing sovereignty-based conflict; and thereby enhance prospects for a long term peace in the region. The article also tracks the substantive evolution of the approach from 1998 to the present, and explores the extent to which policy makers and others adapted the approach in response to the changing factual situation of the conflict, and the perceived viability of the approach as a means for resolving the conflict. Finally, the article highlights the highly fluid nature of "sovereignty" in the context of the Kosovo conflict.

As noted in the introductory note[3], the conflict-resolution approach of earned sovereignty essentially seeks to resolve the centuries-old tension between self-determination and sovereignty by managing the devolution of sovereign authority and functions from a state to a sub-state entity. In some instances the sub-state entity may acquire sufficient sovereign authority and functions which will then enable it to seek international recognition, while in others the sub-state entity may only acquire sufficient authority and functions to enable it to operate within a stable system of internal autonomy.[4]

The conflict resolution approach of earned sovereignty may be characterized as encompassing six elements – three core elements and three optional elements.

The first core element is shared sovereignty. In each case of earned sovereignty the state and sub-state entity may both exercise sovereign authority and functions over a defined territory. In some instances, international institutions may also exercise sovereign authority and functions in addition to or in lieu of the parent state. In rare cases, the international community may exercise shared sovereignty with an internationally recognized state. 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. This element is utilized during the period of shared sovereignty prior to the determination of final status. Here the sub-state entity, frequently with the assistance of the international community, undertakes to construct institutions for self-government and to build institutions capable of exercising increasing sovereign authority and functions.

The third core element is the eventual determination of the final status of the sub-state entity and its relationship to the state. In many instances the status will

3. *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 (2004)

4. While at its essence earned sovereignty is a political approach that grew from the need to structure creative and workable solutions to conflicts arising from the tension between self-determination and sovereignty, it is well-founded in the most basic principles of international law. *See* Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373 (2004)

be determined by a referendum, while in others it may involve a negotiated settlement between the state and sub-state entity, often with international mediation. Invariably the determination of final status for the sub-state entity involves the consent of the international community in the form of international recognition.

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

The second optional element is conditional sovereignty. Conditionality may be applied to the accumulation of increasing sovereign authority and functions by the sub-state entity, or it may be applied to the determination of the sub-state entity's final status. In either case the sub-state entity is required to meet certain benchmarks before it may acquire increased. These benchmarks may include conditions such as protecting human and minority rights, developing democratic institutions, instituting the rule of law, and promoting regional stability. While the relationship between the attainment of certain benchmarks and the devolution of authority, or recognition as an independent state may be formally expressed, there may often be an informal relationship.

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

In almost all instances the state and sub-state entity progress through the phases of earned sovereignty by mutual agreement, but in some instances, such as Kosovo, the international community may support or initiate one or more of the phases of earned sovereignty against the wishes of the state or sub-state entity.

As a relatively new approach to conflict resolution, earned sovereignty, has been referred to by many names, including intermediate sovereignty, phased recognition, provisional statehood, and conditional independence. Conflicts in which variations on the approach of earned sovereignty have been proposed or applied include the Palestinian Road Map for Peace (with provisional statehood); the Northern Ireland Accords (with a referendum for independence and unification with Ireland after seven years); East Timor (with phased sovereignty leading to full independence); the Sudan Machakos Protocol (with an independence referendum by Southern Sudan after six years); the UN proposal for Western Sahara (with shared sovereignty for four years and then an independence referendum by the fifth year); the transformation of the FRY into the Union of Serbia and Montenegro (with provision for a referendum on Montenegrin independence within three years); the recent proposal by President Musharef of Pakistan for a Roadmap for Peace for Kashmir, and most recently the initiation of the Philippine/Moro Islamic Liberation Front negotiations (with the express conditioning of US financial assistance on progress in a number of areas).

As will be discussed below, in the case of Kosovo the approach of earned sovereignty was developed in an ad hoc and halting manner beginning as a proposed initiative by the Public International Law & Policy Group working with

the International Crisis Group, and then becoming a core element of the Rambouillet Peace Accords and UN Security Council Resolution 1244. The approach was then further refined and developed by a number of expert commissions and think tanks, including the Goldstone Commission, the International Crisis Group, and the Center for Strategic and International Studies, and came to form the basis of the current United Nations doctrine of Standards before Status. Throughout its development and application, the earned sovereignty approach competed for influence with the alternative approach of stability through accommodation and was shaped by the compromises inherent in the foreign policy decision making process. In the end, the debate yielded a more refined approach which appears to present the greatest opportunity for facilitating a viable and lasting settlement of the centuries old dispute over the sovereignty of Kosovo.

OVERVIEW

The history of the territory of Kosovo is marked by near perpetual competition for sovereign control between Kosovar Albanians and Serbs.[5] Great powers, such as Germany and Italy, and now the United Nations, have also played important roles in the allocation of sovereignty over Kosovo. Throughout the history of competition, sovereignty has ebbed and flowed from the Kosovar Albanians to the Serbs and back again. Frequently, the competition for sovereign control is accompanied by mass atrocities and human rights violations. Throughout the 1990s, the competition for sovereign control led to increasingly intolerable human rights abuses by the government of Serbia against the people of Kosovo.

In an effort to break the cycle of retribution, to highlight the need for a comprehensive approach to resolving the conflict, and to fill the diplomatic deficit created by the lack of a coherent response by the European Union, in November 1998 the Public International Law & Policy Group (PILPG) defined and proposed the adoption of the approach of intermediate sovereignty.[6] This approach sought to serve as a basis for structuring the phased reduction of Serbian sovereign control over Kosovo, and for allowing the people of Kosovo to accumulate sovereign authority and functions in a manner protecting the legitimate interests of the Serbian minority in Kosovo and of the international community.[7]

The key elements of the 1998 PILPG approach involved the creation of a system whereby the people of Kosovo, through legitimate political bodies, would be entitled to exercise certain sovereign rights, while simultaneously retaining specified links to the Federal Republic of Yugoslavia[8] (FRY).[9] As a condition for

5. *See generally* JULIE A. MERTUS, KOSOVO: HOW MYTHS AND TRUTHS STARTED A WAR (1999) *and* TIM JUDAH, KOSOVO: WAR AND REVENGE (2000).

6. *See* PUBLIC INTERNATIONAL LAW & POLICY GROUP FOR THE INTERNATIONAL CRISIS GROUP, INTERMEDIATE SOVEREIGNTY AS A BASIS FOR RESOLVING THE KOSOVO CRISIS (1998) *available at* http://www.crisisweb.org/projects/showreport.cfm?reportid=171 (last visited Jan. 2, 2003).

7. *Id.*

8. 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

attaining greater sovereign authority and functions, the people of Kosovo and their political institutions would have to: guarantee the protection of the rights of all minority populations within Kosovo; respect the territorial integrity of neighboring states such as Macedonia and Albania; renounce any intention of political or territorial association with Albania; and accept Kosovo's borders as confirmed by the 1974 Yugoslav Constitution. After the three-to-five-year period, Kosovo would be entitled, subject to an internationally conducted referendum within Kosovo, to pursue recognition from the international community.[10] Once Kosovo earned international recognition it would continue to be bound by its obligations to protect minority rights, maintain its current borders, and reject any political or territorial association with Albania.[11]

Within two months of the release of the report, the failure of the then-current approach of stability through accommodation,[12] and the necessity of a new approach, became apparent when Ambassador William Walker proclaimed the massacre of over forty civilians by Serbian security forces at Racak to be a crime against humanity.[13] Public reaction in the United States and Europe to the massacre allowed key American foreign policymakers to push for the convening of peace negotiations backed by the threat of the use of force.[14]

At the Rambouillet/Paris negotiations, the American and European negotiators reached agreement on a proposal for an Interim Agreement for Peace and Self-Government in Kosovo, which embodied many of the core elements of earned sovereignty.[15] Most importantly, the Accords provide that three years after the entry into force of the Agreement an international meeting would be convened to determine a mechanism for a final settlement for Kosovo. The meeting would take into consideration, among other criteria, whether the Kosovar Albanians had fulfilled obligations to establish democratic institutions and to protect human and minority rights.[16] An assessment of the will of the people would also guide the

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PRESS SERVICE, Feb. 4, 2003. For purposes of clarity, however, the former name will be used in this article.

9. PUBLIC INTERNATIONAL LAW & POLICY GROUP, *supra* note 5, at i.

10. *Id.* at 38.

11. *Id.*

12. This approach entailed supporting Serbian sovereign control over Kosovo while attempting to persuade the Serbian regime to halt its atrocities against the people of Kosovo.

13. *See* BBC News Online, "Racak Killings 'Crime Against Humanity,'" (Mar. 17, 1999) *at* http://news.bbc.co.uk/2/hi/europe/298131.stm (last visited Jan. 2, 2003); HUMAN RIGHTS WATCH, YUGOSLAV GOVERNMENT WAR CRIMES IN RACAK, (1999 World Report) *available at* http://www.hrw.org/press/ 1999/jan/yugo0129.htm (last visited Jan. 2, 2003).

14. *See* Radio Netherlands, "Walker: 'Racak Massacre Was Not Faked,'" (June 14, 2002) *at* http://www.rnw.nl/hotspots/html/icty020613.html (last visited Jan. 2, 2003).

15. Rambouillet Accords, Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, U.N. Doc. S/1999/648 (June 7, 1999) *available at* http://www.un.org/peace/kosovo/99648_1.pdf (last visited Jan. 2, 2003) [hereinafter Rambouillet Accords]. It is useful to note that 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".

16. PUBLIC INTERNATIONAL LAW & POLICY GROUP, *supra* note 5, 38.

final decision.[17]

The draft Accords were agreed to by the Kosovar Albanians, but rejected by Mr. Milosevic, who sought to resolve the competition over sovereignty by ethnically cleansing Kosovo of its Albanian population.[18] To prevent this, the North Atlantic Treaty Organization (NATO) launched an air campaign.[19] NATO halted the air campaign when Milosevic agreed to transfer *de facto* sovereign control over Kosovo to the United Nations and NATO.

The U.N. Security Council then adopted Resolution 1244 to provide a framework for the interim administration of Kosovo by the United Nations.[20] While retaining the core elements of 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).[21] 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.

Acting under the authority of Resolution 1244, the Special Representative of the Secretary-General (SRSG) displaced the FRY's ability to exercise sovereign authority and functions in Kosovo and began the process of building Kosovar institutions, but hesitated in transferring substantial sovereign responsibility to the people of Kosovo.

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 Goldstone Commission renewed the call for earned sovereignty for the people of Kosovo.[22] The key elements of the Goldstone proposal, termed conditional independence, included the prompt holding of a referendum to ascertain the will of the people, the initiation of U.N.-sponsored talks between the Kosovar Albanians and the Kosovar Serbs, the development of mechanisms to protect minority and human rights, arrangements for the continued presence of international security forces, and the phased transfer of effective administration from the United Nations to the legitimate national and municipal authorities.[23]

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17. *Id.*

18. For the International Criminal Tribunal for the former Yugoslavia's indictment detailing Milosevic's ethnic cleansing campaign *see* ICTY Prosecutor, IT-99-37, Indictment against Milosevic et al. (May 22, 1999).

19. *See* Radio Netherlands, *supra* note 12.

20. *See* SC Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg, U.N. Doc. S/RES/1244 (1999) *available at* http://www.un.org/Docs/scres/ 1999/sc99.htm (last visited Jan. 2, 2003)..

21. *Id.* at para. 10.

22. INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED, 284 (2000) *available at* http://www.kosovocommission.org/reports (last visited Oct. 14, 2002) [hereinafter THE KOSOVO REPORT].

23. *Id.*

Subsequent to the release of the Goldstone proposal, the United Nations began a process of building up Kosovar institutions and devolving power to those institutions. During this time, and with little input from the Kosovar political leadership, the Americans and the Europeans negotiated a Constitutional Framework for Provisional Self-Government, which was promulgated by the United Nations and laid the foundation for an approach of phased sovereignty.[24] The Constitutional Framework provided for the development of a unique dual key system of initial and primary responsibility for the SRSG and Kosovar institutions. The dual key approach of shared sovereign functions was coupled with a mandate for the provisional institutions of self-government to conduct their work with a view to facilitating the determination of Kosovo's future status through a process, which would take full account of all relevant factors including the will of the people.

Despite significant progress toward earned sovereignty, with the fall of Milosevic and other important political changes, there was increasing pressure by the European Union to reign in the devolution of sovereign authority and functions to Kosovo in an effort to promote perceived democratic reform in Serbia proper.

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.[25] The basic elements of the proposal included the rapid devolution of authority to Kosovar institutions, and substantial limiting of SRSG authority to include only protection of minorities, guarantee of human rights and the guarantee of border integrity. The SRSG powers were to be exercised only when the locally elected officials fail to meet their obligations. According to the Commission, 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. As Kosovo fully met these commitments, the member states of the international community would grant it international recognition.

In partial response to the efforts of the Goldstone Commission and others, the new SRSG for Kosovo, Michael Steiner, embarked on a process of indicating that Kosovo would not likely return to Serbian sovereign control, and of devolving greater power to the Kosovar authorities.

Seeking to support this renewed initiative for earned sovereignty, while recognizing the slow nature of political institution building in Kosovo, the International Crisis Group (ICG) put forth a detailed proposal for a mixing of international trusteeship and earned sovereignty for Kosovo.[26] The cornerstone of the proposal was a call for immediate negotiations on final status, with the United Nations Mission in Kosovo (UNMIK) to then transfer increasing sovereign

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22. *See generally Regulation No. 2001/9 On a Constitutional Framework for Provisional Self-Government*, 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 Jan. 2, 2003).

25. *See generally* THE FOLLOW-UP OF THE KOSOVO REPORT, *supra* note 1.

26. *See* PUBLIC INTERNATIONAL LAW AND POLICY GROUP, *supra* note 5.

authority and functions to Kosovar institutions, retaining only limited veto power in certain areas.[27]

Under increasing international pressure to adopt a clear approach for resolving the crisis over Kosovo's final status, the SRSG adopted a strategy referred to as "standards before status."[28] While ostensibly rejecting conditional independence, this approach contains most of the basic elements of earned sovereignty. It calls for the measured devolution of sovereign authority and functions to Kosovar institutions as they demonstrate capacity to operate effectively and meet select criteria. However, the approach also suspends any discussion of final status until after certain standards are met. At its essence, the standards before status approach simply suspends the political discussion over final status and sets in motion the construction of Kosovar institutions which will likely ensure an independent Kosovo.

THE COMPETITION FOR SOVEREIGNTY OVER KOSOVO

On December 1, 1918, following the end of World War I, Kosovo became a part of The Kingdom of Serbs, Croats and Slovenes, which subsequently became Yugoslavia, though never legally part of Serbia.[29] In 1919, in response to a denial of their basic human rights, including the right to education in the Albanian language, an estimated 10,000 rebels took up arms against the central government of the Kingdom. The suppression of this revolt involved the commission of widespread atrocities against Kosovar Albanians, the arming of Serbian civilians, and the relocation of Kosovar Albanian women and children to internment camps in central Serbia.[30] In an attempt to change the ethnic make-up of Kosovo, the central government accelerated a colonization program, promising sizable tracts of land and exemption from taxes for ethnic Serbs willing to relocate to Kosovo.[31]

In 1929, Yugoslavia was divided into nine governorships, with the territory of Kosovo being dispersed amongst three governorships.[32] From that time until World War II, much of the land held by Kosovar Albanians was confiscated and transferred to the state. In 1933, the government of Yugoslavia sought to resolve the claim to sovereignty by relocating much of the Albanian population to Turkey, and began negotiations with the government of Turkey to accomplish this objective. In 1938, an agreement was reached with Turkey to forcibly relocate as many as 400,000 Kosovar Albanians, but the outbreak of World War II prevented the parties from carrying out the agreement.[33]

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27. *Id.* at i.

28. Press Release, United Nations 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. 22, 2003).

29. *See generally* NOEL MALCOLM, KOSOVO: A SHORT HISTORY (1998).

30. *See id.* at 273-76.

31. *See* MALCOLM *supra* note 27 at 280-81. It is estimated that approximately 14,000 families settled in Kosovo because of the colonization program. *Id.*

32. *See id.* at 283.

33. *See id.* at 285-86.

During World War II, when Axis forces occupied Yugoslavia, Kosovo was partitioned between Bulgaria, Albania (governed by Italy), and Germany. Following the end of the war, when the state of Yugoslavia was reconstituted, the 1946 Yugoslav constitution provided that Kosovo would be an Autonomous Region within the Republic of Serbia. Although the 1946 Yugoslav constitution did not address in detail the rights and obligations of the Autonomous Region of Kosovo, the separate Serb Republic constitution provided that Kosovo would direct its own economic and cultural development and that it would be responsible for protecting the rights of its citizens.[34] At this time, the Yugoslav government relaxed the restrictions on the use of the Albanian language and reduced the intensity of the colonization program, which had been halted during the war – during which many of the Serbian colonists had been forced to return to Serbian territory.

In 1963, Yugoslavia adopted a new constitution, which promoted Kosovo to an Autonomous Province, but effectively decreased some of its federal rights. In 1968, the constitution was amended to provide Autonomous Provinces the status of "socio-political communities" which was the same term used to describe the other republics making up Yugoslavia.[35] In early 1969, the Kosovar Albanians were permitted to fly the Albanian flag as their "national emblem," and later that year the University of Prishtina was established. Throughout the 1970s the Kosovar Albanians increased their participation in the economic sector, political bureaucracy and local police forces, with Kosovar Albanians holding two-thirds of the membership in the local League of Communists, and three-fourths of the membership in the local police and security forces.[36]

In 1974, Yugoslavia adopted yet another constitution, which provided that the Autonomous Province of Kosovo, as well as the Autonomous Province of Vojvodina, would be entitled to a sovereign status nearly equivalent to that of the other six republics of Yugoslavia. As a result, Kosovo adopted its own constitution, appointed its own representative on the rotating federal Presidency and elected Parliamentarians to the federal Parliament.

In the early 1980s, after Tito's death, and in response to perceived and real discrimination by the Kosovar Albanians, the Kosovar Serbs began to agitate for a return to the earlier political system, in which the Kosovar Serbs held greater privilege and power. In 1985, the Serbian Academy of Sciences drafted a "Memorandum," which essentially called for a revocation of the sovereign authority and functions accorded Kosovo under the 1974 constitution, and the creation of a greater Serbia.[37] In 1987, Slobodan Milosevic, then a deputy to the President of the Serbian Party, traveled to Kosovo to hear demands by Kosovar Serbs. In response to an orchestrated riot by Serbian nationalists, Milosevic delivered an extemporaneous speech calling for the "defence of the sacred rights of

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34. *See id.* at 289-93, 315-17.

35. *See id.* at 324-25.

36. *See id.* at 326.

37. For a comprehensive collection of the texts central to the operation of Serb nationalism, *see* LE NETTOYAGE ETHNIQUE (Mirko Grmek et al. eds., 1993)

the Serbs."[38] In late 1987, Milosevic used the growing political unrest in Kosovo as a platform for assuming the presidency of the Serbian League of Communists.

In early 1988, the Serbian Assembly adopted amendments to the Serbian constitution which removed Kosovo's control over the Kosovar police force, criminal and civil courts, civil defense, and economic, social and education policy. The amendments also effectively prohibited the use of Albanian as an official language in Kosovo. To force these amendments through the Kosovar Parliament as required by the Federal constitution, members of the Serbian security forces surrounded the Kosovar Parliament building with tanks and armored personnel carriers, and inserted special police and communist party functionaries amongst the Kosovar delegates.[39] These actions were met by mass demonstrations of the Kosovar Albanian population and resulted in the declaration of a state of emergency in Kosovo by the Serbian regime.

In March and June of 1990, the Assembly of the Republic of Serbia issued a series of decrees meant to entice Serbs to return to Kosovo, while suppressing the rights of the Kosovar Albanians. The decrees for instance created new "Serb only" municipalities, forbade the sale of property to Albanians by departing Serbs, closed the Albanian language newspaper, closed the Kosovo Academy of Sciences, and dismissed several thousand Kosovar Albanian state employees.[40] In response, on July 2, 1990, the Albanian members of the Kosovo Assembly declared Kosovo "an equal and independent entity within the framework of the Yugoslav federation."[41] The Serbian regime reacted by dissolving the Kosovo Assembly and the government. Finally, in late 1990 the Serbian regime expelled 80,000 Kosovar Albanians from state employment.

The members of the dissolved Albanian assembly responded by holding a secret meeting and creating a constitutional law for the Republic of Kosovo, and then holding a referendum on the question of whether Kosovo should be declared a sovereign and independent republic. According to Kosovar Albanian sources, eighty-seven percent of eligible voters participated in the vote, with ninety-nine percent voting in favor of independence. Subsequently, using the same procedure of underground voting, the Kosovar Albanians held an election on May 24, 1992, whereby they elected a new assembly and government.[42] In the spring of 1998, the Kosovar Albanians held a second round of parliamentary elections as required by their constitutional law.

From 1989, the Kosovar Albanians were denied the ability to exercise any sovereign authority or functions or even to participate in the federal government. They were also denied the ability to participate in the local formal political structures responsible for determining the political fate of Kosovo. In addition, the Kosovar Albanians were subjected to a systematic denial of their basic human

38. MALCOLM, *supra* note 27, at 341-42.
39. *See id.* at 343-45.
40. MALCOLM, *supra* note 27, at 345-46.
41. *See id.* at 346.
42. *Id.* at 347.

rights, which included a policy of arbitrary arrests, police violence, detention incommunicado, torture, summary imprisonment and economic marginalization. As a result, in the mid 1990s some elements of the Kosovar Albanian population formed the Kosovo Liberation Army, which murdered members of the Serbian police and military forces and perceived Kosovar Albanian collaborators.

Commencing in the winter of 1998, Serbian forces engaged in a brutal crackdown in Kosovo ostensibly aimed at extinguishing the KLA and its popular support, but in reality aimed at ethnically cleansing large swaths of Kosovo. As part of their campaign, the Serbian forces terrorized local civilian populations, murdered vast numbers of noncombatants, and laid siege to numerous villages.[43] The results of the new campaign of Serbian ethnic aggression were that over 350,000 civilians were displaced and over 18,000 homes were deliberately destroyed, and almost half of the population centers were subject to siege. The intensity of the campaign of terror, ostensibly to drive the KLA from Kosovo, rapidly increased in the autumn of 1998.

In the face of such atrocities, the United States and Europe responded with humanitarian assistance, mild economic sanctions,[44] and public declarations of the need to stop the atrocities. Although the United States and Europe had eventually been compelled to use force in Bosnia and had stationed over 30,000 troops to prevent renewed hostilities there, they initially eschewed even the threat of force in Kosovo.[45]

At this point, the task of the international community evolved into an effort to halt Serbian atrocities in Kosovo and devise a means to peacefully resolve the dispute over the sovereignty of Kosovo.

EARNED SOVEREIGNTY AS AN APPROACH TO RESOLVING THE KOSOVO CONFLICT

Throughout the summer of 1998 the United States and its European allies sought a negotiated settlement of the crisis in Kosovo.[46] Despite the history of Serbian atrocities and aggression in Croatia and Bosnia, America and its allies

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43. For a review of the atrocities committed, see Human Rights Watch, *at* http://www.hrw.org (last visited Jan. 2, 2003); the reports of the Kosovo Verification Mission, *at* http://www.osce.org/Kosovo (last visited Jan. 2, 2003).

44. CNN.com, *Calm Returns to Montenegro on Inauguration Day* Jan. 15, 1998 *at* htp://www.cnn.com/WORLD/9801/15/montenegro (last visited Jan. 2, 2003) (statement of U.S. envoy to the Balkans Robert Gelbard).

45. *See* Press Conference of Ambassador Richard Holbrooke, Special Envoy, and Ambassador William Walker, Director of the OSCE Kosovo Verification Mission, *On-the-record Briefing*, released by the Office of the Spokesman, U.S. Dep.'t of State (Oct. 28, 1998), *available at* http://www.mthoyoke.edu/acad/intrel/holb.htm (last visited Mar. 22, 2003).

46. The draft agreements prepared by the United States generally sought to accommodate the Serbian interests in the territorial integrity and sovereignty of the FRY, while providing certain human rights protections for the people of Kosovo. Like the Dayton Accords, the draft agreements proposed a complicated system of government which was likely to lead to political gridlock. On the whole the draft agreements minimized the emphasis on self-determination and rather placed the emphasis on sovereignty. While there was some hint of earned sovereignty in the draft text it represented the more traditional approach to resolving such conflicts – and was as a result unsuccessful.

were highly reluctant to use, or threaten the use of, force. As a result of the perceived weakness of the international community, the Serbian interlocutors bogged the talks down in technical negotiations over arcane power sharing arrangements, and Mr. Milosevic's forces increasingly relied upon violence against the civilian population to secure Serbia's hold over Kosovo.

Recognizing the necessity of a shift in approach, the Public International Law & Policy Group published a monograph through the International Crisis Group in the fall of 1998. This monograph argued that the only means for resolving the crisis in a manner that would protect the lives of the two million Kosovar Albanians, while not destabilizing the region, would be for the international community to intervene and oversee a three-to-five-year period of transition. During this period of transition, Kosovo would assume increasing levels of sovereign authority and functions from Serbia, so long as it met certain conditions. The approach was dubbed intermediate sovereignty.

According to the proposal, the people of Kosovo, through legitimate political bodies, would be entitled to exercise certain sovereign rights, while simultaneously retaining specified links to the FRY. In exchange for the assumption of these rights, the people of Kosovo would commit to respect fundamental principles of international law. This arrangement would exist for a period of three to five years. After this period, Kosovo would be entitled, subject to an internationally conducted referendum within Kosovo, to pursue recognition from the international community.[47] The assessment of the will of the people of Kosovo through a legitimate referendum served as a cornerstone of the approach of intermediate sovereignty.

The proposal provided that during the interim period, the people of Kosovo would exercise complete legislative, executive and judicial control over their internal affairs relating to the key areas of economic development, internal security, education, taxation, extraction and processing of natural resources, transportation, health care, media and news broadcasting, cultural development, and the protection of minority rights. To a certain degree the institutions of Kosovo would be permitted to conduct their own international affairs and appoint international representatives.[48]

In exchange for the exercise of these rights, the people and institutions of Kosovo would be required to guarantee the rights of all minority populations within Kosovo, respect the territorial integrity of neighboring states such as Macedonia and Albania, renounce any intention of political or territorial association with Albania, and accept its borders as confirmed by the 1974 Yugoslav Constitution. The proposal also indicated that Kosovar representatives would be permitted to participate in the government of the FRY to the degree necessary to ensure an effective transition to its own international status.[49]

To ensure the protection of the rights of the Albanian, Serbian and other

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47. *See* PUBLIC INTERNATIONAL LAW & POLICY GROUP, *supra* note 5, at i.

48. *Id.*

49. *See id.*

inhabitants of Kosovo, international monitors from the Organization for Security and Co-Operation in Europe (OSCE) and the European Union, as well as independent non-governmental organizations, would be authorized to establish monitoring missions and accorded complete and unrestricted access to Kosovo. The proposal envisioned these organizations would publicly report their findings. The key to the success of the proposal rested on the agreement of the Serbian and Yugoslav police, military and paramilitary forces to withdraw from Kosovo within six months and to permit international organizations to monitor this withdrawal.[50]

Upon the expiration of the interim period, the conditions for recognition of Kosovo would include the traditional legal criteria of territory, population, government and capacity to conduct international relations. Additionally, they would include the political criteria of whether Kosovo had fulfilled its commitment to protect the rights of all minority populations within its territory, respected the territorial integrity of Macedonia and Albania, rejected any political or territorial association with Albania, and maintained the status of its borders. Once recognized by the international community, Kosovo would remain bound by these commitments, and would cease its participation in the Yugoslav federal government.[51]

The report sought to base the approach of intermediate sovereignty upon the basic principles of international law, which provide 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. The report then reasoned that 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 sub-state entity in order to ensure the protection of those rights.[52] While this proposition remains the subject of debate among international lawyers, it is increasingly accepted as a viable means for protecting a population from further gross violations of human rights in certain circumstances.

The 1998 proposal also drew legal support from the following factors: 1) the legal and factual similarity between Kosovo and the other republics of the former Yugoslavia, which were deemed by the international community to be entitled to international recognition;[53] 2) the legal precedent of earned recognition established by the international community in recognizing Slovenia, Croatia, Bosnia-Herzegovina and Macedonia after they met specific conditions;[54] 3) the fact that Yugoslavia had dissolved, and the international community had rejected Serbia/Montenegro's claim to continue its international legal personality;[55] 4) the historical fact that Kosovo, while legitimately part of Yugoslavia, had never been

50. *Id.*
51. *Id.* at i.
52. *Id.* at ii.
53. *Id.* at 28-29.
54. *Id.* at 29-32.
55. PUBLIC INTERNATIONAL LAW & POLICY GROUP, *supra* note 5, at 33-35.

legitimately incorporated into Serbia;[56] 5) the fact that the people of Kosovo had been subjected to ethnic aggression;[57] and 6) at the time the recent precedent set by the Russian/Chechen Accords and the Northern Ireland Peace Agreement.[58]

The key themes of the 1998 PILPG proposal were 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. 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.

In order to ensure, however, that the attainment of international status for Kosovo did not have negative consequences in the region, or lead to additional violations of human rights, it was necessary to establish a process whereby the international community could manage the development of an independent Kosovo and ensure the protection of its interests in regional stability. The corollary element was that the Kosovars, while entitled to heightened 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 promotion of regional security. While not explicitly stated in the 1998 PILPG Report, the report provided support for the notion that certain specified limits on sovereignty might continue after Kosovo had attained international recognition.[59]

While the approach of intermediate sovereignty resonated with the policy-making community in the United States and Europe (and would later form the basis for their proposal at Rambouillet), and was adopted in principle by the government of Kosovo,[60] it was dismissed by President Milosevic – who was determined to pursue a program of ethnic cleansing in Kosovo.[61]

THE INITIAL INTERNATIONAL RESPONSE

To implement ethnic cleansing, the Serbian regime began to round up Kosovar Albanian men, and place them in camps reminiscent of the Bosnian concentration camps.[62] In the face of increasing atrocities, the United States and

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56. *Id.* at 33.

57. *Id.* at 35-36.

58. *Id.* at 36-38.

59. *See generally* PUBLIC INTERNATIONAL LAW & POLICY GROUP, *supra* note 5.

60. In part as a result of the 1998 PILPG Report, two members of Group were invited to serve as experts on the Kosovo delegation to the Rambouillet talks. While at Rambouillet and Paris they further developed and advocated for the utilization of the approach of earned sovereignty.

61. For details on Milosevic's plan to resolve the Kosovo crisis through ethnic cleansing, *see Kosovo/Kosova As Seen, As Told, An Analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999* (June 9, 1999) *available at* http://www.osce.org/kosovo/documents/reports/
hr/part1/index.htm (last visited Jan. 2, 2003) (Chapter 14 recounts the forced expulsion of Kosovo Albanians from Kosovo).

62. *See UN Warns of Bosnia-type Horrors as 600 Held by Serbs*, Irish Times, Sept. 9, 1998, at 10

Europe marshaled political and public support for the use of air strikes against Serbian forces,[63] and dispatched Ambassador Richard Holbrooke on a mission to the FRY to negotiate an arrangement for the deployment of international monitors. The resulting Holbrooke/Milosevic deal provided for the stationing of unarmed monitors[64] and the provision for unarmed NATO over flight.[65] The weakness of the deal aside, the primary effect was to temporarily diffuse international support for the use of force to protect Kosovar Albanians by prying sovereign control over Kosovo from Yugoslavia.

In light of the unarmed nature of the monitors and the perceived retrenchment from the threat to use force, the Serbian regime continued its attacks on the civilian population. Public criticism and demand for action reached a peak shortly after January 15, 1999, when Serbian military and paramilitary forces massacred over 40 civilians in the Kosovar town of Racak. The massacre was met by a series of public denunciations by President Clinton,[66] Secretary of State Albright,[67] the Chairman of the OSCE,[68] the European Union, and U.N. Secretary-General Kofi Annan.[69]

As a result of the Racak massacre, the collapse of the Holbrooke/Milosevic deal, the apparent failure of earlier mediation efforts, and political pressure (especially from the U.S. Congress), the United States led its allies from the approach of accommodation and sovereignty first to one of "diplomacy backed by force."[70]

(comments of Kris Janowski, UNHCR Spokesman, on Serbia's arrest of some 600 Kosovar Albanian men).

63. *See* Statement to the Press Following Decision on the ACTORD by Dr. Javier Solana, Secretary General of the North Atlantic Treaty (Oct. 13, 1998) *available at* http://www.nato.int/docu/speech/1998/s981013a.
htm (last visited Jan. 2, 2003).

64. *See* Agreement on the OSCE Kosovo Verification Mission, Oct. 16, 1998, 38 I.L.M. 24 (1999).

65. *See* Operation Eagle Eye - The NATO Kosovo Verification Mission, *available at* http://www.afsouth.
nato.int/operations/deteagle/Eagle.htm#MISSION (last visited Jan. 2, 2003) , (referring to the Agreement between the Chief of General Staff of the FRY and NATO Supreme Allied Commander Europe, signed on Oct.15, 1998, establishing air verification mission over Kosovo)

66. *See* Statement by President Clinton (Jan. 16, 1999), *available at* http://clinton6.nara.gov/1999/01/1999-01-16-statement-by-the-president-on-kosovo.html (last visited Jan. 2, 2003).

67. *See* Press Statement by Madeleine Albright, Secretary of State of the United States (Jan. 18, 1999), *available at* http://www.fas.org/man/dod-101/ops/docs99/99011912.htm (last visited Jan. 2, 2003).

68. *See* Statement to the Press by Ambassador Kai Eide, Chairman of the Organization for Security and Cooperation in Europe Permanent Council (Jan. 18, 1999), *available at* http://www.state.gov/www/
policy_remarks/1999/990118_eide_racak.html (last visited Jan. 2, 2003).

69. *See* Press Release, Secretary-General of the United Nations Kofi Annan, *Secretary General Shocked by Alleged Massacre in Kosovo* (Jan. 19, 1999) (relating the statement issued Jan. 16, 1999, by the Spokesman for the Secretary-General) U.N. Doc. SG/SM/6864, *available at* http://www.un.org/News/Press/docs/1999/19990119.sgsm6864.html (last visited Jan. 2, 2003).

70. *See* Statement to the Press by Dr. Javier Solana, Secretary General of the North Atlantic Treaty (Jan. 28, 1999) *available at* http://www.nato.int/docu/pr/1999/p99-011e.htm (last visited Jan. 2,

RAMBOUILLET AND THE NEGOTIATION OF EARNED SOVEREIGNTY

Using the now credible threat of force, the United States and its allies convened the Rambouillet peace talks in early February 1999.[71] The approach developed by the international community during the talks was based in large part on the approach of earned sovereignty.

As explained in the U.S. Department of State's Fact Sheet entitled "Understanding the Rambouillet Accords," the primary elements of the Interim Agreement for Peace and Self-Government in Kosovo concerned provisions for the creation of democratic self-government, the protection of human rights, the establishment of security, and the convening of an international meeting at the end of a three year period which would establish a mechanism for final settlement.[72] As noted below, the nature of the final settlement would depend in large part on the will of the people of Kosovo and compliance by the Kosovar government and other institutions with the relevant provisions of the agreement.

The primary focus of the Rambouillet Accords was to create democratic self-government in Kosovo. The Rambouillet Accords sought to promote 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. Strong local governments would also be created. The Constitution also provided for a full range of powers to be exercised by the central government, which included taxation, economic regulation and development, property rights, social policy, environmental protection, local self-government, and the power to conduct foreign relations in specified areas. 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.[73]

The Accords also provided for the interim retention of significant elements of sovereignty by the FRY, including the rights 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.[74]

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

2003). *See also* Statement by the North Atlantic Council on Kosovo (Jan. 30, 1999), *available at* http://www.nato.int/docu/pr/1999/p99-012e.htm (last visited Jan. 2, 2003).

71. *See* Press Release, Secretary of State, Madeleine Albright, *Albright on NATO Final Warning on Kosovo* (Jan. 30, 1999), *available at* http://usembassy-australia.state.gov/hyper/WF990201/epf115.htm (last visited Jan. 2, 2003).

72. *See generally Understanding the Rambouillet Accords,* U.S. Dep't of State, Bureau of Eur. Aff. (Mar. 1, 1999), *available at* http://www.state.gov/www/regions/eur/fs_990301_rambouillet.html (last visited Jan. 2, 2003).

73. Rambouillet Accords, *supra* note 13, at ch. 1, art. 2 & 4.

74. *Id.* at ch.1, art. 1(3).

was the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its Protocols, directly into Kosovar law.[75] 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.[76] 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.[77]

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.[78] Importantly, the Accords expressly provided there would be no change in the borders of Kosovo.[79]

The Accords embodied the approach of earned sovereignty by providing the Kosovar Albanians with certain sovereign rights, and excluding the exercise of certain sovereign rights by Serbia and the FRY. For instance, under the Accords, Kosovo would be able to exercise partial sovereignty by conducting foreign relations in specified areas, concluding some international agreements, and receiving direct international assistance.[80] Moreover, there was also no bar to Kosovo appointing international representatives for foreign countries.

In the Rambouillet Accords, the international community set the precedent for diminishing Yugoslav sovereignty, building up Kosovar sovereignty, and accruing certain sovereign responsibilities unto itself. The deployment of the international security force was the most direct example of the erosion of Yugoslav sovereignty, while the presence of three international judges on the Kosovar Supreme Court illustrates the limit on Kosovar sovereignty occasioned by the extensive involvement of the international community in the affairs of Kosovo.

A primary tenet of earned sovereignty, that of an opportunity to earn full sovereignty, was codified in article one of the final chapter of the Rambouillet Accords, which provided that:

> Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act.[81]

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75. *Id.* at ch. 1, art. 6.
76. *Id.* at ch. 6.
77. *Id.* at ch. 1, art. 7.
78. Rambouillet Accords, *supra* note 13, at ch. 7.
79. *Id.* at ch. 1, art.1(6)(a).
80. *Id.* at ch. 1, art.1(6)(c).
81. Rambouillet Accords, *supra* note 13, at ch. 8, art. 3.

This article served as the core of the earned sovereignty approach detailed in the Rambouillet Accords. The three key elements were that the arrangement provided for in the Accords was interim, that at the end of the interim period the international community would participate in the determination of the final status of Kosovo, and that this determination would be based in large part on the will of the people and each party's compliance with the basic elements of the agreement. The reference to the Helsinki Final Act is also important as it seeks to balance the right of self-determination with the rights of sovereignty and territorial integrity.

It is useful to note here that the Rambouillet approach to earned sovereignty did not include provisions for the phased evolution of sovereignty for Kosovo. Rather, the Accords provided for the allocation of sovereign rights and responsibilities among the Kosovars, the Serbs and the international community with a set time for reassessment of that allocation with the possibility of full sovereignty for Kosovo. This was highly similar to the approach mapped out in the 1998 PILPG proposal. As noted in the concluding section of this paper, the inclusion of a process for phased sovereignty, where sovereignty increases in relation to compliance with specified benchmarks, may, in the case of Kosovo, be the key to the successful employment of the approach of earned sovereignty.

THE NATO AIR CAMPAIGN

In response to the massive ethnic cleansing that followed the collapse of the Rambouillet/Paris negotiations, NATO launched a strategic air campaign, striking targets in Kosovo and Serbia proper. During the course of the air campaign, the Yugoslav Tribunal indicted Mr. Milosevic and a number of other top officials for orchestrating crimes against humanity in Kosovo. After seventy-eight days of NATO bombing and an apparently increasing willingness of the NATO member states to authorize the deployment of ground troops, Mr. Milosevic agreed to remove Serbian military forces from Kosovo and to allow the deployment of NATO forces and the creation of an interim administration operated by the United Nations. The NATO victory came, however, after Serbian forces had expelled 1.5 million Kosovo Albanians, killed tens of thousands more, and destroyed most of their homes.

To end the conflict, the NATO member states enlisted Finnish President Marti Ahtisaari, while Russia contributed the former Russian Prime Minister Victor Chernomyrdin, to negotiate Milosevic's withdrawal from Kosovo. The Agreement, accepted by the FRY in June 1999, provided for the withdrawal from Kosovo of all military, police and paramilitary forces, with a possibility of negotiated return to perform tasks under the supervision of international personnel such as de-mining and protecting patrimonial sites.

The agreement also provided for the deployment in Kosovo, under U.N. auspices, of effective international civil and security presences. The civilian presence would be charged with creating mechanisms to provide the people of Kosovo with democratic self-government and substantial autonomy in an interim

period.[82] The security presence would establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.[83]

Although the agreement was primarily designed to codify Milosevic's agreement to withdraw his forces from Kosovo and permit the deployment of a NATO-led protection force, it reflected and modified some of the key elements of earned sovereignty. While the agreement provided for the displacement of Yugoslav and Serbian sovereignty and the necessity of creating institutions for democratic self-government in Kosovo, it also provided for the assumption of sovereign functions by an international civilian administrative force, and by a NATO-led international security force.[84] In light of the devastation caused by Serbian forces and the displacement of nearly the entire Kosovar population, the insertion of civilian and security forces with the responsibility to assume sovereign functions was in fact more practical than the immediate transfer of those functions to non-existent Kosovar institutions.

During the transition period between the withdrawal of the Serbian forces and the full deployment of the NATO-led peacekeeping force, a number of Serbian residents of Kosovo fled to Serbia. While some fled of their own accord, others had been targeted for revenge attacks by some elements of the Kosovar Albanian population. Those that stayed were subject to varying degrees of harassment by armed Kosovar Albanians until the NATO-led forces were able to provide adequate protection. While Serbian residents in Kosovo currently live within a relatively secure environment, very few of the Serbian refugees who left Kosovo have returned.

Also during the transition period, Serbian paramilitary forces retained control of the northern section of the town of Mitrovica which straddles the Ibar River. The town, which is a major access route to Serbia, is now effectively divided into the northern Serb township and the southern Albanian township. All political efforts to reintegrate the town have failed, and the French peacekeepers stationed there have been unwilling to take effective action to provide security for minority individuals wishing to return to their homes. Those who advocate the partition of Kosovo talk of the "Mitrovica line," with the northern township and the territory north of the Ibar River becoming part of Serbia in exchange for the independence of Kosovo.

UN RESOLUTION 1244: SWAPPING SERBIAN SOVEREIGNTY FOR UN SOVEREIGNTY

To formalize the agreement between Milosevic and the international community to end the conflict and withdraw Serbian forces from Kosovo, the U.N. Security Council adopted resolution 1244. Resolution 1244 both established the mandate for the NATO deployment and authorized the United Nations'

82. S.C. Res. 1244, *supra* note 18, at Annex 2, para. 5.
83. *Id.* at Annex 2, para. 4.
84. *Id.* at Annex 2, para. 5.

administration of Kosovo for an interim period.[85] The Agreement further codified a number of principles which were to guide the allocation of sovereignty among the FRY, Kosovo and the international community and sanctioned the intent of the international community to undertake a process for resolving the final status of Kosovo.

The substance of Resolution 1244 focused on: 1) displacing FRY sovereignty from Kosovo[86]; 2) replacing it with interim U.N. and NATO sovereign responsibilities[87]; 3) establishing substantial autonomy and democratic self-governance[88]; 4) "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords,"[89] 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."[90]

The United Nations substantially limited the sovereign authority of the FRY and completely excluded the sovereign authority of Serbia over Kosovo by requiring the FRY to withdraw all military, police and paramilitary personnel from Kosovo,[91] and by making no reference to any form of Serbian sovereign rights in Kosovo. In instances where the Security Council referenced the relationship between the sovereignty and territorial integrity of the FRY and Kosovo, it did so only in the context of the interim period prior to a resolution of the final status of Kosovo, and never in perpetuity.[92]

The Security Council then authorized an international security presence, led by NATO, to replace FRY security forces. The international force was authorized to prevent the return of FRY forces, establishing conditions for a safe and secure environment for the people of Kosovo and the institutions operating there, monitor and secure the Kosovar border, and ensure public safety in the interim – all crucial elements of a sovereign presence.[93]

The international civil presence in Kosovo, which would take the form of an SRSG and accompanying staff, was authorized to provide an interim civil administration for Kosovo.[94] The Security Council then made it clear, however,

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85. In early July, NATO deployed its forces and within the next week the U.N. appointed Bernard Kouchner to head the United Nations Mission in Kosovo (UNMIK). Letter from Kofi Annan, Secretary-General of the United Nations, to the Security Council (July 6, 1999), U.N. Doc. S/1999/748, *available at* http://www.un.org/Docs/sc/letters/1999/sglet.htm (last visited Jan. 2, 2003).

86. S.C. Res. 1244, *supra* note 18, at paras. 3, 4, 9.

87. *Id.* at para. 5-11, 17-19.

88. *Id.* at para. 11(a).

89. *Id.* at para. 11(e).

90. *Id.* at, para. 11(f).

91. *Id.* at para. 3.

92. Resolution 1244 did provide for the possible return of some sovereign authority by FRY forces by including the Ahtisaari Agreement in Annex 2, which, as noted above, provided that after a period of time an agreed number of Yugoslav and Serbian personnel would be permitted to return and would operate under the supervision of international forces to mark and clear minefields; maintain a presence at Serb patrimonial sites; and maintain a presence at key border crossings. *Id.* at Annex 2, para 6.

93. S.C. Res. 1244, *supra* note 18, at para. 9.

94. The mandate of the U.N. administration included the authority to perform basic civilian

that the U.N. administration was only an interim entity and that pending settlement of the final status of Kosovo, its primary task was to promote the establishment of substantial autonomy and self-government in Kosovo, based on the Ahtisaari Agreement and the Rambouillet Accords.[95] To accomplish this objective the U.N. civil administration was charged with "organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections."[96]

As discussed below, a key element in this process was the adoption by the U.N. administration of a Constitutional Framework for Provisional Self-Government. The Security Council also made it clear in its reaffirmation and restatement of the Ahtisaari Agreement that the "negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions."[97] Once the Kosovar institutions were created, the U.N. administration was to transfer to these institutions its administrative responsibilities while overseeing and supporting the consolidation of these provisional institutions as well as other peace-building activities.[98]

Most importantly, the Security Council also charged the interim U.N. administration with the obligation to facilitate "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords."[99] The U.N. administration was then to oversee the "transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement."[100] While the Security Council did not provide an express timetable for resolving the question of the final status of Kosovo, it did indicate this process should be governed by the Rambouillet accords, which set a three-year time-frame.

Resolution 1244 significantly, and likely irreversibly, altered sovereign control over Kosovo. By displacing Yugoslav sovereign control and replacing it with an interim U.N. administration mandated to build Kosovar institutions capable of providing for democratic self-government, it created a situation where the chances of Kosovo returning to Yugoslav or Serbian sovereign control are quite slim.

Resolution 1244 essentially follows the basic themes of earned sovereignty articulated in the 1998 proposal and the Rambouillet Accords in that it displaces Yugoslav sovereignty, creates mechanisms for establishing democratic self-government and the protection of minority rights, and mandates the resolution of

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administrative functions, support the reconstruction of key infrastructure and other economic reconstruction; supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid; maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo; protect and promote human rights; and assure the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo. *Id.* at para. 11.

95. *Id.* at para. 10.

96. *Id.* at Annex 1, para. 11(c).

97. Id. at Annex 2, para. 8.

98. S.C. Res. 1244, *supra* note 18, at para. 11(d).

99. *Id.* at para. 11(e).

100. *Id.* at para. 11(f).

Kosovo's final status. Resolution 1244, however, creates a substantial addition to the approach by providing for the exercise of sovereign functions by the United Nations.[101] Whereas 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 then an evaluation of the final status of Kosovo based in part on its compliance with the specific provisions of the Accords, Resolution 1244 provides for the United Nations to first assume control of sovereign functions, negotiate a constitutional framework and then begin the transfer of sovereign functions to Kosovar institutions. Simultaneously, the United Nations is mandated to pursue a resolution of the final status of Kosovo.[102]

Importantly, Resolution 1244 in no way intends for the deployment of a U.N. administration to supplant the process for a settlement of Kosovo's final status. Rather, Resolution 1244 is very clear in its mandate to the U.N. Administration to facilitate the resolution of Kosovo's final status, to phase in Kosovar control of the mechanisms for self-government, and then to assist in the transfer of sovereign authorities to the new institutions created in any final settlement.[103]

While Resolution 1244 lacks an express provision for the ability of the people of Kosovo to earn increasing degrees of sovereignty based on their demonstrated respect for certain principles, its constant reference to the Rambouillet Accords provides a strong basis for the inference of such a principle.[104] Notably, Resolution 1244 does not provide for a continued international presence, civilian or military after the transfer of authority.

Despite the clarity of Resolution 1244 regarding the interim transfer of sovereignty to the U.N. administration and the legitimacy of a process for determining the final status, some European states have argued that Resolution 1244, by its preambular reference to the sovereignty and territorial integrity of the FRY, precludes an eventual independent final status for Kosovo. This argument, however, does not possess a sufficient legal foundation.

In the preamble to Resolution 1244 the Security Council cited the ritual affirmation of the commitment of all member states to the sovereignty and territorial integrity of the FRY and the other States of the region, as set out in the Helsinki Final Act and Annex 2 of the Resolution.[105] Crucially, the sovereignty and territorial integrity of the FRY was conditioned by the Helsinki Final act and Annex 2 of the Security Council Resolution. The Helsinki Final act provides for the equal recognition of a state's right to sovereignty and territorial integrity, and of a minority peoples' right to self-determination. Annex 2 expressly places the respect for the sovereignty and territorial integrity of the FRY within the context of the "*interim* political framework agreement providing for substantial self-government for Kosovo,"[106] and also noted the necessity of taking full account of

101. S.C. Res. 1244, *supra* note 18, at paras. 5, 6, 9-11.
102. *Id.* at para. 11.
103. *Id.*
104. *Id.* at para. 11, Annex 1, Annex 2, para. 8.
105. S.C. Res. 1244, *supra* note 18, at pmbl.
106. *Id.* at Annex 2, para. 8 (emphasis added).

the Rambouillet Accords.[107]

The Rambouillet Accords, also in the preamble, "recalled" the commitment of the international community to the sovereignty and territorial integrity of the FRY.[108] The Accords, as noted above, then went on to provide for the near total exclusion of FRY sovereignty over Kosovo and for the creation of a mechanism to determine final status in three years. The preamble of Resolution 1244 therefore cannot reasonably be perceived to prevent the international community from moving forward with a process for resolving Kosovo's final status.

THE EROSION OF SERBIAN SOVEREIGNTY

Pursuant to Resolution 1244, the NATO-led security force displaced all of the Yugoslav and Serbian forces operating in Kosovo, and assumed all sovereign functions previously performed by those forces. Moreover, the security force has refused to permit the return of Serbian forces to guard patrimonial sites and be present on the border as envisioned in the Ahtisaari Agreement.[109]

Acting under the authority of Resolution 1244, UNMIK has assumed all of the sovereign functions in Kosovo. In fact, the first act of UNMIK was to adopt Regulation One, which provides, "All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General (SRSG)."[110] UNMIK also assumed authority over all financial assets in Kosovo, by authorizing itself to "administer movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which is in the territory of Kosovo."[111]

Acting under this and subsequent regulations, UNMIK levies and collects taxes; operates its own civil service; issues Kosovo specific stamps through its own postal system; controls borders; collects customs duties to fund Kosovo's budget;[112] enters into agreements with foreign governments; and grants consent for the establishment of "Liaison offices" representing the governments of foreign states.[113]

UNMIK has also operated to remove or prohibit any Yugoslav or Serbian

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107. *Id.*

108. Rambouillet Accords, *supra* note 13, at pmbl.

109. S.C. Res. 1244, *supra* note 18, at Annex 2, para 6.

110. *See Regulation No. 1999/1*, U.N. Interim Administration Mission in Kosovo, § 1, para. 1, U.N. Doc. UNMIK/REG/ 1999/1 (1999) *available at* http://www.un.org/peace/kosovo/pages/regulations/reg1.html (last visited Jan. 3, 2003).

111. *Id.* at § 6.

112. *See Regulation No. 1999/3*, U.N. Interim Administration Mission in Kosovo, § 1, U.N. Doc. UNMIK/REG/1999/3 (1999) *available at* http://www.un.org/peace/kosovo/pages/regulations/reg3.html (last visited Jan. 3, 2003).

113. *See Regulation No. 2000/42*, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/42 (2000) *available at* http://www.unmikonline.org/regulations/2000/reg42-00.htm (last visited Jan. 3, 2003).

sovereign functional control by adopting the Euro to replace the Dinar as the currency, refusing to sanction or organize participation in Yugoslav presidential and parliamentary elections, issuing OSCE developed identity cards which can also be used in lieu of passports, replacing the use of Yugoslav or Republic of Serbia seals and insignia with U.N. symbols and the word "Kosovo," and removing Yugoslav and Serbian flags from former state property.

In keeping with its obligation to build institutions for democratic self-government, while also reducing the likelihood of moving too quickly to establish an independent Kosovo, UNMIK first created government and administrative institutions at the local level. UNMIK thus initially provided an international Municipal Administrator for each of Kosovo's thirty municipalities. At the start of the international mission these local administrators formed consultative municipal councils staffed by local appointees and administrative boards responsible for managing local services.

At first, UNMIK exercised exclusive executive authority at the Kosovo-wide level. After the first six months, however, on January 31, 2000, UNMIK created the Joint Interim Administrative Structure (JIAS) which devised three political structures at the provincial level responsible for incorporating Kosovo's citizens into the decision-making process. The first of these bodies was an executive board called the Interim Administrative Council (IAC) which would come to act as the highest decision making body in Kosovo. The SRSG is the chief executive while eight members, four local and four UNMIK international officials, make up the council.[114] Second, JIAS also established twenty administrative departments, now referred to as ministries, ranging from justice to civil security, that were co-run by UNMIK officials and local representatives. Third, it created a new municipal level governmental system, with municipal elections in October 28, 2000 that offered for the first time defined powers and responsibilities for elected officials.[115]

The municipal elections played a crucial role in transforming the former paramilitary organizations into legitimate political parties and providing them a political avenue to express their views, thereby reducing the overall level of violence in Kosovo. While the local municipal political structures were slow to implement legislation and were often charged with petty corruption, the overall

114. The four local seats were occupied by Ibrahim Rugova, President of the Democratic League of Kosovo (LDK); Hashim Thaçi, President of the Democratic Party of Kosovo (PDK); Rexhep Qosja, President of the United Democratic Movement (LBD); and Bishop Artemije leader of the Serbian National Council (SNC).

115. These powers include: providing basic local conditions for sustainable economic development; licensing of building and other development; the implementation of building regulations and building control standards; public services including fire and emergency services; management of municipal property; pre-primary, primary and secondary education; social services and housing; licensing of services and facilities including: entertainment, food, markets, street vendors, local public transport and taxis, hunting and fishing and restaurants and hotels ; naming and renaming of roads, streets and other public places; and such other activities as are necessary for the proper administration of the municipality and which are not assigned elsewhere by law. *See Regulation No. 2000/45*, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/45 (2000), *available at* http://www.unmikonline.org/regulations/2000/reg45-00.htm (last visited Jan. 3, 2003).

consensus among international observers is the municipal governments are functioning as basic political entities and are capable of assuming increasing degrees of authority and are likely to play a constructive role in protecting human rights and promoting a normalization of life in Kosovo.

FINDING SPACE FOR KOSOVO SOVEREIGNTY: GOLDSTONE PROPOSAL I

In light of the progress made in displacing Yugoslav and Serb sovereignty in Kosovo and initiating the creation of institutions for democratic self-government, the Goldstone Commission, formally known as the Independent International Commission on Kosovo,[116] argued that it would soon be time to resolve the final status of Kosovo and transfer full authority to Kosovar institutions. The Goldstone Commission thus crafted and announced a proposal for earned sovereignty which it termed conditional independence.

The core elements of the proposal reflected the 1998 PILPG proposal with necessary modification to account for the changed circumstances brought about by the NATO air campaign, Resolution 1244 and the establishment of UNMIK. The core elements thus included the prompt holding of a referendum to ascertain the will of the people,[117] the subsequent initiation of U.N.-sponsored talks between the Kosovar Albanians and the Kosovar Serbs, the development of mechanisms to protect minority and human rights, arrangements for the continued presence of international security forces, and the phased transfer of effective administration from the United Nations to the legitimate national and municipal authorities.[118] The Goldstone Proposal provided that a supervisory international presence would continue to operate in Kosovo even after independence was established.[119]

The Goldstone Commission was clear that its proposal would "effectively end FRY sovereignty over Kosovo, [but] it would not immediately confer the full international legal personality of statehood."[120] Under the proposal, Kosovo would "gradually acquire the rights of a state as it demonstrates that its people can live in peace with each other and with the neighboring states in the region."[121] As Kosovo attained increasing levels of sovereignty in response to its protection of minority rights and promotion of stability, the international community could reduce its military presence. At such time as Kosovo "established conditions of internal and external peace" it would be able to earn recognition of its independence from the

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116. The Goldstone Commission, was created at the initiative of the Swedish government and funded by that government as well as the Government of Canada, and numerous foundations. Members of the Commission included key foreign policy makers and commentators from Japan, the United States, Russia, Canada, France, the United Kingdom, Germany and the Czech Republic. The Commission was chaired by Judge Richard Goldstone of the South African Constitutional Court, and Co-Chaired by Carl Tham of Sweden. The report was presented to the Secretary-General of the United Nations on October 23, 20000.

117. THE KOSOVO REPORT, *supra* note 20, at 271.

118. *Id.* at 272-3.

119. THE KOSOVO REPORT, *supra* note 20, at 274.

120. *Id.*

121. *Id.*

member states of the international community.[122]

The Goldstone Proposal was a crucial development in the evolution of the approach of earned sovereignty in two important ways. First, it provided a rational and lucid road map for the international community to establish a secure peace and consequently reduce its presence in Kosovo, at a time when the United Nations had effectively displaced FRY sovereignty over Kosovo, but had begun to settle into the process of establishing a costly and perpetual U.N. protectorate over Kosovo. Second, the Goldstone Proposal further evolved the notion of earned sovereignty by proposing the element of phased sovereignty for Kosovo in proportion to the ability of the Kosovo institutions to provide internal and external security.[123]

One of the flaws of the Goldstone proposal was that it did not seek the express renunciation of designs for a Greater Albania or a Greater Kosovo, or any commitments not to undertake territorial association with neighboring states as called for in the 1998 PILPG report.

In response to the Goldstone proposal, and efforts by influential former policy makers, the United States and the United Nations renewed their efforts to craft 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.

CONSTITUTIONAL FRAMEWORK FOR PROVISIONAL SELF-GOVERNMENT

While Resolution 1244 expressly called for the creation of a Constitutional Framework for the governance of Kosovo, it was not until May 15, 2001 that UNMIK officially promulgated the Constitutional Framework for Provisional Self-Government. Little progress towards a constitution was made during the first two years of UNMIK's operation, as many European states objected to the devolution of authority from UNMIK to the Kosovar people that would accompany the promulgation of a constitution. In large part, key European states returned to the approach of "the stability through accommodation" and sought to diminish the elements of earned sovereignty woven into the Rambouillet Accords and UNSC 1244.

The Constitutional Framework was eventually drafted and promulgated as a result of strong American pressure to fulfill the international obligations set forth in 1244 and by the commitment of a highly skilled Department of State lawyer who was able to craft a constitution which provided for the democratic representation of all legitimate parties in Kosovo, while providing mechanisms for building up the capacity of Kosovar institutions, and thus easing any future transition to final status.[124]

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122. *Id.*

123. THE KOSOVO REPORT, *supra* note 20, at 274.

124. *See generally Regulation No. 2001/9*, *supra* note 22.

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 UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework."[125] Second, it required those institutions to "promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation."[126] 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.[127] 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."[128] 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 of Self-Government. 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." 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.[129]

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 decision-making within the purview of the SRSG. For instance, while the new Kosovar Parliament possessed the authority to establish economic and fiscal policy, and to regulate most areas of state activity, the SRSG retained authorities such as approval of the budget, operation of the customs service, the setting of monetary policy, the appointment and dismissal of judges, and conduct of the international

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125. *Id.* at ch. 2, para. a.

126. *Id.* at ch. 2, para. b.

127. These treaties included the Universal Declaration on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the International Covenant on Civil and Political Rights and the Protocols thereto; the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the European Charter for Regional or Minority Languages; and the Council of Europe's Framework Convention for the Protection of National Minorities. *Id.* at ch. 3, para. 2.

128. *Id.* at ch. 2, para. c.

129. United Nations: Interim Administration Mission in Kosovo, *Constitutional Framework for Provisional Self-Government*, UNMIK/REG/2001/9 (May 15, 2001), Chapter 5.

affairs of Kosovo.[130] 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.[131]

The Constitutional Framework also set up a unique dual key system of initial and primary responsibility that could be used to effectively implement a system of earned sovereignty. For instance, while the Kosovar institutions possessed the right to make decisions regarding the appointment of judges and prosecutors, the SRSG retained the final authority regarding the appointment, removal from office and disciplining of judges and prosecutors. While the Kosovar institutions could ensure coordination on matters pertaining to the judicial system and the correctional service, the SRSG exercised authority over law enforcement institutions and the correctional service, both of which included and were supported by local staff.[132] Similarly, as noted above, the Kosovar institutions could engage in international and external cooperation, including the reaching and finalizing of agreements so long as they coordinated such activities with the SRSG.[133]

With the significant overlap of sovereignty, the system created by the Constitutional Framework was well designed to transfer increasing amounts of sovereign authority in an orderly and effective manner to the Kosovar institutions as they demonstrated their capability to govern successfully and to protect minority and human rights.

The Constitutional Framework also very clearly carried through the key element of earned sovereignty as reflected in the Rambouillet Accords, that of a final status determined along the lines expressed by the will of the people. Specifically, the Constitutional Framework provided that the provisional institutions of self-government should conduct their work with "a view to facilitating the determination of Kosovo's future status through a process at an appropriate future stage which shall, in accordance with UNSCR 1244(1999), take full account of all relevant factors including the will of the people."[134]

Initially, the work of the Kosovar Parliament was largely preoccupied with establishing itself, as opposed to UNMIK, as the responsible body for exercising Kosovo's sovereignty. One of the first acts of the parliament was to pass a resolution in the foreign policy and security sphere, a responsibility retained exclusively for the SRSG under the Constitutional Framework. In May 2002, Parliament voted to reject the Serbia/Macedonia border demarcation agreement of February 2001 between Serbia and Macedonia. The agreement was opposed by Kosovars and was, at first, condemned by UNMIK for failing to consult the international administration in an agreement that altered Kosovo's boundaries.

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130. *See Regulation 2001/9*, *supra* note 22, at ch. 8.
131. *Id.* at chs. 6, 14.2
132. *See Regulation 2001/9*, *supra* note 22, at ch. 9.4.
133. *Id.* at ch. 5.6.
134. *Id.* at pmbl.

However, a year later the United Nations decided to support the agreement over the objections of Kosovars, who claimed that over 2500 hectares of land were being turned over by Serbia, which no longer exercised any de facto sovereignty over Kosovo, to Macedonia.

The Parliament's resolution to preserve and protect Kosovo's territorial integrity was declared null and void by the SRSG, Michael Steiner, who criticized the action as a setback that deliberately antagonized the international community.[135] The Parliament's actions and Steiner's response reflected the growing competition between the United Nations and the new Kosovo political institutions over control of sovereign functions and authority for Kosovo.

POLITICAL CHANGES IN SERBIA AND LULL IN ACCUMULATION OF KOSOVO SOVEREIGNTY

Political changes in Serbia, such as the removal of President Milosevic and his transfer to the Yugoslav Tribunal to stand trial for crimes against humanity in Kosovo and genocide in Bosnia, as well as the continued tension between Kosovar Albanians and Kosovar Serbs led the SRSG to retain substantial powers and to significantly slow any further devolution, despite the requirements of the Constitutional Framework.

With the collapse of Milosevic's authoritarian, nationalist rule and its replacement by a more Western-focused government, the international community 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 international community 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 international community that an increasingly sovereign Kosovo could lead to greater instability in the Balkan region. In particular, the European Union objected to any efforts that might be deemed as leading toward a resolution of final status for fear of undermining the democratic transformation in Serbia.[136]

As a result of these developments there was a lull in the accumulation of Kosovar sovereignty. The lull became all the more pronounced, as the second Kosovo

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135. *See Administrator Rules Kosovo Resolution "Null and Void,"* DEUTSCHE PRESSE-AGENTUR, May 23, 2002.

136. The primary policy objective of the European Union in 2002 has been 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 if Montenegro were to depart Yugoslavia then Kosovo's exit would be guaranteed, the European Union secured an agreement that preserved Yugoslavia in a very loose confederacy for another three years before referendums, if so desired, on independence could be launched. Maintaining the stability through accommodation, in preserving Yugoslavia and in avoiding determination of Kosovo's future political status is the core of the European Union's Balkan policy.

Commission reported, explaining that once Kosovo's Parliament and Prime Minister were chosen, "the stage will be set for a growing conflict over the SRSG's reserved powers, and more generally between a local political elite, ratified by their electorate, bent on securing ever greater powers of self-government and an international administration, bent on maintaining its prerogatives."[137] The Goldstone Commission further noted that some international authorities treated Kosovar capacity for self-rule with "imperial condescension" and that a "pervasive distrust" of the political and administrative capacity of the local population "appears to underlie the constitutional provisions."[138]

GOLDSTONE PROPOSAL II

In September 2001, in response to the stalled efforts to devolve sovereignty to Kosovar institutions, and in light of increasing fears that maintaining the stability through accommodation would lead to an unnecessarily prolonged commitment of U.N. resources and NATO troops, and that the stability through accommodation was creating substantial instability in the region, the Goldstone Commission released a more detailed proposal for conditional independence.[139] The second Goldstone proposal (Goldstone II) maintained the elements of the first proposal, but provided a more specific road map for the devolution of powers.

In rejecting the stability through accommodation model of an indefinite protectorate, the Goldstone proposal cited several reasons that this protectorate was actually increasing and prolonging instability. The Commission argued that the indefinite protectorate implied by the Constitutional Framework would not, as some argued, allay tension in the region by ruling out independence. Rather, the protectorate would increase tension between the people of Kosovo and the international administration of the SRSG. 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 catalysts for ethnic violence, both within and outside Kosovo.[140]

Goldstone II argued for the rapid devolution of important powers from the SRSG 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. 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.[141]

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137. THE FOLLOW-UP OF THE KOSOVO REPORT, *supra* note 1, at 21.

138. *Id* at 20-21.

139. *See generally* THE FOLLOW-UP OF THE KOSOVO REPORT, *supra* note 1.

140. Independent International Commission on Kosovo, *The Follow Up: Why Conditional Independence?* (September 2001), "The Situation in Kosovo and the Illusion of Self-Rule," "Revisiting Conditional Independence."

141. *Id.* at 25

Coupled with the devolution of powers, Goldstone II 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 is feared the Kosovar authorities would have little or no incentive to behave in a responsible manner toward its neighboring states.[142]

In arguing for the rapid devolution of authority, the Goldstone Commission noted that over seventy percent of revenues used by the Kosovo government were internally generated.[143]

Goldstone II proposed that in exchange for the assumption of these powers, the Kosovar government would undertake a variety of commitments which were a mix of general responsibilities of a state under international law, and responsibilities which would be considered limits on the sovereignty of an internationally recognized state.[144]

The first commitment reflected a return to the original condition contained in the 1998 PILPG report and provided that Kosovo must explicitly renounce any claim to a Greater Albania or a Greater Kosovo. While the Commission was sympathetic to the legitimate need to support Albanian rights in other states, it believed it was necessary for the Kosovar government to explicitly declare a commitment to a policy of non-interference in neighboring states, and to the respect for their territorial integrity.[145]

The second commitment reflected a return to a key theme of the Rambouillet Accords, which was the requirement for a constitutional guarantee of human rights for all the citizens of Kosovo. In the same vein as the Rambouillet Accords, Goldstone II seemed to call for guaranteed participation in all the institutions of Kosovo, and in particular the judiciary, police and elected offices. Goldstone II further suggested that minority populations should be entitled to "internationally protected rights to government services and education in their own language." Goldstone II was careful to note that mere constitutional protections and some form of international involvement in the protection of rights were in and of themselves insufficient and that in addition the Kosovar institutions would be expected to make "real efforts" to cooperate with the minority populations in Kosovo and to foster inter-ethnic dialogue and promote reconciliation. The measure of success would be the extent to which minorities continued to remain in Kosovo, and whether conditions were created which prompted Serb refugees to return to their homes in Kosovo.[146]

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142. *Id.* at 26.
143. THE FOLLOW-UP OF THE KOSOVO REPORT, *supra* note 1, at 25.
144. *Id.* at 27-28.
145. *Id.* at 28.
146. THE FOLLOW-UP OF THE KOSOVO REPORT, *supra* note 1, at 26.

The third commitment concerned the standard international legal obligation of states to renounce the use of violence. Here the Goldstone Commission felt it necessary that the Kosovo political leadership expressly renounce violence to settle internal and external disputes and that it take active steps to build a culture of non-violence. Goldstone II also called for the express distancing of the Kosovar political leadership from liberation groups in neighboring Serbia and Macedonia.[147]

The fourth commitment involved the obligation/right to actively engage in efforts at regional cooperation and participate in mechanisms for regional governance and support the work of regional institutions.[148]

To ensure compliance with these commitments, Goldstone II called for continued international supervision, with the final authority for protecting borders and minorities being placed in the hands of the international presence.[149] Goldstone II seemed to argue that the Kosovar government should hold the initial responsibility to fulfill the commitments, and that in areas such as the protection of minority rights and the respect for the territorial integrity of neighboring states the international community would create back-up mechanisms to be employed only when the Kosovo government is unwilling or unable to meet these commitments.

Goldstone II thus called for the near immediate reduction of the powers of the international community, in the form of the SRSG or some other appropriate form, to include only protection of minorities, guarantee of human rights and the guarantee of the integrity of borders, with these powers exercised only when the locally elected officials failed to meet their obligations.[150]

The presence of the international community would be phased out and the sovereign authority of Kosovo would continue to grow as the government and people of Kosovo proved themselves capable of meeting the above commitments. Over time, as Kosovo fully met these commitments, it would become international recognized by the member states of the international community.[151]

The Goldstone Commission sought to rebut the three main arguments presented against earned sovereignty. First the 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. Here, the Commission argued that, in fact, postponing the resolution would actually increase the difficulty of resolving the issue in the future, once support for the new democratic administration had subsided.[152]

Next, the Commission reviewed the concern that permitting conditional independence for Kosovo could set off demands for the same in Montenegro and other regions. The Commission argued that this concern was overstated as the

147. *Id.* at 27.

148. *Id.*

149. *Id.*

150. THE FOLLOW-UP OF THE KOSOVO REPORT, *supra* note 1, at 27.

151. *Id.*

152. *Id.*

specific conditions for Kosovo's earned sovereignty ruled out spillover effects, conditional independence would eliminate many of the current uncertainties in the region, none of the other sub-sate entities possessed the same legal argument for independence, which was a history of systematic human rights abuses, and earned sovereignty was not any more likely than the other proposed scenarios to generate domino effects.[153]

Finally, the Commission addressed the concern that the mere discussion of Kosovo's final status could undermine unanimity within the UN Security Council. The Goldstone Commission argued that this too was an overstated concern as Russia was unlikely to block a resolution if such a resolution had already been agreed to in the region.[154]

ICG PROPOSAL

Following the initial articulation and subsequent development of the concept of earned sovereignty by the Public International Law & Policy Group and the Goldstone Commission, the ICG sought to lend additional support for the concept and to further refine its application to Kosovo.

The ICG proposal, which was firmly based in the PILPG and Goldstone precedent, extended the concept and argued for a renewed international trusteeship. The ICG proposal also separated out the question of compliance with conditions from that of Kosovo's final status. The ICG argued that Kosovo's final status should be settled in parallel with the running of the international trusteeship of Kosovo, and at such point as the international presence was no longer needed Kosovar institutions would be able to assume relevant sovereign powers and then step into whatever status Kosovo possessed.[155]

The ICG proposal argued that a resolution of Kosovo's final status was crucial to stability in the region. ICG 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 the view of each group 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.[156]

Like the Goldstone proposal, the ICG proposal then sought to refute the three main arguments that the international community often made for postponing the discussion of Kosovo's final status. First, ICG argued that the initiation of final status talks would not setback Serbia's transition, as it was in fact the lack of definition of Kosovo's final status which was beginning to undermine Serbian

153. *Id.*

154. *Id.*

155. *See* International Crisis Group, *A Kosovo Roadmap (I): Addressing Final Status,* "ICG Balkans Report N° 124" (2002), pp. ii-iv, *available at* www.crisisweb.org/projects/balkans/kosovo/reports/A400561_01032002.pdf (last visited Oct. 20, 2002).

156. ICG, supra ii..

stability and slow the transition to a non-nationalist state. Second, 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 UN 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."[157]

With respect to the substance of conditional independence, the ICG proposal built on the earlier earned sovereignty proposals by separating out questions of internal and external sovereignty. While ICG adopted the notion of earned sovereignty for the devolution of powers from an international trusteeship to domestic Kosovar institutions, it argued that the final status of Kosovo, be it independence or some association with Serbia, should be settled immediately in political negotiations, and that status should be implemented by an international trustee until such time as the Kosovar institutions were capable of displacing the trustee.[158]

This addition was a critical development as it clarified the need to resolve the fact that there was no possibility for Kosovo to remain part of Serbia and to begin the process of creating an independent Kosovo, so that when Kosovar institutions were capable of assuming full sovereign powers, they were not immediately faced with having to then establish Kosovo as an independent entity.

Recognizing the necessity to respond to the will of the people of Kosovo, the ICG proposal argued that Kosovo and Serbia should negotiate arrangements for Kosovo's final status under the auspices of the United Nations and G8, but that if these negotiations are unsuccessful, the international community "should discharge the responsibility it assumed in 1999 by imposing a solution based on the democratic will of the people of Kosovo."[159] The will of the people would be assessed via a referendum.

The ICG believed that the success of the negotiations would be enhanced if Kosovar and Serb institutions immediately undertook a dialogue on practical issues of mutual concern and on confidence building measures.[160]

While the PILPG and Goldstone proposals focused substantial attention on the conditions for earned sovereignty, the ICG proposal was less adamant about the nature of the conditions, in part because it believed they should be negotiated by the parties concerned, and rather focused on the process of phasing sovereignty, while simultaneously resolving the question of final status. Moreover, the focus of the ICG report was more on the actual ability of Kosovar institutions to effectively govern in a fair and effective manner, and less on its express commitment to certain principles.

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157. ICG, supra ii.
158. *Id.* at p. iv.
159. *Id.* at p. iii.
160. International Crisis Group, *supra* note 149, at. ii-3.

As such, the ICG proposal argued that earned sovereignty would likely include the requirement of the full protection of minority rights, and the renunciation of intentions for a Greater Albania or Greater Kosovo, although the ICG believed this fear to be overstated.[161]

With respect to the nature of the proposed trusteeship, the 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. Like the 1998 PILPG and Goldstone II proposals, ICG argued that the Kosovo government should be permitted to exercise immediate responsibility for foreign policy, the budget and matters of law and order.[162]

The external security of Kosovo would be provided by an international military presence, with internal security being increasingly provided by the internationally trained Kosovo Police Service. Potentially the trustee would be able to call upon the international military force to ensure the protection of minority rights, and could rely upon a monitoring mission to monitor the effectiveness of the Kosovo Police Service.[163]

Finally, the ICG warns that "a viable future for Kosovo has to be based on close integration with its neighbors," but that one should not "impose models of integration that do not enjoy the support of the countries and the entities concerned."[164]

The ICG argued that conditional independence, or earned recognition, was the only final status option that satisfied all the key ingredients necessary for a stable final status. While ICG recognized that Kosovo was not yet prepared to exercise full sovereignty, it reasoned that through a process of conditional independence it would be able to earn this right and gradually prove itself capable of full independence. According to the ICG, conditional independence 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 as 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, Kosovo Albanians would have a strong incentive to ensure that Kosovo would cease to be a factor of regional instability."[165]

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

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161. *Id.* at 12.

162. *Id.* at 12-13.

163. The ICG makes the argument for fair representation of minorities in the judiciary and for supervision of the judiciary by an international entity other than the trustee in order to preserve the principle of separation of powers. International Crisis Group, *supra* note 149, at 12-13.

164. *Id.* at iv.

165. ICG supra, 13-14.

major contribution 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 as the democratically elected Serbian government was unlikely to call for mass emigration in the face of final status. Another argument often presented regarding Serbia is that final status for Kosovo would lead to an increase in nationalist sentiment in Serbia, at the expense of moderates and stability. 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 rebutted 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, that "Kosovo's interim status is underpinned by a UN Resolution that leaves the question of final status open."[166]

UNMIK'S STANDARDS BEFORE STATUS APPROACH

Adopting the key elements of earned sovereignty, UNMIK laid out in May 2002 an approach entitled "standards before status." The two cornerstones of the approach were 1) a public declaration in June 2003, that the United Nations could not foresee a return to direct Serbian control; and 2) the public release in July 2003 of a detailed set of *benchmarks* required of the Kosovo institutions. Michael Steiner also publicly added that he ruled out the possibility "for Kosova's future: a partition along ethnic lines."[167] Steiner's development of an earned sovereignty approach of standards before status came at a time when according to Western observers in Prishtina, "Kosova is heading for independence sooner or later, and that even 'almost everyone in Belgrade regards Kosova as lost' to Serbia".[168]

The standards before status policy sought to ensure that Kosovo possessed sufficient institutions to govern an independent state, and that it would be a democratic state which protected human and minority rights, thus diminishing the need for continued shared international responsibility for Kosovo's sovereign authority and functions.

According to UNMIK, the general prerequisites of the standards before status approach were, "full compliance with and implementation of Resolution 1244 and the Constitutional Framework. Multi-ethnicity, tolerance, security, and fairness under normal conditions, without special measures."[169] In particular, Mr. Steiner placed significant emphasis on the creation of a multi-ethnic society.[170]

166. ICG supra, 6-9.

167. RFE/RL Newsline, *Southeastern Europe: Steiner Says No Return Of Kosova to Serbian Rule* (June 26, 2002) at http://www.rferl.org/newline/2002/06/4-See/see-260602.asp (last visited Mar. 1, 2003).

168. *Id.*

169. UN Mission in Kosovo, *Standards Before Status*, May 2002 *available at* http://www.unmikonline.org/pub/focuskos/apr02/benchmarks_eng.pdf [hereinafter *Standards Before Status*].

170. 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,

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.[171]

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 language."[172] The benchmark for measuring the attainment of this goal was the "unrestricted movement by minorities without reliance on military or police."[173] The required local action included "policy and sustained action by [local institutions] to promote FOM [freedom of movement] publicly" and "[u]nprompted condemnation by holders of public office of obstruction and violence"[174]

With respect to the process for resolving final status, the United Nations determined that it was necessary to meet these benchmarks before discussions on final status could commence.[175] In essence, the UN determined that phase four of earned sovereignty could not commence in the case of Kosovo until after the conditions had in fact been met to a substantial degree. As explained by SRSG Steiner, the rationale behind this approach was that "Kosovo can only advance towards a fair and just society when these minimum pre-conditions are met."[176] Moreover, Mr. 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 benchmarks complement the preconditions that Kosovo needs to meet to qualify for the Stabilisation and Association process."[177] According to the United Nations press office, "the Parliament in Kosovo, the population, the political leaders and the government had agreed to concentrate on the benchmark of a respected society before talking about the status issue."[178]

In deciding to not set a fixed date for final status talks, but to rather condition the initiation of the process upon the achievement of specified conditions, the United Nations seems to have determined both that discussions on final status would generate political instability, which would undermine efforts to build Kosovar institutions, and that when the Kosovar institutions were in fact able to

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2002 *available at* http://www.unog.ch/news2/documents/newsen/pc020627.htm [hereinafter *Highlights*].

171. *See Standards Before Status, supra* note 159.

172. *Id.*

173. *Id.*

174. *Id.*

175. Press Release, UNMIK, Address to the Security Council By Michael Steiner Special Representative of the Secretary-General (Apr., 24 2002) *available at* http://www.unmikonline.org/press/2002/pressr/pr719.htm (last visited Mar. 1, 2003) [hereinafter Steiner Address to Security Council].

176. Steiner Address to Security Council, *supra* note 165.

177. *Id.*

178. *See Highlights, supra* note 160.

meet the criteria set forth in the standards before status approach, the independence of Kosovo would be a relatively foregone conclusion. The view that standards before status attempts to circumvent potentially cumbersome political negotiations with Serbia and establish an irreversible final status for Kosovo is supported by Steiner's declarations that Kosovo would not return to direct Serbian control and by his general unwillingness to consult with FRY or Serbian officials concerning any matters relating to Kosovo – as evidenced by his statement, "I will not mix into Belgrade affairs, and Belgrade will not mix in Prishtina's affairs."[179]

Mr. Steiner and the United Nations may also have calculated that in the 3-5 years it will take Kosovo to reach the standards of democratic self-governance, the political elite in Serbia will have come to accept the inevitable loss of Kosovo and the fact that it would be impossible for a truly democratic Serbia to retain possession of a territory where nearly all two million of its inhabitants desire independence.

The key to a successful implementation of standards before status will be the continued devolution of authority to Kosovar institutions as required by Resolution 1244. According to Mr. Steiner he has begun, and will continue, to phase responsibility for the exercise of sovereign authority and functions to Kosovar institutions in order to prepare Kosovo for a final determination of its international status.[180]

CONCLUSION

The approach of earned sovereignty to the Kosovo conflict, which began in 1998 as a proposal by the Public International Law & Policy Group working with the International Crisis Group has evolved over the past five years through peace negotiations and UN Security Council Resolutions and subsequent interpretations of those resolutions to now to serve as the foundation for the resolution of Kosovo's final status.

During the course of its evolution, the basic elements of the approach were further refined. In the wake of the NATO humanitarian intervention the first phase of shared sovereignty, which initially involved a detailed and complicated arrangement for dual sovereignty over Kosovo with substantial international monitoring and some international administration, evolved into a phase of excluded sovereignty. The first phase thus ended with the United Nations and NATO excluding Serbia for exercising any sovereignty authority or functions on the territory of Kosovo, only in the interim retaining Kosovo within the territorial designation of the FRY. During the second phase, the international community undertook an aggressive approach of institution building, including the election of local and regional officials, but suffered from an initial institutional unwillingness to transfer authority and functions to those institutions once established.

The benchmarks established in the third phase for increased transfer of

179. *See* Naegele, *supra* note 133.

180. *Id.*

authority and functions, which were guided by the views of the Goldstone Commission and the International Crisis Group, included traditional concerns such as the protection of human and minority rights, the transformation to democratic rule and the rule of law, and respecting the territorial integrity of neighboring states. The attainment of these conditions soon became the primary, if not sole focus, of the international presence in Kosovo. Phase four, the determination of final status, which had been set with a clear date in the Rambouillet Accords, was transformed into an ongoing process in the United Nations Standards before Status doctrine whereby the international community required that the conditions in phase three be substantially met prior to undertaking negotiations to settle Kosovo's final status. In light of the heavy involvement of the international community in Kosovo's transition it is predictable that even after independence the international community will continue to undertake certain monitoring tasks to ensure the continued compliance with phase three conditions.

Throughout its development and application in Kosovo, the earned sovereignty approach competed for influence with the alternative approach of stability through accommodation and was shaped by the compromises inherent in the foreign policy decision making process. In the end, the debate yielded a more refined approach which presents the greatest opportunity for facilitating a viable and lasting settlement of the Kosovo conflict.

MILITARY COMMISSIONS AND TERRORISM

DAVID STOELTING*

President George W. Bush's Military Order of November 13, 2001, issued just thirty-two days after the terrorist atrocities of September 11, 2001, pointedly adopted the language of war and, almost by fiat, declared that terrorism was a war crime. As a result, under the Military Order the fight against terrorism became a "state of armed conflict"[1] and terrorist acts became "violations of the laws of war."[2]

These designations abruptly erased long-held distinctions between terrorism and war crimes and represented a signal departure from pre-9/11 practice. More specifically, the Military Order has provided the theoretical underpinning for allowing foreign terrorists to be subject to trial by American military commissions. The consequence has been the largest expansion of the jurisdiction of military commissions in American history.[3]

The novelty of using military commissions to try terrorists is apparent in several respects. First, unlike every other military commission ever created by the United States government, the Military Order, which is focused almost exclusively on terrorism, is designed to create tribunals not for war criminals but for terrorists. Next, terrorism and war crimes had been defined by different legal regimes. The Order, however, collapses their definitions and blurs longstanding distinctions. Finally, military commissions have never before been used to try terrorists. As a long line of U.S. Supreme Court and Attorney General Opinions demonstrate, military commissions had been restricted to members of an organized military force acting as an agent of a state or government.

Using military commissions to try terrorists, then, represents a stark departure previous practice and policy. As a result, because the commissions envisaged by the Order at last appear to be nearing realization (almost two years after the Order's issuance), the Supreme Court may have to decide the legality of this

*Of the New York Bar; Immediate Past Chair, Committee on International Criminal Law, ABA Section of International Law and Practice; Chair, Committee on African Affairs, Association of the Bar of the City of New York. This article arises from a paper delivered on March 23, 2002, as part of the Sutton Colloquium at the University of Denver College of Law. I am grateful to the organizers of the Colloquium, including Prof. Ved P. Nanda, Prof. Michael Scharf and Prof. Paul Williams. The views expressed herein are solely those of the author.

1. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001).

2. *Id.*

3. *See* William H. Taft, Remarks at the OSCE Human Dimension Implementation Meeting (Sept. 10, 2002) ("The act of detaining enemy combatants is not an act of punishment. Rather, it is intended first and foremost to prevent enemy combatants from continuing to fight.") (transcript available at http://www.osce.org/odihr/hdim/2002/doc/speech_1.pdf).

approach. And while the government will emphasize its duty to protect national security in a time of "war," it should at least be recognized that permitting military commissions to try terrorists is a radically different approach. Indeed, supporters of the Military Order could more credibly argue that the exigencies of September 11th led to a cataclysmic transformation of international law legitimizing what had previously been illegitimate. Better to acknowledge an arguably necessary shift in the legal landscape than to assert a dubious consistency.

I. THE MILITARY ORDER CREATES A FORUM FOR TRYING TERRORISTS

In the immediate aftermath of September 11th, the rhetorical and symbolic purposes of the Military Order were paramount. To begin with, the Order departed starkly from prior orders creating military commissions by focusing unambiguously on terrorism rather than violations of the laws of war. This is apparent from the face of the Order, which repeatedly mentions terrorism and terrorists and clearly is directed at persons accused of terrorist acts rather than war crimes. In the "Findings" section, for example, the Order states that "international terrorists" have committed "grave acts of terrorism" and that there is a risk of "further terrorist attacks."[4] Individuals "involved in international terrorism" may "undertake further terrorist attacks."[5] Military commissions are needed due to "the nature of international terrorism" for the "prevention of terrorist attacks."[6]

The Military Order, therefore, introduced and formalized the militarization of America's response to terrorism. It repudiated the idea that terrorism is strictly a criminal justice problem and, more importantly, established the legal basis for a long-term military approach to the problem of terrorism. By embracing the notion that terrorist acts are war crimes, the Military Order provided a conceptual context that sought to legitimate overwhelming force in response. Moreover, the Order delivered this message of resolve at the outset of the military response to terrorism. As a result, those suspected of terrorism during the length of this unending war are subject to what no foreign terrorist has ever faced before: an American military tribunal staffed by U.S. soldiers as judges, no habeas corpus option and no right of appeal to civilian courts.

The text of the Military Order demonstrates its single-minded emphasis on terrorists rather than war criminals. Section 2 of the Order, describing the persons eligible for trial by military commissions, does not state that war criminals are to be subject to the commissions. Instead, the persons to be tried pursuant to the Military Order are any individual who "is or was a member of the organization known as al Qaida" and any individual who "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor" designed to harm "the United States, its citizens, national security, foreign policy, or economy."[7] The Military Order also permits trial by military

4. Military Order, *supra* note 1.
5. *Id.*
6. *Id.*
7. *Id.*

commission of any individual who has "knowingly harbored" current and former members of al Qaida or other persons that have engaged in, aided or abetted of conspired to commit terrorism.[8]

The Military Order's ideological purposes were further evidenced by the fact that at the time of its promulgation there was no apparent intent to actually create commissions. Although various rules and regulations regarding the operation of the commissions have been released in the twenty months after the issuance of the Order, there has been no urgency to try persons by the commissions authorized by the Order. This is unusual. Other Presidential orders resulted in the formation of panels within a short period of time. For example, the German saboteurs prosecuted pursuant to President Roosevelt's order in 1942 were already in custody when the order was issued.[9] Within a two-month period, the saboteurs were captured, the military commission was ordered and completed its proceedings, the U.S. Supreme Court heard oral arguments and upheld the legality of the trial, and the Germans were executed. In contrast, almost two years after the Order, only preliminary steps toward actually using the commissions have been taken, further suggesting that the rhetorical purposes of the Order, at least initially, were paramount.

II. ACTS OF TERRORISM HAVE NOT BEEN CONSIDERED OFFENSES TRIABLE BY MILITARY COMMISSIONS

Military tribunals, not being courts of general jurisdiction, may only adjudicate crimes to the extent authorized to do by an act of Congress or the common law of war. The legitimacy of terrorists being tried by military commissions according to the Military Order, therefore, depends on whether such authorization exists either in a federal statute or in the laws of war. If neither Congress nor the laws of war permits such trials, any commissions created pursuant to the Military Order may be perceived as lacking legitimacy.[10]

Regarding the first point, plainly Congress has never authorized military commissions to try terrorists. No U.S. statute permits military commissions to try terrorists. The statutory authority cited in the Military Order, Section 821 of the Uniform Code of Military Justice (UCMJ) does not state that military tribunals can be used to try terrorists. Instead, it simply preserves the well-established jurisdiction of military commissions over crimes as established by statute or by the laws of war. The statute itself states that it "do[es] not deprive military

8. Military Order, *supra* note 1.

9. Appointment of Military Commission, 7 Fed. Reg. 5103 (July 2, 1942).

10. The Military Order relies upon the President's authority as Commander in Chief and the Authorization for Use of Military Force Joint Resolution. 10 U.S.C. § 836 (1998); S.J. Res. 23 107th Cong. (2001). The President's authority as Commander in Chief to create military commissions, however, must be exercised consistently with the laws of war. As to the Joint Resolution, it authorized the use of force, not the creation of military commissions to try terrorists. It has been argued that authorizing military force against terrorism necessarily includes authorizing military trial of terrorists. There is no evidence, however, that Congress intended to approve military commissions, which had never been used previously to try terrorists.

commissions . . . of concurrent jurisdiction [with courts-martial] with respect to offenders or offenses that by statute or by the law of war may be tried by military commission."[11]

In the absence of statutory authorization, the question becomes whether the law of war, also known as international humanitarian law, permits such prosecutions. As the U.S. Attorney General opined in 1918, military courts cannot try individuals who are "not a member of the military forces" unless they are "subject to the jurisdiction of such court under the laws of war or martial law."[12] Thus, the issue is whether the laws of war, which traditionally has defined the jurisdiction of American military commissions, can be stretched to encompass terrorism. As shown below, while not entirely mutually exclusive, the acts of terrorism committed by al Qaida and other groups that are the focus of the Order cannot generally be fit into the definitional framework of international humanitarian law.

The question of whether terrorism can be defined as a war crimes and therefore come within the jurisdiction of military commissions, largely depends on whether terrorism can be defined as an "international armed conflict." The most universally accepted definition of war crimes, recognized in federal statutes[13] and elsewhere, is the "grave breaches" provisions of the four Geneva Conventions of 1949.[14] The Geneva Conventions require an "armed conflict which may arise between two or more of the High Contracting Parties" as a threshold requirement.[15] Isolated attacks over a period of years by persons associated with freelance terrorist networks unaffiliated with any government, however, generally have not been defined as an armed conflict. Thus, the threshold requirement for application of the Geneva Conventions – an "armed conflict" – is not satisfied by a conflict between one High Contracting Party (the United States) and a transnational network of terrorists (al Qaeda).

Violations of Common Article 3 of the Geneva Conventions, which apply to non-international armed conflicts taking place within the territory of a High Contracting Party, might be considered war crimes and therefore subject to military commissions.[16] However, Common Article 3 has traditionally been viewed as applying to an armed conflict between rebel or insurgent groups and a

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11. 10 U.S.C. § 821 (2003). *See also Ex Parte Vallandigham*, 68 U.S. 243, 249 (1863) ("[M]ilitary jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war").

12. Trial of Spies by Military Tribunals, 31 U.S. Op. Att. Gen. 356, 364.

13. *See* War Crimes Act of 1996, 18 U.S.C. § 2441 (defining war crimes to mean, *inter alia*, any conduct (1) defined as a grave breach under the Geneva Conventions; (2) prohibited by Hague Convention IV; (3) that violates common Article 3 of the Geneva Conventions; or (4) willfully kills or seriously injures civilians through mines or booby-traps).

14. Protection of War Victims: Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Protection of War Victims: Civilian Persons, Aug. 12, 1949, 6 U.S.T. 3516; Protection of War Victims: Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Protection of War Victims: Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217.

15. *Id.* at art. 2.

16. *Id.* at art. 3.

government. The Military Order, moreover, focuses on international rather than domestic crimes. The disconnect between terrorism and the armed conflict requirement is also underscored by the unending nature of the "war on terrorism," its worldwide geographic scope and its applicability to a limitless number of parties.

These problems are compounded by the indeterminacy and controversy over the definition of terrorism. Although multilateral treaties have been concluded defining terrorism largely in terms of specific actions such as airline hijacking, hostage-taking and bombings,[17] a comprehensive treaty definition remains elusive. The notorious subjectivity of defining terrorism, therefore, further suggests an incompatibility between the scope of war crimes and terrorism.

Yet another distinction relates to the fora in which the two crimes are prosecuted. Terrorism prosecutions largely remain a prerogative of domestic courts, while war crimes are prosecuted by both domestic courts (including military courts) and international tribunals. The United States, for example, while applying an assortment of anti-terrorism provisions in the United States Code to convict foreign terrorists in federal district courts, also supports war crime prosecutions by the international criminal tribunals in The Hague and elsewhere.[18] In addition, during the drafting of the Rome Treaty on the International Criminal Court in 1996-1998, the United States vigorously opposed the inclusion of terrorism within the ICC's jurisdiction because of the lack of a consensus definition of terrorism and because domestic courts had typically tried terrorism cases.

This dichotomy is apparent in the fact that military tribunals have never before been used to try terrorists unaffiliated with an enemy government. Indeed, as discussed in Part III below, Supreme Court precedent endorses military jurisdiction over soldiers and agents of enemy states, but not over civilians. The President's Military Order departs from this precedent by authorizing the military trial of foreign civilians suspected of engaging in, or conspiring to commit, acts of international terrorism.

III. THE SUPREME COURT HAS NEVER APPROVED THE USE OF MILITARY COMMISSIONS TO TRY FOREIGN TERRORISTS

Prior to 9/11, the United States had not used military commissions to try foreign civilians unconnected to enemy armies. Instead, military commissions

17. *See* Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T 1641; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, treaty doc. 100-19.

18. *See* United States v. Bin Laden, 92 F. Supp.2d 189 (S.D.N.Y. 2000) (upholding extraterritorial reach of U.S. criminal statutes to persons accused of bombing U.S. Embassies in Kenya and Tanzania); United States v. Rahman, 189 F.3d 88, 160 (2d Cir. 1999) (affirming convictions following nine-month jury trial of ten defendants for "seditious conspiracy and other offenses arising out of a wide-ranging plot to conduct a campaign of urban terrorism"); United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (affirming convictions of four defendants who assisted in bombing of World Trade Center).

have tried persons acting on behalf of, or at the direction of, a foreign government.[19] The Military Order does not require that defendants have any governmental connection. Quite to the contrary, the Order permits the prosecution of persons acting wholly independent of any government or conventional military group. Its very purpose is to provide a forum for a wide range of persons that have never before been prosecuted by military tribunals: foreign terrorists unaffiliated with any government.

Although the Military Order is *sui generis*, its advocates argue that the precedent approving military commissions in other contexts justifies the trial of terrorists by military commissions. As the White House Counsel argued shortly after the issuance of the Military Order, "[t]he use of such [military] commissions has been consistently upheld by the Supreme Court."[20] In fact, the Supreme Court has never upheld the use of military commissions to try foreign terrorists. The Court's jurisprudence only holds that military commissions may try foreign citizens that act on behalf of a country at war with the United States.[21] The Court has also been suspicious of overly broad jurisdiction for military tribunals.

The *Quirin* and *Yamashita* cases are frequently cited for the proposition that foreign terrorists may be properly tried by military tribunals. Neither case, however, involved a foreign terrorist, and both involved persons acting as agents of an enemy government in a declared war against the United States. In *Quirin*, the defendants were agents of a foreign government during a declared war against the United States. They landed on the American coast wearing German military uniforms, and "received instructions in Germany from an officer of the German High Command."[22] They were paid by the German government, and trained at a German "sabotage school."[23] The charging document stated that the defendants were "enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation."[24]

Quirin variously refers to the defendants as "unlawful belligerents," "enemy belligerents," "unlawful combatants," and "enemy combatants." Nothing in *Quirin*, however, supports the argument that these categories can be expanded to include foreign terrorists who are not organized as a military force, and who operate independent of any government. The defendants in *Quirin* themselves were, of course, agents of an enemy government during a declared war. Moreover, of the "familiar examples" of enemy combatants referenced by the Court in *dicta*, such as "the spy" or one who "comes secretly through the [military] lines," none encompass foreign terrorists.[25] The Court cites examples of enemy combatants

19. *E.g.*, Johnson v. Eisentrager, 339 U.S. 763, 765 (1950) (German citizens acting "in the service of German armed forces in China" were properly convicted of violating the laws of war following trial by military commission).

20. Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

21. Johnson v. Eisentrager, 339 U.S. 763 (1950); *Ex Parte Quirin*, 317 U.S. 1; *In re* Yamashita, 327 U.S. 1.

22. *Ex Parte Quirin*, 317 U.S. 1, 7-8 (1942).

23. *Id.*

24. *Id.* at 15.

25. *Id.* at 12.

tried by military commissions from the Revolutionary War, the Mexican War, and the Civil War. In every instance, the enemy combatant was a member or agent of a conventional military force during a recognized armed conflict between two such military forces.[26]

In *Yamashita*, the defendant was a Commanding General of the Imperial Japanese Army.[27] After Yamashita surrendered to the United States Army, General MacArthur ordered a military commission be convened to try him. The Supreme Court held that Yamashita was an "enemy combatant" and that the military commission was properly convened "pursuant to the common law of war."[28] The term "enemy combatant," however, was plainly used in *Yamashita* to connote a member of the organized military in a declared war against the United States.[29] Nothing in *Yamashita* supports the extension of the enemy combatant label to cover foreign terrorists. Indeed, the Court appears to limit it's holding to violations of the laws of war during declared wartime:

> The trial and punishment of enemy combatants who have committed violations of the law of war . . . is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists – *from its declaration until peace is proclaimed*.[30]

In *Quirin* and *Yamashita*, the Court used narrow language to uphold the jurisdiction of military commissions to try captured enemy soldiers during a declared war. These decisions nowhere provide direct support for the contention that military commissions may try terrorists. In contrast, Supreme Court decisions such as *Milligan*, *Duncan* and *Reid* (described below), limiting the authority of military commissions outside of the *Quirin/Yamashita* context, adopt broad language to restrict and limit the authority of military commissions to try civilians.

In *Ex Parte Milligan*, the Supreme Court held that a United States citizen could not be detained or imprisoned by the military absent a declaration of martial law. In granting Milligan's habeas corpus application, the Court held that "[m]artial law, established on such a basis, destroys every guarantee of the Constitution and effectively renders the 'military independent of and superior to the civil power.'"[31] Similarly, in *Duncan v. Kahanamoku*, the Court ruled that a civilian held by the military, when the civilian courts were open and functioning,

26. *Quirin* lists the following persons as "familiar examples" of "offenders against the law of war subject to trial and punishment by military tribunals": Major Andre, an officer of the British Army; T.E. Hogg, who had been "commissioned, enrolled, enlisted or engaged" by the Confederate Army; John Y. Beall, who held a commission in the Confederate Navy; Robert C. Kennedy, a Captain of the Confederate Army; William Murphy, a "rebel emissary"; and other "[s]oldiers and officers 'now or late of the Confederate Army.'" *Id.* at n. 9, n. 10.

27. *In re Yamashita*, 327 U.S. 1, 4 (1946).

28. *Id.* at 19.

29. *Id.*

30. *Id.* at 11 (emphasis added).

31. *Ex Parte Milligan*, 71 U.S. 2, 124 (1866).

cannot be tried by a military tribunal.[32]

The Court again articulated the principle that military jurisdiction over civilians should be limited, not expanded, in *Reid v. Covert*.[33] In *Reid*, the Court held that the military could not exercise criminal jurisdiction over civilian defendants accused of murdering soldiers stationed overseas. The Court stated that "[t]he Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds."[34] *Reid*, moreover, puts to rest the argument that *Milligan* is no longer good law in view of *Quirin*.[35] In *Reid*, the Supreme Court, fifteen years after *Quirin*, described *Milligan* as "one of the great landmarks in this Court's history."[36]

In addition, prior Opinions of the United States Attorney General do not approve military commissions in the absence of a declaration of martial law, or when the accused is a civilian not charged with war crimes.[37] For example, in 1918 the U.S. Attorney General opined on the status of Pable Waberski, an agent of the German government sent to the United States to "blow things up."[38] Applying *Milligan*, the Attorney General distinguished between an "act of war" and a "crime," and concluded that the acts of espionage of which Waberski was accused did not qualify as violations of the laws of war.[39] As a result, Waberski could not be tried by a military tribunal:

> [I]n this country, military tribunals, whether courts-martial or military commissions, can not [sic] constitutionally be granted jurisdiction to try persons charged with acts or offences [sic] committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers.[40]

The issue of international personality informed another Attorney General Opinion approving trial by military commissions over the Mood Indian tribe.[41] The Attorney General found it appropriate to apply the rules of war to such conflicts because the Indian tribes "have been recognized as independent communities for treaty-making purposes" and are capable of engaging in "a negotiation for peace after hostilities."[42] Al Qaida, in contrast, is not recognized as

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32. Duncan v. Kahanamoku, 327 U.S. 304 (1946).

33. Reid v. Covert, 354 U.S. 1 (1957).

34. *Id.* at 23-24.

35. In *Quirin*, Attorney General Biddle disparaged *Milligan* by arguing that "[t]he English courts have . . . long since rejected the doctrine of Ex parte Milligan." Quirin, 317. U.S. at 26.

36. Reid v. Covert, 354 U.S. 1 at 30.

37. *See* Military Commissions, 11 Op. Att'y Gen. 297 (1865) (approving trial by military tribunal of assassins of President Lincoln because at "time of the assassination a civil war was flagrant . . .[and] Martial law had been declared").

38. Trial of Spies by Military Tribunals, 31 Op. Att'y Gen. 356 (1918).

39. *Id.*

40. Trial of Spies by Military Tribunals, 31 Op. Att'y Gen. 356 (1918).

41. The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249 (1873).

42. *Id.*

having the ability to engage in international treaties or peace talks.

The clarity of *Milligan*, *Duncan* and the Attorney General Opinions underscores the fact that, before 9/11, members of al Qaida were not considered "enemy combatants" and the United States was claimed to be in an "armed conflict" with al Qaida. This consensus existed even though it was known that al Qaida and bin Laden had planned and executed a series of deadly terrorist attacks against American targets; that bin Laden had issued a religious edict calling for Americans to be murdered; and that al Qaida planned future attacks against the United States.[43] Moreover, even absent the "enemy combatant" or "armed conflict" designations, the U.S. was not been prevented from undertaking military strikes against terrorist targets when necessary. The United States did so against Libya in 1985, against Iraq in 1993, and against Sudan and Afghanistan in 1998.

After September 11th, however, *Quirin* and *Yamashita* were resurrected in support of the U.S. government's argument that the response to 9/11 qualifies as a "time of war" and that foreign terrorists are "enemy combatants." These designations were intended to legitimize not only the use of military tribunals against foreign terrorists, but also the indefinite detention by military authorities of U.S. and foreign citizens in the United States and in Guantanamo Bay.

IV. CONCLUSION

Certainly the laws of war should to some extent conform to changing circumstances and not remain static. It is also true, however, that international humanitarian law should not be infinitely malleable to suit any circumstance and that our commitment to the rule of law should not be self-serving. As the Supreme Court stated in *Yamashita*, "[w]e do not make the laws of war but we respect them."[44] Before September 11th, the United States regularly lambasted other countries for trying terrorists before military tribunals. Now, however, this is described as criticism of "the process and not the forum."[45] If the United States is to embark now on military trials of foreign civilians, the legal justification for this unprecedented step needs to be clearer. Continuing to justify such trials as consistent with "internationally accepted practice with deep historical roots"[46] will undermine their legitimacy. Absent a greater degree of consensus on the legality of such measures, the United States should not champion military trials of civilians as an acceptable international norm.

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43. *See generally* Exec. Order No. 13,129, (July 4, 1999) (declaring a national emergency due to finding that Afghanistan was being "used as a safe haven and base operations for Usama bin Ladin and the Al-Qaida organization who have committed and threaten to continue to commit acts of violence against the United States and its nationals"); Mark E. Kosnik, The Military Response to Terrorism, NWC Rev. (Spring 2000) *available at* http://www.nwc.navy.mil/press/review/2000/spring/art1-sp0.htm (last visited Mar. 3, 2003).

44. Yamashita, 327 U.S. at 15.

45. Pierre-Richard Prosper, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Statement Before the Senate Judiciary Committee (Dec. 4, 2001).

46. *Id.*

BRIDGING THE GAP BETWEEN INTERNATIONAL LAW AND FOREIGN POLICYMAKING

DANIEL H. JOYNER*

"Lawyer and diplomat. . .are not even attempting to talk to each other, turning away in silent disregard. Yet both purport to be looking at the same world from the vantage point of important disciplines. It seems unfortunate, indeed destructive, that they should not, at the least, hear each other."

The above statement was made by renowned international lawyer and former state department official Louis Henkin in 1979.[1] Professor Henkin was bemoaning what he saw as a significant and disturbing gap in communication between the international legal community and the foreign policy community.[2] That such a gap did exist and does exist today is an easily discernible fact. One need only read accounts of an international lawyer's and a State Department or Foreign Ministry policymaker's thoughts on any given subject of international affairs to see that the two are not even speaking the same language, let alone following the same analytical process when examining the issues. While one talks of norms, precedent and international order, the other's rhetoric is replete with references to national interest and practical exigencies. While one looks to the codicils of the UN Charter and a seemingly never-ending supply of rules contained in international conventions and the customs of nations for guidance, the other looks to the latest administration position paper.

From the perspective of the State Department/Foreign Ministry policymaker, it is completely natural that this should be the case. Why, after all, should she

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* Martin J. Hillenbrand Scholar in the School of Public and International Affairs and Dean Rusk Fellow in the Center for International Trade and Security, The University of Georgia. BA Brigham Young University, JD Duke Law School. The author wishes to thank Gary Bertsch, Scott Jones and especially Jan Huner of The Netherlands' Ministry of Economic Affairs, for helpful review and comments of drafts of this article.

1. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 4 (1979) [hereinafter HOW NATIONS BEHAVE].

2. In this paper, the terms "international legal community" and "international lawyers" make reference to those legal scholars and practitioners who are primarily concerned with issues of public, not private, international law, and in particular those in the academic community. The "foreign policy community" or "foreign policymakers" referred to in this paper are those government officials in a variety of agencies within national governments, but particularly within the primary foreign policymaking organ, at a variety of levels whose responsibilities include significant foreign policymaking or policy execution roles.

devote hours to studying legal opinions, when even the international lawyers can't all seem to come up with the same answer to the simple question "is this legal?" And even if they could, she has a lot more to worry about than some abstract principles of pseudo-law that she knows very well can be broken with near impunity – she knows because she's seen it done a thousand times by her government and others. She knows what her job is – to forward the interests of her state client.[3]

As for the lawyer, he is by now used to being ignored and his ideas scoffed at as being hopelessly idealistic and out of touch with reality. Eventually, he came to accept that his was a discipline which is at the very fringe of consideration by most policymakers, and he is content to theorize and write law review articles about how *opinio juris sive necessitatis* is at the heart of custom. He stopped trying to have meaningful conversations with the people in government years ago. Frankly, he got tired of his ideas being marginalized and being made to feel like an ivory tower utopianist. The best he can hope for is to get his book published and make tenure early.

As Henkin observed, this is a highly inefficient and truly harmful state of affairs, for both parties.[4] Yet it continues, the officials formulating positions and trying to get a head in the big game, basing their foreign policy assumptions on institutional wisdom and the odd consultation with an outside area specialist; the lawyer writing to and attending conferences with other lawyers; while all the time both communities are looking at the same sets of facts and trying to grapple with the most important issues of state behavior, the relationships of states to each other, and the best ways to promote effective and advantageous interaction between nations.

This is not to say that their perspectives on these and other issues are not quite different. This indeed is at the very core of the communications gap that has always existed between the two communities. However, the process of globalization continues to effect an ever-increasing phenomenon of legalization of international relations, as witnessed by the modern multiplication of international institutions and regimes and high frequency of front-page issues of international politics in which international law and institutions play a significant role.[5] Nowhere is this more apparent than in the debate on international security issues. This fact leads to the urgent understanding that the international legal community and the foreign policy community have a strong mutual interest in overcoming the gaps in communication and culture which have long separated them.

This brief essay will attempt to identify some of the causes of this lack of communication and cooperation between international lawyers and foreign policymakers and will propose pragmatic means by which this sizeable gap may be

3. Generalizations of attitudes used in this paper, such as those of an average foreign policymaker, can of course be criticized as overly stereotypical and refuted on a case by case basis. However, throughout I have attempted to capture the core sentiments and assumptions of most policymakers and international lawyers respectively as they bear on the issues addressed.

4. HOW NATIONS BEHAVE, *supra* note 2.

5. *See Legalization and World Politics*, 54 INT'L ORG. 385 (2000).

narrowed. It will offer some prescriptions for both communities for improving their accessibility and acceptability to the other, since as with most instances of miscommunication, no one party is solely to blame. The paper will begin by offering a review of some relevant literature in both the fields of international law and international relations, and will assert that the specific gap between the international legal community and the foreign policymaking community has gone largely unaddressed in academic literature in a targeted, systematic fashion.[6] It will proceed to provide such an analysis, and will conclude with a practical application of the analysis and normative prescriptions based thereon to current issues regarding the Missile Technology Control Regime, a multilateral nonproliferation body.

I. LITERATURE REVIEW

In recent years there has been a wealth of scholarship on the evolving relationship between the academic disciplines of international relations and international law and the substantive role of norms in international politics. Regime theorists such as Abram and Antonia Chayes and Oran Young have written extensively on the relationship between power and rules and procedures in international politics.[7] Institutionalists such as Robert Keohane have focused on the role of formal and informal institutional arrangements between states and the role of rules within those arrangements in coordinating behavior and shaping the expectation of actors.[8] English School political science scholars as well have pointed to the inherent connection between the concept of an international community of states and the binding force of international law.[9] As Hedley Bull has written:

> A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.[10]

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6. There has of course been significant work done on the general issue of the role of international law in foreign policy. *See* FRANCIS A. BOYLE, THE FUTURE OF INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY (1989); THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers, ed. 2000) [hereinafter THE ROLE OF LAW].

7. Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATIONAL RESOURCES AND THE ENVIRONMENT (1989) [hereinafter INTERNATIONAL COOPERATION]; Oran R. Young, *International Law and International Relations Theory: Building Bridges*, 86 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 172 (1992).

8. *See* Robert O. Keohane, *International Institutions: Two Approaches*, *in* INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 187 (Robert J. Beck, Anthony Clark Arend & Robert D. Vander Lugt, eds., 1996); Robert O. Keohane and Lisa L. Martin, *The Promise of Institutionalist Theory*, 20 INTERNATIONAL SECURITY 39 (Summer 1995) [hereinafter CUSTOM, POWER].

9. MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 31 (1999).

10. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 13

International lawyers as well have devoted a great deal of energy to harmonizing the work of the two disciplines and forging analytical as well as rhetorical links between them. Leading legal scholars in this field include Anne-Marie Slaughter, Kenneth Abbott and Michael Byers. These scholars, while asserting the normative independence and value of international law, have made great strides in opening up the field to analysis in international relations (IR) theory terms, and in examining the role of international law in world politics.[11] As Slaughter has commented:

> Just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should two disciplines that study the laws of state behavior seek to learn from one another... If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behavior must afford a foundation and framework for legal efforts to regulate that behavior...From the political science side, if law – whether international, transnational or purely domestic – does push the behavior of States toward outcomes other than those predicted by power and the pursuit of national interest, then political scientists must revise their models to take account of legal variables.[12]

There has also in the field of international relations, particularly since the 1993 publication of the book *Bridging the Gap* by Alexander George,[13] evolved a body of scholarly writing addressing the perceived disconnect between the international relations academic community and the foreign policymaking community.[14] This work proceeds from the realization that the two communities, while nominally focusing their energies on the same sets of facts relative to cross border political interaction, have almost entirely insulated and independent cultures.[15] Several works in this field have attempted to identify the underlying disparities in analytical approach, questions asked and results desired by the two communities, and have fashioned recommendations to both concerning how the widening gap in communication and cooperation might be narrowed.[16]

Despite the long history of disciplinary independence of international law and its primary ownership by students of law as opposed to political theory, there seems yet to be a residual impression within some non-legal sectors of the

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(1977); *See* C. A. W. MANNING, THE NATURE OF INTERNATIONAL SOCIETY (1962).

11. *See* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361 (1999); CUSTOM, POWER, *supra* note 10; THE ROLE OF LAW, *supra* note 7.

12. *See* Burley, *supra* note 12.

13. ALEXANDER L. GEORGE, BRIDGING THE GAP: THEORY AND PRACTICE IN FOREIGN POLICY (1993).

14. *See* MIROSLAV NINCIC AND JOSEPH LEPGOLD, BEYOND THE IVORY TOWER (2002); BEING USEFUL: POLICY RELEVANCE AND INTERNATIONAL RELATIONS THEORY (Nincic & Lepgold eds., 2000) [hereinafter BEING USEFUL]; Bruce W. Jentleson, *The Need for Praxis; Bringing Policy Relevance Back In*, 26 INTERNATIONAL SECURITY 169 (2002).

15. *See* GEORGE, *supra* note 14, at 3.

16. *See* BEING USEFUL, *supra* note 15.

academy that international law as an academic exercise is largely subsumed within, and categorizeable as a sub-discipline under, the overarching subject matter heading of international relations theory. Indeed, international law is thus listed in many political science department registers, highlighting the oft-perceived substantive and procedural softness of international law and the tenuous nature of its existence as a true system of law comparable to domestic legal systems.[17] Thus to develop an analytical treatment of the divergences in form and substance between the academic study of international relations and the practical field of foreign policymaking must to the minds of many within the academy, particularly in secondarily related fields but also to some within the IR community, include scholarship in the field of international law underneath its conceptual umbrella.[18] However, this is a thoroughly misconceived view of the classical relationship between international law and international political theory.

While its intellectual roots stretch back to Thucydides and beyond, international relations theory as a distinct academic discipline is, after all, a relative newcomer to the academic scene, having been developed in the 1930's and 40's by such scholars as Edward Carr and Hans Morgenthau and their followers.[19] International law, by contrast, has been a distinct academic discipline in legal circles since the writings of Grotius in the early seventeenth century and is today a rich and highly developed scholarly field in its own right.[20] Largely due to these genealogical facts, the attributes, assumptions, and analytical processes of international legal scholarship are quite different from traditional international relations theory, as witnessed by modern attempts at reconciliation between the two disciplines.[21] And while the work of George and others in bridging the gap between IR theorists and foreign policymakers is generally useful in many of its points by analogy, in specifics there is yet much to be said concerning the very distinct gap in understanding and communication as between international lawyers and foreign policymakers.

II. THE GAP

This gap can be identified through similar analytical means as those employed by George and his followers, but upon divination it turns out to be in substance quite uniquely constituted. A primary step in isolating the causes of the cooperative disconnect between international lawyers and policymakers is to identify the supply and demand dynamics present.

A. Demand

If we consider policymakers to be the consumers and international lawyers to

17. *See* BULL, *supra* note 11.

18. *See generally* CUSTOM, POWER, *supra* note 10, at 21-34.

19. EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS, 1919-1939 (2nd ed. 1946); HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (3rd ed. 1960).

20. *See generally* CUSTOM, POWER, *supra* note 10, at 3-46.

21. *See* id.

be the providers in this scenario, it is useful to begin by examining what the demand factor is, i.e. what do policymakers need and want. As an introduction to their world, it is preliminarily important to note that foreign policymaking goes on at many levels and by many different officials in government, and not just by the foreign minister or secretary of state and their top aides.[22] Often there are relatively few centralized or top-down sources to guide officials in the day to day making and execution of policy between states, and they are left to interact with their counterparts in foreign governments and with private actors with little but their own internally generated resources and individual experience and judgement to guide them.[23] This phenomenon of decentralized interaction at all levels of national government has only increased as the number of regulatory and issue areas with international aspects, from the environment to securities law to human rights, has multiplied.[24]

Added to this fact is the non-ideal reality that most government officials live in a world in which they are, especially at the policy execution level, constantly devoting large amounts of their time to putting out fires.[25] Their responsibilities are often varied and decisions on discrete issues must often be made with precious little time to deliberate on the ramifications of their action or inaction on international norms.[26] And while they possess a great deal of information and receive counsel from experts both within and without of government, they see their decisions as being made as a result of judgment and common sense in furtherance of the interests of their state as opposed to theory or norm-based decisions made for greater and more abstract goods, such as to benefit global humanity or the international system in general.[27] This is not to assert categorically that such causes may not receive important secondary consideration, but simply that a realistic understanding of the value structure of most foreign policymakers, and most government officials for that matter, must place national interests as unchallenged primary objectives.[28] What they need from outside sources, therefore, is topical and specific information and recommendations, communicated briefly and in understandable language, and laid out in logical and convincing fashion based on their underlying goal – making sound decisions that forward the state interest.

Policymakers often additionally hold latent assumptions which have contributed to the existence of the gap between themselves and members of the

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22. *See* ROBERT O. KEOHANE AND JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 25 (1977).

23. *Id.* at 25-26.

24. *See* Anne-Marie Slaughter, *Governing the Global Economy through Government Networks, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 177, 177-78 (Michael Byers, ed. 2000).

25. *See generally* George, *supra* note 14.

26. *Id.*

27. *Id.*; *See also* Condoleeza Rice, *Promoting the National Interest*, FOREIGN AFF., Jan.-Feb., 2000, at 45, 47, 62.

28. *See* Rice, *supra* note 28, at 47.

international law community.[29] The most widespread and invidious of these are that international law is largely idealistic and impractical, that it is generally ineffectual in carrying out its own prescriptions, and that it should seldom if ever be deferred to when there is a real and pressing issue of national interest, and particularly national security at stake.[30] Policymakers therefore need both these assumptions addressed, as well as their substantive information needs met before they will give greater consideration to international legal concerns and make them a more important part of their overall policymaking calculus.

B. Supply

International lawyers, particularly in the academic setting, are in an entirely different business. They primarily traffic in ideas about the rules that do, and should hold the international system of state relations together.[31] Their work is mainly in discerning what the rules are, their meaning, scope of application and effect.[32] The stock in trade among international lawyers in academia is basically the same as among international relations scholars. It is publications in books and scholarly journals, conferences among leading experts, and teaching the next generation of scholars.[33] And like the IR academic community, the culture of the international legal community of scholars is marked by insularity, perpetuated by shared language, educational background and international system-centric perspective.[34] However, a number of fundamental distinctions may be made between international lawyers and international relations theorists. Unlike IR theoretical work, the substance of international law - the norms themselves - are meant to be part of the workings of the international system, i.e. they are meant to be used by policymakers.[35] Without actual application and recognition by policymakers and policy executors, international law can be said to have even less intrinsic value than analytical IR theory. IR scholars seek to generate theories explaining the actual behavior of states and identifying motivating factors and causal connections between social and administrative variables, an understanding of which has value in and of itself and great potential for policy application in unforeseeable future scenarios of foreign affairs concern even if it is not presently utilized.[36] International law, on the other hand, is a collection of normative prescriptions and standards which, if not put to use merely take up room on library shelves.[37] Thus at face value there would seem to be ample incentive for international lawyers to bridge whatever cultural and communications gaps exist between themselves and the policymaking community, if for no other reason than

29. *See* George, *supra* note 14.

30. In support of these assumptions, policymakers can find no short supply of arguments drawn from IR literature, particularly within the classical and neo-realist schools of thought.

31. CUSTOM, POWER, *supra* note 10, at 47-48.

32. *See id.*

33. GEORGE, *supra* note 14, at 4.

34. GEORGE, *supra* note 14.

35. *See* CUSTON, POWER, *supra* note 10, at 15; BULL, *supra* note 11, at 141.

36. *See* CUSTOM, POWER, *supra* note 10, at 21.

37. *Id.* at 21, 48.

to preserve their relevance and value as a discipline. However, international lawyers face obstacles in this regard that IR scholars do not.

As previously noted, IR theory essentially provides analytical frameworks for explaining and in some cases predicting actual phenomena.[38] International law by contrast is a system of norms, largely contrived by lawyers, which purport to regulate significant areas of international relations, but which are currently at an evolutionary stage in which they are in large measure not supported by institutions capable of effectively adjudicating and enforcing their prescriptions.[39] This recognition of the evolutionary stage of the international legal system, while very valuable for lawyers in understanding the continuing importance of supporting the development of international institutions and norms, does little to persuade foreign policymakers to comply with international law in cases where doing so is seemingly at odds with the short-term interests of their state clients. Government officials in fact often view international law as merely a strategic tool, useful for justifying their actions in harmony with its precepts and for condemning incongruous acts by adversaries, but easily unmentioned when the action of their state lies contrary to its dictates.[40] And international lawyers, it must be said, have done little to usefully change this perception and the resultant lack of serious consideration of international law by policymakers.[41] This is due in part to many international lawyers' apparent fear that greater engagement and cooperation with policymakers on a substantive level might effect a degree of watering down of the objective theoretical integrity of international law, which has developed largely in seclusion for centuries, and which has been the almost exclusive province of academic thinking and writing by lawyers.[42] As in other areas of the law, lawyers are generally suspicious of outside influence in the substance and procedures of their profession, which like the other classical professions has as a general rule been allowed to be self-regulatory.[43]

International lawyers are especially suspicious of the intentions of foreign policymakers, whom they know are largely unconcerned with many of the theoretical underpinnings of international law, such as the maintenance of a logically and theoretically consistent international legal regime founded on norm-based conceptions of principled international interaction, and whose focus is rather on immediate problem-solving and national interest with a general conceptual grounding in realist notions of the influence of power and self-interest in all aspects of international politics.[44] It is also likely a manifestation of the reluctance of many international lawyers to be viewed as hired guns for any government, including their own, in its designs to show the world its compliance and other nations' non-compliance with international norms, and thereby be robbed of their

38. *Id.*
39. CUSTOM, POWER, *supra* note 10.
40. *See* HOW NATIONS BEHAVE, *supra* note 2.
41. *Id.* at Introduction.
42. *Id.*
43. *Id.*
44. *Id.*

perceived objectivity and intellectual integrity.[45]

III. BRIDGING

Having established some of the divergences of culture and perspective as between international lawyers and foreign policymakers, it remains to be considered how those divergences may be addressed so as to foster an increased level of cooperation between the two communities. This paper will attempt to accomplish this in two separate sections, containing recommendations specific to each group.

A. International Lawyers

As will be clarified herein, it is upon international lawyers that the heaviest onus of responsibility for bridging the gap with policymakers should fall. This is due to two particular considerations. Firstly, as between the two sides, international lawyers are possessed with the greatest opportunity to take upon themselves this burden.[46] While the demands of their traditionally valued activities will remain, it will surely be conceded that the capacity exists for international lawyers, particularly those in the academic setting, to re-prioritize those activities and to place increased cooperation with government officials nearer the top of the list.[47] This is decidedly more true for international lawyers than it is for policymakers.

Which brings us to the second consideration. It is proposed that the motivation for bridging the lawyer/policymaker gap also should rest most particularly in the court of the international lawyer.[48] This is caused by two distinct factors. First, as previously stated, the very continuing existence of the discipline of international law depends on its use and consideration by foreign policymakers.[49] Without that relevance, international legal scholarship will become increasingly moot and will very possibly decline in importance and, eventually, find little place in the world of academia.

Second, under a correct conceptualization of their business, international lawyers should be motivated to place greater emphasis on increased engagement with government officials in order to bring about their core interests.[50] The heart of what proponents of international law have always wanted, and the foundation upon which the concept of international law is based, is that a rule of law and not of power should obtain in international politics.[51] This is the theoretical underpinning of the entire exercise of international normative thinking.[52] It is

45. *Id.*
46. *Id.*
47. *Id.*
48.. *Id.*
49. *Id.*
50. *See* Jentleson, *supra* note 15.
51. *See* HOW NATIONS BEHAVE, supra note 2, at introduction.
52. *Id.*

clear, however, that the traditional scholarly and detached activities of international lawyers will be insufficient to bring this change about, if it is to be brought about at all. To in fact achieve such change, the proponents of an international rule of law must work within the existing power structures of national governments to a degree as yet unrealized, and make their wealth of wisdom and experience in normative construction and institutionalization accessible to and usable by those in power, who are in the end the only ones who can actually bring about fundamental change to the existing international order. Policymakers have to want to be a part of the international law system or it will fail.

How then is this to be accomplished by the international law community? Through an emphasis on education and through increased and more effective communication, international lawyers must make a concerted effort to address the concerns and needs of policymakers as outlined herein. Firstly, there must be an organized initiative with the goal of educating policymakers on the origins and salient characteristics of the international legal system and international law in general. There is a palpable lack of understanding of international law among foreign policymakers, particularly in the United States but also among government officials generally.[53] This ignorance breeds confusion and misunderstanding of the nature and application of international law, which too often leads simply to dismissal of the importance and relevance of norms in foreign policy decision-making. A proper education in international law must include both theoretical and practical perspectives on the current evolutionary state of the international legal system and on principles of state compliance with international norms.[54]

This is perhaps the most difficult task facing international lawyers, as a better education for the policymaking community is easy enough to point out as a desirable end, but decidedly more difficult to actually achieve. However, in recent years, there have been great strides in educational programs for judicial officers in the foundational elements of international law through such means as the American Society of International Law (ASIL) Judicial Outreach service and others, through which judges from around the world are given a crash course in international law specifically as it bears upon cases most often heard in their courts.[55] Such programs are constructed to accommodate the busy lives of government officials, and are extremely useful for establishing an elementary understanding of the existence and proper application of international law norms in specific areas of concern.[56] Such courses in the foreign policy context could easily be designed and administered by Universities and other interested non-governmental organizations like the ASIL and would constitute a very useful step toward addressing the pervasively held assumptions of the policymaking

53. *Id.*

54. See the excellent treatment of various forms of normative regulation and their relevance to specific issue-area governance in Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000).

55. The American Society of International Law, *2001 Annual Report: Building for the Future* 2-3 (2001), *available at* http://www.asil.org/annual.pdf (last visited Feb. 12, 2003).

56. The American Society of International Law, *Newsletter:* October/December 2002, *available at* http://www.asil.org/newsletter/news.pdf (last visited Feb. 12, 2003).

community relevant to international law, which form a formidable obstacle to their more substantive and beneficial engagement with international lawyers.

Second, international lawyers must take to heart the recommendations of several writers in the international relations disciplinary context who have observed that communication with government officials is not effectively achieved through the writing of academic journal articles.[57] In the international law context this is no less true. And while it is certainly not proposed that all writing efforts be devoted to the task of bridging the international law/policymaking gap, much could be accomplished through the publication by eminent international law experts of articles in excellent foreign policy periodicals such as *Foreign Affairs*, as well as in more mainstream news media outlets. Even if these publications are little more than boiled down summaries of more expanded arguments made in leading legal journals, in view of the readership constituency of these publications, such efforts will be much more likely to reach the desks of foreign policy makers, partially due to the brevity and clearness of language which those formats demand.

This is not of course to say that direct communication between international lawyers and foreign policymakers should not be attempted. Indeed, this is surely the most effective means of increasing cooperation between the two communities to the extent it can be effectuated. Volunteering to draft brief memoranda on specific issues, and making oneself available for consultation on demand, are efforts by international lawyers sure to be appreciated by officials who often seek to supplement their in-house research and institutional wisdom with outside advice.

When such advice is given, or memoranda drafted, and even in articles targeted to reach the eyes of policymakers, close attention should be paid to the use of vocabulary and identification of motivating dynamics which government officials will both understand and value. This prescription does not merely refer to the use of "legalese" in lawyer-official communications. Rather, it refers additionally to the types of arguments made to motivate action or inaction on the part of the policymakers when persuasive arguments are warranted (recognizing that in many instances such arguments will not be appropriate, and that the product sought by officials will simply be a run down of relevant norms, cost and benefit analysis). International lawyers must take to heart the identification of foreign policymakers' interests as described herein. Thus an argument based on "the best interests of the international community" or "the normative soundness of the international legal regime" is likely to hold much less sway in the mind of a government official than arguments which may well be in support of action or inaction for the good of humanity, but which may also legitimately be based on important perceived national interests, including reputational and strategic interests, which it is the job of the international lawyer to point out can be seriously

57. *See* JOSEPH LEPGOLD & MIROSLAV NINCIC, BEYOND THE IVORY TOWER: INTERNATIONAL RELATIONS THEORY AND THE ISSUE OF RELEVANCE 2-3 (2001); Arthur A. Stein, *Counselors, Kings, and International Relations: From Revelation to Reason, and Still No Policy-Relevant Theory*, *in* BEING USEFUL: POLICY RELEVANCE AND INTERNATIONAL RELATIONS THEORY 51 (Miroslav Nincic & Joseph Lepgold eds., 2000); Jentleson, *supra* note 15.

affected by breaches of international norms. In short, lawyers must do a better job of "writing to their audience" than they have done in the past.

There will of course be situations in which casting international legal compliance in national interest terms will be more difficult than in others. In such circumstances some attempt can be made to equate national interests with international interests, and these arguments will likely be persuasive to a good many in foreign policymaking circles, particularly as the process of globalization and international institutional enmeshment makes the interdependency of nations in an array of issue areas increasingly manifest.[58] However, in extreme cases of the divergence of international and national immediate benefit, the lawyer faces an advisory dilemma which his or her personal ideologies must dictate, but in which there should be awareness of the fact that as one's advice generally is given greater credence through the recognized presence of both substantive knowledge and realistic understanding of national policymaking exigencies, so one's advocation of systemic and overarching international long-term interests at the expense of short-term national interests will be heard with an increasingly friendly ear by government officials.[59]

These efforts by lawyers at the procedural level are very likely to significantly narrow the gap between international lawyers and policymakers. However, it is this paper's assertion that at the substantive norm creation and maintenance level as well, efforts may be made to increase international law's acceptability, and thereby usefulness, to rational-minded policymakers. There has, in recent decades, been a movement within some circles to introduce elements of expanded constitutionalism into the international legal system to a degree never before attempted.[60] This movement aims to make of the international legal and institutional system a regime which in both breadth and depth of regulatory coverage, particularly into relationships traditionally considered to be within the exclusive cognizance of domestic law, is unprecedented, and wholly revolutionary in the history of international normative thinking.[61] This change is most poignant in the modern development of the areas of international human rights law and international criminal law, which seek not only to govern relations between states in their capacity as world citizens, but also the relationships between states and their citizens and of individuals to each other.[62] And while this extension of international legal coverage is satisfying to many on grounds of protecting universal human dignity, it pushes the limits of international law's inherent

58. Woodrow Wilson said in 1916, "We are participants, whether we would or not, in the life of the world. The interests of all nations are our own also. We are partners with the rest. What affects mankind is inevitably our affair as well as the affair of the nations of Europe and of Asia." THE POLITICS OF WOODROW WILSON: SELECTIONS FROM HIS SPEECHES AND WRITINGS 258 (August Heckscher ed., 1956).

59. *See* HOW NATIONS BEHAVE, *supra* note 2 at introduction.

60. *See* Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31 (1995/1996) [hereinafter *Human Rights*]; BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION (Gene M. Lyons & Michael Mastanduno eds., 1995).

61. *See Human Rights*, *supra* note 61, at 34.

62. *Id.* at 39.

limitations in institutional competence and enforcement difficulties, and thereby its overall credibility. It has additionally constituted an increasing source of discomfort to many in government circles due to the potential implications for principles of national sovereignty which such developments bear.[63]

This paper therefore takes the currently unpopular but theoretically compelling position that international lawyers should reexamine the fundamental aims of international law and should strive through their influence to limit its substantive coverage to those areas of international interaction most suited for its regulatory purview. In doing so, they will not only preserve the theoretical integrity of the enterprise of international law, but will make its precepts eminently more palatable to foreign policymakers, who will be impressed more by logic and practical necessity of substantive lawmaking than by idealistic and unnecessary extensions of international law's coverage into areas of international and domestic interaction perceived as traditionally and importantly the province of national governments.[64]

B. Foreign Policymakers

For their part, foreign policymakers must try to overcome the conceptual barriers into which they and their predecessors seem to have boxed themselves by their underlying assumptions of structural realism, power politics and the supremacy of self-centered national interest.[65] These indeed are partially valid and practical foundational understandings, but can be taken altogether too far to the exclusion of other valid conceptualizations of the international system of state interaction. Indeed, within the field of international relations theory, significant challenges to a strict realist understanding of world politics have been mounted in recent decades, notably in this context by the branches of liberal institutionalism and constructivism. These theoretical advancements should encourage a

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63. *See* John R. Bolton, *The United States and the International Criminal Court: The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROB. 167, 169 (2001).

64. For more on this matter of the substantive content of international law *see* J. SHAND WATSON, THEORY & REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 203 (1999); Curtis A. Bradley and Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 369 (1997); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396 (1998); Daniel H. Joyner, *International Human Rights Law: A System Perspective*, FORTHCOMING.

65. *See* Alexander Wendt, *Anarchy is What States Make of It: the Social Construction of Power Politics*, 46 INT'L ORG. 391, 410 (1992) ("By denying or bracketing states' collective authorship of their identities and interests. . .the realist-rationalist alliance denies of brackets the fact that competitive power politics help create the very 'problem of order' they are supposed to solve – that realism is a self-fulfilling prophecy.") [hereinafter *Anarchy*]. There is growing literature within international relations theory challenging rationalism as the conclusive explanatory paradigm of individual and collective decisionmaking, particularly among behavioral decision theorists, constructivists, and prospect theorists. *See* Stephen Walt, *Rigor or Rigor Mortis?*, 23 INTERNATIONAL SECURITY 4 (1999); Herbert Simon, *Human Nature in Politics: The Dialogue of Psychology with Political Science*, *in* RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY (Hogarth & Redereds 1986); Daniel Kahneman and Amos Tversky, *The Psychology of Preferences*, 246 SCI. AM. 1 (1982).

reconceptualization of foreign policy priorities and the value structures and policy calculations of policymakers.[66] Institutionalism has in very persuasive terms called attention to the role of formal and informal regimes, which have been multiplying exponentially in recent decades and increasing both in scope and in depth, in reducing the effects of multipolar anarchy at the heart of realist thought, by promoting cooperation, information transfer, and trust among member states.[67] Constructivism, one of the most influential theories of the past decade, has focused on the changing nature of the identities and interests of states, and has assaulted the traditional realist dogma that both of these attributes are static and the cause of an inherently conflictual international structure.[68] Rather, say constructivists, the state of international anarchy is "what states make of it," pliable to the formative acts and intentions of states.[69] Institutionalism and constructivism, among other modern explanatory theories, illuminate the additional roles of community perception, international norms and institutional cooperation in affecting state behavior. This understanding lends legitimacy to the proposition that international law is a viable motivating and regulating dynamic in the international community of states, and should therefore be taken seriously as an integral element in foreign policy considerations.

It is undeniable that in the modern era and going forward international norms and institutions have and will increasingly have an important role to play in international politics. And although a thorough treatment of the causes and dynamics of this phenomenon is not possible in the context of this essay, it will suffice to recognize that in a majority of nations, governments give deference to international legal prescriptions and do not lightly breach them.[70] As the process of globalization continues, so by necessity will the process of legalization of international relations, as countries increasingly look to rules to order their relations in areas such as trade, environmental protection, collective security, maritime movement and space rights.[71] Enmeshment in international regimes and world engagement will make understanding and working with international law norms of increasing importance to foreign policymakers.[72] This should provide the

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66. *See, e.g.*, INTERNATIONAL COOPERATION, *supra* note 8; Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 385 (1994) [hereinafter *Collective Identity*].

67. *See* ROBERT O. KEOHANE, INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY 1 (1989); INTERNATIONAL COOPERATION, *supra* note 8; M.A. Levy et al. *The Study of International Regimes*, EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS 1/3:267-330 (1995).

68. *Collective Identity*, *supra* note 67, at 384.

69. *See Anarchy*, *supra* note 66; Wendt, *supra* note 68, at 388.

70. As Louis Henkin famously commented "Violations of law attract attention and the occasional important violation is dramatic; the daily, sober loyalty of nations to the law and their obligations is hardly noted. It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*." HOW NATIONS BEHAVE, *supra* note 2.

71. See the excellent special issue entitled *Legalization and World Politics*, 54 INT'L ORG. 3 (2000).

72. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 1 (1995); ROBERT O. KEOHANE, AFTER

necessary motivation for policymakers to step out of their conceptual limitations and seek to foster real and meaningful cooperative links with international lawyers, who as outlined above have complimentary motivations, and who should be happy to meet policymakers halfway in attempts at broader and more effective communication between the two communities.

The term "halfway" is used purposefully here, because of the impression held by many in the international law community that policymakers have not made satisfactory efforts to engage international lawyers, despite the foregoing list of perhaps as yet unperceived motivations, and that they are in a sense waiting for the international lawyers to present a finished product of normative structures which they can both accept and understand *in toto* before giving international norms greater consideration in policy formation.[73] In so doing, of course, policymakers are not sufficiently mindful of their own necessary role, through communication and cooperation with international lawyers in the formative process of international norms itself, in creating just such a product. It is, after all, states that make international law and not international lawyers.[74]

Policymakers should therefore be open to education programs in international law as discussed above, and should actively seek advice from international lawyers both inside and outside of government on specific issues facing them in policy formation and execution. They should make a point to educate themselves through reading the short and hopefully issue-specific articles recommended above to be written by international lawyers in publications already widely circulated among policy officials. These are reasonable steps which can easily be harmonized with the many demands on policymakers, and which are indeed incumbent upon them as a means of better preparing themselves to fulfill the duties of their position and most effectively serve their nations' interests.

IV. CASE STUDY: THE MTCR

Since hortatory exercises such as the above are always clarified by concrete example, this paper will proceed to consider a case study involving a discrete issue area in international politics in order to show how the foregoing prescriptions may be put to use in the real world.

The Missile Technology Control Regime (MTCR) is an informal, non-treaty political arrangement, currently consisting of 33 state members and founded in 1987 for the purpose of controlling the proliferation of rocket and unmanned air vehicle systems capable of delivering weapons of mass destruction (WMD) and their associated materials and technology.[75] It is one of a number of informal

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HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

73. *See* HOW NATIONS BEHAVE, *supra* note 2, at introduction.

74. While traditionally the writings of eminent legal scholars were considered to have weight in the creation of international norms, the use of this pseudo-source of law in the judgments of the International Court of Justice has declined markedly in recent decades. *Id.*

75. *See generally* Aaron Karp, *The Spread of Ballistic Missiles and the Transformation of Global Security*, 7 THE NONPROLIFERATION REVIEW 106, 116 (2000); Kenneth Weiss, *The Limits of Missile*

multilateral regimes in the WMD proliferation area, but is distinct in that unlike other multilateral nonproliferation regimes the MTCR is not closely associated with a multilateral treaty regulating development of subject technologies and materials.[76] It is rather a *sui generis* nonproliferation supply-side regime, comprised of the owner/supplier states of missile-related technologies.[77] Due to this fact, it has been likened to a cartel of supplier states, determined to keep missile technologies within their circle of knowledge and possession, thus creating a continual and enforced haves and have-nots reality.[78] There has been growing consensus, however, that the supply-side approach to regulating WMD proliferation in this area, which the MTCR represents, has been largely ineffective in curbing the proliferation of missile technologies. This perception became acute in the 1990's as four non-regime states, the DPRK, Iran, Pakistan, and India were in active pursuit of long-range ballistic missile capabilities and with the contemporaneous emergence of a willing supplier's group consisting of Russia, China and the DPRK, all of which were either wholly outside the MTCR's framework or had been sanctioned by MTCR members for failing to control exports of sensitive missile technologies.[79]

As one commentator has noted, the single most invidious problem the MTCR faced was its inability to establish norms applicable to its subject matter.[80] As previously stated the MTCR is a voluntary organization of states, devoid of institutional rulemaking or adjudicatory powers.[81] And while the state delegates to MTCR plenaries do by consent agree on "guidelines" for export control and other nonproliferation efforts, compliance with these guidelines is, again, purely voluntary with only reputational cost to deter non-compliance.[82] In this way the MTCR is little different from other multilateral nonproliferation regimes such as

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Diplomacy: Missile Proliferation, Diplomacy, and Defense, WORLD AFFAIRS, Vol. 163, Issue 3 (2001).

76. Such as the Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, 32 I.L.M. 800. *See* David S. Gualtieri, *The System of Non-proliferation Export Controls*, *in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 467, 477-78 (Dinah Shelton ed., 2000); Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755, 820 (1994).

77. Mark Smith, *On Thin Ice: First Steps for the Ballistic Missile Code of Conduct*, ARMS CONTROL TODAY (July/August 2002), *available at* http://www.armscontrol.org/act/2002_07-08/smithjul_aug02.asp (last visited Feb. 5, 2003) [hereinafter *On Thin Ice*].

78. Mark Smith, *Rules for the Road? The International Code of Conduct Against Ballistic Missile Proliferation*, DISARMAMENT DIPLOMACY *Issue No. 63 (March - April 2002)*, *available at* http://www.acronym.org.uk/dd/dd63/63op3.htm (last visited Feb. 5, 2003) [hereinafter *Rules for the Road*].

79. *See* Richard Speier, *How Effective is the Missile Technology Control Regime?* NONPROLIFERATION BRIEF 4 (7), Carnegie Endowment for International Peace (2001); Dinshaw Mistry, *Ballistic Missile Proliferation and the MTCR: A Ten-Year Review*, CONTEMPORARY SECURITY POLICY, Issue 18, Vol. 3 (1998).

80. *Rules for the Road*, *supra* note 80.

81. Barry Kellman, *supra* note 78, at 822.

82. *See* Anastasia A. Angelova, *Compelling Compliance with International Regimes: China and the Missile Technology Control Regime*, 38 COLUM. J. TRANSNAT'L L. 419 (1999).

the Wassenaar Arrangement[83] and the Nuclear Supplier's Group,[84] but as previously noted the subject technologies these regimes seek to control are addressed in binding multilateral treaties, which are legally enforceable against non-compliant states.

With this disparity in mind, in the late 1990's MTCR member countries began to consider ways to introduce norms into the area of missile technology proliferation, and began to develop the idea of a code of conduct to supplement, or under some interpretations replace, the role of the MTCR in the area.[85] At the 15th plenary meeting of MTCR member states in October 2000, a draft International Code of Conduct (ICoC) generating demand-side norms was circulated and discussed, and in November of 2002, 92 countries agreed to adopt the ICoC at a meeting at The Hague.[86] The adopted version of the ICoC contains a recitation of agreed-upon principles, commitments, incentives for compliance, and confidence building measures.[87] And while the commitments are carefully worded so as to avoid the attachment of legal obligation to their terms, they do include commitments by signatory states to ratify a number of international treaties on space exploration, to undertake measures to prevent the proliferation of WMD-capable missiles, to reduce national holdings of the same, to exercise vigilance in the consideration of assistance to space launch vehicle programs in other countries (a notorious front for military-use missile and WMD delivery system programs), and not to support ballistic missile programs in countries which "might be developing or acquiring weapons of mass destruction in a way incompatible with the norms established by the disarmament and non-proliferation treaties."[88] The ICoC seeks to ground the missile proliferation regime in universally applicable commitments and principles and thus to introduce markedly increased levels of normative foundation to the regime.[89]

However, the ICoC has met with a mixed reaction from important states both within and without of the MTCR. Criticisms have ranged from fears of inadvertent legitimization of some missile programs due to the minimalist approach of the ICoC, to some rankling of nationalistic feathers and the expression of concern that attempts through the ICoC to regulate missile programs, many of which are being conducted for ostensibly civilian space-development purposes, impinge upon national prerogatives in important and wholly legitimate areas of technological

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83. The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, *adopted* July 11-12, 1996, *available at* http://www.wassenaar.org/docs/IE96.html (last visited Feb. 8, 2003).

84. *See* Gualtieri, *supra* note 78, at 473.

85. *On Thin Ice*, *supra* note 79.

86. *Preventing Missile Proliferation*, DISARMAMENT DIPLOMACY (May 2001), *at* http://www.acronym.org.uk/dd/dd57/57note.htm (last visited Feb 5, 2003); *MTCR Plenary Meeting*, DISARMAMENT DIPLOMACY (October-November 2002), *at* http://www.acronym.org.uk/dd/dd67/67nr10.htm (last visited Feb 12, 2003).

87. *Rules for the Road*, *supra* note 80.

88. *See Preventing Missile Proliferation*, *supra* note 88.

89. *On Thin Ice*, *supra* note 79.

innovation.[90]

It is not the purpose of the current examination to vet the various significant policy considerations surrounding adoption of the ICoC. However, when viewed on a regime-institutional level, the case of the MTCR does present fertile ground for analysis of possible cooperative interactions between international lawyers and foreign policymakers within the issue area.

To an international lawyer, the current state of the area of missile and WMD proliferation represents an issue area perfectly suited for international regulation by means of soft, as opposed to hard, international law.[91] Some elaboration on the meaning and use of these terms is due. International law classically recognized two sources of binding normative development. The first is treaties, which are written agreements between two or more parties, the obligations of which apply solely to those executing the treaty.[92] Treaties are binding upon signatories and subject to adjudication in international judicial fora.[93] The second is customary international law, which develops through the acts of states accompanied with sufficient *opinio juris*, or expressed sense of legal obligation, of state officials.[94] Custom may form parallel to or wholly independent from treaties and may bind not only those who participate in its creation, but potentially also other states who do not successfully obtain persistent objector status while the customary norm is in creation.[95] While not without theoretical and practical weaknesses as a true system of law, these two sources have traditionally been held to produce binding obligations, or "hard" international law, enforceable to the extent any international norm is enforceable upon subject state parties.[96]

The concept of "soft" international law, by contrast, is relatively new. It is a scholarly movement to attempt to recognize the value of some written instruments as having many of the characteristics of international law, and thus contributing to normative development, while remaining non-binding in a strictly legal sense.[97] Speaking of the proponents of this movement, one commentator has written:

> they stress that these instruments fulfill at least some, if not a great number, of the criteria required for rules to be considered rules of international law and cannot therefore be simply put aside as non-law. In other words, they acknowledge that there exists a considerable 'grey area' of 'soft-law' between the white space of law and the black territory of non-law. Simultaneously, they make the salient point that the 'grey area' may greatly affect the white one and explain, sometimes

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90. *Id.*

91. *See* HOW NATIONS BEHAVE, *supra* note 2, at introduction.

92. AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW [Hereinafter AKEHURST'S] (7th ed., Peter Malanczuk ed., 1997). *See also* Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, *also available at http://www.un.org/law/ilc/texts/treaties.htm* (last visited Feb. 12, 2003).

93. *See* AKEHURST'S, *supra* note 94.

94. *See* UN CHARTER, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38 (listing the sources of international law).

95. *See* AKEHURST'S, *supra* note 94.

96. *See generally* AKEHURST'S, *supra* note 94, at Chapter 3.

97. G.J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW (1983).

in considerable detail, in what ways 'soft law' can have legal effects.[98]

A number of scholarly treatments have been done on the sources and uses of soft law in the modern international legal and political system. One of the best of these is by Kenneth Abbot and Duncan Snidal, entitled "Hard and Soft Law in International Governance," which appeared in the summer of 2000 in *International Organization.* Abbot and Snidal develop therein a methodology for determining issue areas best regulated by soft and hard international law respectively.[99] They conclude that hard law is best utilized in areas of international interaction in which the value placed on making credible commitments is high, reduction of long-term transactions costs from continual re-negotiation is important, political strategies may be supplemented by adjudicative or otherwise legalistic international regimes, and where delegation of authority to international fora is an attractive means for remedying inherent problems of incomplete contracting.[100] They conclude that soft law, by contrast, is most attractive in issue areas in which a premium is placed on low initial contracting costs, where the use of hard law would present unacceptable sovereignty costs (which are highest when proposed international legalization purports to regulate the relationships between a state and its citizens or touches upon important issues of national security), and where the novelty and complexity of the issue area create a high degree of uncertainty and possibility for positional change which make hard law enshrinement of norms unattractive.[101] Abbott and Snidal also recognize soft law as being an efficient means of compromise between antagonistic positions between states, particularly in the early stages of normative consideration of the subject area.[102]

The distinction of hard and soft law and the recognition of soft law instruments has met with disapproval by some in the international legal community, however. As expressed by Sztucki:

> *Primo,* the term is inadequate and misleading. There are no two levels or "species" of law – something is law or is not law. *Secundo,* the concept is counterproductive or even dangerous. On the one hand, it creates illusory expectations of (perhaps even insistence on) compliance with what no one is obliged to comply; and on the other hand, it exposes binding legal norms for risks of neglect, and international law as a whole for risks of erosion, by blurring the threshold between what is legally binding and what is not.[103]

However, as D.J. Harris has responded:

> While it may be paradoxical and confusing to call something "law" when it is *not*

98. *Id.* at 187-8; *See generally* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000).

99. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance,* 54 INT'L ORG. 421 (2000).

100. *Id.* at 428-9.

101. *Id.* at 434.

102. *Id.* at 444.

103. Jerzy Sztucki, in *Festkrift Hjerner* 550-551 (1990).

> law, the concept is nonetheless useful to describe instruments that clearly have an impact on international relations and that may later harden into custom or become the basis of a treaty.[104]

If an international lawyer were to maintain Harris' position, therefore, and view the proliferation of missile and related technologies area as an almost paradigmatically well suited issue area for soft law coverage, based on the Abbot and Snidal methodology, he or she might conclude that the evolution of the normative structure in this area would be well served by the primitive use of soft law mechanisms, and that in so doing the states involved would contribute not only to the normative progression and coherence of the subject area, but would also make a significant contribution to the theoretical understanding of the use of soft law mechanisms in international relations, which is a cutting edge and highly intriguing area for study and further publication.

However, despite the appeal of this form of analysis and these policy recommendations to an international legal scholar, little if anything contained in the foregoing analysis of hard and soft law would appeal to a foreign policymaker, or tempt such an official to invest much time in considering them. Again, such policy professionals are chiefly concerned with effectiveness of policy in achieving the goals which are in the best interest of their states, and they have very little time to devote to or interest in considering the possible large-picture effects of their policy on international legal system development or on the processes and theories of international law. Thus an examination by an international lawyer along the above lines will be of little assistance to them and will likely be ignored. But it is crucial to point out once again that in being irrelevant to policymakers, such analyses, although profitable in their element as progressions in theoretical understanding of international law, fail the ultimate aims of most international lawyers – to have norms and a rule of law govern international relations and not a rule of power and self-interest.

Drawing from the lessons learned from the examinations of supply and demand previously noted therefore, a more useful paradigm for international lawyer/policymaker cooperation in this area, and by analogy in others, can be sketched out. Instead of long-winded examination and in this context useless theorizing, in the case of the MTCR as in other cases international lawyers could be most helpful to policymakers by focusing on the particular facts of the issue area and the problems at hand, and attempt to communicate briefly and effectively the international legal issues involved and specific policy-relevant recommendations.

In the MTCR case, such an analysis might proceed as follows. First to the underlying threat. There is a clear link between effective methods of nonproliferation of missile systems capable of delivering weapons of mass destruction and their resultant non-use by dangerous regimes and the national security of virtually every state in the world. It is further clear that the missile

104. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 65 (5th ed. 1998).

technology proliferation regime as it currently exists is lacking in normative foundation. The first question therefore is whether or not greater normativization in this area is desirable. Effective analysis in this regard could look to analogous issue areas, such as the other weapons nonproliferation regimes to view the effect greater normativization has had on the underlying threat. It could be briefly and clearly shown that nonproliferation regimes in these areas, when closely associated with binding international agreements, have aided in decreasing the threat of proliferation and use of weapons of mass destruction by formalizing underlying normative principles and making them openly recognized as obligatory, thus increasingly drastically the reputational costs of openly flouting the norms.[105] However, in the missile technology area, the exact technologies involved create a situation that includes not only threats of sovereignty impingement, but also significant and uniquely difficult issues for normative coverage, principally due to the dual-use nature of many such technologies. As mentioned previously, missiles, unlike nuclear weapons themselves, have many legitimate civilian uses quite apart from their military uses, many of which are themselves considered legitimate.[106] These include, most importantly, use in peaceful space exploration and development.[107] To add to the difficulty, there is virtually no means available to distinguish between a civilian space missile program and a military missile program up until the very late stages of its development. Thus normative progression in this area has been stalled over difficulties in addressing the specific technologies involved.

However, effective international legal analysis can be offered by going outside of the weapons proliferation regime area and examining cases of normative development in other areas in which the substantive issue area has been especially sensitive and complex. One such illustrative example is the area of international trade. Trade between nations has historically been among the most sensitive of areas to regulate because of the potential far-reaching effect of such regulation on perceived domestic prerogatives and the importance of successful international trade to national economies.[108] After the Second World War, the largest economic powers concluded on a relatively loose association to preliminarily cover the area of international trade, established by the General Agreement on Tariffs and Trade (GATT).[109] The GATT was technically a binding international agreements, but it was in actuality quite soft in a number of ways. It was adopted only "provisionally," its commitments were not subject to effective adjudicatory

105. Although this area presents the familiar logical conundrum wherein proving effectiveness practically equates to proving the negative (i.e. effectiveness of regimes is best shown by the non-occurrence of regulated activities), there is a general consensus, which could be supported by data, that multilateral export control regimes have been effective in at least facilitating national export control policies, which are an important and demonstrably effective tool in stopping, or at least slowing, the proliferation of WMD.

106. *See Preventing Missile Proliferation*, *supra* note 88.

107. *Id.*

108. JOHN H. JACKSON, THE WORLD TRADING SYSTEM (2nd ed. 1998).

109. General Agreement on Tariffs and Trade [Hereinafter GATT] *available at http://www.ciesin.org/TG/PI/TRADE/gatt.html* (last visited Feb. 12, 2003).

institutions, and it contained a relatively lenient withdrawal clause.[110] The GATT however served to introduce some normativization to the field of international trade, and in doing so illustrated in a fairly non-threatening way to its signatories the advantages of mutual cooperation based on norms in the area.[111] The GATT signatories learned this lesson so well, in fact, that in 1995 they collectively agreed to establish a much harder regime in the cross-border trade area, that of the World Trade Organization, which provided a much more binding institutional framework for the GATT with authoritative adjudication of disputes and a number of additional substantive area agreements.[112]

There are a great number of examples of variations on this same theme which can be pointed to for illustrative purposes. One such example is Agenda 21, the Forest Principles, adopted at the 1992 Rio Convention on Environment and development, in which the instrument adopted was fairly precise, but not legally binding.[113] Another is the corollary case of the original Vienna Ozone Convention in which states were legally bound, but in imprecise ways.[114] Perhaps most analogous in form to the missile technology nonproliferation area is the joint Food and Agriculture Organization-UN Environment Program (FAO-UNEP) regime which was established to institutionally monitor the informed consent of states to international transfers of hazardous chemicals and pesticides.[115] The FAO adopted a "code of conduct" to address distribution and use of pesticides in 1985 and the UNEP established "guidelines" for exchange of information regarding internationally traded chemicals in 1987.[116] In 1989 the two organizations jointly amended their respective soft law instruments to add a requirement for prior informed consent of states to hazardous chemical and pesticide transfers and established a procedure for handling the verification of such consents.[117] The two organizations sponsored extensive consultation with outside experts on the issues and provided technical assistance.[118] By the late 1990's the member states of both organizations had authorized formal treaty negotiations and in 1998 a convention was formally adopted which closely followed the FAO-UNEP system.[119]

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110. JACKSON, *supra* note 108, at 40.

111. *Id.* at 41.

112. *See id.*

113. Report of the United Nations Conference on Environment and Development [Hereinafter Forest Principles] A/CONF.151/26 (Vol. III) (1992), *also available at http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm* (last visited Feb. 10, 2003).

114. Vienna Convention for the Protection of the Ozone Layer entered into force Sept. 22, 1985.

115. *See* United Nations Environment Programme available *at http://www.unep.org/themes/chemicals/* (last visited Feb. 12, 2003).

116. Food and Agriculture Organization of the United Nations [Hereinafter FAO], *Guidelines on Efficacy Data for the Registration of Pesticides for Plant Protection* (March 1985); London Guidelines for the Exchange of Information on Chemicals in International Trade [Hereinafter London Guidelines], DB No. 051138 (1987) *available at http://www.ilo.org/public/english/protection/safework/cis/legosh/uno/lx051138.htm* (last visited Feb. 12, 2003).

117. London Guidelines for the Exchange of Information on Chemicals in International Trade Amended 1989 (Decision 15/30 of the Governing Council of UNEP, May 25, 1989) *available at http://irptc.unep.ch/ethics/english/longuien.htm* (last visited Feb. 12, 2003).

118. *Id.*

119. See a narrative and links to these documents *available at* http://www.pic.int/ (last visited Feb.

These differing structures provide flexibility to meet the needs of the underlying substantive issue area, while providing for some preliminary normativization in the area, which allows states to see the rules in practice and learn from actual application rather than engage solely in negotiated speculation.[120] These examples show better than detached theory that normativization through soft law means has decided advantages of providing a process for learning and evolution of understanding of the possibilities for normative coverage in a variety of areas, with very many such primitive soft law instruments evolving over time into harder, more binding and formalized instruments and institutions. Thus, there is a sound basis in logic and observed analogous phenomena to conclude that the further normativization of the area of missile technology nonproliferation will be beneficial to states involved in that process, and that soft law means such as an international code of conduct with obligations limited either by imprecision or non-binding character (both in fact being present in the adopted version of the ICoC) can have an important role to play in the normative evolution of the regime.

Such analytical devices as analogy and briefly expressed logical and situationally-specific argument are much more likely than the previous generalized theoretical observations to be appealing to foreign policymakers, and therefore effective in illustrating the advantages of normativization and in influencing policy choice in a discrete area. These therefore should be the analytical modes of choice in communications between international lawyers and foreign policymakers, whether made through solicited briefs, personal consultation or in journal and other publications whose audience is likely to include policymakers.

CONCLUSION

This essay has attempted to ascertain and provide a brief practical examination of the certain separations, both in communication and cooperation, which currently subsist between members of the international law and foreign policymaking communities. Upon divination, this gap can be seen to be pervasively based in ideology, professional culture, value structure and shared suspicion. The prescriptions for change in method and in substance of communication and engagement between international lawyers and foreign policymakers and in their respective underlying professions and cultures provided herein will be novel to some on both sides of the proposed exchange, and will not be actualized without much difficulty and soul searching by all concerned. However, as the gap between the two communities was not created overnight, so its narrowing will not be accomplished without a substantial re-direction of the efforts and mindsets of both groups. It is submitted that through this process, both sides will reap rewards of increased communication and cooperation, which will inevitably inure to the benefit of both communities, the professions of which are of such timely importance to international society in the modern era, and the synergies among which have scarcely begun to be realized.

12, 2003).

120. *See* HOW NATIONS BEHAVE, *supra* note 2, at introduction.

DEVELOPMENTS AND LIMITS IN INTERNATIONAL JURISPRUDENCE[1]

PETER KOVACS*

I. INTRODUCTION

Today, it is hardly possible to deny the important role that the judicial decisions of international tribunals play in the promotion and execution of states' treaty law commitments, as well as those of international custom. It is commonly admitted that modern international law cannot be understood without acknowledging the paramount importance that scholars, judges, politicians (and students during their exams) attribute to international courts.

But do we know exactly why courts choose to be innovative in certain cases and why they are hesitant to do so in others? The reasoning of individual judges is, in some respects, explained in their individual opinions, dissents, or advisory opinions. Yet how can we reconstruct ex post facto a set of common jurisprudential principles?

Interesting and deep analyses of individual cases are available in all the important reviews of international law, and case-law-based commentaries are often prepared on the proper interpretation of a major treaty or even on a particular article of a given convention. That is why this article has no ambition to give an exhaustive description of all the roots and paths of the evolution of international jurisprudence. This article modestly summarizes only those which are most often referred to in judgments and opinions.

Several different approaches can be chosen for the presentation of the most important factors of jurisprudential development and limitations. I have chosen to begin with legal sources (both written and unwritten) to arrive at an analysis of reasoning beyond traditional legal factors.

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1. The paper is a shortened summary of a larger report presented at the 36th annual conference of the French Society for International Law organized under the somewhat odd title: La Juridictionnalisation du Droit International (Jurisdictionalization of International Law). The collected proceedings of the conference will be published by the Editions Pedone (Paris).

* Professor of international law at Miskolc University and Peter Pazmany Catholic University in Hungary. In the fall semester of 2002 Mr. Kovacs was a visiting Fulbright professor at the University of Denver College of Law where he taught classes on European protection of national minorities and the law of war.

II. DEVELOPMENTS IN INTERNATIONAL JURISPRUDENCE

A. Legal Factors in Jurisprudential Development

Jurisprudential development is engaged in, first and foremost, on a volunteer basis. The will of the state, for example, may be manifested in contractual or ad hoc public documents, but sometimes also in the act of only one of the state-parties, and the international judge will usually take note of such expressions of intent.

The statute of an international tribunal, a given article of a convention, or the uncertain or contradictory nature of the terms of a treaty, can all be considered as treaty-law bases for jurisprudential developments.

More specifically, a mandate contained in a treaty authorizing a tribunal to deliver advisory opinions can a priori function as a good tool for jurisprudential development. The Permanent Court of International Justice,[2] the International Court of Justice,[3] and the Inter-American Court of Human Rights[4] have often used treaty mandates for this purpose. A specific example is the Commission of Arbitration of the International Conference for Peace in Yugoslavia, chaired by the president of the French Constitutional Court, Robert Badinter, which delivered a good dozen advisory opinions during its brief existence.[5] Judges may also be pushed towards jurisprudential development by the material, rather than by procedural, clauses of a treaty, especially when it is thought necessary for judicial decision-making.[6]

The *elasticity* of the terms of a treaty offer a good starting point. This elasticity can be the product of a deliberate decision (the inclusion, for example, of terms such as "economically reasonable efforts," or "in accordance with environmental standards." French scholars refer to this as *renoi mobil*—literally, "mobile reference") but it can also emerge nolens volens.[7] It is obvious that the inherent contradictions in treaty texts require a jurisprudential choice between the hypothetically possible contents. There are a number of famous examples of a

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2. The Permanent Court of International Justice has delivered twenty-seven advisory opinions. *See* World Courts, Statistics on the Permanent Court of International Justice, *available at* http://www.worldcourts.com/pcij (last visited Mar. 3, 2003).

3. As of 2003, the International Court of Justice has issued twenty-two advisory opinions. *See id.*

4. Sixteen advisory opinions were issued from 1981 to 2000. *See* Interamerican Court of Human Rights, Judgments and Opinions, *available at* http://www.corteidh.or.cr (last visited Mar. 1, 2003).

5. Fifteen advisory opinions and one "decision before jurisdiction.".

6. *See* South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319, at 336 (Dec. 21). The International Court of Justice need not limit itself to mere grammatical interpretation because "[t]his rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or the instrument in which the words are contained, no reliance can be validly placed on it." *Id.*

7. The use of such terms is generally the result of diplomatic compromises made during multilateral negotiations in order to create mutually acceptable agreements.

conflict between languages, and the International Court of Justice[8] and the European Court of Human Rights[9] have both encountered such problems and both resolved the issues according to the same general principles.

Treaty terms are often interpreted by recourse to preparatory documents (*travaux preparatoires*), as described in the 1969 Vienna Convention on the Law of Treaties,[10]and most jurisdictions generally consider this to be an important method for arriving at a cleaner vision regarding obscure treaty terms.[11] The International Court of Justice, for example, has often profited from this method.[12]

At the other end of the spectrum, the precise formulation of a given convention does not necessarily eliminate the possibility of competent and evolving interpretations in various jurisdictions. For example, in the context of the Balkan tragedy, the International Court of Justice was faced with the task of formulating the precise relationship between the crime of genocide as defined in the 1948 Geneva Convention, and the national or international character of the particular armed conflict in which the genocide occurred. The Court concluded that the convention applied to the signatories regardless of the political backdrop behind such crimes.[13]

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8. *See, e.g.*, LaGrand (Germany v. United States) 2001 I.C.J. (June 27), *available at* http://www.icjcij.org/icjwww/idocket/iqua/iqusjudgment/ijus_ijudgment_20010625.html. In the LaGrand case, the International Court of Justice had to decide whether provisional measures adopted according to article 41 of its Statute have a legally binding character (as suggested by the French text "doivent etre prises" or the English text "ought to be taken") or not. The Court interpreted the provision to be compulsory in nature, and closed a long doctrinal debate with its decision. *Id.* at §§ 100-09.

9. *See, e.g.*, Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 1 Eur. Ct. H.R. (ser. A) at 252, 284-85 (1968) (merits) [hereinafter Belgian Linguistic case, merits]. In the Belgian linguistic case, the European Court of Human Rights had to pass on whether the English ("without any discrimination") or the French version ("sans distinction aucune") of article 14 of the European Convention of Human Rights better reflects the actual content of the non-discrimination rule.

10. The 1969 Vienna Convention on the Law of Treaties, article 32, *available at* http://www.un.org/law/ilc/text/treaties (last visited Mar. 1, 2003). Article 32 states: "Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion . . . ." *Id.*

11. *See infra* note 12.

12. LaGrand case, *supra* note 8, at §§ 105-07. An important aspect of the case concerned the legal value (i.e., compulsory or only recommendatory) of the provisional measures ordered by the International Court of Justice. The judgment explains extensively in these paragraphs how the corresponding article of the Statue of the Permanent Court of International Justice was formulated; Fifty lines are devoted to the presentation of the history of this formula and the metamorphosis of the original proposal. *Id.*

13. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.), 1996 I.C.J. 595, 615 (July 11). The Court explained:

> [T]he Convention is applicable without reference to the circumstances linked to the domestic or international nature of the conflict provided the acts to which it refers in Article II and III have been perpetrated. In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical.

Id.

B. Jurisprudential Development Beyond Treaty Law Bases

It happens quite often that jurisprudence benefits from the existence of a *custom* (or from the mere postulation of its existence) which is interpreted to enlarge the spectrum of international law. The International Court of Justice, developed, in part, from an analysis of certain terms of the 1969 treaty leading to a presumption of the general representative nature of heads of state—a presumption of their ability to act on behalf of a state concerning its international relations which extends beyond mere treaty-making.[14] However, as Judge Jiménez de Aréchaga noted not only positive customary law, but crystallizing custom can also exercise a considerable influence on tribunals.[15]

One could cite several examples of the influence of customs on treaties and vice versa, but the best-known instance of a comprehensive development is the confirmation of the applicability of the story of *Sleeping Beauty* on codified custom. For example, without the recognition of the autonomous existence of codified customary rules, the International Court of Justice would hardly have been able to decide the dispute between Nicaragua and the United States.[16]

Do other such considerations constitute sufficient bases for a judge to formulate new jurisprudential development? It is undeniable that international jurisprudence—as well as international doctrinal approaches—does not necessarily ignore factors like philosophy, even if they appear to be of importance only rarely. The use of principles of equity provides a well-recognized exception.[17]

Obviously, the less someone is limited, the freer he is. Consequently, judges feel the greatest freedom where a decision is to be taken *ex aequo et bono*.[18]

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14. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.), 1996 I.C.J. 595, 622 (July 11). The Court observed that "[a]ccording to international law, there is no doubt that every Head of Sate is presumed to be able to act on behalf of the State in their international relations." *Id.*

15. *See, e.g.*, Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 20 (1978). Aréchaga observes a willingness, in the International Court of Justice, to rely on generally accepted principles of international law existing outside textual circumscription:

> [I]t may be asserted that the International Court of Justice has, in the last decade made a significant contribution to the evolution of a more flexible concept of the source of customary international law, based on the recognition of an established consensus of State and irrespective of the formal requirements of adoption of a text, signature and ratification of a convention. The Court gave considerable weight to what it termed "the general consensus revealed" at the Second United Nations Conference on the Law of the Sea "which had crystallized as customary law in recent years," on the basis of subsequent practice of States.
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> *Id.*

16. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 96 (June 27). In this case, the Court explained, "[i]t will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content." *Id.*

17. *See infra* note 25 for examples of the International Court of Justice discussing the concept of equity.

18. *See* Wolfgang Friedmann, *General Course in Public International Law*, 127 RECUEIL DES

However, neither the Permanent Court of International Justice, nor the International Court of Justice have ever felt such freedom in delivering a judgment,[19] and the same can be said of most international tribunals.[20] The very few examples to the contrary are not very convincing. In these cases, the existence of a mandate to pass a decision *ex aequo* was never truly clear and certainly not express.[21] Indeed, the related decisions are very short and their formulation is often lacking a proper legal argument, or even a written opinion. As such, they seem not to be judicial decisions so much as amalgams of social, sociological, geographical and ethnic considerations.

Grosso modo, the same considerations can be evoked in order to explain why states are reluctant when deciding upon a mandate in favor of an international tribunal for a transactional decision. This theoretical possibility apparently does not avail too much of a chance for jurisprudential development.[22]

However, the use of *analogy* and *general principles of law* has contributed largely to jurisprudential development.[23] Though it is sometimes criticized in academic circles because of its seemingly indefinable character,[24] *equity* has not been abandoned as a component of jurisprudence. Scholars have observed and appreciated the presence of equity in the reasoning of tribunals and consequently,

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COURS 159 (1969). Friedmann explains the concept in holistic terms:

> What *ex aequo et bono* means is that the Court should, by agreement of the parties, look at the whole matter in the light of the appropriate economic, geographical, racial, religious and other circumstances which would seem conducive to a fair and lasting solution. And such a decision may involve the modification of legal rights, e.g., of boundaries established by previous treaties or annexations, or colonial occupations.
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> Freidmann, *supra*, at 159.

19. *See* Robert Yewdall, *General Course on Principles of International Law*, 121 RECUEIL DES COURS 343-44 (1967). Yewdall has observed, "[i]t is not surprising, therefore, that this is a much underworked provision of the Statute; for it is inherently unlikely that in any case *both* parties will be found willing to seek a decision which may be at odds with the legal rights of a party." *Id.*

20. *See infra* note 21 and accompanying text.

21. *See generally* the text of the Vienna Award of August 30th, 1940, ceding the territory of Transylvania to Hungary, reprinted in *Rumanian-Hungarian Frontier*, 3 Whiteman DIGEST § 12, at 138-39. *See also* the very short text of the Ribbentrop-Ciano awards in *Hungarian-Czechoslovak Frontier*, 3 Whiteman DIGEST § 13, at 145-47.

22. *See generally* the Arbitral Tribunal for Dispute over Inter-Entity Boundary in the Brcko Area, Final Award, Mar. 5, 1999, *available at* http://www.state.gov/www/regions/eur/bosnia/990305_arbiter_brcko.html (last visited Feb. 27, 2003).

23. *See, e.g.*, Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 at 29 (Sept. 13). Here, the Court explained, "It is a general conception of law that every violation of an engagement involves an obligation to make reparation." *Id. See also* Advisory Opinion No. 6, German Settlers in Poland, 1923 P.C.I.J. (ser. B) No. 6, at 36. In this case, the Court observed, "[i]t can hardly be maintained that although the law survived, private rights acquired under it perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice." *Id. See also* Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 18 (Apr. 9) ("Indirect evidence is admitted in all systems of law and its use is recognized by international decisions."); Effect of Awards of Compensation made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 53 (July 13) ("According to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is *res judicata* and has binding force between the parties to the dispute.").

24. *See, e.g.*, PROSPER WEIL, PERSPECTIVES DU DROIT DE LA DELIMITATION MARITIME 147 (1988). Weil has characterized equity as a "jeu de hazard" (hazardous game). *Id.*

an impressive jurisprudential construction [concerning equity?] has been created, particularly in the law of sea.[25]

Yet it is without any doubt that the simplest and most often observed method of rendering progressive, activist developments in international law is through the cascade of *successive jurisprudential decisions*.

To refer to formerly pronounced *dicta*, and to profit from their existence in order to go a bit further is a well known and maybe the most often employed method of jurisprudential development. It is rooted also in *inherent judicial functions,* recognized in the European literature by the German phrase "*Kompetenz-Kompetenz*" or the more or less similar Latin principle *jura novit curia.* The judgments passed in *Nicaragua v. United States*[26] and the *Fisheries Competencies*[27] cases provide examples. The same doctrine can also play an important role in the field of advisory opinions; from their larger circle, let us cite only the opinion on the legality of the use of nuclear weapons in order to demonstrate the International Court of Justice's adoption of this prerogative.[28]

May it sound exaggerated to call it a stricto sensu development, it is worth noting that a tribunal can proprio motu pass a decision on issues or aspects of

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25. *See* North Sea Continental Shelf (Ger. v. Den.), 1969 I.C.J. 3, 49 (Feb. 20) ("Equity does not necessarily imply equality."); Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 60 (Feb. 24) ("Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it."); Continental Shelf (Libyan Arab Jamahiriya v. Malta), 1985 I.C.J. 13, 39 (June 3) ("Thus the justice of which equity is an emanation, is not an abstract justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability . . . .") [hereinafter cases concerning continental shelves].

26. Military and Paramilitary Activities (Nicr. v. U.S.), 1986 I.C.J. 14, 24 (June 27) ("For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law . . . .").

27. Fisheries Jurisdiction (U.K. v. Iceland), 1974 I.C.J. 3, 9 (July 25). The Court explained:

The Court, however, as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required . . . to consider on its own initiative all the rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.

Id. See also Fisheries Jurisdiction (Ger. v. Ice.), 1974 I.C.J. 175, 181 (July 25) (employing the same language).

28. *See* Legality of the Use or Threat of Nuclear Weapons, 1996 I.C.J. 226, 237 (July 8). In section 18 of the opinion, the Court explained:

> It is clear that the Court cannot legislate and in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris [sic] is devoid of relevant rules in this matter. The Court could not accede to this argument. It states the existing international law and does not legislate. This is so even if in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.
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> *Id.*

minimal importance even when the question is not explicitly mentioned in the compromise.[29]

Additionally, the *statutory position of a tribunal* within the structure of an international organization can have a considerable effect on its reasoning, as judges must place the legal dispute or the legal problem in the general framework of an international organization, either universal or regional. The due consideration of the functional interests of the organization as well as its capacities can exercise an important influence on the procedure of judicial decision-making as well. For example, the *functional interests* of the United Nations and in particular the role and the position of the International Court of Justice in this context were pointed out by Elihu Lauterpacht.[30] The determination of the legal personality of the United Nations in the *Bernadotte* case,[31] the capacities of its organs in the *Certain Expenses* case,[32] and the assessment of its organs in the *South West African* and *Namibia* cases[33] are all examples of the phenomenon.

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29. CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES, Vol. 2 1631-32 (2d. rev. ed., 1945). In the context of an arbitral award, Hyde observes that collateral matters may be determined by the tribunal, even where there is no explicit authorization to do so from the parties. For example:

> It is perhaps unnecessary that the agreement to arbitrate should prescribe the currency in which the terms of an award are to be expressed, even though it be highly important that the amount thereof be fixed with precision and set forth in terms that leave no room for doubt as to the extent of the fiscal burden imposed upon the respondent.
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> *Id.*

30. Elihu Lauterpacht, 152 RECUEIL DES COURS 466 (1976). Lauterpacht explains:

> We are bound to ask whether the treatment by the Court of questions relating to international organizations—and especially the interpretation of their constitutions—represents a deliberate or consistent attempt to develop a systematic approach to the law of international organization as such. Or, is it, on the other hand, nothing more than an accumulation of judicial episodes which share the common feature of being founded upon facts of an "organizational" character and which happens only accidentally or haphazardly to shed light on the legal system of international organization?
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> *Id.*

31. *See generally* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 185-87 (Apr. 11).

32. *See, e.g.*, Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (July 20). In this advisory opinion, the Court observed:

> [W]hen the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* . . . [I]f the action was taken by the wrong organ, it was irregular as a matter of that internal structure, but this would not necessarily mean that the expense incurred was not the expense of the organization.
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> *Id.*

33. *See generally* International Status of South West Africa, 1959 I.C.J. 128 (July 11); Admissibility of Hearings of Petitioners by the Committee on South West Africa, 1956 I.C.J. 23 (June 1); Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, 1955 I.C.J. 67 (June 7). *See also* Legal Consequences for States of the Continued Presence of South Africa and Namibia Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16 (June 21). In this case the Court assessed the competency of the United Nations to supervise its own various organs. The Court observed, "[T]he United Nations, as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international

In order to respect the principle of res judicata, great attention must be paid to the scrupulous observance of prior decisions passed in the same case. However this does not mean that mathematical errors should not be corrected[34]—even if a pure arithmetical correction cannot really be taken as a true jurisprudential development. The Permanent Court of International Justice was formally mandated to correct *ex officio* minor mistakes, and the existence of an analogous competence is presumed for the International Court of Justice, despite silence on the issue in the statute creating the court.[35]

The phenomena of individual jurisprudential developments can be viewed as bricks used in the *progressive construction* of a building. This happened most obviously in the development the jurisprudence of the International Court of Justice concerning the law of sea, the crime of genocide, or the norms *erga omnes* (*jus cogens*).[36] Often, a judgment can finalize the slow, continuous and consequent evolution of international custom—a custom eventually linked to a particular treaty law question.

Clearly, previous *dicta* enjoy an irrefutable authority in the formulations of later judgments by the same court. It is interesting, however, to observe not only a tribunal's utilization of its own historical jurisprudence, but also the effects on an international tribunal of the judgments of *other* international tribunals. For purposes of the present article, I will call this phenomenon *jurisprudential interactions,* mindful that in reality we cannot speak about truly *mutual* interactions, the general feeling among tribunals being a certain unilateralism accompanied by judicial aristocratism. Still, this phenomenon merits a closer look.

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obligations, and competent to act accordingly. *Id.*

34. HYDE, *supra* note 29, at 1635. Hyde quotes Arbitrator Roberts:

> I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and applicable legal rules.
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> *Id.*

35. *See* Richard Plender, *Procedure in the European Court: Comparisons and Proposals,* 267 RECUEIL DES COURS 304 (1997). Plender notes that despite the lack of an explicit delineation of its power to correct simple errors, the Court is, nevertheless, presumed to be able to do so. He observes:

> It is a curiosity that between 1931 and 1936 the Permanent Court (or the President if the Court was not sitting) was formally provided with a power to correct any error in any judgment, opinion or order arising from a slip or accidental omission. Although thereafter neither the Rules of the Permanent Court nor those of the International Court of Justice expressly stipulated such a power, there is no doubt that the International Court of Justice has an inherent power to rectify clerical errors or slips of the hypothetical pen without invoking its revision jurisdiction under article 61 of the Statute.
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> *Id.*

36. *See generally* North Sea Continental Shelf, 1969 I.C.J. 3 (Feb. 20); Continental Shelf (Tunis. v. Libyan Arab Jamahiriya) 1982 I.C.J. 18 (Feb. 24); Continental Shelf (Libyan Arab Jamahiriya v. Malta) 1951 I.C.J. 15 (May 28); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28); Barcelona Traction, Light, and Power Company (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

In the jurisprudence of the European Court of Human Rights we can find a good dozen references to cases decided by the Permanent Court of International Justice[37] or the International Court of Justice.[38] It is true however that the *ratio* of such references compared to the total number (over three thousand) of judgments from the European Court of Human Rights is very low.[39]

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37. *See, e.g.*, Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 1 Eur. Ct. H.R. (ser. A) at 241, 247 (1970) (preliminary objections) [hereinafter Belgian Linguistic case, preliminary objections] ("[H]aving regard to the decisions of the Permanent Court of International Justice and the International Court of Justice, the Belgian Government contends that the European Court has no jurisdiction to pronounce on the merits of this case . . ."); Belgian Linguistic case, merits, *supra* note 9. In the decision on the merits, the Court referred expressly to the jurisprudence of both the Permanent Court of International Justice and the International Court of Justice:

> In its opinion of 24th of June 1965, the Commission expressed the view that although Article 14 is not at all applicable to the rights and freedoms not guaranteed by the Convention and Protocol, its applicability "is not limited to cases in which there is an accompanying violation of another Article." In the view of the Commission "such a restrictive application" would conflict with the principle of effectiveness established by the case law of the Permanent Court of International Justice and the International Court of Justice, for the discrimination would be limited to the aggravation "of the violation of another provision of the Convention."
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> *Id.* at 277.

See also Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) at 1, 7 (1960) (preliminary objections) ("The Commission has invoked various precedents drawn from advisory opinion procedure at the Permanent Court of International Justice and subsequently at the International Court of Justice . . . ."); Stran Greek Refineries v. Greece, App. No. 13427/87, 19 Eur. H.R. Rep. 293, 329. (1994) (Court report). Here, to support its proposition that the unilateral termination of a contract cannot effect certain clauses of that contract (such as an arbitration clause) the court cited the Losinger decision of the Permanent Court of International Justice (Losinger & Co. v. Yug., 1935 P.C.I.J. (ser. C) No. 78, at 110 (Oct. 11).). *See also* Papamichalopoulos v. Greece, App. No. 14556/89, 21 Eur. H.R. Rep. 439, 452 (1996) (Commission report) (citing the Chorzow Factory case, *infra* note 40).

38. *See, e.g.*, Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A), *supra* note 37, at 7; Belgian Linguistic case, preliminary objections, *supra* note 37, at 247 ("[H]aving regard to the decisions of the Permanent Court of International Justice and the International Court of Justice, the Belgian Government contends that the European Court has no jurisdiction to pronounce on the merits of this case . . ."); Belgian Linguistic case, merits, *supra* note 10, at 277 ("In the view of the Commission, 'such a restrictive application' would conflict with the principle of effectiveness established by the case law of the Permanent Court of International Justice and the International Court of Justice . . ."); Ringeisen v. Austria, 23 Eur. Ct. H.R. (ser. A) at 455, 498 (1971) ("Like the International Court of Justice, 'it is the duty' of our Court 'to interpret the Treaties, not to revise them.'"); Cruz Varas v. Sweden, App. No. 15576/89, 14 Eur. H.R. Rep. 1, 40-41 (1991) (Commission report) ("The European Movement, which first proposed the drafting of a European Convention on Human Rights, originally included in a draft Statue of the European Court of Human Rights an interim measures provision (Article 35) based in substance on Article 41 of the Statute of the International Court of Justice."); Loizidou v. Turkey, App. No. 15318/89, 20 Eur. H.R. Rep. 99, 103 (1995) (Commission report) (discussing both differences and similarities in the nature of the two courts); Agrotexim v. Greece, App. No. 14807/89, 21 Eur. H.R. Rep. 250, (1995) (Court report) ("The Supreme Courts of certain Member States of the Council of Europe have taken the same line. The principle has also been confirmed with regard to the diplomatic protection of companies by the International Court of Justice."); Cyprus v. Turkey, 35 Eur. H.R. Rep. 731, 737 (2001) ("Moreover, recognising the effectiveness of those bodies for the limited purpose of protecting the rights of the territory's inhabitants does not, in the Court's view and following the Advisory opinion of the International Court of Justice, legitimise the TRNC in any way.").

39. The European Court of Human Rights counts 3,499 judgments as of February 2003. *See* the European Court of Human Rights, list of recent judgments, *at* http://hudoc.echr.coe.int (last visited

The European Court of Human Rights refers namely to the *Chorzow*[40] and *Losinger*[41] cases of the Permanent Court of International Justice and some famous arbitral awards.[42] From the jurisprudence of the International Court of Justice, Strasbourg judges cited, for example, the judgment in the *Barcelona Traction* case[43] and the 1971 advisory opinion on Namibia.[44]

It is also interesting to observe that several times, the European Court of Human Rights has refused to follow the direction of the Permanent Court of International Justice or of the International Court of Justice, usually in cases containing differences between the important aspects of the affairs.[45]

When the European Court of Human Rights refers *proprio motu* to the jurisprudence of the Permanent Court of International Justice or to that of the International Court of Justice, it usually follows their direction. On occasion, the plaintiff, the respondent government or the European Commission of Human Rights has suggested that the court follow this or that *dictum*. In such instances, the European Court of Human Rights has scrupulously examined the relevance of the work of other tribunals before adopting any of their positions.[46]

Concerning the Inter-American Court of Human Rights, we can refer *inter alia* to its recent judgments in the *Last Temptation of Christ* case (after the 1988 Martin Scorsese film of the same title, which was banned from release in Chile), and the *Ivcher Bronstein* cases. In the first case, the judges of the court made reference to the well-developed jurisprudence of the European Court of Human Rights in the field of freedom of expression.[47] In the second, the Inter-American

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Feb. 17, 2003).

40. *See, e.g.*, Papamichalopoulos v. Greece, App. No. 14556/89, 21 Eur. H.R. Rep. 439, 452 (quoting the holding of the Chorzow Factory case).

41. *See, e.g.*, Stran Greek Refineries v. Greece, App. No. 13427/87, 19 Eur. H.R. Rep. 293, 329 (1994) (Court report) (referring to the Losinger decision).

42. *See* Stran Greek Refineries v. Greece, 19 Eur. H.R. Rep. at 329 (referring to Lena Golfields v. Soviet Government and Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Government of the Libyan Arab Republic).

43. *See* Agrotexim v. Greece, App. No. 14807/89, Eur. H.R. Rep. 250, 271 (1995) (Commission report) (citing the rules of diplomatic protection for shareholders and societies).

44. *See* Loizidou v. Turkey, App. No. 15318/89, 20 Eur. H.R. Rep. 99, 113 (1995) (Commission report).

45. *See e.g.*, Akdivar v. Turkey, App. No. 21893/93, 23 Eur. H.R. Rep. 143, 182 (1996) (Court report) (declining to follow principles enunciated in the Interhandel and Ambatielos judgments concerning exceptions from the rule requiring exhaustion of local remedies).

46. For examples of the Court accepting principles delineated by other tribunals see the Belgian Linguistic case, preliminary objections, *supra* note 37, at 247; Belgian Linguistic case, merits, *supra* note 9, at 284-85. For an example of the Court refusing, despite the urging of the respondent government, to adopt the jurisprudence of the International Court of Justice see Akdivar v. Turkey, *supra* note 46.

47. *See* The Last Temptation of Christ Case (Olmedo Bustos v. Chile), *available at* http://www.corteidh.or.er (last visited Feb. 18, 2003). In section 69 of the judgment, the Court quoted the European Court of Human Rights itself:

> [The] supervisory function [of the Court] signifies that [it] must pay great attention to the principles inherent in a "democratic society." Freedom of expression constitutes one of the essential bases of such a society, one of the primordial conditions for its progress

Court of Human Rights recalled the jurisprudence of the International Court of Justice with an apparent allusion to the *Barcelona Traction* case, though without mentioning the case expressly.[48]

And vice versa?

The European Court of Human Rights appears to have adopted the jurisprudence of the Inter-American Court of Human Rights in order to find support for its thesis on the responsibility of the plaintiff concerning the burden of proof of the nonexistence or inefficacy of a remedy existing *ex lege*.[49] In another case, the plaintiff's explicit reference to an Inter-American case was not addressed.[50]

If we examine the tendency of the International Court of Justice to cite the *dicta* of other international tribunals, we can conclude that the attention of the judges of the World Court is focused mostly on the jurisprudence of the Permanent Court of International Justice and some arbitral awards. Apparently, the International Court of Justice was more reluctant to profit from the *dicta* of the European Court of Human Rights, the Inter-American Court of Human Rights or the International Criminal Tribunal of Yugoslavia. Three judges have referred, however, to the Strasbourg jurisprudence in their dissenting opinions.[51]

Importing the principle *uti possidetis juris* to Europe, the Commission of Arbitration for Peace in Yugoslavia also profited from the heritage of the

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> and for the development of man. Article 10.2 [of the European Court of Human Rights] is valid not only for the information or ideas that are favorably received or considered inoffensive or indifferent but also for those that shock, concern or offend the State or any sector of the population. Such are the requirements of pluralism, tolerance and the spirit of openness without which no "democratic society" can exist. This means that any formality, condition, restriction or sanction imposed in that respect, should be proportionate to the legitimate aim sought. Also, those who exercise their freedom of expression assume "obligations and responsibilities," the scope of which depends on the context and the technical procedure used.
>
> *Id.*

48. The text of the Ivacher Bronstein decision is available at http://mitglied.lycos.de/harueckner/art21achr. In section 121 of the judgment, the Court explained, "[t]he International Court of Justice has made a distinction between the rights of a company's shareholders from those of the company itself." *Id.*

49. *See, e.g.*, Akdivar v. Turkey, App. No. 21893/93, 23 Eur. H.R. Rep. 143, 182 (1996) (Court report). The European Court of Human Rights referred to both the Velasquez Rodrigues case (1987) and the Advisory Opinion of 10 August 1990 on the Exceptions to the Exhaustion of Domestic Remedies, though not explicitly.

50. *See* Ergi v. Turkey, App. No. 23818/94, 32 Eur. H.R. Rep. 388, 426 (1998). The plaintiff referred to sections 136 and 140-41 of the judgment in Godinez Cruz v. Honduras, decided by the Inter-American Court of Human Rights in 1989.

51. *See* Fisheries Jurisdiction, (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4). Judge Bedjaoui, in his dissenting opinion, referred to the Interhandel case when emphasizing the importance of the principle of divisibility of the reservations. *Id.* at 539-40. Similarly, Judge Torres Bernardez referred to the Loizidou case in his dissent. *Id.* at 637. *See also* Ariel Incident of 10 August 1999 (Pak. v. India), 2000 I.C.J. 12, 85 (June 21) (citing Belilos v. Switzerland, decided by the European Court of Human Rights in 1988, and Loizidou v. Turkey).

International Court of Justice[52] when it pronounced on the borders of the ex-Yugoslav states.[53]

However surprising it may be, the International Tribunal for the Law of Sea has referred rarely to the decisions of the International Court of Justice. Among its references, we can find classical *dicta* [54](as well as well known arbitral awards[55]) and newly pronounced judgments,[56] but surprisingly none of these decisions concerned the law of the sea. The Tribunal generally cited its own *dicta*[57]—which is not really surprising.

Another example presents itself in the decisions of international criminal tribunals. Referring instead to the Nuremberg jurisprudence,[58] the International

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52. *See, e.g.*, Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22). The Court explained the principle as follows:

> [T]he principle is not a special rule which pertains solely to one specific system of international law. It is a general principle which is logically connected with the phenomenon of the obtaining of independence wherever it occurs. Its obvious purpose is to prevent the independence and stability of new sates being endangered by fratricidal struggles.
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> *Id.*

For an in-depth discussion on the Badinter Commission, *see generally* STEVE TERRETT, THE DISSOLUTION OF YUGOSLAVIA AND THE BADINTER ARBITRATION COMMISSION: A CONTEXTUAL STUDY OF PEACE-MAKING EFFORTS IN THE POST-COLD WAR WORLD.

53. *See* Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 I.L.M. 1448, 1500 (1992). The Commission referred explicitly to the jurisprudence of the International Court of Justice concerning the principle of *uti possidetis*:

> Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and in particular from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in its judgment of 22 December 1986 in the case between Burkina Faso and Mali.
>
> *Id.*

54. *See, e.g.*, Saiga Case (St. Vincent v. Guinea), 38 I.L.M 1323, 1349 (1999). In section 120 of the judgment the International Tribunal for the Law of the Sea cited the Permanent Court of International Justice's decision in the case concerning Certain German interests in Polish Upper Silesia. *Id.* Additionally, in section 170 of the judgment, the Tribunal refers to the Chorzow case. *See also* Southern Bluefin Tuna (N.Z. v. Japan; Austl. v. Japan), 38 I.L.M. 1624 (1999). Here, the International Tribunal for the Law of the Sea charactarized a legal dispute according to the terminology adopted by the Permanent Court of International Justice in the Mavromattis Palestine Concessions judgment of 1962 ("[A] dispute is a 'disagreement on a point of law or fact, a conflict of legal views or of interests.'"). *See also* Grand Prince, (Belize v. Fr.), *available at* http://www.itlosorg/start2_eng.html (last visited Feb. 18, 2003). The Tribunal referred to the *dictum* of the case concerning the Competencies of the Council of the ICAO, explaining, "[t]he Court must however always be satisfied that it has jurisdiction and must if necessary go into that matter, *proprio motu*." *Id.*

55. *See* Saiga Case (St. Vincent v. Guinea), 38 I.L.M 1323, 1355 (1999). Section 156 of the judgment refers to the *I am Alone* (1935) and Red Crusader (1962) cases. *Id.*

56. *See id.* at 1351-52. Section 133 of the judgment refers to the case concerning the Gabcikovo-Nagymaros Project. *Id.*

57. *See, e.g.*, Camouco Case (Pan. v. Fr.) 39 I.L.M. 666 (2000) (citing the Saiga case); Monte Confunco (Sey. v. Fr.), *available at* http://www.itlos.org/start2_en.html. (citing the Comouco case in sections 41 and 63).

58. *See, e.g.*, International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment

Criminal Tribunal of Yugoslavia, for example, not only failed to observe the jurisprudence of the International Court of Justice in the dispute between Nicaragua and the United States,[59] but purposefully distanced itself from the International Court of Justice.[60]

We cannot say that recourse to *auxiliary documents* of compromises or to the memoranda of the parties to the dispute has contributed in a consistent or decisive manner to jurisprudential development. On the contrary, the picture is quite contradictory especially concerning the value attributed to *geographical maps.* But only due to the *factum concludens* of the parties, the International Court of Justice can take note of maps even if "in [their] inception and at the moment of [their] production, [they] had no binding character."[61] The Court seems to reason that "maps merely constitute information . . . [and] by virtue solely of their existence they cannot constitute a territorial title . . . [though] in some cases, maps may acquire . . . legal force . . . [as] physical expressions of the will of the State or States concerned."[62] However, in the case of the "uncertainty and inconsistency of the cartographic material submitted," the International Court of Justice can decline to give weight to such materials.[63] Arbitral practice is slightly more open.[64]

Soft law—the resolutions adopted by the organs of different organizations—has also fermented international jurisprudence. By opening the door to the possible contribution of such resolutions to the formation of general norms of international law, the International Court of Justice has manifested its willingness

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in Prosecutor v. Dusko Tadic, and Dissenting Opinion, 36 I.L.M. 908, 936 (1997) ("the Trial of the Major War Criminals before the International Military Tribunal ('Nürnberg Judgment') does not delve into the legality of the inclusion of crimes against humanity in the Nürnberg Charter . . . .'").

59. *See id.* at 927.

60. *See id.* at 927-28. The Commission was careful to distinguish the facts of the Nicaragua case from the case before it:

> However, the facts of the *Nicaragua* case and this case are very different . . . thus, unlike the *Nicaragua* case in which the Court considered whether the *contra* forces had, over time, fallen into such a sufficient state of dependency and control *vis-à-vis* the United States that the acts of one could be imputed to another, the question for this Trial Chamber is whether the Federal Republic of Yugoslavia (Serbia and Montenegro), by its withdrawal from the territory of the Republic of Bosnia and Herzegovina and notwithstanding its continuing support for the VRS, had sufficiently distanced itself from the VRS so that those forces could not be regarded as de facto organs or agents of the VJ and hence of the Federal Republic of Yugoslavia (Serbia and Montenegro). Consequently, the Trial Chamber must consider the essence of the test of the relationship between a de facto organ or agent, as a rebel force, and its controlling entity or principal, as a foreign Power. It must also be shown that the VJ and Federal Republic of Yugoslavia (Serbia and Montenegro) exercised the potential for control inherent in that relationship of dependency.
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> International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment in Prosecutor v. Dusko Tadic, and Dissenting Opinion, *supra* note 58, at 927-28.

61. Temple of Preah Vihear, (Cambodia v. Thail.), 1962 I.C.J. 6, 21 (June 15).

62. Frontier Dispute (Burk. Faso v. Mali) 1986 I.C.J. 554, 581 (Dec. 22).

63. *See* Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1100 (Dec. 13) ("[I]n light of the uncertainty and inconsistency of the cartographic material submitted to it, the Court considers itself unable to draw conclusions from the map evidence produced in this case.").

64. *See generally* Rann of Kutch Arbitration (India v. Pak.), 7 I.L.M. 633 (1968).

to take into account changes implied by the new world-order. The reference to United Nations Resolution 2625 on the principles of co-existence and friendly relations adopted by the General Assembly is a good example.[65] The *soft law* of the protection of the environment has also contributed to a new jurisprudential response to contemporary challenges, as is reflected by the inclusion of terms used in the 1972 Stockholm Declaration in one of the orders of the International Court of Justice.[66]

The contribution of *the acts of parties* to jurisprudential development can be found in several judgments as well. The International Court of Justice has explained that "the views of the parties to a case as to the law applicable to their dispute are very material, particularly . . . when those views are concordant."[67] For example, in the *Kasikili-Sedudu* case,[68] the International Court of Justice concurred with the observation by Namibia and Botswana, of the jurisprudential line concerning the boundaries as was formulated in the *Preah Vihear* case.[69] *Mutatis mutandis* this can be seen also in the advisory opinions vis-à-vis the position-papers submitted by states.[70]

B. Non-legal reasons of jurisprudential development

Social necessity or *changes in global context* can also influence international

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65. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99-100 (June 27). The Court explained:

> *[O]pinio juris* may, though with all due caution, be deduced from, *inter alia* the attitude of the Parties and of the States towards certain General Assembly Resolutions and particularly resolution 2625 (XXV) . . . The effect of consent to the text of such resolutions cannot be understood as merely that of 'reiteration or elucidation' of treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions themselves.
>
> *Id.*

66. *See* Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 (N.Z. v. Fr.), 1995 I.C.J. 288, 306 (Sept. 22) ("Whereas moreover [sic] the present order is without prejudice to the obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment . . . .").
For a deep analysis of the environmental issue in the Court's jurisprudence *see* SANDS, PHILIPPE: L'AFFAIRE DES ESSAIS NUCLEAIRES II (NOUVELLE-ZELANDE C. FRANCE): CONTRIBUTION DE L'INSTANCE AU DROIT INTERNATIONAL DE L'ENVIRONNEMENT RGDIP 1997/2 473-74.

67. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 25 (June 27).

68. Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045 (Dec. 13)

69. *See* id. at 1073 ("The Court stated in the Temple of Preah Vihear Case . . . this was 'an obvious and convenient way of describing a frontier line objectively, though in general terms.'").

70. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 45 (June 21). The Court explained:

> Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations' organs concerned . . . . However, in the exercise of its judicial function and since objections have been advanced, the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions. *Id.*

tribunals to refine their jurisprudence.[71]

We sometimes have the feeling that a tribunal in a given case was answering a *historical challenge*, though it is true that courts acknowledge this kind of reasoning with exceptional rarity. These are, however, very important moments in the history of mankind—moments when the courts do not merely deliver justice, but also reaffirm the notion that justice is triumphant. In these instances, the tribunal cannot afford to be criticized for having allegedly committed an abuse of power or denial of justice. Quite plainly, this feeling is perceptible in the work of international criminal tribunals. The International Military Tribunal of Nuremberg, for example, scrupulously summarized the number of witnesses, affidavits, and testimonies (with a special regard to those advocating for the defense) in the introductory portion of the judgment.[72] The Tribunal pointed out that "from the beginning of the War in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity."[73] In the context of the tragedy of the Balkans, the International Criminal Tribunal for the Formal Yugoslavia was confronted with the same challenge and it referred, logically, to the heritage of the Nuremberg judgment.[74]

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71. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226. In this advisory opinion, the Court considered the overarching social context surrounding the law governing nuclear weapons:

> Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context. In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.
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> *Id.*

72. *See* The Avalon Project at Yale Law School: Judgment of the International Military Tribunal for the Trial of Major War Criminals, *at* http://www.yale.edu/lawweb/avalon/imt/proc/judgen.htm (last visited Mar. 5, 2003). The prosecution offered the testimony of thirty-three witnesses, and the defense sixty-one witnesses. The defense also offered additional testimony in the form of 143 written answers to interrogatories. Specially appointed Commissioners heard the testimony of another 101 witnesses, and a total of 1,809 affidavits were submitted.

73. "Nürnberg Judgment," *infra* note 82, at 254.

74. *See* International Criminal Tribunal for the Former Yugoslavia: Excerpts from Judgment in Prosecutor v. Dusko Tadic, and Dissenting Opinion, 36 I.L.M. 908, 936 (1997). The Tribunal acknowledged the reasoning behind the inclusion, in the Nürnberg charter, of jurisdictional provisions allowing authorities to deal with nontraditional crimes against humanity:

> The decision to include crimes against humanity in the Nürnberg Charter and thus grant the Nürnberg Tribunal jurisdiction over this crime resulted from the Allies' decision not to limit their retributive powers to those who committed war crimes in the traditional sense but to include those who committed other serious crimes that fall outside the ambit of traditional war crimes, such as crimes where the victim is stateless, has the same nationality as the perpetrator, or that of a state allied with that of the perpetrator. The origins of this decision can be found in assertions made by individual governments, the London International Assembly and the United Nations War Crimes Commission.
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> *Id.*

International tribunals are not separated artificially from the social realities which influence and develop their jurisprudence. In other words, we must examine the underlying exigencies of the times in order to gain a complete understanding of the work of such tribunals.[75]

The question is, of course, how to identify the moment when international tribunals should feel the necessity to react to such exigencies. Arguably, both national and international judges should pay due attention to the social acceptability of their decisions. This dilemma is similar—according to Reisman, who addressed the influence of social forces on the advisory opinion concerning the 1947 peace treaties—to "navigating *Scylla* and *Charybdis*."[76]

The issue of the objective legal personality of the United Nations,[77] the law of the sea,[78] or the growing importance attributed nowadays to environmental protection[79] are also representative examples of that judicial phenomenon in the

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75. *See* Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 178 (Apr. 11). The International Court of Justice took the same view, arguing that "[t]hroughout its history, the development of international law has been influenced by the requirements of international life." *Id.*

76. Michel Reisman, *The Supervisory Jurisdiction of the International Court of Justice: International Arbitration and International Adjudication*, 258 RECUEIL DES COURS 135 (1996).

77. *See, e.g.*, Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11) ("[F]ifty States, representing the vast majority of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone.").

78. *See, e.g.*, Continental Shelf (Tunis. v. Libyan Arab Jamahiriya), 1982 I.C.J. 18, 47 (Feb. 24) ("The Court must thus turn to the question whether principles and rules of international law ... may be derived or may be affected by the 'new accepted trends' which have emerged at the Third United Nations Conference on the Law of the Sea.").

79. *See, e.g.*, Legality of the Use or Threat of Nuclear Weapons, 1996 I.C.J. 226, 237 (July 8). In its advisory opinion on the use of nuclear weapons, the Court explicitly recognized the importance of environmental considerations:

> The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. *Id.*

See also Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 67-68 (Sept. 25). The Court, in this case, emphasized environmental concerns in its assessment of the treaty governing certain aspects of the plan to develop and operate the Gabcikovo Nagymaros dam:

> [T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan ... the Treaty is not static, and is open to adapt to emerging norms of international law.
>
> *Id.*

jurisprudence of the International Court of Justice. The *dicta* of the Commission of Arbitration of the Peace Conference of Yugoslavia about the *jus cogens* nature of the principle of the protection of minorities[80] were pronounced in a particular period of history when several famous diplomatic and political brainstorming centers were working to advocate the principles of preventative rather than curative law. Governmental offices suggested that direction in order to avoid the outbreak of a bloody conflict. With the pronouncement of their thesis on *jus cogens*, Robert Badinter and his co-arbiters certainly made a historical step forward, even if the court's decision did not fully embrace their ideals.

The *expectations of the public* also show some similarities with the phenomenon of the exigencies of the times explored above. These expectations were certainly perceptible in the condemnation of nazi war criminals and were undoubtedly present in the creation of two contemporary penal tribunals—the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda—and the litigation before them.[81] Even if one can find a huge complex of considerations formulated *sine ira et studio*, one cannot help but observe a profound indignation in some of the language used by the International Military Tribunal of Nuremberg.[82]

The judicial policy of the International Criminal Tribunal for the Former Yugoslavia follows the same line, if perhaps somewhat more austerely.[83] In Africa, in the *Kambanda* case, the International Criminal Tribunal for Rwanda considered it important to emphasize that the crimes against humanity particularly shocked the conscience of mankind.[84]

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80. *See* Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising From the Dissolution of Yugoslavia, 31 I.L.M. 1488, 1496 (1992) ("[T]he peremptory norms of general international law and in particular respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all parties to the succession."). *See generally* Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178 (1992).

81. For example, the indictments and the current proceedings against Milosevic, Milutinovic, and others for crimes against humanity committed in the former Yugoslavia.

82. "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." NURNBERG JUDGMENT Vol. 1 223

83. *See, e.g.*, International Criminal Tribunal for the Former Yugoslavia: Prosecutor v. Furundzija, 38 I.L.M. 317, 346 (1999). The Tribunal clearly expressed a distaste for the criminal acts of the defendant and for torture in general:

> The treaty and customary rules referred to above impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals, in particular to State officials or more generally, to officials of a party to the conflict or else to individuals acting at the instigation or with the consent or acquiescence of a party to the conflict. Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts.
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> *Id.*

84. *See* International Criminal Tribunal For Rwanda: Prosecutor v. Kambanda, 37 I.L.M. 1411, 1417 (1998) ("The Chamber holds that crimes against humanity, already punished by the Nuremberg and Tokyo Tribunals, and genocide, a concept defined later, are crimes which particularly shock the

As Judge Bedjaoui noted, judicial decisions express law but they do not completely neglect the moral climate.[85] A universal *community of values* definitely exists in certain fields and the *jus cogens* is the quintessence of these supreme, peremptory principles. Common values are born more easily and may have more of an impact of judicial decision making when the number of the countries concerned is limited, and especially when history and certain cultural characteristics are shared among those countries. This factor is, then, generally more developed and influential on a regional basis—namely European or Inter-American. A shared community of values can be found, for example, behind the affirmation of an absolute ban on the practice of torture,[86] or in the tolerance of some behaviors earlier considered to be criminal in nature, or to stem from mental health problems.[87]

What is the role played by the *science of international law* in the phenomenon of jurisprudential development? Without going into depth on this question it is appropriate to observe that the contribution of the doctrine is mostly manifested *in abstracto*[88] and rarely *ad hominem*.[89]

Do *other scientific branches* contribute to jurisprudential development? The cases concerning the delimitation of continental shelves were impregnated with geomorphologic and other scientific data,[90] and in the case of the dispute over the

collective conscience.").

85. BEDJAOUI, MOHAMMED: L'OPPORTUNITE DANS LES DECISIONS DE LA COUR INTERNATIONALE DE JUSTICE in BOISSONS DE CHAZOURNES, L – GOWLAND-DEBBAS, V (EDS) : THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY / L'ORDRE JURIDIQUE INTERNATIONAL, UN SYSTEME EN QUETE D'EQUITE ET D'UNIVERSALITE, LIBER AMICORUM GEORGES ABI-SAAB, KLUWER 580 (2001).

86. *See, e.g.*, International Criminal Tribunal for the Former Yugoslavia: Prosecutor v. Furundzija, 38 I.L.M. 317, 346 (discussing various aspects of both customary and treaty law prohibiting torture); Tyrer v. United Kingdom, 2 Eur. Ct. H.R. 1 (ser. A) at 14 (1978) ("[T]he prohibition contained in article 3 is absolute and . . . the Contracting States may not derogate from article 3 even in the event of war or other public emergency threatening the life of the nation.").

87. *See, e.g.*, Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. (ser. A) at 149, 167. The Court considered evolving social attitudes, particularly as reflected in domestic legislation, in its determination that:

> As compared with the era when that legislation [criminializing homosexual behavior] was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.

Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. (ser. A) at 149, 167.

88. *See, e.g.*, Manfred Lachs, *Teachings and Teaching of International Law*, 151 RECUEIL DES COURS 218 (discussing the role of scholarship in international law).

89. *See* The Allusions of Arbitrator René-Jean Dupuy on the Teachings of Paul Guggenheim, Charles de Visscher, Prosper Weil, Michel Virally, Eduardo Jimenez de Arechaga, Sir Gerald Fitzmaurice, Georg Schwarzenberger et Sir Hersch Lauterpacht, Texaco-Calasiatic v. Libya, 19 January 1977, J.D.I. 1977

90. *See generally* the cases concerning continental shelves, *supra* note 25. (discussing the exact

Gabcikovo-Nagymaros dam,[91] a considerable part of the memoranda (and the replicas) as well as the oral pleadings were devoted to the presentation of scientific research and the testimony of experts in the natural sciences.[92] Similarly, in the jurisprudence on the law of sea, the International Court of Justice has taken scientific evidence into account[93] probably because of the ambiguity of the legal rules. In the case of the Gabcikovo-Nagymaros dam, however, the same tribunal largely avoided such evidence because it was possible for the judges to decide the dispute on the sole basis of the law of treaties, thus conforming to the rules of procedure.[94]

III. LIMITS ON INTERNATIONAL JURISPRUDENCE

A. Limits of a Legal Nature

The *explicit* limitations posed by *treaty law* should be considered first. The existence of pertinent international treaties often prevents judges from formulating jurisprudential developments. We can consider these types of treaties as *a priori* imposed limits on jurisdictions. The actual applied formulae of decision-making, whether precise or vague, can also be considered as limits of jurisprudential development.

In its first judgment delivered in the *Lawless* case, the European Court of Human Rights approved, without any hesitation, the theory of "*acte claire*".[95]

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extension and direction of continental shelves, the importance of submarine canyons, the issue of geographical contiguity of the coast, and other scientific data).

91. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7.

92. *See id.* at 8. The list of technical experts is particularly illustrative. *Id.*

93. *See* Mohammed Bedjaoui, *The "Manufacture" of Judgments at the International Court of Justice*, 3 PACE Y.B. INT'L L. 29, 46 (1991). While Bedjaoui recognizes the difficulties inherent in the voluminous pleadings of the parties, he also recognizes their potential benefits:

> Would it then have been normal for the Court to have told the parties at a given point in the oral arguments, "enough of geology and geomorphology!?" Perhaps, if the Court had been absolutely sure of itself. But it has no right to certainties before hearing the parties out. Listening has, after all, one very important function, which is to sow doubt, to generate the philosophical "skepsis" which cleans out all preconception from the Judge's mind before he embarks upon his ultimate function of decision.
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> *Id.*

94. *See* Rosalyn Higgins, *Respecting Sovereign States and Running a Tight Courtroom*, 50 INT'L & COMP. L.Q. 121, 122 (2001) ("[A]s both the Gabcikovo-Nagymaros Project (Hungary/Slovakia) and the Spain-Canada Fisheries cases have shown, what one party terms an overriding environmental issue, another sees as rather relating to treaty obligations, or the law of State responsibility, or the law of the sea.").

95. *See* Lawless v. Ireland, 1 Eur. Ct. H.R. (ser. A) at 1, 28 (1960). Vis-à-vis the habeas corpus rule of the European Convention of Human Rights, the European Court of Human Rights emphasized that:

> The meaning thus arrived at by grammatical analysis is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest .... [T]he Court cannot deny Article 5(1)(c) and (3) the plain and natural meaning which follows both from the precise words used and from

Elsewhere, recourse to the preparatory documents of a treaty (*travaux préparatoires*) was felt appropriate—essentially in cases of obscure treaty language.[96] In the very first period of its practice, the European Court of Human Rights rejected, under these limitations, the application of the European Convention of Human Rights to problems of national or linguistic minorities.[97] (We have to add however, that the European Court of Human Rights later revised that position, and its attitude became much more open as witnessed by the judgments in the *Buckley*, *Chapman*, *Serif*, and *Hassan & Chaush* cases).[98] A theoretical openness alone is already a considerable step forward, and is generally the product of changed social and inter-social attitudes, but it cannot furnish an absolute guarantee for a change *in merito* of jurisprudential policy—certainly not if the consensus of states is precarious or more political than legal, as can be observed a series of judgments in Roma issues.[99]

To find and to define a set of uniform European morals seems to be an impossible mission. Without a common denominator at hand, States seek mostly to preserve their margin of appreciation for other values, and the European Court of Human Rights has often refused to go forward and build new jurisprudential pillars. For example, in controversial cases such as those concerning the gay and lesbian community, the European Court of Human Rights has been highly cognizant of the moral climate and has taken pains to respect the limits imposed by the diverging opinions of the states concerning minorities of different sexual orientation.[100] In Europe, only one common principle exists in this field—a

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> the impression created by their context.
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> *Id.*

96. *See* Belgian Linguistic case, merits, *supra* note 9, at 282 (referring to the preparatory work of the European Convention on Human Rights).

97. *See id.* (rejecting the application of the Convention).

98. *See generally* Buckley v. United Kingdom, App. No. 203848/92, 23 Eur. H.R. Rep. 101 (1996) (Court report); Chapman v. United Kingdom, App. No. 27238/94, 33 Eur. H.R. Rep. 399 (2001) (Court report); Serif v. Greece, App. No. 38178/97, 31 Eur. H.R. Rep. 561 (1999) (Court report); Hasan and Chaush v. Bulgaria, App. No. 30985/96 34 Eur. H.R. 55 (2000) (Court report).

99. *See, e.g.*, Chapman v. United Kingdom App. No. 27238/94, 33 Eur. H.R. Rep. 399, 428 (2001) (Court report). Whether the adoption of the Framework Convention for the protection of national minorities should give an impetus for the Court to go towards a renewal of its jurisprudential policy, the judges emphasized:

> [T]he Court is not persuaded that the consensus is sufficiently concrete for it to derive any guidance as to the conduct or standards which Contracting States consider desirable in any particular situation. The Framework Convention, for example, sets out general principles and goals but signatory states were unable to agree on means or implementation. This reinforces the Court's view that the complexity and sensitivity of the issues involved in policies balancing the interests of the general population, in particular with regard to environmental protection and the interests of a minority with possibly conflicting requirements, renders the Court's role a strictly supervisory one.
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> Chapman v. United Kingdom, 33 Eur. H.R. Rep. at 428.

See also Lee v. United Kingdom, App. No. 25289/94, 33 Eur. H.R. Rep. 677, 702-03 (Court report); Beard v. United Kingdom, App. No. 24882/94, 33 Eur. H.R. Rep. 442, 470 (2001) (Court report) (employing the same wording).

100. *See generally* Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. (ser. A) at 149, 163-64 (1981)

respect for the right to be different. Out of the application of this principle emerges the jurisprudential concept that individual States are generally the best positioned to determine the extent of gay rights within their own borders.[101]

Limits can also be found in the principles of *compromise*, as can be observed in the huge bodies of arbitral[102] and permanent jurisprudence. The Permanent Court of International Justice expressed this rule for the first time in the *Lotus* case[103] and the International Court of Justice has done so as well.[104]

Grosso modo the same principle can be found vis-à-vis advisory opinions. The International Court of Justice is not bound to pronounce on questions which are not raised in the original pleadings—even where certain states would like to push the court to give an opinion on a particularly important but collateral issue.[105]

(Court report); Cossey v. United Kingdom, App. No. 10843/84, 13 Eur. H.R. Rep. 622, 631 (1990) (Court report).

101. *See, e.g.*, Frette v. France, merits (2002), *available at* http://hudoc.echr.coe.int/hudoc (last visited Mar. 5, 2003). In section 41 of the judgment, the European Court of Human Rights addressed, among other issues, the legal rights of gays and lesbians to adopt children, and largely differed to the judgment of individual States:

> It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.
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> *Id.*

102. *See, e.g.*, HYDE *supra* note 29, at 1626. Hyde observes that arbitrators have often limited themselves to deciding only those questions explicitly put to them:

> Secretary Bayard was correct in declaring in 1877, that an arbitrator should not assume to decide any question other than that submitted to him by the States seeking his judgment, or to take cognizance of any collateral issues between either of them and a third State which was not expressly submitted to him by the States directly concerned.
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> *Id.*

103. *See* Lotus case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 12 (Sept. 27) ("[T]he Court, having obtained cognizance of the present case by notification of a special agreement concluded between the Parties, it is rather to the terms of the agreement than to the submissions of the Parties that the Court must have recourse establishing the precise points which it has to decide.").

104. *See, e.g., Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 266 (Oct. 12).*

105. *See* Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 236 (July 8). In the nuclear context, for example, the court has found it unnecessary to consider some principles of international humanitarian law, despite the urging of the parties:

> It has been maintained in these proceedings that these principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The question whether a norm is part

There are, of course, also *legal limits other than treaty law,* such as the *inherent powers of the judiciary.*

International tribunals (as well as national ones) try to follow the shortest and the most logical path to a decision–at least according to their own theories. In their judgments, judges may ignore those issues which have no direct connection to the object of the dispute. They can do this despite the length of the memoranda or the exhaustiveness of the pleadings submitted by the parties; courts can and do often limit their considerations to issues which are dispositive to the outcome of the dispute. No answer need be given to impertinent questions, and the court is not obliged to follow the parties in all the directions suggested by them.[106] The *dictum* in the *Gabcikovo-Nagymaros* case provides a good example. [107] In the same manner, the answer to sterile questions having a purely scientific interest[108] can be economized, as was pointed out by Judge Shahabudden.[109]

Jurisdictions also avoid passing judgment on documents having an uncertain probative value or documents which are highly contradictory if the judges are not convinced by either of the positions.[110] This is especially true if the dispute can be settled without such documents, or when such a decision would have a negligible effect on the merits of the case.[111]

Courts prefer to develop the rule of the case—and their jurisprudence—slowly and carefully. Courts are not bound to answer any preliminary questions if there is enough time to deal with them during the procedure on the merits and a

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> of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.
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> *Id.*

106. *See, e.g.*, Gabcikovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 39 (Sept. 25) ("Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct.").

107. *See id.* at 45-46.

108. *See id.* at 71 ("The Court does not find it necessary . . . to enter into a discussion of whether or not Article 34 of the 1978 Convention [on the succession of States in treaties] reflects the state of customary international law."). *See also* Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 35 ("The Court does not find it necessary to pronounce an opinion on these points which, in so far as concerns the operation or administration of the trusteeship is no longer in existence, and no determination reached by the court could be given effect to by the former administering authority.").

109. *See* MOHAMMED SHAHABUDDEN, PRECEDENT IN THE WORLD COURT 219 (1990).

110. *See, e.g.* Application of the Convention on the Prevention and Punishment of the Crime of Genocide 1996 I.C.J. 595, 619 (July 11); Serif v. Greece, App. No. 38178/97, 31 Eur. H.R. Rep. 561, 570 (1999) (Court report).

111. *E.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide 1996 I.C.J. 595, 619 (July 11); Serif v. Greece, App. No. 38178/97, 31 Eur. H.R. Rep. 561, 570 (1999) (Court report). In both of these cases, the Courts avoided pronouncing on the eventual legal validity of the minority protecting instruments of the League of Nations. *Id.*

decision on that particular point is not a *sine qua non* condition of the provisory measures.[112] Even the principle *Kompetenz-Kompetenz* has been used by international tribunals in order to avoid highly political issues[113] or questions not vital to a resolution of the issues.[114]

We can also find good examples of *a statutory approach* to self-limitation in interstate disputes[115] as well as in advisory opinions.[116] There are especially good examples in the United Nations staff litigation cases.[117]

Another jurisprudential limitation can be observed in the fact that tribunals

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112. *See, e.g.*, Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1992 I.C.J. 3, 15. The International Court of Justice declined to decide upon certain questions which it saw as non-dispositive:

> [T]he Court is not called upon to determine any of the other questions which have been raised before it in the present proceedings, including the question of its jurisdiction to entertain the merits of the case; and whereas the decision given in these proceedings in no way prejudges any such question, and leaves unaffected the rights of the Government of Libya and the Government of the United Kingdom to submit arguments in respect of any of these questions . . . the Court finds that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. *Id.*

See also Legality of the Use of Force (Yug. v. Fr.), 1999 I.C.J. 363, 374 (June 2) (assessing the separability of the jurisdictional issues from the merits of the case).

113. *See, e.g.*, Advisory Opinion No. 5, Status of Eastern Carelia, 1923 P.C.I.J. (ser. B) No. 5 at 27, 29 ("[T]he Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.").

114. *See* Agean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. 3, 16-17. The Court managed to avoid pronouncing on the legal validity of the 1928 General Act of the Pacific Settlement of International Disputes because "it is evident that any pronouncement of the Court as to the status of the 1928 Act whether it were found to be a Convention in force or to be no longer in force, may have implications in the relations between States other then Greece and Turkey." *Id.*

115. *See* Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.) 1993 I.C.J. 325, 344 (Sept.13). The Court implicitly refused to adjudge the legality or the opportunity of the Security Council's arms embargo, hampering Bosnia from exercising self-defense:

> The Court may, for the preservation of those rights, indicate provisional measures to be taken by the parties, but not by third States or other entities who would not be bound by the eventual judgment to recognize and respect those rights; whereas consequently the Court cannot, in the exercise of its power to indicate provisional measures, indicate by way of "clarification" that those States or entities should take, or refrain from, specific action in relation to the acts of genocide which the Applicant alleges are being committed in Bosnia-Herzegovina.
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> *Id.*

116. *See, e.g.*, International Status of South-West Africa, 1950 I.C.J. 128, 140 (July 11) ("The Court is however, unable to deduce from these general considerations any legal obligation for mandatory States to conclude or to negotiate such [trusteeship] agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.").

117. *See, e.g.*, Judgments of the Administrative Tribunal of the International Labour Organisation Upon Complaints made Against the United Nations Educational, Scientific and Cultural Organization, 1956 I.C.J. 77, 99 (Oct. 23). This phenomenon is manifested much more often in the United Nations staff litigation cases in order to preserve the respective roles of the administrative tribunals and the International Court of Justice. The Court has said, for example, that "a challenge of a decision confirming jurisdiction cannot properly be transformed into a procedure against the manner in which jurisdiction has been exercised or against the substance of the decision." *Id.*

are generally rather reluctant to pronounce on the *decisions of another tribunal*, particularly when the object of a dispute is to nullify or to maintain an arbitral award.[118]

Judicial caution, the reluctance of judges, or a desire to preserve the coherence of a firmly established jurisprudence often operates as a well-founded theoretical obstacle to development.[119] Despite the aesthetic beauty of a logical construction, we cannot forget the underlying consideration that preserving jurisprudential coherence is the best way to maintain the states' confidence—a necessary condition for bringing future disputes before the courts.[120] Even in cases of the compulsory jurisdiction of certain courts—for example, the reform of the European Convention of Human Rights—the preservation of jurisprudential heritage remains particularly important.[121]

The influence of *auxiliary* documents is limited; the International Court of Justice, for example, generally refuses to base a decision on geographical maps.[122]

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118. *See, e.g.*, Arbitral Award Made by the King of Spain (Hond. v. Nicar.), 1960 I.C.J. 192, 214 (Nov. 18). The Court explained, "the [arbitral] award is not subject to appeal and the Court cannot approach the considerations of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal. The Court is not called upon to pronounce whether the arbitrator's decision was right or wrong." *Id.*

119. *See, e.g.*, Northern Cameroons, (Cameroon v. U.K.), 1963 I.C.J. 15, 29 (Dec. 2) ("There are inherent limitations on the exercise of the judicial function which the Court, as a Court of Justice, can never ignore . . . the Court itself, and not the parties, must be the guardian of the Court's judicial integrity."

120. *See, e.g.*, Leo Gross, *The International Court of Justice and the United Nations*, 120 RECUEIL DES COURS 341 (1967) ("[T]he Court may refuse to give an opinion if the question is not a legal one and even refuse to give an opinion if 'the circumstances of the case are of such a character as should lead it to decline to answer the Request.'"). *But see*, Elihu Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 466 (1976). Lauterpacht questions whether the body of decisions by the International Court of Justice concerning international organizations amounts to any coherent jurisprudence:
[W]e are bound to ask whether the treatment by the Court of questions relating to international organizations—and especially the interpretation of their constitutions—represents a deliberate or consistent attempt to develop a systematic approach to the law of international organization as such. Or, is it, on the other hand nothing more than an accumulation of judicial episodes which share the common feature of being founded upon facts of an "organizational" character and which happens only accidentally or haphazardly to shed light on the legal system of international organization?
Id.

121. *See, e.g.*, Franz Matscher, *Quarante Ans D'activités de la Cour Européenne des Droits de L'Homme*, 270 RECUEIL DES COURS 283 (1997).

122. *See, e.g.*, Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, 582 (Dec. 22). The court made clear that maps are usually regarded only as *prima facie* evidence and are rarely dispositive:

> Maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability

However, in some cases, it has considered such maps where both parties have submitted them. On other occasions, it has refused to invalidate an arbitral award because one of the parties simply lacked a map to support its argument.[123]

Acts and behavior of the parties can also serve as limits for on the development of jurisprudence. If the parties do not ask the Court to provide an explanation on a given legal question, despite the fact that the question is important to the merits of the case, the judges are not bound to address the issue.[124] In the Gabcikovo-Nagymaros case, for example, the International Court of Justice could avoid pronouncing on the eventual jus cogens nature (or at least the current stage of the metamorphosis of a norm of jus cogens in statu nascendi) of environmental protection.[125] Despite the logic in such a deduction, one cannot forget the suddenly proclaimed examples of erga omnes norms in the Barcelona Traction case.[126]

B. Non-Legal Limitations

The *absence of information* and the *inaccessibility of information* thought necessary for the background of a judgment have also been evoked as motives for refusing to make a decision, or refusing to extrapolate decisions with major legal consequences from incomplete facts, or to use such information to take a new and delicate direction. The advisory opinion on the legality of the use of nuclear weapons[127] and some aspects of the case concerning military activities in

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> which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.
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> *Id.*

But see, Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1099 (Dec.13). In this case, the court pointed out that the parties themselves had treated maps as evidence of little value:

> The Court considers that, in the light of that disagreement, there cannot be any question of the authorities concerned having accepted the maps then available in a manner capable of constituting "subsequent practice in the application of the [1890] treaty," still less recognition of the boundary shown on those maps. To the contrary, it appears to the Court that the parties largely ignored the maps, which they regarded as either accurate or inaccurate according to their respective positions on the course of the boundary.
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> *Id.*

123. *See, e.g.*, Arbitral Award of July 3, 1988 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53, 74 ("In the circumstances of the case, the absence of a map cannot in any event constitute such an irregularity as would render the [arbitral] Award invalid."); Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1071 (Dec. 13) (finding no viable conclusions could be drawn from the cartographic evidence offered by the parties).

124. *See* LaGrand case (Germany v. United States) 27 June 2001 ICJ Reports § 98.

125. *See* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 67 (Sept. 25) ("Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties."); LaGrand case, *supra* note 124, at § 98.

126. *See* Barcelona Traction, Light, and Power (Belg. v. Spain), 1979 I.C.J. 3, 32 (Feb. 5). The case is well known for its characterization of slavery and genocide as criminal acts *erga omnes*, though the pronouncement had nothing to do with the merits of the case, which centered on diplomatic protection of corporation.

127. *See* Legality of the Use or Threat of Nuclear Weapons, 1996 I.C.J. 226, 237 (July 8). The

Nicaragua are examples of such jurisprudential behavior.[128]

Major social changes also encourage international tribunals to curb their jurisprudential developments, and a particular legal heritage can have a similar effect. Despite the philosophy developed in *Tyrer v. United Kingdom*, the European Court of Human Rights has considered some local particularities—namely historical ones—in some of its decisions.[129] For example, in refusing to apply the theory professed by some schools that a policeman is only a man in uniform, the European Court of Human Rights recognized the importance of maintaining a distance between police and political parties because of the historical role, particularly in Central and Eastern Europe, of the police and army within totalitarian communist regimes.[130]

Does the *science of international law* have any restrictive influence on the decision-making of international tribunals? As Judge Bedjaoui noted, the existence and the attention of the academic community of international lawyers considerably limit the subjectivism of tribunals.[131] The manifest preference of the

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Court felt unable to rule on the legality of the use of nuclear weapons in all circumstances:

> Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict . . . the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.
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> *Id.*

128. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 125. ("Since the Court has no information as to the interpretation in fact given to the Congress decision, or as to whether intelligence information is in fact still being supplied to the contras, it will limit itself to a declaration as to how the law applies in this respect.").

129. *See* Tyrer v. United Kingdom, 2 Eur. Ct. H.R. 1 (ser. A) at 13-14 (1978.

130. *See, e.g.*, Rekvenyi v. Hungary, App. No. 25390/94 30 Eur. H.R. Rep. 519, 522 (1999) (Court report). The Court recognized that:

> In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate.
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> *Id.*

131. *See* MOHAMMED BEDJAOUI, L'OPPORTUNITE DANS LES DECISIONS DE LA COUR INTERNATIONALE DE JUSTICE 569. Bedjaoui asserts:

> Ce qui limite grandement la part non pas de "subjectivité", même au meilleur sens, mais de "particularisme acquis de ses origines et de son éducation, c'est le regard attentif et critique des "transmetteurs de normes" (*"rule-transmitters"*): les collègues de travail d'abord, les Etats parties au procès ensuite, et enfin toute la profession juridique internationale. Il demeure aussi sous le regard de l'élite juridique de son pays d'origine, qui attend confusément de lui d'être le promoteur de sa culture juridique nationale; mais cela se mêle et se croise aussi avec le regard des autres juristes du monde, fréquentés dans les forums internationaux et auprès desquels il tient à conserver sa réputation. Il est aussi à l'écoute des Académies savantes, des Organisations internationales, des hauts fonctionnaires internationaux et des membres des corps diplomatiques, particulièrement ceux du Siège de la Cour et ceux du Siège des Nations Unies.
>
> *Id.*

International Court of Justice to the notion of *erga omnes* norms instead of *jus cogens* can be explained by the division of the scientific community on the utility and operability of the theory of *jus cogens.*[132]

The International Court of Justice has often distanced itself from *non-juridical sciences* in order to avoid that exterior considerations should exercise too great an influence on its decision-making. This is reflected, for example, in the court's attitude towards geography and ecology.[133] For example, though the parties submitted a considerable number of calculations and analyses on the safety or potentially dangerous character of the Gabcikovo-Nagymaros dam, the International Court of Justice explained that "it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded."[134]

Reading scientific articles and books written by judges, one can often be left with the impression of their authors' conviction that masses of technical dossiers often have a counter-productive effect.[135] The European Court of Human Rights has also been rather hesitant to come down on either side when it observes a division in the views of scholars on a particular issue.[136]

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132. Elisabeth Zoller, Elisabeth L'Affaire du Personnel Diplomatique et Consulaire des Etats-Unis à Téhéran (Etats-Unis d'Amérique c. Iran) Arrêt du 24 mars 1980 RGDIP 1980/4 1024. Zoller notes:

La question de savoir si les principes du droit international qui régissent les relations diplomatiques et consulaires participent de la notion de *jus cogens*, ne trouve pas de solution dans l'arrêt. Il est possible que la Cour ait préféré laisser le problème en l'état, le contenu de cette notion étant trop imprécis.

Id.

133. *See* Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1068 (Dec. 13) ("The Court is not in a position to reconcile the figures submitted by the Parties, who take a totally different approach to the definition of the channels concerned.").

134. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 42 (Sept. 25).

135. *See* Bedjaoui, *supra* note 93, at 37 ("The weight of documentation does not necessarily correspond to the weight of the arguments, for at least two-thirds of the bulk consists of annexes, that is, texts produced in support of the contentions sustained in the pleadings."); *See also* Higgins, *supra* note 94, at 129. Higgins argues:

> In recent years, the dossier for each case has undoubtedly got larger and larger. In technical cases, understandably, long and detailed technical reports are appended (*Gabcikovo-Nagymaros Project* and *Botswana/Namibia* afford recent examples). Moreover, there has been a tendency to append every possible scrap of paper, however marginal to the outcome. The translation costs for the Court were becoming prodigious and indeed the necessity to translate these thousands of pages of documentary annexes was beginning to dictate the pace at which cases could be heard.
>
> *Id.*

136. *See, e.g.*, Frette v. France, merits (2002), *available at* http://hudoc.echr.coe.int/hudoc (last visited Mar. 5, 2003). In section 42 of the judgment, the Court declined, to make any findings as to the consequences of being adopted by homosexual parents based on the scientific evidence presented, noting that "[i]t must be observed that the scientific community—particularly experts on childhood, psychiatrists and psychologists—is divided over the possible consequences of a child's being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date." *Id.*

IV. CONCLUSIONS

As a conclusion to the above presentation—however rudimentary—of the most often used reasons for jurisprudential development or jurisprudential limitation, it can be observed that in the practices of international tribunals as a whole, the same considerations are evoked as justifications for both expanding and keeping in check jurisprudential evolution.

Thus, the judges' freedom may be based on reasons derived from the *ex ante* will of states, manifested at different points in international conventions, submitted for adjudication before an international tribunal. Or that freedom can be linked to the acts of states or parties to the dispute. This freedom may also be recognized by judges on the basis of the theory, practice, or functionality at work in a particular jurisdiction. We can refer also to Bedjaoui's words comparing judicial opportunity to the effect of *yeast* in cooking.[137]

What are the reasons judges give to explain their reluctance to formulate new jurisprudence? These reasons can be found in the will of states, reflected in conventions, treaties, or in procedural acts. The perception of proper judicial functions is equally important, not only vis-à-vis usages and customs but, first and foremost, according to the requirements of the position enjoyed by a given international organization.

Apparently, there are other—probably less frequently occurring—motives as well.

Was the eighteenth century French grand chancellor Henri-François d'Aguesseau right or wrong when exclaiming, "judges of the Earth, you are Gods!" long before the creation of international tribunals?

Who is, in the final analysis, an international judge? An administrator or a creator? A serf, a professor or a prophet? Can he be all of them at the same time?

In conclusion, we may observe that the developments and limits of international justice can be conceived in a quadrangular system where the corners are the following:

primo: judicial logic;

secundo: organic-functional imperative;

tertio: social necessity; and

quarto: the ambiguous "plus," or incalculable factor of irrationality that we can call also a divine sparkle.

The order of their enumeration also reflects, however, the importance that we should attribute to these factors. International jurisdiction and international jurisprudence are neither automatisms, nor a lottery—they are a complex of social phenomena, activity and science with all the precisions and lacunas, certainties and uncertainties, that such a statement presumes.

137. *See* BEDJAOUI, *supra* note 131, at 583.

This dialectic interrelation—the faculty of limited creativity, according to Judge Shahabuddeen's observations[138]—was well described by former President of the International Court of Justice, Gilbert Guillaume, when he observed, "[I]nternational law is our common heritage from the nineteenth through the twentieth centuries. It should evolve with the time. It must be adapted to local and regional needs. But it must not be broken."[139]

138. MOHAMMED SHAHABUDDEN, PRECEDENT IN THE WORLD COURT 232 (1990).

139. Guillaume, Gilbert: La Cour internationale de Justice - Quelques propositions concrètes à l'occasion du cinquantenaire RGDIP 1996/2 331-32 ("Le droit international est l'héritage commun que nous avons reçu du XIXe siècle et du XXe siècle. Il doit à l'évidence évoluer avec le temps. Il doit aussi s'adapter aux besoins locaux et régionaux. Mais ne doit pas être brisé.").

CHINA'S GREAT WESTERN DEVELOPMENT PROJECT IN XINJIANG:

ECONOMIC PALLIATIVE, OR POLITICAL TROJAN HORSE?

Matthew D. Moneyhon[*]

The Han nationality has the population, the minority nationalities have the land. . . It is thus imperative that the Han assist the minorities in raising their standard of living and socialist ideological consciousness, while the minorities provide the natural resources necessary for the industrialization and development of the motherland.[1]

– Mao Zedong

I. INTRODUCTION

In the early 1980s, when Deng Xiaoping declared that some people and some regions in China should be allowed to get rich before others,[2] he initiated a dramatic departure from traditional socialist economic policies and ushered in an era of economic reforms.[3] Indeed, throughout the 1980s and 1990s, Deng's economic reforms made some people and some regions incredibly rich.[4] Others, however, have been left dramatically behind.[5] While coastal Special Economic Zones (SEZs) and "open cities" have flourished in the east, western regions, comprising more than half of China's total land area and approximately twenty-

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* As an East-West Center Graduate Fellow, the author received a J.D. at the University of Hawai'i, William S. Richardson School of Law and an M.A. in Chinese Studies at the University of Hawai'i at Manoa. This paper was judged "Best Overall Second Year Seminar Paper, 2002" by the Young Lawyers Division of the Hawai'i State Bar Association. While attending the University of Hawai'i the author served as Editor-in-Chief of the Asian-Pacific Law & Policy Journal. The author would like to thank Dru Gladney, Eric Harwit, and Allison Conner for their guidance in writing this article.

1. Mao *quoted in* Chien-Peng Chung, *Regional "Autonomy" For Minority Nationalities in the People's Republic of China: Rhetoric or Reality?*, *in* SELECTED PAPERS IN ASIAN STUDIES 23 (Western Conference of the Association for Asian Studies, 1996).

2. DENG XIAOPING, SELECTED WORKS OF DENG XIAOPING, VOL. III, 1988-1992, at 62 (Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin, and Stalin trans., 1994).

3. *See generally* DAVID WEN-WEI CHANG, CHINA UNDER DENG XIAOPING: POLITICAL AND ECONOMIC REFORM (1988).

4. *See generally* Khorshed Chowdhury et. al., *Regional Income Inequality in China*, *in* CONTEMPORARY DEVELOPMENTS AND ISSUES IN CHINA'S ECONOMIC TRANSITION 238-61 (Charles Harvie ed., 2000) [hereinafter Chowdhury].

5. *See id.*

three percent of its population,[6] still languish in dusty poverty. Many of China's fifty-five minority groups live in the west and, especially in Xinjiang, economic disparities fuel ethnic tensions, conjuring frightening parallels to the break up of Yugoslavia and the Soviet Union.[7] The Chinese central government, wary of separatist rumblings in both Tibet and Xinjiang, has endeavored to exorcise the specter of political disintegration with an ambitious development campaign: the "Great Western Development Drive" (alternatively, Go West).

The Go West development plan, in conjunction with recent revisions of the Law on Regional National Autonomy (LRNA),[8] and accompanying economic incentives, represents China's current strategy for dealing with its restive ethnic minorities. The program, its policies, and accompanying legal reforms may rightly be viewed as the latest incarnation of China's evolving minority policy. Analysis of Go West's implications for Xinjiang demonstrates that the program is intended as a significant step towards greater integration of ethnic minorities and, ultimately, assimilation into the greater Han framework—a process incongruous with the central government's proclaimed commitment to ethnic regional autonomy. Although construed as an effort to alleviate poverty and bridge the growing gap of economic disparity between the eastern and western regions,[9] Go West is actually an attempt to quell ethnic unrest, solidify the nation, and legitimize the current regime by taming the "wild west."

This article addresses the Go West development campaign's impact on Xinjiang, specifically as the plan fits into Beijing's greater strategy for integration and assimilation of Xinjiang's restive Uighur population. Section II begins with a brief introduction to Go West's economic impetus—the asymmetric development spawned by economic reforms of the 1980s. Section III explores the volatile political and economic climates in Xinjiang, their role in feeding separatist sentiment, and Go West's attempt to quell unrest. Section IV examines some of Go West's policies and projects, emphasizing how they fit into the political agenda of solidifying the nation through the pacification and integration of Xinjiang. Section V briefly considers Go West as an effort to legitimize the current Chinese Communist Party (CCP) regime. Section VI provides a historical framework for conceptualizing Go West as part of China's evolving minority policy. Section VII examines the legal wake of Go West—particularly the contraction of the autonomy regime. Finally, the article concludes that even if the central government's economic promises bear fruit, prosperity in Xinjiang may not yield Beijing's desired results.

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6. *The Hinterland: Plan to Avoid "Asian Kosovo,"* CHINA ECON. REV., Mar. 13, 2001 [hereinafter *"Asian Kosovo"*].

7. *Id.*

8. LAW OF THE P.R.C. ON REGIONAL NATIONAL AUTONOMY (LRNA) (1984); *see* CHINA LAW NO. 200 (Adopted at the Second Session of the Sixth National People's Congress, promulgated by Order No. 13 of the President of the People's Republic of China on May 31, 1984, and effective as of October 1, 1984), *available at* http://www.lexis.com/research/retrieve?_m=b16222ade91408d60379c3aca06fabbb&docnum=2 (last visited Feb. 11, 2003).

9. Bruce Gilley, *Saving the West*, *in* FAR EASTERN ECONOMIC REVIEW 22 (2000).

II. GO WEST: ANTIDOTE FOR ASYMMETRIC DEVELOPMENT?

Go West, Young Han: China's Manifest Destiny

Horace Greeley's cry to "Go west young man," epitomizes the dream of American expansion and development of the west in the nineteenth century.[10] America's conquest of the west both helped craft the American ethos and ushered in what has widely been called the "American century."[11] Today, China stands at the beginning of what many scholars predict will be the "Chinese century,"[12] and it is believed that sometime within the next twenty years, China will emerge as the world's largest economy.[13] The CCP, maintaining a tenuous hold on power and faced with serious legitimacy concerns,[14] would like, more than anything, to make such predictions realities.

In June 1999, President Jiang Zemin emphasized the need to "seize the historic opportunity at the turn of the century to accelerate the development of western China."[15] An integral part of Beijing's strategy for ushering in the "Chinese century" is the "Great Western Development Campaign," an ambitious effort designed to direct state investment, outside expertise, foreign loans, and private capital into vast, and comparatively backward, western China.[16] When launching the project in early 2000, Chinese authorities drew comparisons to the development of the American west in the early 1900s.[17] Premier Zhu Rongji and

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10. *See generally* COY F. CROSS, GO WEST YOUNG MAN: HORACE GREELEY'S VISION FOR AMERICA (1995).

11. *See generally* HAROLD EVANS, THE AMERICAN CENTURY (1998).

12. *See e.g.*, Andy Hines, *The Coming Chinese Century*, *in* FUTURIST, Sept. 19, 1997, at 8 [hereinafter Hines]; *see also* John Lloyd, *Will This Be The Chinese Century?*, *in* NEW STATESMAN, Jan. 10, 2000, at 15.

13. Hines, *supra* note 12, at 8.

14. *See generally* FENG CHEN, ECONOMIC TRANSITION AND POLITICAL LEGITIMACY IN POST-MAO CHINA: IDEOLOGY AND REFORM, 1-20 (1995) [hereinafter FENG]. Chinese economic reforms, initiated by Deng Xiaoping and continued in the post-Deng era, have shaken the foundation of CCP legitimacy. Despite contradictions between the economic reforms and Marxist ideology, the CCP has been unwilling to repudiate its fundamental principles. The discrepancy leads to a legitimacy crisis caused by the disparity between current practices and original ideological tenets upon which the regime was founded. *Id.*

15. Go West: Exploring New Business Opportunities, Hong Kong Indus., July 1, 2001 [hereinafter Go West, Indus.]. In March 2003, Jiang Zemin stepped down after ten years as China's top leader. Jiang's successor, Hu Jintao, has indicated that he will pick up where Jiang left off with the Go West development plan. *See* Antoine Blua, *Kazakhstan: Hu's Visit Highlights Beijing's Growing Interest in Central Asia*, TIMES OF CENTRAL ASIA, June 5, 2003 (last visited Aug. 8, 2003).

16. *See generally* John Pomfret, *Go West, Young Han; Beijing Urging Dominant Ethnic Group to Resettle, Develop Restive Regions*, WASH. POST, Sept. 15, 2000 at A01 [hereinafter Pomfret, *Go West*]; *Go West, Young Han*, ECONOMIST, Dec. 23, 2000 [hereinafter *Go West*, ECONOMIST]; Ted Plafker, *China's 'Go West' Drive Seeks to Funnel Aid to Poor Region*, INT'L HERALD TRIB., May 8, 2001, at 9; Clara Li, *Bountiful Region is Envy of the Neighborhood; Xinjiang Playing a Crucial Role in Development Drive*, S. CHINA MORNING POST, May 18, 2001, at Supplement 2 [hereinafter Li, *Bountiful Region*].

17. *See generally Go West*, ECONOMIST, *supra* note 16; Calum Macleod, *China's 'Go West' Plan May Threaten Tibetan Culture*, UNITED PRESS INT'L, Dec. 1, 2000 [hereinafter Macleod].

Vice-Premier Wen Jiabao, leaders of the campaign, even commissioned a detailed study of the "take off of the American West in the early decades of the last century."[18] Indeed, the central government has high hopes that the Go West project will tame China's Wild West. The growing economic disparity between east and west has fueled ethnic unrest in the region, thereby threatening China's stability and security.[19] Jiang Zemin declared that the development of the west is crucial to China's stability, the Communist Party's hold on power, and the "revitalization of the Chinese people."[20]

Although it makes for good rhetoric domestically, comparisons between China's Go West drive and the development of the American west are somewhat suspect. In fact, there are more differences than similarities between the two "projects." First, there is a dramatic difference in prevailing economic systems. The pursuit of property drove the development of the American west.[21] In China, however, land still belongs to the state and the central government has no plans to cheaply sell, or freely distribute, land to "pioneers."[22] Second, although China's west abounds with natural resources, it suffers from a severe scarcity of fertile land—one of the great incentives to westward development and migration in the United States.[23] Finally, in the twenty-first century, the international community generally does not tolerate conquest and subjugation of minority rights. Thus when China goes west, it must do so with sensitivity to local populations. Although there are significant differences between the two endeavors, similarities between China's Go West drive and the conquest of the American west do not go unnoticed. Critics of the Go West plan have pointed out that just as America's thrust westward translated into sweeping, and often negative, changes to the lives of Native Americans,[24] China's Go West campaign also has serious implications for the indigenous populations of China's west.[25] For the CCP, however, these implications are actually a major impetus for Go West, and the overt economic goals belie the underlying political agenda.

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18. Willy Wo-Lap Lam, *Beijing Rides Out West*, S. CHINA MORNING POST, Feb. 2, 2000, at 17 [hereinafter Lam].

19. *See generally* Melinda Liu, *Trouble in 'Turkestan,'* NEWSWEEK, July 10, 2000, at 45 [hereinafter Liu, *Trouble*].

20. *See* Pomfret, *Go West, supra* note 16, at A01.

21. *See generally* PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST, 55-77 (1987).

"If Hollywood wanted to capture the emotional center of Western history, its movies would be about real estate. John Wayne would have been neither a gunfighter nor a sheriff, but a surveyor, speculator, or claims lawyer. The showdowns would occur in the landclaims office or the courtroom; weapons would be deed and lawsuits, not six-guns." *Id.* at 55.

22. P.R.C. ch. I, art. 10 (1998).

23. *Id.*

24. *See, e.g.*, Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1 (1997).

25. *See generally* TIBET INFO. NETWORK , CHINA'S GREAT LEAP WEST (2000) [hereinafter CHINA'S GREAT LEAP WEST]; *see also* Macleod, *supra* note 17.

"Two overall situations"

The very notion of the Go West drive provokes a preliminary question: Why is developing China's west suddenly such an imperative? The answer lies in the past two decades of asymmetric economic development. In the late 1980s Deng Xiaoping put forth the strategy of "two overall situations."[26] Essentially, this meant that the coastal regions in eastern China would be encouraged to develop first, and only after they achieved a measure of prosperity would the central government give the west special help.[27] Since its implementation, the strategy of asymmetric development has created a vast wealth gap between east and west. In line with Deng Xiaoping's strategy, central policies overwhelmingly emphasized development of Special Economic Zones (SEZs) and "open cities" located in coastal provinces.[28] The coastal regions capitalized on natural advantages and favorable economic policies by developing town and village enterprises (TVEs), cultivating export-oriented ventures, and by successfully attracting foreign direct investment.[29] In contrast, the interior remained comparatively backward and impoverished.[30]

While coastal provinces continue to reap the benefits of greater integration into the international economy, the west scrambles to climb out of poverty and debt. In 1978, the beginning of Deng's economic reforms, the difference in per capita income between eastern and western China was two hundred yuan.[31] Today, more than half of the eighty million people living under the poverty line are in the west[32] and the income differential between coastal and interior provinces stands at greater than 1:15.[33] Other economic indicators also tell the interior's rather dreary tale. The western region accounts for only fourteen percent of the national GDP[34] and in the past two decades the west has attracted less than five percent of foreign investment in China.[35] The western "poverty belt" sweeps across almost two-thirds of China's landmass—from Yunnan in the south to Xinjiang in the north—and includes 285 million people, twenty-three percent of China's 1.3 billion.[36] The Go West initiative, covering six provinces (Yunnan,

26. *Go West*, INDUS., *supra* note 15.

27. *Id.*

28. Chowdhury, *supra* note 4, at 239. The first four SEZs were located in the southern coastal provinces Guangdong (Shenzhen, Zhuhai, and Shantou) and Fujian (Xiamen). The 14 cities designated as open cities in 1984 are also in coastal provinces: Dalian, Tianjin, Yantai, Qingdao, Qinhuangdao, Lianyungang, Nantong, Shanghai, Ningbo, Wenzhou, Fuzhou, Guangzhuou, Zhanjiang and Beihai. *Id.* at 240.

29. *Id.* at 259.

30. *See generally* Dexter Roberts, *China's Wealth Gap*, BUS. WK., May 8, 2000, at 26.

31. Lam, *supra* note 18.

32. *Go West*, ECONOMIST, *supra* note 16. It should be noted that the Chinese state definition of the poverty-line is an income of only U.S.$36 a year, well below the international standard of U.S.$370. *See* ALAN HUNTER & JOHN SEXTON, CONTEMPORARY CHINA, 94 (1999) [hereinafter HUNTER & SEXTON].

33. *Id.*

34. Chowdhury, *supra* note 4, at 238.

35. *Go West*, ECONOMIST, *supra* note 16.

36. Penny Crisp & Rose Tang, *The Great Leap West*, ASIAWEEK, July 28, 2000, at 52.

Gansu, Sichuan, Guizhou, Qinghai, Shaanxi), three autonomous regions (Ningxia, Xizang (Tibet), Xinjiang), and one provincial level municipality (Chongqing),[37] strikes at the heart of the western "poverty belt" and hopes to redress the effects and implications of asymmetric economic development. Go West's economic goals, however, are window dressing for the underlying political agenda of quelling unrest, solidifying the nation, and legitimizing the current regime.

III. QUELLING UNREST: TAMING THE "NEW FRONTIER"

Nowhere are the implications and dangerous possibilities of asymmetric development more apparent than in the Xinjiang Uighur Autonomous Region (XUAR). Positioned at the crossroads of Central Asia, Xinjiang (literally "New Frontier") is the nexus of six cultural and geographic regions: Russia, Central Asia (bordering Kazakhstan, Kyrgyzstan and Tajikistan), Mongolia, the Indian subcontinent, (Afghanistan, Pakistan, and Kashmir provide Xinjiang's western border), Tibet, and China proper.[38] Xinjiang, occupying a sixth of China's landmass,[39] also holds vast natural resources, critical to China's energy-hungry economy.[40] In 1993, domestic oil consumption finally outpaced production, and China became a net importer of oil.[41] Recent geological explorations indicate Xinjiang's Tarim basin contains large oil deposits, which some believe to be more than three times those of the United States.[42] In addition to its strategic position and vast natural resources, Xinjiang hosts Lop Nor, China's premier nuclear test site.[43]

One of five autonomous regions in China,[44] the XUAR is also home to the

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37. *See* Sheila Rae, *Time to Go West?*, *at* http://www.amcham-china.org.cn/publications/brief/document/GoWest9-00.htm (last visited Jan. 29, 2003) [hereinafter Rae]. Although both western and Chinese sources offer various definitions of "west," the ten listed above are always included. The various definitions include or omit Guangxi and Inner Mongolia. Rae notes that Guangxi and Inner Mongolia will be added to the list in the future. *Id.*

38. *See* Nicolas Becquelin, *Xinjiang in the Nineties*, CHINA J., July, 2000 at 65 [hereinafter Becquelin]; *see also* http://www.lib.utexas.edu/maps/middle_east_and_asia/china_pol96.jpg (last visited Jan. 29, 2003).

39. *See* JACK CHEN, THE SINKIANG STORY, at xix-xx (1977). Xinjiang covers one-sixth of China's total land area, and at 660,000 square miles, the province is as big as Britain, France, Germany, and Italy combined.

40. Paul S. Triolo & Christopher Hegadorn, *China's Wild West: A Wealth of Natural Resources Has Made Xinjiang a Bustling New Frontier*, CHINA BUS. REV., 41 (Mar.-Apr. 1996).

41. James P. Dorian et. al., *China and Central Asia's Volatile Mix: Energy, Trade, and Ethnic Relations*, ASIA PAC. ISSUES, May 1997, at 4 [hereinafter Dorian].

42. *Report on Xinjiang Oil, Gas, Exploration*, Xinhua, Jun. 12 1997 *available at* http://www.uyghuramerican.org/mediareports/1997/xhjun1297.html (last visited Feb. 08, 2002). Other reports suggest that the Tarim Basin will not be as productive as anticipated. *See, e.g.*, Dorian, *supra* note 41, at 4.

43. *See* Terry C. Wallace & Mark A. Tinker, *The Last Nuclear Weapons Test? A Brief Review of the Chinese Nuclear Weapons Program* (IRIS, U. Ariz.), *at* http://www.iris.iris.edu/newsletter/fallnews/chinese.html (last visited Jan. 29, 2003); *see also* Bill Gertz, *Spy Photos Show Beijing Set for Underground Nuclear Test*, WASH. TIMES, Apr. 9, 2001 at A1.

44. Three of the five autonomous regions (Xinjiang, Xizang (Tibet), and Ningxia) are already included in the Go West campaign, and the two others (Inner Mongolia and Guangxi) will be included

Uighur nationality—a predominantly Muslim ethnic group encompassing the oasis Turks of Xinjiang.[45] With a population of approximately eight million, the Uighurs are Xinjiang's largest ethnic group, comprising almost half of the region's population.[46] The state recognized majority Han Chinese are still a minority in Xinjiang, accounting for approximately thirty-seven percent of the region's seventeen million people.[47] Xinjiang, home to thirteen officially recognized nationalities, is actually one of China's most diverse regions.[48] But despite Xinjiang's diversity, the region is sharply segregated: Han Chinese live in larger industrialized urban areas in the north, while ethnic minorities populate the predominantly rural south.[49]

Economics and Unrest

The geographic segregation in Xinjiang also alludes to the economic disparities in the region. While Xinjiang has experienced rapid economic growth,[50] prosperity has remained elusive for the Uighurs.[51] Moreover, the growing economic chasm between east and west (and Han/non-Han) fuels ethnic tensions and widens popular political fissures with Beijing. Arslan Alptekin, a Uighur leader living in Turkey, predicts, "the Chinese empire will collapse from within. The workers and farmers who brought Mao Zedong to power are unhappy with the enormous wealth gap."[52] Alptekin's words apply generally to China, but they carry special import for Xinjiang. Of the twenty counties (in Xinjiang) where Uighurs make up ninety percent or more of the population, the central government has designated thirteen as key poverty alleviation counties.[53]

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in the project later. *See* Rae, *supra* note 37.

45. This piece employs the modern definition of "Uighur." In addition to the Uighurs, Xinjiang has long been inhabited by the Muslim Kazakhs, Krgyz, and Tajiks. The Uighurs believe that their ancestors were the indigenous peoples of the Tarim Basin. The Uighurs, though often portrayed as a united front, are divided by religious conflicts, territorial loyalties, linguistic discrepancies, commoner-elite alienation, and competing political loyalties. *See* Dru C. Gladney, *China's Interests in Central Asia*, *in* ENERGY AND CONFLICT IN CENTRAL ASIA AND THE CAUCASUS 211-13 (Robert Ebel & Rajan Menon eds., 2000). For a full discussion of the Uighur ethnicity, *see generally* JUSTIN JON RUDELSON, OASIS IDENTITIES: UYGHUR NATIONALISM ALONG CHINA'S SILK ROAD 17-38 (1997) [hereinafter RUDELSON].

46. *The Uighurs of China, Kazakhstan, Kyrgyzstan, and Uzbekistan*, at http://www.strategicnetwork.org/index.asp?loc=pe&pe=2021& (last visited June 29, 2003).

47. *Id.*

48. *See generally* RUDELSON, *supra* note 45, at 20-32.

49. *See* Becquelin, *supra* note 38, at 68.

50. *Id.* at 67. For example, between 1991 and 1994, GDP doubled from 7.5 billion yuan to 15.5 billion. *Id.*

51. *See id.* at 68. The situation is especially bad in the southern, predominantly Uighur, regions. In 1998, while the average rural income for Xinjiang was 684 yuan, in the Uighur south the figure was a mere 200 yuan. *Id.* at 69.

52. Mark O'Neil, *A Life in Forgotten Exile*, S. CHINA MORNING POST, May 15, 2001, at 15.

53. Becquelin, *supra* note 38, at 68 n.10; *see also* Barry Sautman, *Preferential Policies for Ethnic Minorities in China: The Case of Xinjiang*, *in* NATIONALISM AND ETHNOREGIONAL IDENTITIES IN CHINA 87 (William Safran ed., 1998) [hereinafter Sautman, *Preferential Policies*]. ("Of 311 poor counties listed by the PRC State Council, 143 are in minority areas. More than eighty percent of

For much of the 1980s, Xinjiang suffered both from the consequences of opening the economy to outside forces and the central government's preferential policies for coastal areas.[54] In spite of the region's vast natural resources, the central government did little throughout the 1980s to develop Xinjiang's potential—leading to the view that Beijing was failing to give the region adequate attention.[55] The Seventh Five-Year Plan (1986-1990) relegated most of western China to the function of resource and raw material provider—Xinjiang would have to wait for large-scale modernization projects.[56] In 1991, however, the sudden collapse of the Soviet Union, the subsequent emergence of independent Central Asian states, and a growing separatist movement forced Beijing to reevaluate its strategy for dealing with the western frontier.[57] Even before the breakup of the Soviet Union, separatist agitations in Xinjiang forced Beijing to confront growing Uighur unrest.[58] In 1990, Han police and soldiers clashed with Uighurs, whom authorities called "counterrevolutionary plotters" belonging to the Islamic Party of East Turkestan.[59] Although the death toll is uncertain, most estimates suggest the altercation left dozens dead.[60] The incident in 1990 would serve as a prelude of things to come.

In the wake of the Soviet Union's disintegration, economic and security issues have become increasingly intertwined as the CCP pursues its goals of stability and continued integration and assimilation.[61] In 1991, the Soviet collapse and Uighur separatist rumblings provoked a political scramble in Beijing, and just after the aborted Moscow coup, Vice-President Wang Zhen rushed out to the XUAR.[62] Wang seized the opportunity to advocate greater national unity, exhorting the entire nation to "form a steel wall to safeguard socialism and the unification of the motherland."[63] By tying socialism to the notion of a united motherland, Wang demonstrates how the Party line links the support for the state economic system to the concept of a united China.

Paralleling Party rhetoric, economic policies shifted to encourage greater

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Chinese who lack sufficient food and clothing live in minority areas."). *Id.*

54. Peter Ferdinand, *Xinjiang: Relations with China and Abroad*, *in* CHINA DECONSTRUCTS: POLITICS, TRADE AND REGIONALISM, 279 (David S.G. Goodman & Gerald Segal eds., 1994) [hereinafter Ferdinand].

55. *Id.*

56. *Id.*

57. *See generally* Becquelin, *supra* note 38, at 65.

58. *See* Colin Nickerson, *Moslem Unrest Simmers on Sino-Soviet Border*, BOSTON GLOBE, June 20, 1990, at 1. Shortly after this incident, authorities declared Xinjiang off-limits to foreigners and People's Liberation Army (PLA) enforcements were mobilized to quell outbursts in the region. *Id.*

59. *Id.*

60. *Id.*

61. *See generally* Becquelin, *supra* note 38, at 65.

62. *See* J. Richard Walsh, *China and the New Geopolitics of Central Asia*, *in* ASIAN SURVEY, Vol. 33, No. 3, Mar. 1993, at 272-84 (A Monthly Review of Contemporary Asian Affairs, U. Cal. Press).

63. *See id.* The central government has recently used similar rhetoric to combat separatists in Xinjiang. *See generally* Amy Woo, *China-Xinjiang; "Great Wall of Steel" to Quell Ethnic Unrest*, INTER PRESS SERVICE, Mar., 11, 1997, *at* http://194.183.22.90/ips/eng.nsf/vwWebMainView/0DBF69567EF3C68D80256A07004F6CE1/?OpenDocument (last visited Feb. 16, 2003).

integration of outlying areas. The Eighth Five-Year Plan (1991-1995) continued the emphasis on coastal regions, but also included initiatives to facilitate development of China's west.[64] The new focus on the west brought dramatic changes to Xinjiang—between 1991 and 1994, infrastructure investment in the XUAR soared from 7.3 billion yuan to 16.5 billion, and the region's GDP doubled from 7.5 billion yuan to 15.5 billion.[65] In 1992, the central government announced that tax-sharing arrangements like those enjoyed by coastal provinces would apply to nine additional provinces, including Xinjiang.[66] Moreover, rather than the usual fifty percent, ethnic minority regions would be allowed to retain eighty percent of local taxes.[67] Notwithstanding the economic changes of the early 1990s, by 1995 Xinjiang's per capita gross domestic product remained a dismal U.S.$598, one of the lowest in China.[68] Although there were a number of economic triumphs in Xinjiang, the region remained dogged by economic difficulties.[69] Thus, rather than rallying restive Uighurs around central government policies, the unfulfilled promises of prosperity have helped channel the rising tide of Uighur disaffection into separatist sentiment.

Rising Tide of Separatism

In the 1990s, periodic outbursts of separatist violence shook Xinjiang.[70] The disintegration of the Soviet Union stimulated both a swell of Uighur pride and new hope that the independence of the former Soviet Republics in Central Asia would spill over into China, "establishing if not an independent 'Uighurstan,' at least perhaps a unified 'Eastern Turkestan,' that would stand alongside Kazakhstan, Uzbekistan, and Kyrgzstan as independent Turkic republics."[71] Beijing blames Uighur separatists for riots, assassinations, and hundreds of bombings since 1990.[72] Abulahat Abdurixit, chairman of the XUAR government, admitted in 1999 that "since the . . . 1990s, if you count explosions, assassinations and other terrorist activities, it comes to a few thousand incidents."[73] The central government now

64. *See Aims of the Eighth Five-Year Plan*, BBC Monitoring Service, Oct. 10, 1990 *from* WEN WEI PO (H.K.), Sept. 28, 1990, *available in* LEXIS, News Group File.

65. Becquelin, *supra* note 38, at 67.

66. *Id.* at 71.

67. *Id.*

68. Dorian, *supra* note 41, at 2. In 1995, the per capita GDPs of Kazakhstan (U.S.$3,200), Kyrgyzstan (U.S.$1,790), Tajikistan (U.S.$1,415), Turkmenistan (U.S.$3,280), and Uzbekistan (U.S.$2,400) all dwarfed that of Xinjiang. *Id.* at 6.

69. *See* June Teufel Dreyer, *The PLA and Regionalism: Xinjiang*, *in* CHINESE REGIONALISM 264 (Richard H. Yang et al. eds., 1994).

70. *See, e.g.*, RUDELSON, *supra* note 45, at 171-72.

71. Dru Gladney, *China's Uyghur Dilemma*, *in* PROJECT SYNDICATE, *at http://www.project-syndicate.cz/series/series_text.php4?id=770* (last visited Feb. 16, 2003). Although there is no right to secession under international law, there is also no prohibition on forcible division of an existing state, so long as it does not result from an unlawful outside intervention. *See* DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS, at xiv (Hurst Hannum, ed., 1993).

72. Liu, *Trouble*, *supra* note 19, at 45.

73. Becquelin, *supra* note 38, at 87.

recognizes separatists in Xinjiang as China's most serious internal security threat.[74]

In 1996, the central government responded to the escalation of violence in the hinterlands with the "Strike Hard" anticrime campaign, designed to eradicate crime and crack down on Uighur separatists.[75] The Xinjiang Public Security Bureau[76] announced that after launching the campaign, it captured more than 2,700 terrorists, murderers, and other criminals in the span of two months.[77] Rather than stemming the growing tide of Uighur separatism, the "Strike Hard" campaign actually incited separatists, increasing Uighur anti-government protests and violence to levels unprecedented since the Communists took control of the region.[78] In February 1997, hundreds of Uighurs took to the streets in Yining waving blue East Turkestan flags and shouting "God is Great" and "Independence for Xinjiang."[79] The "Yining incident," the largest publicly known "separatist" protest, left at least ten dead and hundreds injured.[80] Shortly after the Yining incident, Uighur separatists demonstrated their contempt and disrespect for Chinese rule by coordinating several Urumchi bus bombings to coincide with the state funeral for Deng Xiaoping.[81] As an encore, separatists exploded a pipe bomb on a bus in Beijing's busiest shopping district.[82]

Although there are some indications of diminishing Uighur activism,[83] in April 2001, Abulahat Abdurixit stated: "[T]he sabotage activities carried out by ethnic separatist elements are the greatest threat to stability and public order in Xinjiang."[84] In the wake of the September 11 attacks against the United States, China has used the international campaign against terrorism to rally support for its actions against Uighur separatists, even linking separatists in Xinjiang to Osama bin Laden.[85] Fearing that instability in Central Asia could ignite an uprising in the

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74. Interview with an American Diplomat, Beijing, China (March 2000) (on file with author).

75. RUDELSON, *supra* note 45, at 171.

76. The Public Security Bureau (PSB) is the law enforcement agency charged with maintenance of the criminal law and public administration. *See* CHIU ET AL., LEGAL SYSTEMS OF THE PRC 93-97 (1991) (providing a general overview of the duties and powers of the PSB).

77. RUDELSON, *supra* note 45, at 171.

78. *Id.*

79. *See* John Pomfret, *Separatists Defy Chinese Crackdown: Persistent Islamic Movement May Have Help from Abroad*, WASH. POST, Jan. 26, 2000, at A17 [hereinafter Pomfret, *Separatists Defy Chinese*]; *see also* PEOPLE'S REPUBLIC OF CHINA: GROSS VIOLATIONS OF HUMAN RIGHTS IN THE XINJIANG UIGHUR AUTONOMOUS REGION, AMNESTY INTERNATIONAL REPORT (1999), *available at* http://www.web.amnesty.org/ai.nsf/index/ASA170181999 (last visited Mar. 2, 2003) (providing an account of the 1997 Yining incident and its context)[hereinafter AMNESTY REP.]

80. Pomfret, *Separatists Defy Chinese*, *supra* note 79.

81. RUDELSON, *supra* note 45, at 171.

82. *Id.*

83. Dru Gladney, *China's Uyghur Dilemma*, *in* PROJECT SYNDICATE, Feb. 19, 2002, *at http://www.project-syndicate.cz/series/series_text.php4?id=770* [hereinafter Gladney, *China's Dilemma*].

84. *Id.*

85. Joe McDonald, *China Targets Xinjiang Rebels for bin Laden Links: Report, Aimed at World Opinion, Lacks Support of Claims*, WASH. TIMES, Jan. 22, 2002, at A13; *see also* Jasper Becker, *China's 'Homegrown Terror,'* S. CHINA MORNING POST, Nov. 16, 2001, at 18.

region, China has intensified surveillance and control of Uighurs in Xinjiang.[86] Recent reports also indicate that China has moved up to 40,000 troops into Xinjiang to quell separatist activities and maintain security in the region.[87]

While most Uighurs are not involved in separatist activities, economic and cultural resentment toward Han Chinese is widespread.[88] Some experts warn that growing numbers of dispossessed Uighur males constitute fertile ground for extremist ideologies or separatist uprisings.[89] While increased ties with Central Asia have had the desired effect of facilitating the flow of goods into the region, increased cross-border trade means potentially dangerous ideologies will also flow into Xinjiang from Central Asia. The centrifugal forces of ethno-nationalism (pan-Turkism) and pan-Islamism pose new challenges to stability and security in Xinjiang.[90] In an attempt to counter the dangerous political undercurrents in the region, Beijing has joined Tajikistan, Kazakhstan, Russia, Uzbekistan, and Kyrgyzstan in the "Shanghai Six," which, among other functions, serves as a unified front against separatists and extremists.[91] In spite of Beijing's best efforts, future unrest is likely. Dru Gladney points out that the "Strike Hard" campaign has done little but alienate Xinjiang's local population, and if the central government truly wants to poultice the growing fissures between Xinjiang and Beijing, the war against separatism must be combined with a policy that gives Uighurs hope for the future.[92]

IV. SOLIDIFYING THE NATION

Pacification and Integration: Taking Prosperity to the Hinterlands

The Go West plan is designed to give Uighurs (and other minorities in the west) hope by redressing the dangerous economic rift between east and west. This strategy rests upon the theory that prosperity will breed greater minority cooperation and thereby encourage their integration into the "Chinese Han majority mainstream."[93] Chinese officials note: "Separatist movements gnawing away at Chinese control in ethnic border regions will only be silenced by an

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86. Craig S. Smith, *Fearing Unrest, China Presses Muslim Group*, N.Y. TIMES, Oct. 5, 2001, at A3.

87. *China Moves 4 Army Divisions To Xinjiang to Quell Separatists*, JAPAN ECON. NEWSWIRE, Jan. 12, 2002.

88. Eric Eckholm, *China Seeks World Support in Fight With Its Muslim Separatists*, N.Y. TIMES, Oct. 12, 2001, at A7.

89. Gladney, *China's Dilemma*, *supra* note 83.

90. *See* Yasmin Melet, *China's Political and Economic Relations with Kazakhstan and Kyrgyzstan*, 17 CENTRAL ASIAN SURV., 229, 246 (1998)

91. Robert Marquand, *Central Asians Group to Counterweigh US*, *in* CHRISTIAN SCI. MONITOR, June 15, 2001, *at* http//www.csmonitor.com/durable/2001/06/15/p8s1.htm.

92. Gladney, *China's Dilemma*, *supra* note 83.

93. *See* Dru C. Gladney, *Economy and Ethnicity: The Revitalization of a Muslim Minority in Southeastern China*, *in* THE WANING OF THE COMMUNIST STATE 242 (Andrew G. Walder ed., 1995) [hereinafter Gladney, *Economy and Ethnicity*].

increase in material wealth among local populations."[94] A "long-term program," with a timeline of twenty or thirty years, Go West emphasizes infrastructure development, local industry, science, technology, education, improving the investment environment, and working on environmental protection projects.[95] In Xinjiang, thus far the plan has materialized in the form of large infrastructure projects such as roads, railroads, and a U.S.$14 billion pipeline running from Xinjiang's natural gas fields to Shanghai, 2,500 miles to the southeast.[96] As part of the Go West campaign, Xinjiang Regional Development Planning Commission identified thirty key projects for inclusion in the Tenth Five-Year Plan (2001-2005).[97] Three of the thirty projects are in agriculture, four are in the power industry, two are in urban construction, three are in the petrochemical and gas industry, five are water resource projects, nine are in transportation (road and railway construction), and four are in other industries.[98] These projects require a total investment of 70 billion yuan (U.S.$8.46 billion).[99] In spite of Beijing's pledges for support, some western scholars point out that central authorities have back-pedaled from promises of financial participation, and Go West amounts to little more than an opportunity for regional elites to demonstrate loyalty to the central government by waving the Go West banner.[100] If rhetoric has any hope of becoming reality in Xinjiang, the Go West plan will have to overcome the region's harsh topography, technological backwardness, and infrastructure deficiencies.[101]

In isolated Xinjiang, building transportation links to markets in the east is of paramount importance. Infrastructure improvements are critical to reduce Xinjiang's isolation from both central and coastal China and potential markets in Europe and Central Asia.[102] Currently, transportation links are woefully inadequate. While grapes from California can make it to a Guangdong fruit stand in less than a week, grapes from Turfan, located in central Xinjiang, take up to fifteen days.[103] Clearly, Xinjiang's biggest challenge to development is enhancing shipping capabilities and transportation links.[104]

As part of the Tenth Five Year Plan, the central government has promised approximately 100 billion yuan (U.S.$12.1 billion) for large and medium sized

94. *Economic Improvement Only Antidote to Separatism*, AGENCE FRANCE PRESSE, Oct. 2, 1996.

95. *See generally* Thomas L. Sims & Jonathan James Schiff, *The Great Western Development Strategy*, CHINA BUS. REV., 44, 48 (Nov.-Dec. 2000).

96. Pomfret, *Go West supra* note 16, at A01. The natural gas pipeline is the only Xinjiang-related project of the central government's ten major Go West projects. *See* Li, *Bountiful Region*, *supra* note 16, at 2.

97. *Economic & Technical News*, XINHUA NEWS AGENCY, Jan. 19, 2000.

98. *Id.*

99. *Id.*

100. Robert M. Cutler, *China's "Go West" Pipeline Projects: A "Great Leap Westward"?*, CENTRAL ASIA CAUCASUS ANALYST, Aug. 16, 2000, *at http://www.cacianalyst.org/Aug_16/homeaug16.htm* (last visited Feb. 21, 2003).

101. Paul S. Triolo & Christopher Hegadorn, *China's Wild West*, CHINA BUS. REV., Mar. 1996, at 41.

102. *Id.* at 43.

103. Pomfret, *Go West*, *supra* note 16.

104. Li, *Bountiful Region*, *supra* note 16.

railway construction projects in west China.[105] Plans exist to extend the recently completed Kashgar-Urumqi line into Kyrgyzstan and Uzbekistan,[106] while another proposed railway project passes through Yining into Kazakhstan.[107] Go West also hopes to improve domestic east-west links, by either double-tracking existing lines or building new ones.[108] In addition to facilitating the enhanced transport of goods, improving transportation links helps the central government maintain control of the region.[109]

Another priority for Xinjiang is "shift[ing] from exporting natural resources to development of higher value-added processing industries in minerals, agricultural produce and tourism."[110] Xinjiang has tremendous potential for a lucrative tourism industry. The region is replete with historical and cultural sites, stunning natural beauty, and colorful minority groups.[111] Local authorities also eye increased tourism as the first phase in luring both domestic and international investment.[112]

The two pillar industries, black (oil) and white (cotton), are also central to Xinjiang's strategy for economic development.[113] The emphasis on these industries, however, demonstrates that Go West's strategy for Xinjiang does not make sound economic sense. Although Xinjiang does have sizeable oil reserves, hopeful estimates have largely been disappointed,[114] and the extraction costs make Xinjiang's oil extremely expensive.[115] Beijing's emphasis on Xinjiang's oil also has the undesired effect of fueling local frustrations. The oil industry in Xinjiang is now almost completely run by Han Chinese, and the China National Petroleum Company's exploration and extraction projects have bypassed the Xinjiang Petroleum Bureau altogether.[116] Situations such as these anger locals and some scholars speculate that the industry is steering the Han onto a collision course with Uighurs. June Teufel Dreyer points out that the hype surrounding Xinjiang's oil reserves gives locals the impression that the region could easily be economically self-sufficient, even wealthy, if only Beijing would stop siphoning off the valuable natural resources.[117] Thus, oil is problematic, both as an engine for development

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105. CHINA'S GREAT LEAP WEST, *supra* note 25, at 43.

106. *Id.* at 44.

107. *Id.*

108. *Id.* at 43.

109. Dru C. Gladney, *The Ethnogenesis of the Uighur*, 9 CENTRAL ASIAN SURV., 17 (1990) ("While it took Zuo Zongtang six months to bring an imperial Qing army from Lanzhou to Urumqi in order to suppress the Uighur uprising led by Yakub Beg at the end of the 19th century, today Urumqi is only five hours by plane and 72 hours by train from Beijing.").

110. Li, *Bountiful Region*, *supra* note 16.

111. In 1999, the author spent three weeks in Xinjiang.

112. *See* Li, *Bountiful Region*, *supra* note 16.

113. Office of Leading Group for Western Region Development of the State Council, *"Black and White" Strategy Boosts Xinjiang's Economy*, *at http://www.chinawest.gov.cn/english/asp/start.asp?id=a* (last visited Feb. 21, 2003).

114. *See* Cutler, *supra* note 100. ("[S]everal years ago western energy companies, encouraged by Beijing's touting of Xinjiang's natural energy resources, paid high fees to test-drill for oil, and they came up dry."); *See also* Dorian, *supra* note 41, at 4.

115. Cutler, *supra* note 100.

116. Pomfret, *Go West*, *supra* note 16.

117. Dreyer, *supra* note 69, at 271.

and as a rhetorical tool for rallying support for Go West.

As for cotton, "there is little evidence that cotton is [even] economically viable" in the region.[118] Imported cotton is still fifteen per cent cheaper than the local product, and heavy government subsidies keeping the industry going are proving very costly for the central government.[119] China's textile crisis has left the state with a stockpile of four million tons of cotton, equivalent to three years of Xinjiang's output.[120] The cotton strategy also demonstrates the need for nationally integrated planning. Many of Go West's projects are conceived and implemented from "the bottom up,"[121] with little or no national coordination. One commentary from Xinhua News Agency points out the danger of such an approach, noting that if regional plans are not coordinated centrally, it will be "hard to avoid running around in circles when the work is fully underway, and we may have to pay a considerably higher price for the 'remedies' after problems crop up, which will inevitably impair the entire process of development."[122] In Xinjiang, as in other regions, development policies that make little sense economically are often driven by an underlying political agenda. Some have speculated that the explanation for the importance of cotton in Xinjiang "lies in the opening up of new land through reclamation: a key element in bringing in massive numbers of Han settlers to reinforce territorial consolidation."[123] This explanation resonates with Beijing's desire to shore up control of the region by diluting restive indigenous populations with Han settlers, a process colloquially referred to as "mixing sand."[124]

"Mixing Sand": Han Migration and Integration into the Chinese Fold

When Communist forces "liberated" Xinjiang in 1949, over ninety percent of Xinjiang's population was ethnically non-Han.[125] The region, embroiled in a long tradition of ethnic and religious animosity (both among native groups and towards the non-Muslim Han), proved to be a difficult land to control.[126] After the CCP consolidated power, the authorities launched a massive program of Han resettlement, thereby dramatically increasing the Han population in the region.[127] By 1979, almost half of Xinjiang's eleven million people were Han.[128] The 1990 census, however, indicated a steady and continuing decline of the Han population

118. Becquelin, *supra* note 38, at 81.
119. *Id.*
120. *Id.*
121. Cutler, *supra* note 114.
122. CHINA'S GREAT LEAP WEST, *supra* note 25, at 14.
123. Becquelin, *supra* note 38, at 83.
124. *Id.* at 74.
125. Donald H. McMillen, *Xinjiang and the Production and Construction Corps: A Han Organization in a Non-Han Region*, AUSTRALIAN J. OF CHINESE AFF., July 1981, at 66 (exploring the role of the Production and Construction Corps in the consolidation of CCP power and Han rule)[hereinafter McMillen, *Xinjiang PCC*].
126. *Id.* at 67.
127. *Id.* at 66.
128. *Id.*

in Xinjiang—owing in large part to lower Han birthrates.[129] The central government, concerned by the implications of such a demographic shift countered the trend with a strategy of increased Han migration, colloquially called "mixing sand."[130]

Go West continues the recent trend of accelerated Han migration to Xinjiang. Increased economic opportunities and improved transportation links facilitate a steady stream of Han migrants, and according to some estimates, 250,000 Han make the journey west each year.[131] Go West's large infrastructure construction projects provide jobs for migrant workers and in spite of preferential policies for ethnic minorities,[132] jobs often go to Han workers rather than indigenous Uighurs. For example, among 20,000 oil workers in the Tarim Basin, relatively few jobs have been allocated to minorities; in the Taklamakan Desert oil exploration project, only 253 of 4,000 technical workers came from minority groups.[133] Employment discrimination adds to Uighur frustrations and resentments of the Han. One young Uighur in Xinjiang vents: "Look, . . . I am a strong man and well-educated. But [Han] Chinese firms won't give me a job. Yet go down to the railway station and you can see all the [Han] Chinese who've just arrived. They'll get jobs. It's a policy, to swamp us."[134] Given the large number of Han Chinese moving to Xinjiang, Go West may well be a Trojan Horse—Beijing tempts Xinjiang with the prospect of economic prosperity while using development projects as a vehicle for flooding the region with Han Chinese.

The steady stream of Han Chinese into Xinjiang has a powerful assimilative effect on the Uighurs. In spite of the fact that Uighurs are the largest ethnic group in Xinjiang, they demonstrate a much higher rate of assimilation to the Han, than vice versa.[135] The potency and supremacy of Han Chinese culture stands as a strong and well-established principle in the Chinese world-view, and Han leaders have long recognized its assimilative power. Mencius (fourth century B.C.)[136] commented: "I have heard of man using the doctrines of our great land to change barbarians, but I have never yet heard of any being changed by barbarians."[137] For

129. Becquelin, *supra* note 38, at 69.

130. *Id.* at 74.

131. Pomfret, *Go West*, *supra* note 16.

132. *See* Sautman, *Preferential Policies*, *supra* note 53, at 88.

133. *Id.* at 97 (Wang Lequan, the Regional Party Secretary explains: "[T]he workforces in Xinjiang's oilfields all come from other oilfields in China so we don't take local people.").

134. *Go West*, ECONOMIST, *supra* note 16.

135. *See* Ji Ping, *Ethnic Inequality and Social Structural Assimilation: The Xinjiang Autonomous Region of China*, *in* MIGRATION, POPULATION STRUCTURE, AND RESDISTRIBUTION POLICIES 117-35 (Calvin Goldscheider, ed., 1992).

136. Mencius was the second sage in the Confucian tradition. He expanded on Confucian thought by suggesting that human nature is inherently good. *See* DAVID HINTON, MENCIUS, at ix (1998).

137. JAMES LEGGE, THE CHINESE CLASSICS, II, 253-54 (1960). Ming Dynasty philosopher-statesman Wang Yang-ming also expressed this view in his prescription for governing the frontiers:

> Barbarians are like wild deer. To institute direct civil service administration by Han Chinese magistrates would be like herding deer into the hall of a house and trying to tame them. In the end they merely butt over your sacrificial altars, kick over your tables, and dash about in frantic flight. In the wilderness districts,

the Uighurs, socioeconomic advancement is often tied to assimilation into the Han social structure.[138] Han Chinese, however, do not see similar rewards for assimilating into the Uighur social system.[139] Therefore, rather than creating a balanced blend of Han and Uighur, the Go West policy of "mixing sand" will produce a Han-dominated social structure—the Uighurs will be forced to assimilate, or "drown" in the "quicksand" of a Han dominated socioeconomic structure.

Taming the West: A "Civilizing Project"

With increased separatist violence, and international awareness of the Uighur plight growing,[140] CCP leaders recognize that this frontier powder keg is the single greatest threat to their hold on power.[141] Cadres from Beijing's leading Group on Developing the Western Areas readily admit Go West's political agenda: "boosting national unity, maintaining social stability, and consolidating the border defences."[142] Party officials have repeatedly stated that the only way to silence separatist movements and consolidate control of ethnic border regions is to increase wealth and economic prosperity in local minority populations.[143] One official noted: "Only a strong economy and improved material and cultural living standards can show the advantages of socialism . . . and promote the unification of all peoples towards the Communist Party."[144] A member of the special team set up by the State Council to draw up a master plan for the west even said:

> therefore, one should adapt one's methods to the character of the wilderness . . . On the other hand, to leave these tribal chiefs to themselves to conduct their own alliances or split up their domains is like releasing deer into the wilderness . . . To fragment their domains under separate chiefs is to follow the policy of erecting restraining fences and is consonant with the policy of gelding the stalling and castrating the boar . . . To set up independent chiefs without supervisory aids is like herding deer in enclosed gardens. Without watchers to guard the fences and prevent their goring and battling, they will leap the fences, bite through the bamboo screens, and wander far to trample the young crops. The presently established civil service aides are such guardians of the parks and fences.

quoted in JUNE TEUFEL DREYER, CHINA'S FORTY MILLIONS, 13-14 (1976) [hereinafter DREYER, FORTY MILLIONS].

138. *Id.*

139. *Id.*

140. A 1999 Amnesty International Report, *see* AMNESTY REP., *supra* note 79, and the proliferation of websites devoted to the "Uighur cause" indicate growing international awareness of the Uighur movement. *See generally* Uyghur Human Rights Coalition, *at* http://www.uyghurs.org/ (last visited Mar. 2, 2003); Uyghur American Ass'n, *Freedom for the Heart and Soul of Eastern Turkestan, at http://www.caccp.org/et/* (last visited Mar. 2, 2003); Uyghur American Ass'n, *Brief Introduction to East Turkestan and Uyghurs, at* http://www.uyghuramerican.org/ (last visited Mar. 2, 2003).

141. Interview with an American Diplomat, Beijing, China (March 2000) (on file with author). *See also* David Wall, *A Grim Future for China's Hinterlands*, JAPAN TIMES, May 17, 2000.

142. Lam, *supra* note 18.

143. *Economic Improvements Only Antidote to Separatism: Chinese Official*, AGENCE FRANCE PRESS, Oct. 2, 1996.

144. *Id.*

> The aim of the government's program to develop China's western provinces is to prevent China's foreign enemies using poverty to create a Kosovo-style crisis in the region . . . Providing ethnic minorities in those regions with more economic development would help guarantee the inviolability of China's borders and political and social stability in the region.[145]

Given that fifty-two of China's fifty-five ethnic minority groups live in the west,[146] the Go West plan looks very much like a "civilizing project," designed to assuage ethnic tensions and further integrate outlying minority regions into the Chinese fold. In fact, the Go West project is an example of what Dru Gladney calls internal colonialism—a situation "predicated upon the unequal rates of exchange between the urban power centers and the peripheral, often ethnic, hinterlands."[147]

The ideological basis for "civilizing projects" is a combination of the civilizing center's perceived superiority and a commitment to raise the level of peripheral peoples' civilization.[148] Han Chinese widely view their own culture to be "one of progress, opportunity, science, and reason,"[149] while Uighur culture is perceived to be "backward, poor, weak, superstitious, and worst of all, 'feudal'."[150] One Chinese (Han) specialist of minority affairs characteristically proclaimed: "[T]he Han nationality has always kept a higher level of development, so many of the ethnic minorities have learned a lot from the Han nationality's mode of production and way of life."[151] Members of the Ninth Chinese People's Political Consultative Conference (CPPCC) echo this sentiment when they assert that ethic minority groups will be the biggest beneficiaries of the Go West development scheme.[152] Wei Jiezheng, a minority member of the CPPCC National Committee notes: "China's ethnic minorities have been poor and backward for centuries, but we are confident of the future."[153] Go West as a civilizing project, however, has serious implications running counter to Beijing's objectives. Civilizing projects invariably precipitate greater ethnic consciousness in those people being civilized.[154] Ethnic awareness does not necessarily lead to an increase in separatist agitation, but in the past ten years increased identification with Uighur culture has paralleled an increase in Uighur protests.[155]

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145. *"Asian Kosovo," supra* note 6.

146. *Ethnic Minorities Biggest Beneficiaries of West China Development*, *at* http://www.china.org.cn/english/8416.htm (last visited Mar. 1, 2003) [hereinafter *Ethnic Minorities*].

147. Dru C. Gladney, *Internal Colonialism and China's Uyghur Muslim Minority*, XISIM Newsletter, Jan. 1998, *available at* http:www.uyghuramerican.org/researchanalysis/ internalcol.html (last visited Mar. 1, 2003) [hereinafter Gladney, *Internal Colonialism*].

148. Stevan Harrell, *Civilizing Projects and the Reaction to Them*, *in* CULTURAL ENCOUNTERS ON CHINA'S ETHNIC FRONTIERS, 4 (Stevan Harrell ed., 1995) [hereinafter Harrell].

149. RUDELSON, *supra* note 45 at 124.

150. *Id.*

151. Sautman, *Preferential Policies, supra* note 53, at 88.

152. *Ethnic Minorities, supra* note 146.

153. *Id.*

154. Harrell, *supra* note 148, at 6.

155. RUDLESON, *supra* note 45, at 130-31.

The explicit agenda of China's new "civilizing project" attempts to tackle the separatist threat. The stated goals of "boosting national unity, maintaining social stability and consolidating border defenses,"[156] clearly address the west's problem of separatist agitators. Uighur and Tibetan groups vying for independence have made Beijing painfully aware that the economic disparity between ethnic minorities in the west and Han Chinese in the east strengthens the cause of separatist movements.[157] A 1994 State Ethnic Affairs Commission report to the CCP Central Committee notes: "[M]inority nationalities are complaining that all the rich are Han people and that the Communist Party could not care less about the minorities. This problem, if ignored, surely will deepen nationality contradictions."[158] In 1994, *China Today* recognized that of the eighty million people living under the poverty line, eighty percent (sixty-four million) live in minority areas.[159] Mou Benli, Vice Minister of the State Ethnic Affairs Commission recently hailed the Western Development strategy, noting it provides ethnic minorities their "best ever historical opportunities."[160] Although minorities are the intended "beneficiaries" of Go West, the plan's political and economic agendas are crafted with a broader audience in mind. Go West also plays an important role in the CCP's efforts to legitimize the current political power structure and justify the continued existence of the regime.

V. LEGITIMIZING THE CURRENT REGIME BY TAMING THE WILD WEST

Since the PRC's inception, Party ideology has served as the theoretical basis for all major policies.[161] In spite of China's economic liberalization and the movement towards capitalism, the Party has refused to renounce its fundamental ideology. Insistence on "socialism with Chinese characteristics," demonstrates an attempt to reconcile the contradictions between economic reforms and Party ideology, thereby sustaining political legitimacy.[162] The contradictions between official ideology and the process of economic reform create a legitimacy crisis threatening the current regime.[163] When Jiang Zemin said that the development of the west is crucial to China's stability, the Communist Party's hold on power, and the "revitalization of the Chinese people,"[164] he acknowledged the political

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156. Lam, *supra* note 18.

157. Linda Benson, in her book on the Ili Rebellion, notes that economic factors helped push Xinjiang to rebellion in the 1940's. *See generally* LINDA BENSON, THE ILI REBELLION: THE MOSLEM CHALLENGE TO CHINESE AUTHORITY IN XINJIANG 1944-1949, at 34-37 (1990).

158. *Cited in* Barry Sautman, *Ethnic Law and Minority Rights in China: Progress and Constraints*, 21 LAW & POL'Y 208-302, (1999), [hereinafter Sautman, *Ethnic Law*].

159. *China: A United Country of 56 Ethnic Groups*, CHINA TODAY, Dec. 12, 1994, at 7.

160. *China Continues to Highlight Economic Development in Minority Inhabited Areas*, XINHUA NEWS AGENCY, Feb. 22, 2000, *available at* LEXIS, News Group File.

161. FENG, *supra* note 14, at 2.

162. *See generally id.*

163. Muthiah Alagappa, *Contestation and Crisis*, *in* POLITICAL LEGITIMACY IN SOUTHEAST ASIA: THE QUEST FOR MORAL AUTHORITY, 59 (Muthia Alagappa ed., 1995), A legitimacy crisis is "a situation in which the basis on which authority has been claimed or acknowledged is under such severe stress that there is a strong possibility of its destruction or transformation." [hereinafter Alagappa].

164. *See* Pomfret, *Go West*, *supra* note 16, at A01.

imperative behind western development.

While scholars recognize a number of bases for political legitimacy other than performance, an unelected regime without a state religion, a charismatic leader, or a viable ideology has little to justify its claim to power.[165] A strong performance demonstrating a "[p]roper and effective use of power to promote the collective well-being of the political community can generate moral authority."[166] The CCP hopes that successful development of the west will lend the regime legitimacy in the eyes of both Han Chinese throughout the country and Uighurs in Xinjiang. The program's primary thrust, however, is directed at the minority groups in the west. Given the intended "beneficiaries" of the plan are minority groups, the Go West project should be considered in the context of China's evolving minority policy—a weaving story of appeasement and movement towards eventual assimilation.

VI. CCP MINORITY POLICY IN XINJIANG: ROAD TO INTEGRATION

A brief history of China's minority policy and its impact in Xinjiang is needed to fully contextualize the Go West project. China's minority policy has general characteristics, applicable to all minority nationalities, but this history will focus on the policy's impact on Xinjiang. Chinese policy towards the peoples of Xinjiang has generally followed a trajectory of integration with the implicit expectation of assimilation at a later date.[167] Since "liberation" in 1949, the central government's integration policies have paralleled concerns for territorial integrity and stimulation of greater Chinese nationalism. Tracing the evolution of CCP minority policy from pre-liberation pacification to the current system of regional autonomy reveals that although policy has undergone several major transformations, the underlying goals of quelling unrest, moving the Uighurs steadily towards assimilation, and ensuring continued control over the region have always guided central government decision-making.[168]

Early Appeasement: Unify and Conquer

In the PRC's early years, the Party line maintained that Xinjiang, Tibet, and Mongolia should be "autonomous states," ultimately voluntarily uniting with China in a federated republic.[169] Communist leaders recognized that minorities on China's frontiers harbored both deep nationalist desires and strong fears of forced

165. *See* Alagappa, *supra* note 163, at 31-53.

166. *Id.* at 41.

167. Political integration is the process through which an ethnic group shifts loyalties, expectations, and political activities toward a new center, whose institutions welcome the group under an umbrella of jurisdictional protection. *See* DREYER, FORTY MILLIONS, *supra* note 137, at 1.

168. Gladney suggests that this is part of a process of "internal colonialism" which relies on "integration by immigration" to make Uighurs a minority and incorporate them into the Chinese state. *See* Gladney, *Internal Colonialism*, *supra* note 147.

169. CONRAD BRANDT ET AL., A DOCUMENTARY HISTORY OF CHINESE COMMUNISM 64 (1959) [hereinafter BRANDT].

assimilation, and policy was thus crafted to assuage these fears. In 1931, the Constitution of the Chinese Soviet Republic (Jiangxi Constitution)[170] emphasized the equality of minorities[171] and recognized "the right of self-determination of the national minorities in China, their right to complete separation from China, and to the formation of an independent state for each national minority."[172] In 1934, however, Mao acknowledged that the minority policy set out in the Jiangxi Constitution was an effort to enlist minority support against the Guomindang (KMT) and imperialist forces.[173] Both the option of secession and the promise of self-determination quickly evaporated once the rhetoric outlived its usefulness.[174]

The Party soon shifted its position—eliminating both the possibilities of secession or true self-determination.[175] Under the CCP's new policy, minorities were granted equal rights with the Han, they were encouraged to develop their own cultures, were not forced to learn Chinese, and they were promised control of their own affairs—as long as they remained part of a unified Chinese state.[176] In the years leading up to the founding of the PRC in 1949, the CCP introduced a new brand of rhetoric: unifying the nation by broadening the Chinese "family."

Creating a Chinese "Family"

The next stage in the development of the minority policy reflects efforts by the CCP to unify the country and cultivate a sense of Chinese nationhood. The new regime's legitimacy in the hinterlands hinged upon the CCP's ability to recreate the Chinese national identity.[177] Successful and lasting unification required a stimulation of Chinese nationalism that spanned regional differences and overcame localism.[178] In 1924, Dr. Sun Yat-sen, regarded as the father of

170. *Id.* at 220-24.

171. *Id.* at 221-24. Ostensibly, Chinese policy does not distinguish between different minority groups. Unless otherwise noted the policies discussed in this paper apply to the Uighurs in Xinjiang as well as Mongolians, Tibetans, Miao, Yao, Koreans, and others living on Chinese territory.

172. *Id.* at 223.

173. *See generally* David Deal, *Policy Towards Ethnic Minorities in Southwest China*, 1927-1965, *in* 1 J. OF ASIAN AFF. 31, 34 [hereinafter Deal, *Policy Towards Ethnic Minorities*].

174. *See generally id.* at 34.

175. *Id.*

176. In 1945, Mao Zedong wrote, in 'On Coalition Government', that the future People's China would 'grant nations the right to be their own masters and to voluntarily enter into an alliance with the Han people All national minorities in China must create, along voluntary and democratic lines, a federation of democratic republics of China.' In later editions of Mao's *Selected Works*, however, that passage vanished, and the original words of 'granting of the right to national self-determination to all national-minorities' were replaced by the phrase 'the granting of the right to national autonomy to all national minorities. BAO-GANG HE & YINGJIE GUO, NATIONALISM, NATIONAL IDENTITY AND DEMOCRATIZATION IN CHINA 173-74 (2000).

177. Habermas dramatically states: a legitimacy crisis "is directly an identity crisis." Ernst Haas asserted: "Legitimate authority under conditions of mass politics is tied up with successful nationalism; when the national identity is in doubt, one prop supporting legitimacy is knocked away." *quoted in* CHINA'S QUEST FOR NATIONAL IDENTITY 9 (Lowell Dittmer & Samuel S. Kim eds., 1993).

178. The nature of the Chinese Empire prior to 1949, in conjunction with the prolonged period of foreign (Manchu) rule, inhibited the development of Chinese nationalism. The Chinese Empire was traditionally comprised of numerous ethnic groups and nationalities, borders were not fixed and its

modern China, highlighted the importance of instilling a sense of Chinese nationhood:

> The Chinese people have shown the greatest loyalty to family and clan with the result that in China there have been family-ism and clan-ism but no real nationalism. Foreign observers say that the Chinese are like a sheet of loose sand . . . The unity of the Chinese people has stopped short at the clan and has not extended to the nation.[179]

Sun Yat-sen's words resonate throughout the early policy statements of the CCP.[180] Preparing to declare the formation of the PRC, Mao realized Sun's observations revealed a critical aspect of Chinese society the CCP could utilize in mobilizing the masses. Party rhetoric synthesized the concepts of nation and clan into a familial metaphor, declaring: "All nationalities within the boundaries of the People's Republic of China are equal. They shall establish unity and mutual aid among themselves, and shall oppose imperialism and their own public enemies, so that the PRC will become a *big fraternal and cooperative family* composed of all its nationalities."[181] The Party's new language tried to inculcate both patriotism and the notion that "older brother" had arrived to assist his "younger brothers" develop their own languages, customs, religious beliefs, and traditions.[182]

Creation of the Autonomous Regions

By casting minority integration in familial terms and by reneging on the promise of the right to secede, the CCP paved the way for the creation of autonomous minority regions. When the XUAR was created in 1955, CCP rhetoric was tinged with overtones of the "Han man's burden," and the long-term goal was ultimate assimilation of the province through sinification.[183] While a few basic rights were incorporated into the 1954 Constitution, insufficient guarantee for these rights meant they basically did not exist.[184] Many have argued the long-

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territorial expanse depended largely on the reigning emperor's power and ambition. *See generally* MARIA CHANG, RETURN OF THE DRAGON: CHINA'S WOUNDED NATIONALISM (2001).

179. SUN YAT-SEN, THE THREE PRINCIPLES OF THE PEOPLE: SAN MIN CHU I 2 (1990).

180. In a political report to the party Mao addressed the minority question:

> The CCP is in complete accord with Dr. Sun's racial policy . . . to assist the broad masses of the racial minorities, including their leaders who have connections with the people, to fight for their political, economic, and cultural emancipation and development, as well as for the establishment of their own armed forces that protect the interests of the masses. Their languages, customs, habits, and religious beliefs should be respected.

Mao Zedong, *On Coalition Government*, *quoted in* BRANDT, *supra* note 169, at 313.

181. *The Common Program of the Chinese People's Political Consultative Conference* art. 50 (Sept 29, 1949), *reprinted in* HENRY G. SCHWARZ, CHINESE POLICIES TOWARDS MINORITIES: AN ESSAY AND DOCUMENTS 52 (1971) [hereinafter CPCPPCC] (emphasis added).

182. *See* WOLFRAM EBERHARD, CHINA'S MINORITIES: YESTERDAY AND TODAY 157 (1982) [hereinafter EBERHARD].

183. *See* DREYER, FORTY MILLIONS, *supra* note 137, at 137.

184. THOMAS HEBERER, CHINA AND ITS NATIONAL MINORITIES: AUTONOMY OR ASSIMILATION? 41 (1989).

term Chinese policy is founded on the principle that giving minority areas a degree of autonomy pacifies them by sustaining their own customs, religion, language, and limited self-government until the immigration of Han Chinese slowly changes the makeup of the population.[185] Go West, and the accompanying policy of "mixing sand" fit very nicely into this pattern.

The Deng Years: Building a Legal Framework for "Autonomy"

As China shook off the lingering effects of the Cultural Revolution[186] and attempted to restore some semblance of law and order, CCP leaders reconsidered the minority issue.[187] By the early 1980s, the central government was quite aware of growing minority discontent: "In 1981, a Han Chinese official in Xinjiang complained that Uighurs would tell him repeatedly: 'What difference does it make if the Russians come. They'll cut off the heads of the Han, not ours.'"[188] The 1982 Constitution upgraded the status of minorities and granted them more rights than ever before—reflecting demands by minority leaders for an immediate realization of regional autonomy as promised in the 1950s.[189] In 1984, the central government promulgated the Law on Regional National Autonomy, the "basic law for the implementation of the system of regional national autonomy prescribed by the Constitution."[190]

The LRNA Avoids the Issue of Autonomy

The LRNA does not grant Xinjiang, or the other autonomous regions, any degree of meaningful autonomy.[191] Although official pronouncements laud the autonomy regime as a system of self-government "established for the exercise of autonomy and for people of ethnic minorities to become masters of their own areas,"[192] Western scholars criticize the system as little more than "fake" or "paper autonomy."[193] One scholar even likened China's autonomous areas to "political eunuchs serving at the pleasure of the Communist court in Beijing."[194] In fact, the modern autonomy regime, as defined by the 1982 Constitution and the LRNA, is

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185. EBERHARD, *supra* note 182, at 162.

186. HEBERER, *supra* note 184, at 29. ("Humiliation, insults, oppression, and an attempt at forced assimilation; destruction of the ecological equilibrium and ruinous exploitation; economic plundering of the minority regions: these were the consequences of the Cultural Revolution for the national minorities and their regions.") *Id.*

187. *See generally id.* at 41-42.

188. *See id.* at 42.

189. *See id.*

190. LAW OF THE P.R.C. ON REGIONAL NATIONAL AUTONOMY (LRNA) preamble (1984), *available at* http://www.novexcn.com/regional_nation_autonomy.html (last visited Feb. 6, 2003).

191. *See generally* Binh G. Phan, *How Autonomous are the National Autonomous Areas of the PRC? An Analysis of Documents and Cases*, ISSUES AND STUDIES, Vol. 32, 7, 83-108 [hereinafter Phan].

192. *Regional Autonomy for Ethnic Minorities*, *at* http://englishpeopledaily.com.cn/199909/28/enc_19990928001020_HomeNews.html (last visited Feb. 18, 2002).

193. Sautman, *Ethnic Law*, *supra* note 158, at 293.

194. Phan, *supra* note 225, at 85.

designed as a clever dance around the issue of true autonomy. Both documents represent variations on the same theme of "give" and "take." They give autonomous regions rights and powers, and then by tying these rights to central government approval, effectively take them away. While the modern system is the most far-reaching autonomy regime to date, autonomous regions are still subject to the "despotism and arbitrary wills of authorities and functionaries [of the central government]."[195]

Ultimately, "autonomy" as implemented under the Constitution and LRNA amounts to little more than a different way of describing the central-local relationship.[196] In spite of the claim that the LRNA "takes into account the characteristics and special needs of the country's autonomous areas and ensures the full exercise of autonomy by organs of self-government *which have bigger decision-making powers than other local governments*,"[197] there is actually little difference in the substantive powers enjoyed by autonomous regions and the provinces.[198] In Xinjiang, the central government walks a fine line between encouraging a safe amount of autonomy (thereby placating ethnic minorities) and breeding local nationalism, or worse separatism. Economic prosperity (Go West) is the promised panacea—it is supposed to tip the balance in favor of greater integration by demonstrating that Uighurs will benefit more from cooperation with the Chinese regime than resistance against it.[199]

VII. GO WEST'S LEGAL WAKE: RECENTRALIZING POWER

CCP leaders recognize that developing, or taming, the west will require more than rhetoric and money for infrastructure projects. In government news organs, Party leaders note that the success of Go West depends upon the promulgation of enabling legislation and the creation of a favorable legal environment.[200] A state-run website touts the achievements in legal reform of the last twenty years, but acknowledges that the legal climate still needs improvement.[201] This website quotes Lu Hushan, vice-chairman of the Guangxi Zhuang Autonomous Region People's Political Consultative Conference, as saying that the CCP should address the following areas: legislation establishment, the systemic problems of law enforcement agencies and judicial departments, and legal awareness.[202] In fact, Go West's legal wake sends ripples through the existing autonomy regime—

195. HEBERER, *supra* note 218, at 43.

196. LIN FENG, CONSTITUTIONAL LAW IN CHINA 158 (2000) [hereinafter LIN FENG].

197. *Self Government, at* http://www.china.org.cn/e-groups/shaoshu/self.htm (last visited Feb. 7, 2003).

198. LIN FENG, *supra* note 230, at 158.

199. DRU C. GLADNEY, ETHNIC IDENTITY IN CHINA 171 (1998).

200. *See Legal Climate Needs Improvement, at http://www.china.org.cn/english/2001/Mar/9028.htm* (last visited Feb. 7, 2003) [hereinafter *Legal Climate*] (" The Chinese Communist Party has made the strategic decision to develop western China. People talk more about natural resources, infrastructural facilities, ecological environment and flow of trained people when referring to this subject. But, in fact, a favorable legal environment is also crucial.").

201. *See id.*

202. *See id.*

contracting Xinjiang's powers of self-control and recentralizing decision-making authority.

In March of 2001, President Jiang Zemin signed an order announcing revisions to the LRNA.[203] Xinhua cites the wide economic gap between autonomous regions in the west and prosperous coastal areas in the east as the primary motivation for the changes.[204] Officials say the amendments will "promote the prosperity of all nationalities by narrowing the economic and social development gap between autonomous minority nationality areas [and other regions]."[205] Li Dezhu, minister in charge of State Ethnic Affairs Commission notes the revisions promote legal construction in the autonomous regions and help to foster an "equal, united, and mutually beneficial relationship among all of China's fifty-six nationalities."[206] The revisions to the LRNA are appropriately viewed as an integral component of the Go West campaign.

Recent Revisions to the LRNA

CCP pronouncements accompanying the recent amendments to the Law on Regional National Autonomy demonstrate that the Go West project and the LRNA are inextricably intertwined.[207] Xinhua notes that amendments to the law were "grounded in the need to build a socialist market economy and *implement the grand development of western China*."[208] Another report indicates that the newly amended law "will play an even more important role in promoting the development of minority areas and preserving the nation's unification."[209] The changes to the LRNA, prompted by Go West's political and economic agendas, are designed to help the central government realize its political objectives in Xinjiang.

The revised law, which includes seventy-four articles, instead of the original sixty-seven, changes the definition of regional autonomy in the Preamble from "an important political system of the state" to "a basic policy system of the state."[210] This semantic shift is intended to demonstrate the CCP's redoubled commitment to minority ethnicities and the system of regional autonomy.[211] In fact, the revisions

203. *Jiang Zemin Signs Order Announcing Revision of Minority Self-rule Law*, BBC Monitoring Service, Mar. 1, 2001, *from* XINHUA NEWS AGENCY, Feb. 28, 2001, *available in* LEXIS, News Group File [hereinafter *Jiang Signs Order*].

204. *See id.*

205. *China: New Law Tries to Narrow Regional Divides*, BUS. DAILY UPDATE, Apr. 4, 2001, *available at* http://www.china.org.cn/english/2001/Apr/11192.htm (last visited Feb. 7, 2003).

206. *China to Amend Law on Regional Autonomy for Minorities*, BBC Monitoring Service, Jan. 10, 2000, *from* XINHUA NEWS AGENCY, Jan. 7, 2000, *available in* LEXIS, News Group File.

207. *See, e.g., China's Li Peng Addresses Forum on Regional National Autonomy Law*, BBC Monitoring Service, Dec. 7, 2001, *from* XINHUA NEWS AGENCY, Dec. 6, 2001, *available in* LEXIS, News Group File.

208. *Id.*

209. *NPC Deputies and CPPCC Members Hail Regional National Autonomy System as Success*, FIBIS Mar. 16, 2001, *from* XINHUA NEWS AGENCY, Mar. 11, 2001.

210. THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON THE AUTONOMY OF MINORITY NATIONALITY REGIONS 2001, Preamble, FIBIS translation [hereinafter LRNA (2001)].

211. *See generally, Jiang Signs Order, supra* note 203.

are a step towards greater integration of minority areas into the Chinese fold. Several of the few revisions that actually have a substantive bite recentralize decision-making powers, rather than expanding the autonomy regime.[212] The changes focus primarily on financial incentives and preferential policies designed to "accelerate the economic and social development of ethnic minorities and promote national solidarity."[213] Although the revised law is replete with Go West rhetoric, it is short on substance. Some of the amendments are merely statements of intent and carry little practical force. Article 69, in an expression of idealism and magnanimity, provides that "state and higher level people's governments should . . . help impoverished populations shake off poverty as soon as possible and realize a moderately high standard of living."[214] The LRNA, however, does nothing to actualize such aspirations.

The exploitation of natural resources is an integral aspect of Go West in Xinjiang.[215] While the revised LRNA takes the important step of addressing compensation for resource exploitation, the law quietly shifts control of resources and agricultural products to the central government. Article 65 maintains the state will provide "certain compensations to the national autonomous areas exporting natural resources."[216] This provision suggests the state acknowledges autonomous areas should be compensated for the exploitation of their natural resources—a right previously not recognized.[217] The Chinese Constitution states: "In developing natural resources [which, according to Article 9, are owned by the state] and building enterprises in the national autonomous areas, the state shall give due consideration to the interests of those areas."[218] This marks a potentially significant change, as it affords the autonomous areas in the west the opportunity to capitalize on resources taken from them to fuel the east. Notwithstanding the recognition of rights to compensation, the revised law takes steps to shift control of those resources from the autonomous areas to the central government.

One of the more significant changes to the LRNA is not an added provision, but rather an article that the new law does not include. The old version of the LRNA included a provision granting autonomous areas the right to independently arrange for the "use of industrial, agricultural, and other local and special products after fulfilling the quotas for state purchase."[219] This right disappears in the revised law.[220] The new version of the LRNA subtly shifts the right to control resources and industrial and agricultural products from the autonomous regions to the central government. Article 65 provides: "While exploiting resources and

212. *See, e.g.*, LRNA (2001) arts. 56, 57, 60, 65, 66, 69, 71.

213. *Jiang Signs Order*, *supra* note 203.

214. LRNA (2001) art. 69.

215. *See supra* pages 113-115.

216. LRNA (2001), art. 65.

217. NATIONAL AUTONOMY LAW REVISED TO SUPPORT WESTERN DEVELOPMENT POLICY, TIBET INFORMATION NETWORK, Mar. 13, 2001, *at* http://www.tibetinfo.net/news-updates/nu130301.htm (last visited Feb. 11, 2003) [hereinafter LAW REVISED].

218. P.R.C. CONST. art. 118.

219. LRNA (1984) art. 31.

220. *See* LRNA (2001).

carrying out construction in national autonomous areas the *state should take the interests of national autonomous areas into consideration*."[221] The LRNA makes very clear that the state will play an integral role in resource exploitation and agricultural production. Xinhua inadvertently highlights the inherent irony in official rhetoric accompanying the law: "Economically, the Regional National Autonomy Law is imbued with the spirit of *self-reliance* for national autonomous areas, *with sharp state support and active aid by economically developed regions*."[222] Under the revised LRNA, "self-reliance" means greater state involvement and increased dependence on other regions.

Other Go West inspired changes to the LRNA are merely statements of existing policy—allowing the CCP to wave the banner of progress and generosity without loosening the reigns of political control. Article 62 stipulates that autonomous areas are entitled to special treatment from fiscal authorities at higher levels.[223] This "special treatment" is intended to "increase funds for national autonomous areas to be used in expediting the economic development and social progress of national autonomous areas and gradually narrowing the gaps with developed areas."[224] This provision, however, does not signify anything new for Xinjiang. Since 1992, the XUAR has benefited more than any other province from preferential fiscal transfer policies.[225]

Interestingly, the revisions also indicate some of the difficulties facing Go West. Article 65 stipulates that the state will "guid[e] and encourage enterprises in economically developed areas to act according to the principle of mutual benefit and reciprocity to make investment in national autonomous areas and conduct economic cooperation of diversified forms."[226] This provision exposes the reality that capital will not flow west naturally. Moreover, the subsidies necessary to fund Go West are taken from the prosperous east, and may become a source of resentment. One troubling possibility is that "[t]he growing numbers of unhappy people in the west will . . . be joined by growing numbers of people in the east who are unhappy at the increasing cost to them of financing the Great Leap West."[227] CCP leaders may unwittingly promote the very beast they hope to eradicate—increased regionalism and national division.

Revisions to the LRNA do, however, offer a kernel of hope for Xinjiang's large and decrepit state-owned enterprises (SOEs). Article 61 provides that the state "formulates preferential policies, supports autonomous areas to develop foreign economic and trade activities, expands the decision-making right of production enterprises in national autonomous areas in conducting foreign trade, encourages and develops the export of local superior products, and implements

221. LRNA (2001) art. 65 (emphasis added).

222. *China's Li Peng, supra* note 207 (emphasis added).

223. LRNA (2001) art. 62.

224. *Id.*

225. Becquelin, *supra* note 38, at 71.

226. LRNA (2001), art. 65.

227. David Wall, *A Grim Future for China's Hinterlands*, JAPAN TIMES, May 17, 2000, *available at http://www.japantimes.co.jp/cgi-bin/getarticle.pl5?eo20000517a1.htm* (last visited Feb. 10, 2003).

preferential border trade policy."[228] Depending on their implementation, several aspects of this amendment have the potential to dramatically affect Xinjiang. Four-fifths of the XUAR's industrial assets remain in state hands, and this remains one of the most serious impediments to Xinjiang's development.[229] China's SOEs are lumbering and inefficient and do not facilitate growth.[230] According to the government's National Statistics Bureau, somewhere between half and two-thirds of all SOEs are in the red, and keeping them afloat requires enormous state subsidies.[231] If Article 61 translates into greater autonomy for Xinjiang's large state sector, when combined with the prospect of favorable border trade policies, there is hope yet that Xinjiang will fulfill its potential as a "regional powerhouse."[232]

The revised LRNA offers no clear prescription for accomplishing its expressed commitment to autonomous areas—none of the changes expand, or even address autonomy. Arguably, all the amendments are policies designed to recentralize decision-making powers. The amendments elucidate responsibilities or commitments of the central government to the autonomous areas, without offering the autonomous areas any expansion of power. Thus, the recent revisions to the LRNA seem to suggest greater state involvement in the affairs of autonomous areas[233]—a trend incongruous with the concept of autonomy itself.

Other legal changes designed to buttress the Go West project also help recentralize decision-making powers. In an effort to encourage foreign investment in the west, the central government has granted a number of tax incentives to foreign investment enterprises (FIEs). The incentives, which include a reduced income tax rate and import tax breaks on technological equipment, only apply to investment in projects and categories approved by the State Council.[234]

The recent revisions to the LRNA and the new tax laws are consistent with the two-pronged strategy of loudly granting Xinjang preferential economic policies, while quietly recentralizing fiscal and decision-making powers.[235] Almost all of the revisions take the form of state commitments to the autonomous areas, thereby fostering greater integration of Xinjiang.[236] Beijing has taken care to tie Xinjiang's economic development to other Chinese provinces, while also

228. LRNA (2001) art. 61.

229. Li, *Bountiful Region*, *supra* note 16. This is a stark contrast to prosperous Guangdong province, where private businesses account for two-thirds of economic output. *Id.*

230. *See* MARIA HSIA CHANG, THE LABORS OF SISYPHUS: THE ECONOMIC DEVELOPMENT OF COMMUNIST CHINA 104 (1998).

231. *See id.* at 103-08 (1998).

232. Becquelin, *supra* note 38, at 66-67. After the disintegration of the Soviet Union, China announced a wish to open Xinjiang up to the world. Economic zones, expanded border trade, and heavy investment into infrastructure and capital construction would cast Xinjiang as a regional powerhouse. *Id.*

233. LAW REVISED, *supra* note 217.

234. *New Tax Incentive for FIEs in Central and Western China*, China Legal Change, Jan. 15, 2000, *at http://www.chinalegalchange.com/2000-01/01newtax.htm* (last visited Feb. 10, 2003).

235. Becquelin, *supra* note 38, at 71-72.

236. *See e.g.*, LRNA (2001) arts. 56, 57, 60, 65, 66, 69, 71.

ensuring that large sectors of Xinjiang's economy remain under the control of the central government.[237] The amendments to the LRNA fit nicely into this strategy and in spite of the CCP's expressed commitment to regional autonomy, Go West translates into a contraction of the autonomy regime.

VII. THE ECONOMICS OF GO WEST: EMPTY PROMISES?

Some of China's most influential economists question the ability of Go West to bring prosperity to Xinjiang.[238] Hu Angang, head of the National Situation Research Center at the Chinese Academy of Sciences, points out numerous stumbling blocks for Go West:

> First, the policies of the 9th Five Year Plan cannot effectively curb the widening of regional disparities, which will continue to increase in the next five years. Second, global economic restructuring weakens the comparative advantages of the western regions in agriculture, energy, raw materials, and so on. Third, the formation of a pattern in which supply exceeds demand on the domestic market has weakened the west's relative advantages in resource exploitation. Fourth, after China joins the WTO, the opportunities will outweigh the challenges in the eastern regions, but the opposite will apply in the west.[239]

As Hu notes, in the short term, Go West is likely to disappoint. Even if Go West does meet its economic objectives in the long-term, Beijing's political hopes for the project are also suspect.

The underlying theory of the Go West strategy is that prosperity fosters greater minority acquiescence and assists integration into the Han framework.[240] In fact, there is reason to believe that economic prosperity may cut the other way. Gladney points out that "[o]ne of the unexpected consequences of economic reforms in China has been ethnic revitalization."[241] Reforms designed to bring prosperity to minorities, and thereby encourage integration into the Han mainstream, instead fostered an ethnic resurgence.[242] A former director of the CCP United Front Work Department also acknowledged this phenomenon:

> The imbalance between the economic and cultural development of different areas and different races is widening. On the one hand, the Han and minority peoples are getting closer in terms of economic and cultural connections, and on the other the consciousness of minorities, their sense of pride, nationalism and self-respect is getting stronger and stronger.[243]

Deng's economic reforms have strengthened and enhanced ethnic

237. Becquelin, *supra* note 38, at 72.
238. CHINA'S GREAT LEAP WEST, *supra* note 25, at 12.
239. *Id.*
240. *See "Asian Kosovo," supra* note 6.
241. Gladney, *Economy and Ethnicity*, *supra* note 93, at 242.
242. *Id.*
243. Sautman, *Ethnic Law*, *supra* note 158, at 285.

differences,[244] while the state's promotion of Han-centered "racial" nationalism has effectively alienated minority people.[245] Thus, even if the Go West program fulfills its economic objectives, the plan may stimulate the very forces of disintegration it was designed to counteract.

IX. CONCLUSION

Viewed within the context of China's evolving minority policy, Go West looks more like the latest incarnation of Beijing's strategy to integrate and assimilate ethnic minorities into the fabric of greater China, than it does a serious economic development and poverty alleviation plan. The economic policy is a vehicle for Beijing's political agenda in the region, and thus comparisons to the Trojan Horse are not entirely inappropriate. However, if the political benefits (i.e., national unity, social stability, border security) of Go West are to accrue, the CCP must accompany the policy of integration and assimilation with expanded autonomy and increased decision-making powers for Xinjiang. Some scholars have pointed out that the goal of Uighur separatists "is true autonomy, the kind promised in the 1950s by the People's Republic of China but never really delivered."[246]

The current system of autonomy, created in the mid-1980s and premised on a planned economy is dominated by central power and guided by central decision-making.[247] China's economic success stories suggest that those jurisdictions granted the greatest political and economic latitude—the SEZs—have also received a tremendous developmental advantage.[248] If Go West's political agenda is to have any chance of success in Xinjiang, the central government must expand the XUAR's powers of autonomy—specifically granting Xinjiang greater political and economic latitude. Ultimately, the Go West program and the promise of prosperity will not be enough to assuage separatist agitators. Furthermore, given the program's design, Go West makes little economic sense. Go West does little to alleviate poverty and fails to adequately address the role of the state in the economy—one of the primary reasons for Xinjiang's economic backwardness.[249] Even if the promised economic benefits do come to fruition, increased prosperity may have the undesired effect of pushing the "New Frontier" further from Beijing.

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244. Gladney, *Economy and Ethnicity*, *supra* note 93, at 264.

245. Sautman, *Ethnic Law*, *supra* note 158, at 286.

246. Amy Woo, *China-Xinjiang: "Great Wall of Steel" to Quell Ethnic Unrest*, INTER PRESS SERVICE, Mar. 11, 1997 (quoting Linda Benson, professor of history at Oakland University and author of THE ILI REBELLION).

247. Sautman, *Ethnic Law*, *supra* note 158, at 301.

248. *Id.* at 301.

249. *Go West*, ECONOMIST, *supra* note 16.

WTO and the Environment

REVIEW BY DON C. SMITH*

FIONA MACMILLAN, WTO AND THE ENVIRONMENT; Sweet & Maxwell, London (2001); (£146); ISBN: 0-4218-2420-4; 368 pp. (hardcover).

One of the most vexing contemporary economic, legal, and political issues is the interrelationship between and underlying tension involving trade policy and environmental policy. Indeed, there has never been a time when trade and the environment have been so inextricably interwoven. This has come about largely because of the environmental ramifications relating to where goods are produced and sold. Moreover, despite the poor showing of the world economy in the last several years, it has been estimated that trade (measured in terms of value) in merchandise exports amounted to $6,240 billion in 2002 while trade related to commercial services reached a new record of $1,540 billion.[1]

The importance of encouraging cross-border trade has long been an important element in world economic development. However, it was not until the creation of the World Trade Organization (WTO)[2] in 1995 that trade was "elevated to its true level in the international economic pantheon."[3] The objective of the WTO is to encourage, and oversee, the liberalization of trade between nation state members.[4] In the context of the WTO, nation state members agree to the avoidance of discriminatory trade practices.[5]

It is in this context that Fiona Macmillan undertakes consideration of the trade-environment issue through the prism of the WTO by looking at the protection of the environment on one hand and the liberalization of trade on the other. In so doing, the book aims to assess the way in which the WTO's legal rules and system interact with environmental concerns.

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* Adjunct Professor of Law, University of Denver College of Law, and Editor-in-Chief, Corporate Environmental Strategy: International Journal of Corporate Responsibility; LL.M. University of Leicester (England); J.D. Washburn University School of Law; B.S. University of Kansas.

1. Press Release, World Trade Organization, Trade Recovered in 2002, but uncertainty continues, (April 22, 2003), http://www.wto.org/english/news_e/pres03_e/pr337_e.htm.

2. WTO legal texts can be found at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

3. Hugo Paeman, WORLD TRADE ORGANIZTION IN ENCYCLOPEDIA OF THE EUROPEAN UNION 490 (Dinan & Desmond eds., 2000).

4. Daniel Esty, Economic *Integration and the Environment*, *in* THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY 192 (Vig, Norman & Axelrod, Regina, eds.,1990).

5. Ian & Pamela Barnes, ENVIRONMENTAL POLICY IN THE EUROPEAN UNION 153 (1999).

In terms of organization, Ms. Macmillan follows a logical and inclusive approach. Chapter 1 addresses general issues about trade and the environment. Chapter 2 considers the WTO system including rule making and conflicts between WTO agreements and multilateral environmental agreements. In Chapter 3 the institutional landscape of environmental policy is described and assessed. Chapter 4 provides a look at the General Agreement on Tariffs and Trade (GATT) and its relationship to environmental protection. Access to genetic resources and biotechnology and trade are the focus of Chapters 5 and 6. Trade in environmental services is analyzed in Chapter 7 while Chapter 8 reviews the difficulty associated with the regulation of multinational enterprises in the context of the environment. Chapter 9 provides a glimpse of the future. Finally, the book contains the full text of a number of key documents including the Agreement on Technical Barriers to Trade, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights.

In large measure, *WTO and the Environment* provides a thoughtful, if not always in depth, view of the issues involved in the environment-trade debate. This will be particularly useful to those who are not generally familiar with the issues at hand. By considering the central issues in terms of topics (e.g., the WTO system, biotechnology and trade, and trade in environmental services), the reader is provided a clear frame of reference in which to contemplate the oftentimes seemingly intractable tensions. For example, Chapter 7 presents a clear and succinct discussion about trade in environmental services including defining "environmental services," explaining why they are a WTO concern, and factors that restrict trade in environmental services.

On the other hand, however, it is unfortunate that a number of critical issues do not receive the attention they deserve. In this regard, the book generally does not really consider the role of trade sanctions in the context of achieving environmental goals. In addition, more analysis could have been undertaken in the matter of how the developed and developing countries view the underlying issues, and assessing the reason for the differences. This is a key to the overall debate since in many instances economic and even cultural differences play a role in how the two sets of countries view environmental protection and trade. Another topic that could have been expanded involves the relationship between multilateral environmental agreements and the WTO. While the book identifies this as a potential area of conflict, the discussion is brief and to some extent perfunctory. A final area that received scant attention, but could have been useful to a first time reader, would be consideration of how the world's two biggest trading powers, the European Union and the United States, view the integration of environmental protection into trade policies. In this regard, the E.U. recently tabled in the WTO a detailed list of sectors "where it is offering companies and individuals in third countries further opportunities to offer services in the E.U. market."[6] One of the types of services are those in the environmental area. This is not an insignificant

6. Press Release, European Commission, EU proposes to improve trading opportunities giving developing countries a better deal, (April 29, 2003), http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/582|0|RAPID&lg=EN&display=.

proposal in its own right since currently two out of every three jobs in the E.U. are in the service sector. Moreover, the E.U. has advocated adopting a framework of trade policy rules that would encourage the integration of sustainable development into all areas of national policy-making.[7] The contrast of the E.U. with the current U.S. position, which has shown little interest in sustainable development generally, would be useful in illustrating the differences between the two economic superpowers and explaining how these differences might influence future WTO actions involving the environment.

In the final chapter, Ms. Macmillan sets out the case for the establishment of a World Environment Organization. While this is not the first time such an organization has been contemplated,[8] Ms. Macmillan does pull together an interesting list of features that should be a part of the new organization. Having described what a World Environment Organization might look like, however, the author admits that despite the growing consideration of such an organization, " [G]reening the WTO is a more urgent priority."[9]

Bearing in mind the considerable range of issues that could be discussed in a book about the WTO and environment as well as the plethora of information that is available about nearly any WTO-related issue, *WTO and the Environment* is a work well worth having as a reference source for those who seek to understand the sometimes odd, but in nearly all cases complex, tapestry of the WTO.

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7. European Commission, Towards sustainable trade: background paper, http://europa.eu.int /comm/ trade/csc/bkg.htm.

8. IN GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE (The Institute for International Economics, 1994), Daniel Esty introduced the idea of a World Environment Organization.

9. Fiona Macmillan, WTO AND THE ENVIRONMENT 274 (Sweet & Maxwell, 2001).