

Making Bread from Broken Eggs: A Basic Recipe for Conflict Resolution Using Earned Sovereignty

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I. Introduction

The idea of state sovereignty is one of the most important and contentious issues in international law. It is an abstract concept that has evolved over time with important effects. Many recent and ongoing conflicts, such as those in Southern Sudan, Georgia, Sri Lanka, the Philippines, Aceh, Iraq, and Bougainville, revolve around the idea of sovereignty. This article examines the concept of earned sovereignty² and shows that its core elements taken alone are a step-by-step approach to keeping disputants involved in conflict resolution, while its optional elements are parts of a toolkit to be used in facilitating the step-by-step approach laid out by the core elements of the theory. A review of recent practice shows that the core elements of earned sovereignty offer a three-part roadmap for conflict resolution beginning with shared sovereignty, continuing through institution building, and ending at a determination of final status. Other parts of the theory, called optional elements, are tools stakeholders in a conflict situation may use in order to move from one core element to another until a final status solution is obtained. Though the optional elements of phased sovereignty, conditional sovereignty, and constrained sovereignty are parts of earned sovereignty they need not always be used. In-depth analysis of the peace agreements in Southern Sudan, Bougainville, and Aceh show that, while the core elements are implemented throughout, the optional elements are used to varying degrees and in some instances not at all.

Before delving too deeply into earned sovereignty, Part II of this article examines the concept of state sovereignty in international law, finding that is an important, if complicated subject, and makes the point that a step-by-step approach to accumulating sovereignty such as earned sovereignty is useful in conflict resolution. Part II concludes by finding that the concept of sovereignty is fluid in practice, and it is this fluidity that makes it particularly useful.

Part III provides a general discussion of earned sovereignty as an important and perfectible concept, and uses a bread baking analogy to show the relationships between the core elements and the optional elements. Part IV demonstrates how those relationships are expressed in international practice using Southern Sudan, Bougainville, and Aceh as case studies. Finally, Part V concludes that the core elements alone can provide a pared-down version of earned sovereignty useful in conflict resolution, while

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² See generally, Paul R. Williams, Michael P. Scharf, and James R. Hooper, *Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty*, 31 DENV. J. INT'L. L. & POL'Y 349 (2004); Paul R. Williams and Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 STAN. J. INT'L L. 347 (2004).

the optional elements retain their usefulness as tools to help implement and secure the use of the core elements.

II. *Sovereignty Is One of The Premier Issues Facing International Law In The Twenty-First Century*

Issues concerning sovereignty of states and substate entities are some of the most important and complex issues debated in the international legal community today. As Lorie M. Graham stated, “Let me just close by saying that in the last six weeks I have heard it twice stated 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 Diane Otto agreed that the idea of state sovereignty was a one of immediate importance, “There is little doubt that states’ sovereignty is being contested by contemporary developments both locally and supranationally.”⁴

Though scholars may agree that sovereignty is an important concept, discussions of sovereignty are often complicated. Sovereignty has been referred to as an imprecise, subjective term, referring to many different belief systems over time.⁵ However, sovereignty retains relevance: functionally as an organizing principle, and politically as a symbol of national self-identity.⁶ This belief is affirmed by Dan Sarooshi, who wrote on the relationship between sovereignty and international organizations, stated that, “[t]he characterization of sovereignty as an essentially contested concept has an important real-world manifestation in relation to international organizations. The concept of sovereignty being inherently unstable and in a constant state of having its core criteria subject to contestation and change has the consequence that there is no single, or indeed authoritative, definition that can be given to the concept.”⁷

³ See Lorie M. Graham, *International Law Weekend Proceedings: Self-determination for Indigenous Peoples after Kosovo: Translating Self-determination “Into Practice” and “Into Peace”*, 6 ILSA J. INT’L & COMP. L. 455 (2000).

⁴ Diane Otto, *A Question of Law or Politics? Indigenous Claims to Sovereignty in Australia*, 21 SYRACUSE J. INT’L L. & COM. 65, 100 (1995); see also Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029 (2003). Stacy, in putting forth the concept of Relational Sovereignty, argues that, “Sovereignty is a concept that reflects both the historic conditions at the time of its initial conception, and the philosophical and intellectual moods of the moment. In other words, the conceptions of sovereignty at the foundation of legal and political theory arose out of contingencies of history, rather than as the result of any immanent logical necessity in history or in the development of political thought. (fn64)”

⁵ Jenik Radon, *Sovereignty: A political Emotion, Not a Concept*, 40 STAN. J. INT’L L. 195, 208 (2004). In the Commemorative Introduction to the Commemorative Issue: *Balance of Power: Redefining Sovereignty in Contemporary International Law*, Radon goes on to say that sovereignty is a critical focal point in academic exploration because of the contemporary controversy surrounding its proper place in world order.

⁶ *Id.*

⁷ See Dan Sarooshi, *Diversity or Cacophony? New Sources of Norms in International Law Symposium: Article: The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government*, 25 MICH. J. INT’L L. 1107, 1110 (Summer 2004).

Taken at its most simple, the basic rule for international legal sovereignty is that recognition is extended to entities, states, with territory and formal juridical autonomy.⁸

Even if one takes a more complicated view of sovereignty as an abstract concept, as a practical matter, some scholars, including Stephen Krasner, believe that, “Today, stability requires more than maintaining a balance of power among strong states. Safety [...] depends on the ability of the United States and the international community to make sovereignty work – to establish democracies that improved the lives of ordinary individuals rather than of the ruling elite.”⁹

It is therefore important to study sovereignty, with all its variation, in order to better understand, prevent, and end conflicts within and among states.

This article bases its arguments regarding sovereignty upon the definition of sovereignty as a bundle of rights, including external and internal governing rights.¹⁰ It is this idea of sovereignty that allows the theory of earned sovereignty to function.

A. *Most Recent Conflicts Revolve Around Sovereignty*

Many recent and ongoing conflicts concern the central problem of sovereignty: what are powers reserved to government; who exercises which of them; and how should they be exercised?¹¹ If one looks at recent and ongoing conflicts such as those in Southern Sudan, Bougainville, and Aceh one finds that they revolve around the issues laid out as external or internal governing rights by Williams and Heymann.

B. *A Step-By-Step Approach to Accumulating Sovereignty Is Useful in Conflict Resolution*

Stakeholders involved in many conflict and newly post-conflict situations often do not know where to begin. Once the peace process begins, the parties have no idea how to proceed, and progress is often hampered by unclear, divergent objectives that lead to impasses. In many post-conflict situations conditions go unmet or important steps fail to

⁸ Stephen Krasner, *SOVEREIGNTY: ORGANIZED HYPOCRISY*, 14, Princeton University Press, Princeton (1999).

⁹ Krasner, S.J and Pascual, C., “Addressing State Failure,” *Foreign Affairs*, Vol. 84, Number 4, page 163, July/August 2005.

¹⁰ Paul Williams and Karen Heymann, *Earned Sovereignty: An Emerging Conflict Resolution Approach*, 10 *ILSA J. INT’L & COMP. L.* 437, 442-443 (2004) (The external sovereign rights may include the right to territorial integrity; the right to defend the state through the use of force; the right to govern by establishing, applying and enforcing law; the capacity to act as a legal entity for owning, purchasing, transferring property, etc.; grant of sovereign immunity for noncommercial activities and consular relations; capacity to sign international agreements; the duty to respect other nations; and the obligation to abide by international law. Internal sovereign rights may include taxation; determining governing structures and political policies; providing for social welfare; regulating the judicial system; creating internal law; and managing state infrastructures).

¹¹ See Sarooshi, *supra* note 6, at 1110 - 1112, on the contestation of sovereignty by international organizations in relation to the contestation of sovereignty between Nation-States. Sarooshi believes that these questions are the central problems surrounding the concept of sovereignty.

take place as scheduled. The importance of formulating strategies to keep disputants engaged in settlement processes should not be underestimated.¹² Recent experience in peace negotiations has proven that keeping the parties engaged in the development and implementation of a peace plan is by far the most difficult challenge, hence the importance of a guideline like earned sovereignty.

The parties themselves, regional organizations, international organizations, nongovernmental organizations (NGOs) often must work together to keep peace negotiations and peace implementation on track. Scholars have proposed, for example, that the United Nations (UN) could construct a positive sanctions regime to enhance a given community's sense of identity.¹³ If the UN placed more faith in reward-based strategies clearer rules and regulations governing their use would need to be developed.¹⁴

Earned sovereignty fits into this model of conditional engagement and positive sanctions. The core elements outline a set of steps that show constant rewards for progress in obtaining, and preserving, peace: sharing sovereignty fosters dialogue between the stakeholders; institution building fosters competence in the substate entity and provides both the stakeholders and the international community with assurance of future competency; determining final status of the substate entity, whether it is autonomy, independence, or something else entirely, gives the parties an idea of an ultimate reward, a goal that all parties can attempt to attain.

The optional elements, with the possible exception of constrained sovereignty, keep the parties on track by rewarding them for tasks accomplished during the implementation process. Phased sovereignty rewards the substate entity with increased sovereignty over time. This "timer" on sovereignty rewards the original state with peace for the duration of the phased sovereignty period. It rewards the substate entity with a gradual delegation of authority to the substate entity. It rewards both parties with a period of time in which to continue dialogue and solicit aid from the international community. Conditional sovereignty again rewards the substate entity with increased sovereignty, this time for meeting certain conditions using a quid pro quo arrangement. It rewards the original state with a quid pro quo system that allows the original state to set, to some degree, the conditions necessary for the substate entity to obtain increased sovereign rights or powers. Finally, constrained sovereignty rewards the substate entity with increased sovereignty, though not independence or, necessarily, as much sovereignty as it had originally desired. The original state is rewarded with restrictions on the conduct of the substate entity, which could provide, for example, a measure of increased security for the original state.

¹² See Edward A. Amley, Jr., *Peace by Other Means: Using Rewards in UN Efforts to End Conflicts*, 26 DENV. J. INT'L L. & POL'Y 235 (1998).

¹³ *Id* at 283.

¹⁴ *Id* at 296.

C. *The Concept of Sovereignty Is Fluid in Practice*

There are numerous articles and books that attempt to define sovereignty and statehood.¹⁵ Some even go so far as to argue that sovereignty, by its very nature, is undefinable, and it is that very lack of definition that gives the intellectual discussion surrounding the concept such great importance.¹⁶ For example, a recent article in *The Economist* showed that many Western diplomats think that it is unrealistic for Serbia to retain any kind of link to Kosovo. Some are mulling the idea of conditional independence, which would break the link with Serbia and replace the present UN mission with a new body that would have considerable reserve powers to keep the province under tight international control for years to come.¹⁷ The idea of conditional independence, similar to that of earned sovereignty, takes the idea of sovereignty out of its strict historical sense, and lends credence to the theory that a modern idea of sovereignty involves the distribution of a bundle of rights.

III. *Earned Sovereignty Is an Important and Perfectible Concept; Optional Elements Are Means To The End of Achieving Final Status*

This section will show that the concept of earned sovereignty, when pared down to the core elements, offers a step-by-step approach to using a reward-based system to keep disputants engaged in settlement processes. It will further demonstrate how, in practice, the optional elements are in fact parts of a toolkit to be used in facilitating the step-by-step approach laid out by the core elements of the theory.

A. *Core Elements: Shared Sovereignty, Institution Building, and Determination of Final Status as Eggs, Flour, and Bread as an End Product*

The core elements, outlined in this section, are the indispensable components in the step-by-step process of conflict resolution through earned sovereignty. The first step is delegation of certain responsibilities to the substate entity in shared sovereignty. The second step involves an increase in the capacity of the substate entity to undertake those responsibilities through institution building. Finally, the third step, determination of final status, involves determining a level of responsibility to be exercised by the substate entity that will satisfy the original state, the substate entity, and the international community.

¹⁵ See generally e.g. Krasner; Scott Pegg, *International Society and the De Facto State*, 187-192, Ashgate Publishing Company, Brookfield (1998). Pegg argues, quoting Victor Li, that ‘From an *international law perspective*, a *de facto* entity may clearly conduct foreign relations with countries which have not extended *de jure* recognition to it...’ and that *de facto* states already have some degree of “juridically cognizable” existence. He discusses how the status of *de facto* statehood could be conferred upon Eritrea before independence, Tamil Eelam, The Republic of Somaliland, the Turkish Republic of Northern Cyprus. He also briefly suggests that, at some point in history, Biafra, Rhodesia after its unilateral declaration of independence, Charles Taylor’s Liberia, the Southern Sudan, Chechnya, Krajina, the Bosnian Serb Republic, Kosovo, the Trans-Dniester region of Moldova, Abkhazia, Kurdistan, the Karen and Shan states of Myanmar, the Muslim-controlled areas of Mindanao in the Philippines, the Khmer Rouge-controlled areas of Cambodia, and Taiwan, also qualify as potential *de facto* states.

¹⁶ See Sarooshi, *supra* note 7, at 1110-1111.

¹⁷ *ECONOMIST*, *Independence dreams: A Serbian province heads towards full independence*, 51-52, Jun. 4 – Jun. 10, 2005.

The entire process could be analogized to baking bread. The parties must begin with eggs and flour and desire the baking process to result in bread.

i. *Shared Sovereignty: the Eggs*

Each case of earned sovereignty is characterized by an initial stage of shared sovereignty, whereby the state, the substate entity, and possibly the international community may exercise some sovereign authority and functions over a defined territory.¹⁸ Which parties exercise what parts of sovereignty over the substate entity varies from case to case. For example, in Kosovo, though Serbia retains legal sovereignty over the province it has been administered by the United Nations for years, with some authority delegated to a local government.¹⁹ In other situations, such as Bougainville, sovereignty is shared between the state and the substate entity, without any administrative authority being ceded to the international community.²⁰ This still allows for the participation of the international community in a supporting role.²¹

ii. *Institution Building: the Flour*

The substate entity, frequently with the assistance of the international community, undertakes to construct new institutions for self-government, or modify those already in existence, to develop the institutional capacity for exercising increased sovereign authority.²² This institution building often takes place during the period of shared sovereignty and sometimes prior to the determination of final status. It can come in many forms, from the creation of new administrative organizations, as is currently happening in Southern Sudan, to the modification of already existing institutions, such as the Public Service of Bougainville, discussed *infra*. The methods of institution building are determined on a case-by-case basis, taking into account the need for the new institutions to aid in the reconciliation process and possibly implementing confidence-building measures in order to bring a satisfactory settlement to the conflict.

iii. *Final Status: Bread as an End Product*

The third core element is the determination of the final status of the substate entity and its relationship to the parent state, which is invariably conditioned on the consent of the international community based upon international recognition.²³ This element may be

¹⁸ See Williams and Jannotti Pecci, *supra* note 2 at 355.

¹⁹ *Id* at 358-359.

²⁰ See generally Bougainville Peace Agreement, Aug. 30, 2001, Papua N.G.-Bougainville, available at http://www.usip.org/library/pa/bougainville/bougain_20010830.html (last visited Sep. 26, 2006) [hereinafter Bougainville Peace Agreement].

²¹ See e.g. Bougainville Peace Agreement, *supra* note 20; see also Memorandum of Understanding Between the Government of the Republic of Indonesia and the Free Aceh Movement, Aug. 15, 2005 [hereinafter MoU], available at http://www.thejakartapost.com/RI_GAM_MOU.pdf, (last visited Jul.13, 2006), signed August 15, 2005 (specifically the provisions relating to the establishment of the Aceh Monitoring Mission (AMM)).

²² Williams and Jannotti Pecci, *supra* note 2 at 355.

²³ Williams and Jannotti Pecci, *supra* note 2, 355-356.

decided at any time during the peace process: before an agreement is signed, in the agreement itself, or after implementation of the agreement.

B. *Optional Elements as Means to Achieving the End of Final Status: the Timer, the Yeast and Counting Calories*

In the original presentation of earned sovereignty certain processes were attached to the core elements and were termed optional elements.²⁴ The optional elements of phased sovereignty, conditional sovereignty, and constrained sovereignty are outlined below. Section C, *infra*, will discuss how the optional elements are not specific parts necessary for a conflict resolution scenario to be termed earned sovereignty. Instead, they are tools used to move from one core element to another, eventually arriving at a determination of final status.

i. *Phased Sovereignty: The Timer*

Phased sovereignty entails the accumulation by the substate entity of increasing sovereign authority and functions over a specified period of time prior to the determination of final status.²⁵ An example would be setting a specified time for a referendum on independence and, until the date of the referendum, allowing the substate entity participation in the national government so that it could gain competency and experience within a pre-determined timeframe.²⁶ Application of phased sovereignty to the conflicts between Sudan and Southern Sudan, Papua New Guinea and Bougainville, and the Republic of Indonesia and the Free Aceh Movement (GAM) are discussed in Section IV.

Phased sovereignty is the timer in the bread baking analogy. Once the ingredients are mixed – at least two parties, shared sovereignty, and institution building – they are put in the oven of phased sovereignty and the timer is set. While the international community waits, and possibly participates in institution building, the processes take place that will eventually produce a final status solution acceptable to all stakeholders

ii. *Conditional Sovereignty: The Yeast*

Conditional sovereignty may be applied to the accumulation of increased sovereign authority by the substate entity, or it may be applied as a set of standards to be achieved prior to the determination of the substate entity's final status.²⁷ The first manifestation of this tool involves a quid pro quo arrangement between the two parties. The example of the Roadmap to Peace in the Israeli/Palestinian conflict springs readily to mind. The Roadmap is set out as a “performance-based plan” under which the parties must perform

²⁴ Williams and Jannotti Pecci, *supra* note 2, 351, 355-356, 366-370.

²⁵ Williams and Jannotti Pecci, *supra* note 2 at 356.

²⁶ See generally the discussion of the Sudan and Bougainville peace agreements *infra*.

²⁷ Williams and Jannotti Pecci, *supra* note 2 at 356.

certain obligations in order to ensure progress through the different phases of the plan.²⁸ Failure to comply with obligations impedes progress under the Roadmap.²⁹ The second manifestation of this tool involves the substate entity fulfilling a number of criteria, with the eventual return on their investment being a determination of final status.

To once again use a cooking analogy, conditional sovereignty is like using certain critical ingredients to make a dish. The quid pro quo aspect is embodied in the idea that if one wants to make chocolate chip cookies one must use chocolate chips. The important factor is the use of chocolate chips. If the baker fails to use chocolate chips plain cookies result. The second interpretation of conditional sovereignty, which involves fulfilling a number of steps before attaining final status, could be analogized to making an entire three-course meal, advertising chocolate chip cookies as dessert. If the host forgets to add the chocolate chips the guests may leave disappointed.

iii. *Constrained Sovereignty: Counting Calories*

The third optional element, constrained sovereignty, consists of applying limitations on the sovereign authority and functions of the new state.³⁰ In analyzing instances of constrained sovereignty it is especially useful to think of sovereignty as a bundle of rights. For an entity to be entirely “sovereign,” when using the bundle of rights theory, it must possess all of the external and internal governing rights described in Section II. In constrained sovereignty some of the governing rights are not devolved to the substate entity. Instead, they are retained by the original state or, in some instances, transferred to the international community.

Going back to the bread analogy, constrained sovereignty is what happens when, for whatever reason, the parties bake too little bread. The parties have added all the right ingredients, the bread cooked for the appropriate time, they followed all the appropriate steps in the recipe, and now it is ready to eat. The bread is perfectly good but there is too little of it. It may be necessary for each party to get less bread than they had hoped to ensure that all parties get a piece, whether that decision is taken amongst the parties themselves or imposed by an outside facilitator (the host of the party, to follow the analogy). Most would agree, however, that it is better to have some bread than none at all.

C. *Optional Elements are Means to the End of Final Status*

The optional elements of earned sovereignty, as outlined above, are therefore tools to facilitate the transition from one core element to another, with the eventual goal of determining an acceptable final status for the substate entity. To continue the analogy above, final status is the ability to eat bread. It is the ability to exercise mutually

²⁸ See *A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, Apr. 30, 2003, available at <http://www.un.org/News/dh/mideast/roadmap122002.pdf> (last visited Jul. 9, 2006) [hereinafter Roadmap].

²⁹ See Roadmap.

³⁰ Williams and Jannotti Pecci, *supra* note 2 at 356.

acceptable levels of whatever may be called “sovereignty” by the state, the substate entity, and the international community.

IV. *Demonstrative Cases*

Earned sovereignty is currently being used, in practice if not in name, in a number of conflict and post-conflict situations around the world.³¹ In order to illustrate the breadth of its use, and the diverse ways in which its core and optional elements can be used, or interpreted as being used, the author has chosen to examine the peace agreements that have been, and are being, implemented in Southern Sudan, Bougainville, and Aceh. These conflicts were selected because they resulted in peace agreements that were relatively successful and could therefore serve as guides to the future application of earned sovereignty.

A. *Sudan*

The signing of the Comprehensive Peace Agreement (CPA) between the Government of Sudan (GOS) and the Sudan People’s Liberation Movement/Army (SPLM/A) marked the conclusion of a 21-year civil war that cost the lives of 1.5 million people.³²

As an introduction, it is important to note that the CPA is a name given to a collection of other Agreements and Protocols including, but not limited to, the Machakos Protocol, the Agreement on Security Arrangements, and the Protocol on Power Sharing.³³ For that reason the CPA is certainly the most complicated peace agreement examined in this article, if not one of the most Byzantine drafted in recent memory. In order to provide specific examples of the CPA’s provisions, particularly as they relate to the theory of earned sovereignty and the concept of sovereignty as a bundle of rights, this article will focus on the Implementation Modalities of the Protocol on Power Sharing dated 26 May 2004. In order to provide for ease of understanding the author will continue to refer to the agreement generally as the CPA.

The CPA, specifically the portion noted above, is replete with examples of all the elements of earned sovereignty. It satisfies the core elements because it contains numerous examples of shared sovereignty and institution building and provides specific means for the determination of final status. It also contains examples of all three of the optional elements: phased sovereignty, conditional sovereignty, and constrained sovereignty. Interestingly, and importantly, a number of the provisions do not fit neatly

³¹ See generally Williams and Jannotti Pecci, *supra* note 2; See also, Karen Heymann, *Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust*, 19 AM. U. INT’L L. REV. 153 (2003).

³² Country Profile: Sudan, at http://news.bbc.co.uk/1/hi/world/middle_east/country_profiles/820864.stm, (last visited July 10, 2006).

³³ See Agreement Between the Government of the Sudan (GOS) and the Sudan People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/SPLA) on Implementation Modalities of the Protocols and Agreements (2004), available at http://www.usip.org/library/pa/sudan/cpa01092005/implementation_coversheet.pdf (last visited Jul. 13, 2006).

into the above categories. Instead, a number of them are hybrids of two (or more) of the elements that make up earned sovereignty.

The CPA contains multiple examples of shared sovereignty.³⁴ Perhaps the most important example, in terms of the political landscape of both the Sudan and Southern Sudan, is process outlined by the parties, and followed by them, in drafting an interim constitution. In April 2005 the National Constitution Review Commission convened to draft the Interim National Constitution, which was ratified July 6, 2005.³⁵ The National Constitution Review Commission (NCRC) is a body made up of representatives of both stakeholders tasked with drafting the interim constitution prior to the election of regional

³⁴ See generally Implementation Modalities of the Protocol on Power Sharing (2004), available at http://www.usip.org/library/pa/sudan/cpa01092005/implementation_agreement.pdf (last visited Jan. 30, 2007) [hereinafter Implementation Modalities of the Protocol on Power Sharing] (Though this article only discusses two examples in detail the CPA also utilizes shared sovereignty in a number of other situations, including the establishment of the referendum commission (activity 1(b)); the plan for repatriation, resettlement, reintegration, rehabilitation, and reconstruction (activity 2); establishment of the Assessment and Evaluation Commission (AEC) (activity 3); Improvement of institutions and arrangements created under the Agreement to making the unity of Sudan attractive to the people of southern Sudan (Activity 4); guarantees to safeguard agreement against Unilateral revocation and abrogation (Activity 5); the national reconciliation and healing process (NHRP) (Activity 7); the national population census (NPC) (Activity 8); the enactment of the National Electoral Law, including establishment of the National Electoral Commission, holding general elections, presidential elections, and elections for the post of President of the government of southern Sudan (Activity 9); the Council of States (Activity 11); establishment and convening of the National Assembly (Activity 12); determination of the scope of legislative competency of the National Assembly and the Council of States, respectively (Activity 13); election of Speakers, Deputy speakers, and other officers of the National Legislature (Activity 14); defining the functions of the two Vice Presidents (Activity 16); specification of appointments made by the President with the consent of the First Vice President (Activity 17); matters in respect of which the President shall take decisions with the consent of the First Vice President according to the Protocols and Agreements (Activity 20); representativeness of the administration of the National Capital (Activity 21); representation of the people of Sudan in the law enforcement agencies in the National Capital and provision for their adequate training (Activity 22); appointment of a special commission to ensure that the rights of non-Muslims are protected in the National Capital (Activity 23); clustering of National Ministries (Activity 25); allocation of seats on the National Executive (Activity 26); information campaign in all languages to popularize the Peace Agreement and foster national unity, reconciliation and mutual understanding (Activity 27); Establishment of the National Civil Service Commission (NCSC) (Activity 28(b)); establishment of the National Security Council (NSC) (Activity 31); establishment of the National Security Service (NSS) (Activity 32); identification of the security organs of the two parties and their assets (Activity 34); development and promotion of national languages, specifically enactment of a founding law (Activity 35(a)); establishment of the Human Rights Commission (Activity 36(b)); the Constitutional Court Act, including establishment of the Constitutional Court (Activity 37); establishment of the National Judicial Service Commission (Activity 38); Southern Sudan representation in the Constitutional Court, National Supreme Court, and other national courts in the Capital (Activity 39); submission and approval of the CPA to the National Assembly (NA) and National Liberation Council (NLC) (Activity 40); preparation of the Constitutional Text by the NCRC (Activity 42); preparation of other legal instruments as stipulated in 2.10 of PSP (Activity 43); organization of an inclusive constitutional review process (CRP); determination of North/South border of 1/1/56 (Activity 46); and establishment of the Abyei Area Council (Activity 56)).

³⁵ United States Department of State Background Note: Sudan, Bureau of African Affairs, January 2006, available at <http://www.state.gov/r/pa/ei/bgn/5424.htm> (last visited Sep. 26, 2006); see also Implementation Modalities of the Protocol on Power Sharing, *supra* note 34, Activity 41.

assemblies, particularly in Southern Sudan.³⁶ A second equally important example is the institution of the Presidency. Under the terms of the CPA the institution of the Presidency shall be composed of the President, the First Vice President, and the Vice President.³⁷ Subsequent negotiations determined that the First Vice President shall be the President of Southern Sudan. Following the death of Dr. John Garang, Salva Kiir was made the president of Southern Sudan and is currently acting as First Vice President of Sudan.³⁸ Under the system developed in the CPA the President shall take some decisions with the consent of the First Vice President.³⁹ This executive structure therefore provides an important and potentially powerful example of shared sovereignty, in which the national government cannot act without the consent of the substate entity.

The CPA similarly contains many examples of institution building. Most of the institutions of the newly created government of Southern Sudan must be cut from whole cloth.⁴⁰ The CPA specifically calls for the establishment of no less than twenty-one new institutions at the state and national levels.⁴¹ The National Electoral Commission, the National Assembly, the Institution of the Presidency, the Human Rights Commission, the Constitutional Court, and the Judiciary of Southern Sudan are just a few examples of new institutions created by the CPA.⁴²

The international community in particular has recognized the importance of institution building since the signing of the CPA.⁴³ In his report on the Sudan from January 2005, some six months after the signing of the CPA's Protocols, United Nations Secretary General Kofi Annan (Secretary General Annan) stated that the assistance of the UN

³⁶ See Machakos Protocol, Jul. 20, 2002, para. 3.1.2, available at http://www.usip.org/library/pa/sudan/sudan_machakos07202002_toc.html (last visited Jul. 13, 2006). See also Implementation Modalities of the Protocol on Power Sharing, *supra* note 34, at Activity 41.

³⁷ See Implementation Modalities of the Protocol on Power Sharing, *supra* note 34, at Activity 15.

³⁸ See, The CPA Monitor: Monthly Report on the Implementation of the CPA, May 2006 [hereinafter May CPA Monitor], para. 13, available at http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_may06.pdf (last visited January 30, 2007).

³⁹ See Implementation Modalities of the Protocol on Power Sharing, *supra* note 34, Activity 20.

⁴⁰ International Crisis Group, Sudan's Comprehensive Peace Agreement: The Long Road Ahead (2006), at http://www.crisisgroup.org/library/documents/africa/horn_of_africa/106_sudan_comprehensive_peace_agreement_long_road_ahead_web.doc (last visited Jul. 11, 2006) ("With more than 50 national bodies and commissions to be formed, multiple systems and levels of governments (with the GOSS and southern state governments to be formed almost from scratch), the parties, partners and observers are understandably overwhelmed.")

⁴¹ See generally Implementation Modalities of the Protocol on Power Sharing, *supra* note 34.

⁴² See Implementation Modalities of the Protocol on Power Sharing, *supra* note 34, Activities 9, 12, 15, 36, 37, and 52.

⁴³ See *Report of the Secretary General on the Sudan*, U.N. SCOR, U.N. Doc. S/2005/57, at 7 (2005). (To avoid these risks, strong and concerted strategies at both the national and international levels are required. The Sudanese leadership, in collaboration with the international community, will need to identify ways to prevent competing interests from derailing the process. To promote the inclusive implementation of the Comprehensive Peace Agreement, the new Sudanese leadership will have to promote its acceptance beyond its immediate constituencies to the wider body politic and civil society. The new Government must take the lead, with the help of the international community, in starting to restore confidence and reconciliation in an all-inclusive national process.)

should be an all-inclusive national process. The UN mission, he said, should work with the government of Southern Sudan (GOSS), including in the area of policy formation and planning. A high-level representative of the UN mission should be present at all times in Southern Sudan.⁴⁴ The Secretary General also said that the UN mission should *include* a public information component to assist the Government of National Unity (GNU) and the GOSS in providing an effective information capacity.⁴⁵ A civilian police component should advise and assist both stakeholders in re-examining roles and functions [of police] and reviewing methods of operation.⁴⁶ The rule of law section would be tasked to work with international partners to support legislative, executive and judicial institutions of GNU and Southern Sudan, including good offices and technical assistance in areas such as constitutional development and the strengthening of institutions and systems.⁴⁷ Finally, the section of the UN mission responsible for human rights should work with both parties to develop a local capacity including establishment of a Human Rights Commission.⁴⁸

⁴⁴ *See id* at 12

(While the mission's headquarters would be based in Khartoum, a special office would be established in Rumbek, which would relocate should the government of southern Sudan decide to move its capital to another location. This office would be charged with working with the government of southern Sudan, as well as managing the peace support operation, including policy formation and planning in the south. Pending a final decision on the mission's management structure for the interim period, at least one of the four members of the mission's senior leadership (namely, my Special Representative, his two deputies and the Force Commander) would be present at all times in southern Sudan.)

⁴⁵ *See id* at 13

(The public information component of this mission would seek to offer a clear, impartial, reliable and credible voice and information source for all stakeholders in the peace process. The component would further assist the Government of National Unity and the government of southern Sudan by providing an effective information capacity, including through local and national radio, television and newspaper outlets, in order to promote understanding of the peace process and the role a United Nations peace support operation would play among local communities and the parties.)

⁴⁶ *See id* at 15

(The civilian police component of the mission would work in close collaboration within bilateral international partners to advise and assist existing government police structures and the SPLM/A police force as they re-examined their roles and functions and reviewed their methods of operation to move away from military-style policing, which evolved in wartime, towards a style involving direct interaction with the community.)

⁴⁷ *See id* at 16

(The rule of law component would ensure that the peace support operation was able to work closely with other international partners to support the establishment and operation of essential legislative, executive and judicial institutions of the Government of National Unity as well as the government of southern Sudan. Accordingly, the rule of law component would offer good offices advice and technical assistance to support key processes in a number of areas, including constitutional development and the strengthening of legislative, judicial and correctional institutions and systems.)

⁴⁸ *See id* at 16-17

(The human rights component of the peace support operation would work with the parties to develop and strengthen national and local capacity for the protection and promotion of human rights, including the development of an independent and effective national Human Rights Commission, which would be of particular importance. The human rights component, working closely with the rule of law component and other international partners, would also assist national stakeholders in the development of a transitional justice strategy in accordance with the lessons

In June 2006, Secretary General Annan delivered another report to the Security Council on the Sudan.⁴⁹ In it, he noted that the parties continued to make slow progress towards full implementation of the CPA and that, while the main structures are in place, many of the commissions charged with overseeing the implementation process are not being used effectively.⁵⁰ Problems still exist with the formation and deployment of Joint Integrated Units.⁵¹ He expressed optimism in that Sudan People's Liberation Army (SPLA) and Sudan Armed Forces (SAF) soldiers were being redeployed on schedule, that the Ceasefire Joint Military Committee met regularly, and that the Assessment and Evaluation Commission has formed four working groups.⁵² He noted that a number of important commissions have yet to meet, and that though the membership of the National Constitutional Review Commission has been chosen, its original directive of ensuring the independence of CPA institutions was omitted from its new mandate.⁵³ The United Nations Mission in Sudan (UNMIS) had intensified efforts aimed at promoting reconciliation and conflict resolution in Southern Sudan, though tensions were increasing and its efforts were limited by various constraints.⁵⁴ In March 2006 UNMIS assisted the GOSS in organizing its first review of rule of law institutions in Southern Sudan, and continued to provide policy expertise and support for reform of correctional institutions in the Sudan.⁵⁵

Secretary General Annan reported that in March 2006 the Sudan Consortium, which was organized by the World Bank, the International Monetary Fund (hereinafter IMF), and the UN, brought together representatives of the GNU, the GOSS, and 22 donor countries in Paris.⁵⁶ Though donors again expressed support for a Multi-Donor Trust Fund managed by the World Bank disbursement remained very slow.⁵⁷

In his concluding observations, the Secretary General emphasized that the greatest challenge for Southern Sudan was creation of a true peace dividend. He believed that the prospects for long-term stability would suffer if the gap between peace and a tangible improvement in peoples living conditions was not bridged. In order for this to occur, he believed that the international community must ensure the provision of adequate resources for reconstruction and development.⁵⁸

learned and experience identified in my report on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).).

⁴⁹ See generally *Report of the Secretary General on the Sudan*, U.N. SCOR, U.N. Doc. S/2006/426 (2006).

⁵⁰ *Id.* at 1.

⁵¹ *Id.*

⁵² *Id.* at 2.

⁵³ *Id.*

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 7.

⁵⁶ *Id.* at 9.

⁵⁷ *Id.*

⁵⁸ *Id.* at 12.

The third core element of earned sovereignty, determination of final status, will be determined by referendum, tentatively scheduled for 2011.⁵⁹ Activity 1 in the CPA is broadly titled “Self determination Referendum for the people of South Sudan” and sets forth that a referendum will take place six months prior to the end of the Interim Period.⁶⁰ Per the Machakos Protocol, the Interim Period is a period of six years following the Pre-Interim Period, which began with the signing of the CPA and extended for six months thereafter.⁶¹

The CPA therefore contains all of the core elements of earned sovereignty. In essence, using these three basic tools, Southern Sudan should be able to obtain some form of increased sovereignty; that is, it can add to the bundle of sovereign rights it already holds.

The CPA is also interesting, however, because it illustrates utilization of at least two of the so-called conditional elements of earned sovereignty: phased sovereignty and conditional sovereignty.

Phased Sovereignty, the accumulation of increasing sovereign authority and functions over a specified period of time, can be seen throughout the CPA, wherein certain powers are granted to the Sudan People’s Liberation Movement (SPLM) and, later, the fledgling GOSS. This process was to be implemented along a timeline, beginning, as discussed above, with the signature of the CPA and passing through a Pre-Interim Period, an Interim Period, enactment of the Interim National Constitution (INC) and finally ending in the Self-determination Referendum for the people of South Sudan. This is probably the single greatest example of phased sovereignty in the CPA⁶² although whether Southern Sudan will obtain full sovereignty is dependant upon the outcome of the referendum. Other examples of phased sovereignty, that do not rely on the outcome of the Self-determination Referendum, include conducting a census two years into the Interim Period,⁶³ enactment of the National Electoral Law within six months from the start of the Interim Period, establishment of the National Electoral Commission within one month after the adoption of the Law, and general and presidential elections to be held not later than the end of the fourth year of the Interim Period,⁶⁴ and establishment and convening of the Council of States and the National Assembly within two weeks of the adoption of the INC.⁶⁵ At the outset, most of the provisions of the CPA were to happen within specified timeframes.⁶⁶

⁵⁹ See May CPA Monitor, *supra* note 38 at para. 11 (“President Bashir visited Juba and Rumbek on 14 February 2006 for the first time since Dr. Garang’s funeral [...] During his speech, President Bashir noted the right of the people of Southern Sudan to vote freely in the referendum in 2011.”).

⁶⁰ See Implementation Modalities of the Protocol on Power Sharing, *supra* note 34 at Activity 1.

⁶¹ See Machakos Protocol, *supra* note 36 at paras. 2-2.5.

⁶² See Machakos Protocol, *supra* note 36 at para. 2.5; *see also* Implementation Modalities of the Protocol on Power Sharing, *supra* note 34 at Activity 1.

⁶³ See Implementation Modalities of the Protocol on Power Sharing, *supra* note 34 at Activity 8.

⁶⁴ See Implementation Modalities of the Protocol on Power Sharing, *supra* note 34 at Activity 9.

⁶⁵ See Implementation Modalities of the Protocol on Power Sharing, *supra* note 34 at Activities 11-12.

⁶⁶ See, e.g., Implementation Modalities of the Protocol on Power Sharing, *supra* note 34 (Review of the feasibility of the dates set for census and elections (Activity 10), Preparation of the constitutional text by the NCRC (Activity 42), submission and approval of the CPA to the National Assembly and the National Liberation Council (Activity 40), establishment of an inclusive Southern Sudan Constitutional Drafting

A number of them have come to pass, though not always as scheduled. President Bashir signed the INC into law on July 9, 2005, and the three-member Presidency was inaugurated that day. The National Legislature, which consists of the National Assembly and the Council of States, was formed and convened on August 31, 2005. The Government of National Unity (GNU) was established by four decrees issued by President Bashir on September 20, 2005 (this was done after considerable delay), and was formed largely in accordance with the CPA power-sharing formula. Members of the GNU were sworn in on September 22, 2005. On December 7, 2005, President Bashir established the National Judicial Service Commission. The enactment of the National Judicial Service Commission Act properly passed through the National Assembly but bypassed the NCRC. There was considerable difficulty with the establishment of the NCRC.⁶⁷

Conditional sovereignty, where certain benchmarks must be met for increased sovereign authority to be conferred upon the substate entity in a quid pro quo fashion, is also evident in the CPA. For example, the Council of Ministers will be established prior to elections and within thirty days after the adoption of the INC.⁶⁸ It therefore follows that the INC had to be adopted by both parties for the Council of Ministers to be established.

The final optional element, constrained sovereignty, is not explicitly used in the CPA because it does not provide for restrictions on the sovereignty of Southern Sudan following the determination of final status. One may infer from the text of the Machakos Protocol and the CPA that, should Southern Sudan decide not to remain part of Sudan in the 2011 referendum it will be entitled to the entire bundle of rights granted to a sovereign nation.

The argument could be made, however, that prior to the 2011 referendum a form of constrained sovereignty is in effect in Southern Sudan. This is similar to the current situation in Bougainville, which will be discussed below. The most striking examples of

Committee (SSCDC) (Activity 47), establishment of the first Southern Sudan Assembly (Activity 48), establishment of the Council of Ministers of the Government of Southern Sudan (Activity 51), establishment of the Judiciary of Southern Sudan (Activity 52), appointment of the President and Justices of Southern Sudan Supreme Court, Courts of Appeal and Judges of Other Courts (Activity 53), establishment of state legislatures (Activity 55), establishment of the Abyei Area Council (Activity 56), drafting and adoption of the state constitutions (Activity 58), and establishment of state Council of Ministers (Activity 59)).

⁶⁷ See May CPA Monitor, *supra* note 38 at paras. 13, 15, 16, 23, 30, and 38-41; see also The CPA Monitor: Monthly Report on the Implementation of the CPA, November 2006 [hereinafter November CPA Monitor], paras. 1, 3-7, available at http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_nov06.pdf (last visited January 30, 2007) (The NCRC originally prepared the INC. President Bashir re-established the NCRC by decree on 7 January 2006. Its mandate has been controversial, as President Bashir's decree did not mention some functions assigned to the NCRC by the CPA. The NCRC published a new Presidential decree on 8 October 2006 which was originally dated 6 June 2006. This decree confirmed the mandate of the NCRC to prepare legal instruments as required to give effect to the CPA and confirmed a number of additional functions, including preparing model State constitutions in compliance with the INC and the Interim Constitution of South Sudan (ICSS)).

⁶⁸ See Implementation Modalities of the Protocol on Power Sharing, *supra* note 34, at Activity 18.

the use of constrained sovereignty in the pre-referendum period are the degree of control over Southern Sudan that is exercised by the GNU in Khartoum, as discussed above, and the integration of SPLA forces into Joint Integrated Units (JIUs).⁶⁹

B. *Bougainville*

The Bougainville peace agreement between Papua New Guinea (PNG) and separatists on the island of Bougainville is probably one of the most comprehensive and successful applications of earned sovereignty. The peace agreement, signed in 2001 in Arawa, put an end to a conflict on the island that had taken the lives of between 15,000 and 20,000 people. It also provided a framework for the election of an autonomous Bougainville Government.⁷⁰ The PNG Government gazetted an agreed Constitution for the Autonomous Region of Bougainville in December 2004 that paved the way for elections and the establishment of an autonomous Bougainville Government.⁷¹ In June 2005 Bougainville elected a president for its new autonomous government. This election was seen as a key test of the 2001 peace agreement.⁷²

An in-depth examination of the Bougainville peace agreement shows that the stakeholders made use of all the elements of earned sovereignty. The text of the agreement includes provisions outlining how sovereignty is to be shared, providing for institution building, and includes a strategy for achieving final status. It uses the means of phased sovereignty, constrained sovereignty, and to a lesser extent conditional sovereignty to arrive at the endpoint of determining the final status of Bougainville.

Two “lists” comprise the shared sovereignty component. Section 5 of the peace agreement delineates a two list system for dividing powers and functions between the National Government and the autonomous Bougainville Government.⁷³ According to the peace agreement the two lists will be “as exhaustive as possible” in outlining all the powers and functions of government, and for any issues that arise during the drafting of constitutional amendments, the agreement provides that the parties will consult and agree

⁶⁹ May CPA Monitor, *supra* note 38 at para 10 (The Joint Integrated Units (JIUs) Act was endorsed by the National Assembly on 17 January 2006. The Act covers the establishment of the JIUs, their mandate, areas of deployment, uniform and common doctrine. It also specified the rules relating to the formation of the Joint Defense Board (JDB) and its mandate); *see also* The CPA Monitor: Monthly Report on the Implementation of the CPA, December 2006 [hereinafter December CPA Monitor], paras. 308-316, *available at* http://www.unmis.org/common/documents/cpa-monitor/cpaMonitor_dec06.pdf (last visited January 30, 2007) (Discussing the current status of the JIU Act, JIU strength and composition, and the JDB).

⁷⁰ *See* Country profile: Papua New Guinea, http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1246074.stm, (last visited Sep. 29, 2006). *See also*, Australian Government Department of Foreign Affairs and Trade: Bougainville Peace Process, <http://www.dfat.gov.au/geo/png/bougainville/> (last visited Sep. 26, 2006).

⁷¹ Australian Government Department of Foreign Affairs and Trade: Bougainville Peace Process, *available at* <http://www.dfat.gov.au/geo/png/bougainville/>, (last visited Sep. 26, 2006).

⁷² *President Elected in Bougainville*, <http://news.bbc.co.uk/1/hi/world/asia-pacific/4612685.stm> (last visited Sep. 26, 2006).

⁷³ *See* Bougainville Peace Agreement, Aug. 30, 2001, Papua N.G.-Bougainville, § 5, *available at* http://www.usip.org/library/pa/bougainville/bougain_20010830.html (last visited Jan. 30, 2007) [hereinafter Bougainville Peace Agreement].

on how they shall be resolved.⁷⁴ It further provides that the constitutional laws implementing the peace agreement will supply a mechanism to deal with overlap and conflict between the two lists.⁷⁵ The first list, which is provided in the peace agreement itself, demarcates the functions and powers of the National Government.⁷⁶ The “list” of powers and functions provided to the autonomous Bougainville Government is not actually a list, but rather a catch-all provision stating that the autonomous Bougainville Government shall exercise the powers and functions not already delegated to the National Government, beginning with those available to provincial governments under the National Constitution, and to be developed while drafting the Constitutional laws implementing the peace agreement.⁷⁷ Policing functions will also be divided between the autonomous Bougainville Government and the National Government.⁷⁸ These examples show how the state, in this case Papua New Guinea, shares sovereignty with the substate entity, the autonomous Bougainville Government, prior to the determination of final status by referendum.⁷⁹

The institution building component of earned sovereignty is satisfied in the peace agreement itself by an interesting mechanism that allows the government of an autonomous Bougainville to gradually assume control of various responsibilities. One of the best examples of institution building in the Bougainville peace agreement comes in the provisions related to the establishment of the Bougainville Public Service. The National Government’s Public Service apparatus will remain in Bougainville in the beginning, and then will undergo a transitional period that will result in their conversion in to a Bougainville Public Service, responsible to the autonomous Bougainville Government.⁸⁰ Similar provisions apply to the Bougainville Police and the Bougainville Correctional Institutional Services (CIS).⁸¹ In an interestingly hands-off approach on the part of the government of Papua New Guinea, the peace agreement provides that the costs of maintaining the post-agreement, pre-referendum level of autonomy in Bougainville will be shared by the autonomous Bougainville Government and the National Government.⁸² The autonomous Bougainville Government will be able to collect Bougainville taxes as well as, by agreement, certain National-level taxes.⁸³

⁷⁴ See *id* at paras. 47-48, available at http://www.usip.org/library/pa/bougainville/bougain_20010830_B_04_06.html (last visited Jan. 30, 2007),

⁷⁵ See *id* at para. 49.

⁷⁶ See *id* at para. 51.

⁷⁷ See *id* at para. 52.

⁷⁸ See *id* at paras. 209-239, available at http://www.usip.org/library/pa/bougainville/bougain_20010830_B_10_12.html (last visited Jan. 30, 2007).

⁷⁹ See *id* at para. 312, available at http://www.usip.org/library/pa/bougainville/bougain_20010830_C_F.html#C (last visited Jan. 30, 2007) (Though para. 312 is not marked, its location can be inferred from the various sub-sections that fall between paras. 311 and 315).

⁸⁰ See *id* at paras 201-208, available at http://www.usip.org/library/pa/bougainville/bougain_20010830_B_10_12.html (last visited Jan. 30, 2007).

⁸¹ See *id* at paras 209-262.

⁸² See *id* at para. 136, available at http://www.usip.org/library/pa/bougainville/bougain_20010830_B_07_09.html (last visited Jan. 30, 2007).

⁸³ See *id* at para. 146.

In a briefing to the UN Security Council, Assistant Secretary General Danilo Turk, of the UN Department of Political Affairs, showed the international community's continued commitment to institution building in Bougainville, as evidenced in a May 2004 UN Security Council press release.⁸⁴ Mr. Türk's statements show that the Bougainville Interim Provisional Government received support from the Law and Justice Programs of AusAID, NZAID, the Australian Federal Police, the United Nations Observer Mission in Bougainville (UNOMB), the United Nations Development Programme (UNDP), United Nations Children's Fund (UNICEF).⁸⁵ Statements from the representatives of Germany, Chile, Spain, Romania, Brazil, France, Philippines, China, Angola, the United Kingdom, the Russian Federation, Pakistan, New Zealand (speaking on behalf of the Pacific Islands Forum Group), Japan, and Fiji underlined the importance of the international community's continued involvement in institution building to support the peace process.⁸⁶

In particular, AusAID's Framework for AusAID Assistance to Bougainville 2004-2008 outlined three broad objectives for Australian aid to Bougainville: helping implement autonomy and re-establish public administration; improving essential service delivery; and expanding agricultural income-generating opportunities.⁸⁷ It also provides funding through the Governance and Implementation Fund.⁸⁸ Over the medium to long-term, Australia expects that this fund will contribute toward improved public expenditure management and development outcomes, public sector reforms, better coordination of donor assistance, and transfer of essential powers from the PNG Government to Bougainville consistent with the autonomy provision of the Bougainville peace agreement.⁸⁹ These objectives fit well within the core earned sovereignty element of institution building.

The use of the core elements of shared sovereignty and institution building will hopefully allow the autonomous Bougainville Government to obtain the basic skills necessary to effectively assert itself as either an autonomous or sovereign entity upon determination of Bougainville's final status in the upcoming referendum. In an effort to ensure that the necessary skills are acquired in a timely and effective fashion the Bougainville peace agreement implements, to varying degrees, all three of the so-called optional elements of earned sovereignty: phased sovereignty, conditional sovereignty, and constrained sovereignty. As was acknowledged by Williams and Jannotti Pecci, use of the optional elements are not necessary in every case of earned sovereignty.⁹⁰ They do however, in this case, provide useful tools to facilitate the interim period before a decision on final status for Bougainville.

⁸⁴ See *United Nations Security Council press release*, SC/8086 (2004).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Australian Government AusAID: Australian Aid to Bougainville, <http://www.ausaid.gov.au/country/png/bougainville.cfm> (last visited January 30, 2007).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Williams and Jannotti Pecci, *supra* note 2 at 367 (Regarding phased sovereignty. The author contends that this belief, that phased sovereignty need not be present in all instances of earned sovereignty, extends to all three of the optional elements.).

The Bougainville peace agreement relies to a greater extent upon phased sovereignty, and possibly constrained sovereignty, than it does upon conditional sovereignty. The quid pro quo arrangements are fewer and farther between. In the case of Bougainville, the timer is set for between ten and fifteen years, nearly all the ingredients have been added, and the most important question that remains, to be decided in the upcoming referendum, is Bougainville's final status.

The "timer" of phased sovereignty is evident throughout the Bougainville peace agreement. One of the "three pillars" of the agreement is the right of Bougainvilleans to hold a referendum to decide their final status, which will be held no sooner than ten years, and no later than fifteen years, after the election of an autonomous Bougainville Government.⁹¹ The gradual assumption of powers and duties by the autonomous Bougainville Government in the areas of Public Service, Police Service, and CIS, also shows use of phased sovereignty.⁹²

The Bougainville peace agreement also contains the quid pro quo arrangement that embodies conditional sovereignty. According to the Bougainville peace agreement, in order for the referendum on Bougainville independence to take place the conditions of "weapons disposal" and "good governance" must be met. The autonomous Bougainville Government's success in meeting these conditions will allow the referendum to proceed within the specified timeframe, at least 10 but no more than 15 years after the signing of the Bougainville peace agreement.⁹³

These conditions are not terribly onerous, as long as the stakeholders remain committed to the peace process. Weapons disposal has been accomplished under international monitoring,⁹⁴ and "good governance" is so vague that it will be difficult for the autonomous Bougainville Government to fail as long as the National Government remains committed to the peace process, and especially to institution building in autonomous Bougainville.

The implementation of the weapons disposal programs in Bougainville has been almost a textbook example of conditional sovereignty. "With the completion of the second phase of weapons collection, the Bougainville peace process could proceed with the remaining tasks, including finalization of the constitution and the holding of elections, leading to the establishment of an autonomous government [...]."⁹⁵ The United Nations Political Office in Bougainville's verification and certification of the completion of stage II of the Weapons Disposal Plan in July 2003 triggered the constitutional process of bringing the Constitutional Amendment and the Organic Law on Peace-Building in Bougainville into

⁹¹ See Bougainville Peace Agreement, *supra* note 73 at Introduction, Pillar 2.

⁹² See *id* at paras. 201-262.

⁹³ See *id* at para. 312.

⁹⁴ *Bougainville Peace Process: History of the Peace Process*, Australian Government Department of Foreign Affairs and Trade, available at <http://www.dfat.gov.au/geo/png/bougainville/> (last visited July 9, 2006) ("In May 2005, U.N.O.M.B. declared the weapons disposal program complete and verified the situation on Bougainville as being conducive to holding elections.").

⁹⁵ *United Nations Security Council press release*, SC/7839 (2003).

full operation.⁹⁶ As of May 2004 the Bougainville Constitutional Commission was working on a draft constitution for the autonomous Bougainville, which was to be submitted to the Bougainville Constitutional Assembly (BCA) in June 2004. Following adoption by the BCA it would be submitted to the National Government of Papua New Guinea for endorsement, which was expected to take place by the end of July.⁹⁷ The Bougainville Interim Provincial Government had also started preparations for the election of the autonomous Bougainville Government, including establishment of the Ministry for Peace and Autonomy.⁹⁸

The 10 to 15 year period prior to the referendum on Bougainville independence also acts as a form of constrained sovereignty. It could be argued that the current, pre-referendum status of the autonomous Bougainville is a test of constrained sovereignty, giving Bougainvilleans an idea of what it would be like to remain an autonomous province of Papua New Guinea. After this limited period of constrained sovereignty the people of Bougainville will have the opportunity to choose whether to remain autonomous or seek independence from the National government.⁹⁹ Should the benefits of continued autonomy outweigh those of full independence at that time a form of entirely consensual, permanent, increased constitutional autonomy could result, based in constrained sovereignty.

The Bougainville peace agreement is one of the best, if not the best, embodiment of an earned sovereignty approach to conflict resolution. The parties share sovereignty over Bougainville for a period of time as its institutions are developed, therefore satisfying two of the three core elements of earned sovereignty. The parties also use all three of the so-called optional elements, to varying degrees, as means by which to share sovereignty and build the nascent institutions of the autonomous Bougainville. The 10-15 year waiting period prior to the referendum on final status is evidence of the use of phased sovereignty. It is a particularly good example of phased sovereignty, in fact, because it provides a roadmap for the transfer of increased power and responsibility from the national government to the government of autonomous Bougainville, particularly in the areas of the Public Service, Police Service, and CIS. Bougainville can move forward along the path to the referendum on independence, using the method of conditional sovereignty, due to the success of the weapons disposal program. Until the determination of final status, which will satisfy the third core element of earned sovereignty, the autonomous Bougainville will exist in a kind of limbo of constrained sovereignty, as powers are slowly devolved from national institutions to those of the province. For these reasons, Bougainville is probably one of the best relatively recent examples of the use of earned sovereignty to determine the final status of an emerging state at the end of a conflict.

⁹⁶ *Id.*

⁹⁷ See United Nations Security Council press release, SC/8086, *supra* note 87.

⁹⁸ *Id.*

⁹⁹ See *generally* Bougainville Peace Agreement, *supra* note 73.

C. Aceh

The peace agreement signed between the Government of Indonesia (GoI) and the Free Aceh Movement (GAM)¹⁰⁰ is relatively recent example of earned sovereignty moving at breakneck speed. The conflict between the Indonesian Government and GAM has cost over 9,000 lives since its beginning in 1976.¹⁰¹ However, since the signing of the Memorandum of Understanding (MoU) between the GoI and GAM on August 15, 2005, steady progress has been made.¹⁰² When taken together, the text of the MoU and its thus-far successful implementation shows a valuable perspective on the application of the various elements of earned sovereignty, particularly the use of constrained sovereignty to end a seemingly intractable conflict.¹⁰³

The use of shared sovereignty in resolving the GoI/GAM conflict begins in the preamble of the August 15, 2005, MoU. The second paragraph commits the parties to, “creating conditions within which the government of the Acehnese people can be manifested through a fair and democratic process within the unitary state and constitution of the Republic of Indonesia.”¹⁰⁴ This statement offers an initial hint that the GoI and GAM will share competencies in the post-MoU environment. The hint is confirmed in Section 1, which discusses the Law on the Governing of Aceh that had to, according to the MoU, enter into force no later than March 31, 2006 and be promulgated by the GoI.¹⁰⁵ The principals on which the Law on the Governing of Aceh should be based are laid out in Paragraph 1.1.2 of the MoU and call for such measures as granting authority to the Acehnese government in all public affairs except in foreign affairs, external defense, national security, monetary and fiscal matters, justice and freedom of religion;¹⁰⁶ that the GoI will consult with the government of Aceh and obtain its consent from the Acehnese legislature on international agreements that relate to matters of special interest to Aceh;¹⁰⁷ decisions by Indonesia’s legislature regarding Aceh will be taken in consultation with and with the consent of Aceh’s legislature;¹⁰⁸ and, finally, that administrative measures taken by the GoI regarding Aceh will be implemented in consultation with and with the consent

¹⁰⁰ Aceh Rebels Sign Peace Agreement, <http://news.bbc.co.uk/2/hi/asia-pacific/4151980.stm> (last visited Sep. 26, 2006).

¹⁰¹ See, International Crisis Group Briefing, *Aceh: A New Chance For Peace*, Asia Briefing No. 40, Jakarta/Brussels, Aug. 15, 2005, http://www.crisisgroup.org/library/documents/asia/indonesia/b040_aceh__a_new_chance_for_peace.doc (last visited Jul. 13, 2006).

¹⁰² ECONOMIST, *Aceh: Hope Fragile but Still Alive*, Vol. 377, No. 8450, p. 43 (October 29th – November 4th 2005).

¹⁰³ See Aceh rebels surrender last arms, <http://news.bbc.co.uk/2/hi/asia-pacific/4541566.stm> (last visited January 30, 2007) (stating that on 19 December 2005 rebels from the Free Aceh Movement (GAM) handed in the final 35 of 840 weapons they agreed to turn over under the August 15 MOU); see also Indonesia completes Aceh pull-out, <http://news.bbc.co.uk/2/hi/asia-pacific/4545116.stm> (last visited January 30, 2007)(in which a spokesman for the Indonesian military stated that security services were on target to meet the 31 December 2005 deadline for withdrawals).

¹⁰⁴ MoU, *supra* note 21.

¹⁰⁵ See *id.* para. 1.1.1.

¹⁰⁶ See *id.* para. 1.1.2(a).

¹⁰⁷ See *id.* para. 1.1.2(b).

¹⁰⁸ See *id.* para. 1.1.2(c).

of the head of Aceh's administration.¹⁰⁹ According to the MoU, the Law on the Governing of Aceh would allow the Acehnese people to have the opportunity to choose many national symbols, such as the determination of the name of Aceh, the titles of senior elected officials, and the regional symbol, flag, crest and hymn.¹¹⁰ The GoI is also obligated under the MoU to facilitate the establishment of Aceh-based political parties that meet national criteria. It is the GoI's responsibility under the MoU to create the political and legal conditions for the establishment of local political parties in Aceh.¹¹¹

The MoU also provides the Acehnese government the opportunity to self-govern in a number of other substantive ways, particularly in economic matters. For example, Aceh has the right to raise funds with external loans, set interest rates beyond those set by Indonesia's Central Bank, raise taxes to fund official internal activities, conduct trade and business internally and internationally, and seek foreign direct investment and tourism.¹¹² Aceh also has jurisdiction over living natural resources in its surrounding territorial waters.¹¹³

Importantly, under the MoU Aceh is entitled to retain 70 percent of the revenues from all current and future hydrocarbon deposits and other natural resources in Acehnese territory and in its surrounding territorial seas.¹¹⁴ In order to develop these resources, the MoU grants Aceh the right to conduct the development and administration of all seaports and airports within its territory, the right to enjoy free trade with all other parts of the Republic of Indonesia, and direct and unhindered sea and air access to foreign countries.¹¹⁵

The court system of Aceh is also touched by shared sovereignty. Under the MoU, an independent and impartial court system will be established for Aceh within the judicial system of the Republic of Indonesia.¹¹⁶ The appointment of the Chief of the organic police forces, and prosecutors, shall be approved by the head of the Aceh administration, which will also consult in their recruitment and training in compliance with the applicable national standards.¹¹⁷ These provisions in particular show a concrete example of shared sovereignty, with both the Aceh government and the GoI participating in the selection and training of the judiciary and forces of order.

As a separate and distinct entity, a Commission for Truth and Reconciliation will be established for Aceh by the Indonesian Commission of Truth and Reconciliation in order to formulate and determine reconciliation measures.¹¹⁸

¹⁰⁹ See *id.* para. 1.1.2(d).

¹¹⁰ See *id.* paras. 1.1.3 and 1.1.5.

¹¹¹ See *id.* para. 1.2.1.

¹¹² See *id.* paras. 1.3.1 and 1.3.2.

¹¹³ See *id.* para. 1.3.3.

¹¹⁴ See *id.* para. 1.3.4.

¹¹⁵ See *id.* paras. 1.3.5 – 1.3.7.

¹¹⁶ See *id.* para. 1.4.3.

¹¹⁷ See *id.* para. 1.4.4.

¹¹⁸ See *id.* para. 2.3.

On a level affecting former combatants directly, both the GoI and Acehese authorities will establish a Reintegration Fund under the administration of Aceh in order to facilitate the reintegration of persons who participated in GAM activities, including former combatants, pardoned political prisoners and affected civilians, into civil society.¹¹⁹ In order to deal with unmet claims of those affected by the conflict the GoI and Aceh will establish a Joint Settlement Commission.¹²⁰ Former GAM combatants will also have the right to seek employment in the organic police and organic military forces in Aceh without discrimination and in conformity with national standards.¹²¹ These provisions again show important instances of shared sovereignty between Aceh and the GoI. Though many of these programs are to be administered by the government of Aceh, few of them could be allowed or funded without the good graces of the GoI.

The MoU provides a number of specific provisions that would fall into the category of institution building. These provisions are designed to help Aceh build its internal institutions, and to supervise them as they gain competency. For example, the MoU provides for outside auditors to verify the collection and allocation of revenues between the GoI and Aceh. The auditors will communicate the results to the head of the Aceh administration.¹²²

The MoU also provides that both stakeholders will take part in the post-tsunami reconstruction effort. In particular, GAM will nominate representatives to participate in the commission established to help post-tsunami reconstruction, also known as the BRR.¹²³

From a legal and policy standpoint, one of the most important aspects of the MoU is the extent to which it addresses the rule of law and a fair and efficient judicial system. Section 1.4.2 of the MoU is therefore critical, in that it states, broadly, that the legislature of Aceh will redraft its legal code on the basis of universal principles of human rights.¹²⁴ Not only that, but the MoU goes so far as to dictate that a Human Rights Court will be established for Aceh.¹²⁵

One of the most important examples of institution building in the MoU is the establishment of an Aceh Monitoring Mission (AMM), an international body tasked with a number of important responsibilities.¹²⁶ The AMM successfully completed its mission in December 2006.¹²⁷ The MoU tasked the AMM with monitoring the demobilization

¹¹⁹ See *id* para. 3.2.3.

¹²⁰ See *id* para. 3.2.6.

¹²¹ See *id* para. 3.2.7.

¹²² See *id* para. 1.3.8.

¹²³ See *id* para. 1.3.9.

¹²⁴ See *id* para. 1.4.2.

¹²⁵ See *id* para. 2.2.

¹²⁶ *Id* at para. 5.1 (“An Aceh Monitoring Mission (AMM) will be established by the European Union and ASEAN contributing countries with the mandate to monitor the implementation of the commitments taken by the parties in this Memorandum of Understanding.”).

¹²⁷ See Peace monitors end Aceh mission, <http://news.bbc.co.uk/2/hi/asia-pacific/6181857.stm> (last visited Jan. 5, 2007) (The AMM formally ended its mission in Aceh after successful local and gubernatorial elections, which took place on December 11, 2006).

and decommissioning of GAM, the relocation of non-organic military and police troops, the reintegration of active GAM members, the human rights situation, and the “process of legislation change.” It also provided that the AMM would provide assistance in the human rights field, ruling on disputed amnesty cases, investigating and ruling on complaints and alleged violations of the MoU, and establishing and maintaining liaison and good cooperation with the parties.¹²⁸ These provisions show not only a commitment on the part of the two stakeholders to help Aceh attain a measure of self-sufficiency; they also show the degree to which the international community, in the form of the EU and ASEAN, was committed to a lasting political settlement.

The third core element of earned sovereignty, determination of final status, is contemplated by the MoU. The first example comes in the Preamble, which specifically states that “The parties commit themselves to creating conditions within which the government of the Acehnese people can be manifested through a fair and democratic process *within the unitary state and constitution of the Republic of Indonesia*. [Emphasis added]”¹²⁹ This statement indicates that Aceh’s final status, at least under the MoU, is to remain within the Republic of Indonesia. The MoU does not provide a referendum or other mechanism for determining possible Acehnese independence.¹³⁰

This conclusion is supported by the MoU’s operational paragraphs. For example, Paragraph 1.2.3 states that free and fair *local* elections will be organized under the new Law on the Governing of Aceh,¹³¹ which is a law set to be enacted by the GoI. Paragraph 1.2.6 provides for full participation of the Acehnese people in local *and national* elections in accordance with *the constitution of the Republic of Indonesia*. [Emphasis added]¹³² The Law on the Governing of Aceh will be promulgated, seemingly, by the GoI.¹³³ Paragraph 1.2.1 of the MoU specifically states that the GoI will facilitate the establishment of Aceh-based political parties that *meet national criteria*.¹³⁴ Additionally, the Acehnese court system will be set up within the judicial system of the Republic of Indonesia.¹³⁵ Paragraph 3.2.1 confirms that the Acehnese people are citizens of the Republic of Indonesia.¹³⁶ Finally, Paragraph 1.1.2 sets out the specific areas in which the GoI retains competence.¹³⁷ Though the MoU does not provide for Acehnese independence it does provide Aceh with final status and, therefore, satisfies the third core element of earned sovereignty.

The MoU also contains all three of the optional elements of earned sovereignty. The dates set in the MoU when the government of Aceh will obtain competence in various areas shows phased sovereignty. Conditional sovereignty is shown in the MoU’s

¹²⁸ See *id* para. 5.1(a)-(h).

¹²⁹ MoU, *supra* note 21 at Preamble, para. 2.

¹³⁰ See generally MoU, *supra* note 21.

¹³¹ See MoU, *supra* note 21 at para. 1.2.3.

¹³² See *id*, para. 1.2.6.

¹³³ See *id* para. 1.1.2(a).

¹³⁴ See *id* para. 1.2.1.

¹³⁵ See *id*, para. 1.4.3.

¹³⁶ See *id* para. 3.2.1.

¹³⁷ See generally *id* para. 1.1.2.

disarmament provisions. Finally, and perhaps most interestingly, the restrictions on the competency of the future Acehese government, as outlined in the MoU, provide an excellent example of constrained sovereignty.

Phased sovereignty is best exemplified in the MoU in the provisions involving elections. Paragraph 1.2.2 shows that, upon signing the MoU, the people of Aceh had the right to nominate candidates during elections to be held in Aceh in April 2006.¹³⁸ Elections were to take place in April 2006 for the head of the Aceh administration, with elections for an Acehese legislature coming in 2009.¹³⁹ Finally, the legislature of Aceh, prior to 2009, will not be entitled to enact any laws without the consent of the head of the Aceh administration.¹⁴⁰

Conditional sovereignty and its hallmark *quid pro quo* arrangement plays a smaller role in the MoU than in the Sudan and Bougainville peace agreements. The MoU's best example of conditional sovereignty is expressed in Paragraphs 4.2 to 4.6, which concern the decommissioning of GAM's arms, ammunition, and explosives congruent with the relocation of non-organic military and police forces. Paragraph 4.4 stated that the decommissioning of GAM armaments would begin on September 15, 2005, would be executed in four stages, and would be concluded by December 31, 2005. Under paragraph 4.6, the relocation of non-organic military and police forces was set to begin on September 15, 2005. It would be executed in four stages in parallel with GAM's decommissioning "immediately after each stage has been verified by the AMM," and concluded by December 31, 2005.¹⁴¹ The language of the agreement therefore showed that GAM would decommission its arms in four stages and, as each stage was verified by the AMM, the GoI would relocate non-organic military and police personnel. This arrangement showed that the MoU incorporated a form of conditional sovereignty, albeit to a rather limited degree.

The prevalence of constrained sovereignty in the MoU makes it a particularly interesting document in terms of earned sovereignty. In summary, the MoU conveys to the people of Aceh an expanded bundle of rights to self-government, while maintaining important links, including constitutional links, to the Republic of Indonesia. The discussions of shared sovereignty and final status, *supra*, illustrate this point. The preamble of the MoU reaffirms Aceh's constitutional ties to the Republic of Indonesia and highlights Indonesia's status as a unitary state.¹⁴² The burden fell upon the GoI to promulgate the Law on the Governing of Aceh,¹⁴³ upon which the entire peace agreement depends.¹⁴⁴

¹³⁸ See *id* para. 1.2.2.

¹³⁹ See *id* para. 1.2.3.

¹⁴⁰ See *id* para. 1.2.4.

¹⁴¹ See *id* paras. 4.2-4.6.

¹⁴² See *id* at Preamble para. 2.

¹⁴³ See *id* para. 1.1.2(a).

¹⁴⁴ See Indonesia MPs Back Aceh Autonomy, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/5168718.stm> (last visited Jul. 11, 2006) (The Indonesian parliament unanimously passed a new law in July 2006 giving more autonomy to Aceh. The law was the product of the peace agreement between the GoI and GAM and gave Aceh more autonomy than any other province in Indonesia. Some of GAM's leaders, however, were unsatisfied with certain aspects of the law); see also Peace monitors end Aceh

Even once that milestone is accomplished any Aceh-based political parties must meet national criteria.¹⁴⁵ These provisions, which form the four corners of a concession on the part of GAM in which it foregoes its demand for independence,¹⁴⁶ are wonderful examples of an effective use of constrained sovereignty.

In this instance circumstances were such that both parties were able to come to an agreement in order to end the conflict following the tragedy of the December 2004 tsunami. The method chosen by the parties included all of the elements of earned sovereignty to various degrees. The MoU includes provisions for shared sovereignty and institution building as well as using the so-called “optional” elements of earned sovereignty. Aceh’s final status, at least for the moment, may be inferred from the text of the agreement, and it provides an excellent example of constrained sovereignty. In the very particular context of the Aceh conflict, the parties agreed that constrained sovereignty could provide a mutually beneficial outcome, even though it fell short of Acehese independence.

V. *Conclusion*

It therefore appears that even a pared-down version of earned sovereignty, which uses the core elements but may not use the optional elements, provides a useful tool for attaining peace between states and substate entities. The CPA uses all of the core elements but does not use all of the optional elements, particularly constrained sovereignty. The Bougainville peace agreement follows a similar pattern. In both cases the peace agreements themselves contain no true restraints upon the bundle of rights the substate entity may eventually obtain, and the final status of Southern Sudan or an autonomous Bougainville may well be full-fledged statehood. The MoU between the Government of Indonesia and GAM takes a completely different approach and uses all the core and optional elements of earned sovereignty. The use of constrained sovereignty, wherein Aceh’s final status is a form of heightened autonomy instead of statehood, is of particular importance in the MoU. Indeed, it has allowed the peace process to proceed successfully through the completion of the AMM’s mission. It thus appears that the most important elements of earned sovereignty to apply are the core elements – shared sovereignty, institution building, and determination of final status. The optional elements, however, may be used to a great extent, sparingly, or not at all depending on the particular circumstances of the conflict. As illustrated by the MoU, the optional elements retain their usefulness as tools to help implement and secure the use of the core elements of earned sovereignty. In doing so, they ensure earned sovereignty’s continued usefulness as a tool of conflict resolution.

mission, *supra* note 127 (According to the BBC, former separatist leader and probable gubernatorial election victor Irwandi Yusuf does not believe the current law on Aceh secures every aspect of the autonomy promised to Aceh by the MoU).

¹⁴⁵ See MoU, *supra* note 21, at para. 1.2.1.

¹⁴⁶ See Aceh marks final troop withdrawal, <http://news.bbc.co.uk/2/hi/asia-pacific/4565612.stm> (last visited January 30, 2007).