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

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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 too 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

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.