

2003

## Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust

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### Recommended Citation

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# EARNED SOVEREIGNTY FOR KASHMIR: THE LEGAL METHODOLOGY TO AVOIDING A NUCLEAR HOLOCAUST

KAREN HEYMANN\*

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## INTRODUCTION

Self-determination is the right of groups to “determine their political status and freely pursue their economic, social, and cultural development.”<sup>1</sup> Although the emergence of new sovereign entities was not initially a concern of international law, decolonization necessitated the emergence of new international law in the form of rules for self-determination.<sup>2</sup> Much like there are legal guidelines for passing domestic statutes in the United States, there are international legal requirements for resolving self-determination conflicts.<sup>3</sup> The use of legal norms such as earned sovereignty and plebiscites legalizes the process of recognizing emerging independent states or, in the alternative, recognizing the sovereign rights attributed to sub-states.<sup>4</sup> Earned sovereignty provides the legal framework for resolution and addresses international legal status, and the plebiscite ensures that the framework attains legal status only after popular consultation of the people.<sup>5</sup>

The conflict in Kashmir is a fight for self-determination, a recognized right in international law.<sup>6</sup> Until recently, the

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1. International Covenant on Civil and Political Rights, Dec. 16, 1966, art.1, 999 U.N.T.S. 171, *available at* [http://193.194.138.190/html/menu3/b/a\\_ccpr.htm](http://193.194.138.190/html/menu3/b/a_ccpr.htm) (last visited Sept. 2, 2003).

2. See Michael P. Scharf, *Intermediate Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y (forthcoming 2003) (manuscript at 7, on file with the American University International Law Review) (claiming that the codification of the right to self-determination created the need for applicable international legal norms).

3. See U.S. CONST. art. I, § 7, cl. 2 (stating that the President of the United States must approve all bills, and if the President chooses to veto the bill, the bill can only become law if both Houses pass the newly considered bill by a two-thirds majority vote).

4. See Visuvanathan Rudrakumaran, *The “Requirement” of Plebiscite in Territorial Rapprochement*, 12 HOUS. J. INT'L L. 23, 34 (1989) (positing that where plebiscites ensure self-determination, which is a human right, they enjoy the status of an international legal norm). *But see id.* at 36-37 (arguing in the latter part of the article that a plebiscite is not a necessary corollary to self-determination).

5. See *infra* Part I.B (outlining the basic structures of plebiscites and earned sovereignty).

6. See U.N. CHARTER art. 1, para. 2 (declaring that one of its main purposes of the United Nations is: “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to

international legal community had not come up with the legal framework to reach a solution.<sup>7</sup> From the beginning of the Kashmir conflict, the involved parties argued that the appropriate solution was a plebiscite, a direct vote whereby the government gives the people the right to accept or refuse a particular proposal.<sup>8</sup> The parties claimed that a plebiscite would illustrate the will of the people. The actions of Pakistan and India, however, have negated any possibility of self-determination.<sup>9</sup> The international community's attitude toward the Kashmir plebiscite was to ignore it and retain the status quo.<sup>10</sup> This attitude has changed as the danger of the situation has

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take other appropriate measures to strengthen universal peace.”); *see also* International Covenant on Civil and Political Rights, *supra* note 1, art. 1 (confirming the existence of a legal right to self-determination); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 3 (granting the right of self-determination to all people), *available at* [www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (last visited Sept. 2, 2003); Halim Morris, *Self-Determination: An Affirmative Right or Mere Rhetoric?*, 4 ILSA J. INT'L & COMP. L. 201, 204 (1997) (declaring that self-determination has not only reached the status of customary international law, but also the status of a *jus cogens* norm); Sam Blay, *Self-Determination: A Reassessment in the Post-Communist Era*, 22 DENV. J. INT'L L. & POL'Y 275, 275 (1994) (noting that self-determination is, “an operative legal right in international law and has arguably acquired the status of *jus cogens*.”).

7. *See infra* Part I.A and accompanying notes (explaining the history of the conflict and the present dangers facing the warring parties); *see also* U.N. CHARTER art. 1, para. 2 (identifying that supporting self-determination is one of the main purposes of the United Nations); International Covenant on Civil and Political Rights, *supra* note 1, art. 1 (upholding the right of self-determination); International Covenant on Economic, Social and Cultural Rights, *supra* note 6, art. 1 (granting the right of self-determination to all people); Morris, *supra* note 6, at 204 (stating that self-determination is not only part of customary international law, but also is a *jus cogens* norm); Blay, *supra* note 6, at 275 (arguing that self-determination has attained *jus cogens* status).

8. *See infra* note 35 and accompanying text (detailing the promise of a referendum upon Kashmir's accession to India); *see also infra* note 45 and accompanying text (noting the plebiscite order from the U.N. Commission on India and Pakistan); Merriam-Webster Online Dictionary (2003) (providing the definition of the term “plebiscite”), *available at* <http://www.m-w.com/home.htm> (last visited Sept. 2, 2003).

9. *See infra* note 46 and accompanying text (outlining the requirements of the plebiscite order from the U.N. Commission on India and Pakistan).

10. *See* MOONIS AHMAR, THE PROGRAM IN ARMS CONTROL, DISARMAMENT, AND INTERNATIONAL SECURITY, THE ROAD TO PEACE IN SOUTH ASIA: LESSONS FOR INDIA AND PAKISTAN FROM THE ARAB-ISRAELI PEACE PROCESS 28 (1996)

escalated since India and Pakistan became nuclear powers.<sup>11</sup> Neither of the parties rules out the use of nuclear weapons, and Pakistan does not deny the possibility of a first strike.<sup>12</sup> Recent alterations in regional politics, along with changing worldviews on terrorism, may soon open the door for a final solution to the Kashmir conflict.<sup>13</sup>

However, this solution must be amenable to all of the divergent groups involved in the conflict.<sup>14</sup> Kashmir is composed of many cultures fighting for recognition.<sup>15</sup> The regions of "Kashmir" include Jammu, mostly Hindu; the Kashmir valley, principally Islamic; and Ladakh, primarily Buddhist.<sup>16</sup> The majority of the Jammu and Kashmir population resides in Kashmir, which gives the Islamic

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(explaining that the nuclear factor is the only factor that motivates involvement by external powers), available at [http://www.acdis.uiuc.edu/homepage\\_docs/pubs\\_docs/PDF\\_Files/Ahmar.pdf](http://www.acdis.uiuc.edu/homepage_docs/pubs_docs/PDF_Files/Ahmar.pdf) (last visited Oct. 29, 2003).

11. See Fakiha Khan, Note, *Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute*, 29 GA. J. INT'L & COMP. L. 361, 367-68 (2001) (recognizing that India's nuclear weapons program first began in 1974 and became a viable program in May 1998 with underground testing). Pakistan implied as early as January 1987 that it had a successful nuclear weapons program. *Id.* at 369.

12. See INT'L CRISIS GROUP, KASHMIR: CONFRONTATION AND MISCALCULATION, ASIA REPORT NO. 35, at 9 (July 11, 2002) [hereinafter INT'L CRISIS GROUP] (describing the nuclear use policies of India and Pakistan in the Indo-Pak conflict), available at [http://www.crisisweb.org/projects/asia/afghanistan\\_southasia/reports/A400696\\_11072002.pdf](http://www.crisisweb.org/projects/asia/afghanistan_southasia/reports/A400696_11072002.pdf) (last visited Sept. 2, 2003).

13. See *infra* notes 70-74 and accompanying text (outlining the possible effects of the October 2002 elections).

14. See PUBLIC INT'L LAW & POLICY GROUP, INTERMEDIATE SOVEREIGNTY AS A BASIS FOR RESOLVING THE KOSOVO CRISIS, ICG BALKANS REPORT NO. 46, Nov. 9, 1998, Foreword [hereinafter BALKANS REPORT NO. 46] (preventing further conflict in the Kosovo crisis required settlement of the claims of all parties interested), available at <http://www.intl-crisis-group.org/projects/showreport.cfm?reportid=171> (last visited Sept. 2, 2003).

15. See H.P. Srivastava, *Kashmir*, COLLIER'S ENCYCLOPEDIA (1998) (noting that Hindus, Muslims, Sikhs, and Buddhists populate Indian-held Kashmir), available at <http://www.mtholyoke.edu/acad/intrel/colkash.htm> (last visited Sept. 12, 2003).

16. See *id.* (detailing the Jammu and Kashmir region and its religious make-up).

population a majority.<sup>17</sup> With this in mind, interested parties must balance the interests of the three major interest groups when considering a solution for the Kashmir crisis because each group contributes to the violence and the nuclear danger.<sup>18</sup>

This comment argues for the application of earned sovereignty, approved by plebiscite, as the best possible legal methodology for an agreement on the future of Kashmir.<sup>19</sup> The legal structures established to seek resolutions to the conflicts in Kosovo and East Timor, earned sovereignty and plebiscites respectively, serve as the primary basis of analysis.<sup>20</sup> Rather than considering options for the final status of Kashmir, this comment focuses on analyzing the best application of two conflict-ending legal mechanisms by exploring the benefits and consequences of each mechanism.<sup>21</sup>

Part I discusses the historical background to the conflict in Kashmir and provides a brief overview of the legal concepts used to

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17. See Paul Wiseman, *Conflict Has More Than Two Sides*, USA TODAY, Jan. 9, 2002, at A4 (providing approximate percentages of religious representation in Jammu and Kashmir).

18. See *India's Secret Army in Kashmir*, HUMAN RIGHTS WATCH REPORT, Vol. 8, No. 4, May 1996 (outlining the violence of both the Indian military and the various paramilitary groups operating in Kashmir), available at <http://www.hrw.org/campaigns/kashmir/1996/> (last visited Sept. 2, 2003).

19. See *infra* Part III (recommending the use of a plebiscite to approve the use of earned sovereignty as a solution to the conflict).

20. See *infra* Parts II.A.1 & II.B.1 (considering the application of these legal solutions to the conflicts in East Timor and Kosovo by outlining the benefits and drawbacks to the use of the solutions in the conflicts).

21. See INT'L CRISIS GROUP, A KOSOVO ROADMAP (I): ADDRESSING FINAL STATUS, ICG BALKANS REPORT NO. 124, ii (Mar. 1, 2002) [hereinafter A KOSOVO ROADMAP] (discussing the necessity of the determination of final status), [http://www.intl-crisis-group.org/projects/europe/kosovo/reports/A400561\\_01032002.pdf](http://www.intl-crisis-group.org/projects/europe/kosovo/reports/A400561_01032002.pdf) (last visited Sept. 2, 2003). Suggested solutions for Kashmir include partition along ethnic lines, forcible demographic changes, joint Indo-Pak rule, independence, heightened autonomy in India, and maintaining the status quo. See MUSHTAQR RAHMAN, DIVIDED KASHMIR: OLD PROBLEMS, NEW OPPORTUNITIES FOR INDIA, PAKISTAN AND THE KASHMIRI PEOPLE 161-67 (1996) (discussing the various options for Kashmir's future status); see also BALKANS REPORT NO. 46, *supra* note 14, at Executive Summary (affirming that the determination of statehood would still rest on the international law requirements of (1) territory; (2) population; (3) government; and (4) capacity to conduct international relations).

resolve the conflicts in Kosovo and East Timor.<sup>22</sup> The background highlights significant milestones in the history of the Kashmir region that led to the present state of conflict.<sup>23</sup> Part II explores the two primary legal avenues for the groups ending the fight for self-determination in Kashmir.<sup>24</sup> These include a plebiscite and a newly emerging theory after Kosovo – earned sovereignty.<sup>25</sup> Part III then recommends that the parties use a plebiscite to approve a contractual peace agreement legalizing the use of earned sovereignty.<sup>26</sup>

## I. BACKGROUND

### A. HISTORY OF THE KASHMIR CONFLICT

#### *1. The Origin of the Conflict*

As with most conflicts, the drive for self-determination in Kashmir finds its roots in history.<sup>27</sup> In 1947, the Indian Independence Act (“Independence Act”) divided the British ruled state of India into the independent dominions of India and Pakistan.<sup>28</sup> The Independence Act permitted the leaders of the 565 semi-independent princely states owned by the British, but controlled by local parties, to choose

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22. See *infra* Part I and accompanying notes (illustrating that Kashmir’s violent history and lack of self-determination play important roles in today’s conflict and discussing the legal definitions of plebiscite and earned sovereignty).

23. See *infra* Part I.A (tracing the history of the conflict back to Kashmir’s initial accession to India in 1947).

24. See *infra* Parts II.A.1.b & II.A.2.b and accompanying notes (applying the possible legal theories to Kashmir).

25. See *infra* Parts II.A.1 & II.B.1 and accompanying notes (considering the application of plebiscites and earned sovereignty in East Timor and Kosovo, respectively).

26. See *infra* Part III (explaining that Kashmir has a legal right to a plebiscite and that earned sovereignty provides a legal solution to the conflict).

27. See *infra* notes 28-69 and accompanying text (outlining the history of the Kashmir conflict).

28. See Indian Independence Act, 1947, 10 & 11 Geo. VI, c. 30, § 1 (Eng.) (“two independent Dominions shall be set up in India, to be known respectively as India and Pakistan”), available at <http://www.geocities.com/CapitolHill/Congress/4568/memorandum/a113-204.html> (last visited on Sept. 2, 2003).

independence or accession to either India or Pakistan.<sup>29</sup> This included the state of Jammu and Kashmir.<sup>30</sup>

Delay by Kashmir's leader led to Indian accession and the first promise for a plebiscite.<sup>31</sup> Although Kashmir's leader preferred independence, he chose to wait before making a decision.<sup>32</sup> Before he could make his choice, Pashtun tribesmen invaded the Pakistani border of Jammu and Kashmir, and Muslim Kashmiris living in the region joined the invasion, hoping that it would force Kashmir to accede to Pakistan.<sup>33</sup> Lord Mountbatten, Governor General of India at the time, required Kashmir to accede to India before he would

29. See John Gershman, *Overview of Self-Determination Issues in Kashmir*, Foreign Policy in Focus (2001) (stating that there were 565 semi-independent princely states in 1947) at [http://www.selfdetermine.org/conflicts/kashmir\\_body.html](http://www.selfdetermine.org/conflicts/kashmir_body.html) (last visited Sept. 2, 2003); see also Ali Khan, *The Kashmir Dispute: A Plan for Regional Cooperation*, 31 COLUM. J. TRANSNAT'L L. 495, 496 (1994) (explaining that although there were three legal options for these states, the princely states could not realistically survive on their own).

30. See Khan, *supra* note 29, at 496 (noting that a majority of the states joined either Pakistan or India due mainly to geographic location or religion); see also Anthony Wanis St. John, *The Mediating Role in the Kashmir Dispute Between India and Pakistan*, 21 FLETCHER F. WORLD AFF. 173, 174 (Winter/Spring 1997). Although Pakistan did not hold the same view, Prime Minister Nehru of India insisted that India welcomed all religions. *Id.*

31. See *infra* notes 32-35 and accompanying text (detailing the historical delay by Maharajah Sing and Lord Mountbatten's promise for a plebiscite).

32. See Gershman, *supra* note 29 (noting that Singh refused to make a decision for Kashmir). The Maharajah was a descendant of Gulab Singh and leader of Jammu and Kashmir in 1947. *Id.*

33. See Edward Luce, *Nuclear Threat Fails to Dim Kashmir's Allure*, FIN. TIMES (London), Dec. 31, 2001, at 5 (stating that the Pashtun troops invaded Kashmir three months after signature of the Independence Act.) The article states that Pakistan supported the invasion in its attempt to capture Kashmir for Pakistan. *Id.*; see also S.C. Res. 47, U.N. SCOR, 287th mtg., U.N. Doc. S/726 (1948) (securing the withdrawal of Pakistani nationals from Kashmir). The invasion forced Maharajah Singh to ask the newly independent Indian government for military aid. See Michael L. Feeley, Note, *Apocalypse Now? Resolving India's and Pakistan's Testing Crisis*, 23 SUFFOLK TRANSNAT'L L. REV. 777, 780 (2000) (noting that Kashmir traded its accession to India for Indian military reinforcements); see also Luce, *supra* 33 ("This provided the pretext for Indian troops to occupy Srinagar, the capital of Kashmir, and cajole the Maharajah into signing a treaty of accession to India.").



agree to aid Kashmir militarily.<sup>34</sup> Mountbatten indicated that the Kashmiri people would later have the opportunity to confirm the accession.<sup>35</sup> Kashmir acceded to India, but the referendum on accession never occurred.<sup>36</sup>

## 2. War Breaks Out Between the Parties

Kashmir's accession to India marked the beginning of the first war between India and Pakistan.<sup>37</sup> Pakistan claimed, and continues to claim today, that Kashmir's Muslim majority and geographic proximity make Kashmir rightfully a part of Pakistan.<sup>38</sup> It bases this belief upon the idea that Pakistan is the one place on the subcontinent where Muslims could live outside of Hindu rule.<sup>39</sup> India, on the other hand, believed that Kashmir was, and still is, essential to the idea of

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34. See St. John, *supra* note 30, at 175 (confirming that India would only supply military aid conditioned upon the accession of Kashmir to India). But see *India-Pakistan: Troubled Relations, The 1947-48 War*, BBC NEWS, (noting the possibility that Indian forces had already entered Kashmir and therefore Kashmir acceded under duress), at [http://news.bbc.co.uk/hi/English/static/in\\_depth/south\\_asia/2002/india\\_pakistan/timeline/default.stm](http://news.bbc.co.uk/hi/English/static/in_depth/south_asia/2002/india_pakistan/timeline/default.stm) (last visited Sept. 2, 2003).

35. See Khan, *supra* note 29, at 509 (quoting Lord Mountbatten's accession speech).

36. See St. John, *supra* note 30, at 175 (noting that the plebiscite promised by Mountbatten never occurred).

37. See Khan, *supra* note 11, at 364-65 (confirming that the initial invasion had escalated into a full-scale war between India and Pakistan).

38. See Sumit Ganguly, *Explaining the Kashmir Insurgency: Political Mobilization and Institutional Decay*, INTERNATIONAL SECURITY, vol. 21, no. 2, Fall 1996 (affirming that Kashmir's Muslim-majority and geographic location are the basis for Pakistan's claim of right), available at <http://www.mtholyoke.edu/acad/intrel/sumit.htm> (last visited Sept. 2, 2003).

39. See Somini Sengupta, *The India-Pakistan Tension: The Background; Struggle for Kashmir is Fueled by Clashing National Narratives*, N.Y. TIMES, Jan. 13, 2002, p. 12 (noting the reason for the British creation of Pakistan). "As Zulfikar Ali Bhutto, then the foreign minister and later the president of Pakistan, declared in 1964, 'Kashmir must be liberated if Pakistan is to have its full meaning.'" *Id.*

Indian secularism.<sup>40</sup> The war over Kashmir's accession began in 1947 based on these two opposing views.<sup>41</sup>

Almost immediately after the beginning of the war, however, the two countries sought help from the United Nations ("U.N.") Security Council.<sup>42</sup> The United Nations Commission on India and Pakistan ("UNCIP") ordered the first ceasefire, which took effect in January 1949.<sup>43</sup> The UNCIP resolution ordering the ceasefire also ordered the parties to determine the future of Kashmir "in accordance with the

40. See *id.* (claiming that Indians see Kashmir as the "mantle" to their "secular, multiethnic democracy").

41. See Craig Whitlock, *Even Patriots Grow Weary Over Kashmir*, WASH. POST, Jan. 16, 2002, at A16 (explaining that the war was fought on these two principles).

42. See S.C. Res. 38, U.N. SCOR, 229th mtg., U.N. Doc. S/651 (Jan. 17, 1948) (illustrating that both India and Pakistan registered complaints with the U.N. Security Council as early as January 1948); see also S.C. Res. 39, U.N. SCOR, 230th mtg. U.N. Doc. S/654 (Jan. 20, 1948) (establishing a Security Council Commission in Kashmir); S.C. Res. 47, U.N. SCOR, 287th mtg. U.N. Doc. S/726 (April 21, 1948) (enlarging the Commission from three members to five). The five members of the U.N. Commission for India and Pakistan were (1) Argentina (nominated by Pakistan), (2) Czechoslovakia (nominated by India), (3) United States of America (nominated by President of the Security Council), (4) Belgium, and (5) Colombia (the Council nominated both Belgium and Columbia as required by Resolution 51). *Id.* The Commission's mandate was to investigate issues under Article 34 of the U.N. Charter as well as assess mediation possibilities. *Id.* Article 34 of the U.N. Charter states, "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." U.N. CHARTER art. 34.

43. See U.N. SCOR, U.N. Comm. for India and Pakistan, U.N. Doc. S/1100, ¶ 75 (Nov. 9, 1948) [hereinafter UNCIP S/1100] (detailing the cease-fire order issued by the U.N. Commission for India and Pakistan), available at <http://www.un.int/pakistan/15480813.htm> (last visited Sept. 2, 2003). The cease-fire and truce were to begin "as of the earliest practicable date or dates to be mutually agreed upon." *Id.* Part I, § A. The U.N. Commission for India and Pakistan also created the U.N. Military Observer Group in India and Pakistan ("NMOGIP") in January 1949 to supervise the ceasefire. See U.N. SCOR, U.N. Comm. for India and Pakistan, U.N. Doc. S/1196, ¶ 15 (Jan. 10, 1949) [hereinafter UNCIP S/1196] (setting the date for the cease-fire because the two parties were unable to reach an agreement), available at <http://www.un.int/pakistan/15490105.htm> (last visited Sept. 2, 2003).

will of the people.”<sup>44</sup> Most importantly, the Commission ordered a plebiscite at the request of both India and Pakistan.<sup>45</sup> Notably, the United Nations conditioned any plebiscite on the withdrawal of Indian and Pakistani forces from Kashmir.<sup>46</sup>

Disagreements between India and Pakistan resulted in two additional wars and two additional agreements.<sup>47</sup> The parties agreed to solve the Kashmir issue through peaceful means in the Tashkent Agreement, which ended the 1965 war.<sup>48</sup> The Simla Agreement, ending the 1971 war over Bangladesh, specified that the parties would determine the future of Kashmir at a later date.<sup>49</sup> To this day, Pakistan argues that India ignored the U.N. resolution calling for a plebiscite.<sup>50</sup> India retorts that Pakistan never withdrew its forces from Kashmir pursuant to the resolution requirements and that the Simla

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44. See UNCIP S/1100, *supra* note 43 (detailing the requirement of a ceasefire); see also AHMAR, *supra* note 10, at 40 (observing that, at one time, both India and Pakistan supported a plebiscite for Kashmir). India later changed its position and now considers Kashmir to be an integral part of India. *Id.*

45. See UNCIP S/726, *supra* note 43, pmbl. (noting that India and Pakistan reaffirmed their hope for a plebiscite).

46. See UNCIP S/1196, *supra* note 43, § 2 (stating that the plebiscite will not be held until the cease-fire is met).

47. See Whitlock, *supra* note 41 (noting that India and Pakistan have fought three wars, in 1945, 1965, and 1971).

48. See *India-Pakistan: Troubled Relations, The 1965 War*, BBC NEWS ONLINE (outlining the cause of the 1965 war and its pacific settlement at Tashkent), *at* [http://news.bbc.co.uk/hi/english/static/in\\_depth/south\\_asia/2002/india\\_pakistan/timeline/1965.stm](http://news.bbc.co.uk/hi/english/static/in_depth/south_asia/2002/india_pakistan/timeline/1965.stm) (last visited Sept. 4, 2003).

49. See The Simla Agreement, July 2, 1972, India-Pak., 858 U.N.T.S. 71, 73 (stating that the two parties will meet at a future date to discuss the final settlement of Jammu and Kashmir), *available at* <http://www.indianembassy.org/policy/Kashmir/shimla.htm> (last visited Sept. 4, 2003).

50. See Sengupta, *supra* note 39 (proclaiming that the non-occurrence of a plebiscite is, “the mantra for Pakistani outrage against India”).

agreement negated the 1949 UNCIP resolution.<sup>51</sup> The result was that the parties again frustrated a plebiscite.<sup>52</sup>

### 3. *The Current Insurgency*

In the late 1980s, the fight over Jammu and Kashmir took a turn for the worse.<sup>53</sup> India controlled two-thirds of Jammu and Kashmir while Pakistan controlled one-third of the region, presently known as Azad, or "Free," Kashmir.<sup>54</sup> At the same time, trust in the Kashmir political process deteriorated.<sup>55</sup> The Indian government consistently dismissed Kashmir leaders who did not agree with the Indian agenda.<sup>56</sup> Popular groups routinely accused the state's ruling party,

51. See MUSHTAQR RAHMAN, *DIVIDED KASHMIR: OLD PROBLEMS, NEW OPPORTUNITIES FOR INDIA, PAKISTAN AND THE KASHMIRI PEOPLE* 162 (1996) (noting India's position on the plebiscite after the Simla Agreement).

52. See YVES BEIGBEDER, *INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS* 126 (1994) (discussing the non-occurrence of the U.N. sponsored plebiscite for Kashmir).

53. See *infra* notes 54-60 and accompanying text (noting the beginning of the present-day insurgency).

54. See Gershman, *supra* note 29 (detailing the division of Jammu and Kashmir between India and Pakistan after the 1947 war). During the war, Pakistan seized northwestern Kashmir. See Sengupta, *supra* note 39 (describing the area seized by Pakistan in the 1947 war). The dividing line between the two regions is the "Line of Control". See Michael Fathers, *Play Nice*, TIME, Feb. 5, 2001, at 18 (noting that the Simla Agreement established the Line of Control as the informal border between India and Pakistan; see also The Simla Agreement, *supra* note 49, at 73 ("[T]he line of control resulting from the ceasefire of December 17, 1971, shall be respected by both sides . . ."); Charles Sanctuary, *Analysis: Contentious Line of Control*, BBC NEWS, Jan. 4, 2002 (confirming that the Line of Control basically matches the frontline at the end of the 1947 war), at [http://news.bbc.co.uk/1/hi/world/south\\_asia/377916.stm](http://news.bbc.co.uk/1/hi/world/south_asia/377916.stm) (last visited Sept. 3, 2003). The Line of Control became the flash point for many cross-border incursions and a constant build of troops. See INT'L. CRISIS GROUP, *supra* note 12, at 1 (detailing the history of the Line of Control).

55. See Wiseman, *supra* note 17 (affirming the belief that local elections were "rigged"); see also Sanjoy Majumder, *A New Era in Kashmiri Politics*, BBC NEWS, Oct. 11, 2002 (quoting Shujaat Bukhari, a local journalist, "[t]he fact is that many do believe that [the October 2002 election] has been one of the fairest elections in Kashmiri history."), at [http://news.bbc.co.uk/1/hi/world/south\\_asia/2320605.stm](http://news.bbc.co.uk/1/hi/world/south_asia/2320605.stm) (last visited Sept. 3, 2003).

56. See *Jammu and Kashmir Backgrounder*, SOUTH ASIA TERRORISM PORTAL (2001) [hereinafter *Backgrounder*] (explaining that the central government

the National Conference ("NC"), of widespread corruption.<sup>57</sup> The 1987 election fraud cemented this belief.<sup>58</sup> Seizing the opportunity, Pakistan began supporting newly emerging Kashmiri and non-Kashmiri paramilitary groups fighting for accession to Pakistan.<sup>59</sup> The rise of these paramilitary groups began the present insurgency in Kashmir.<sup>60</sup>

The end of diplomatic relations between India and Pakistan occurred in 1999.<sup>61</sup> The Kargil crisis, resulting from the 1999 meeting between Pakistani Prime Minister Nawaz Sharif and Indian Prime Minister Atal Vajpayee, increased the intensity of violence in Kashmir.<sup>62</sup> Unfortunately, the confidence-building measures considered at the meeting never took effect because Pakistan's Chief of Army Staff, General, and future President, Pervez Musharraf, sent

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dismissed Farooq Abdullah's government in 1984 and Ghulam Mohammad Shar's government, the successor of Abdullah, in 1986), at <http://www.satp.org/satporgtp/countries/india/states/jandk/backgrounder/index.html> (last visited Sept. 3, 2003). The Indian Prime Minister, Rajiv Gandhi, then swore in Farooq Abdullah as the new Chief Minister of Kashmir after the 1987 election. *Id.* Abdullah won the election with Gandhi's support and agreement. *Id.*

57. See Gershman, *supra* note 29 (discussing the public view of the National Conference party).

58. See *id.* (outlining the outcome and effect of the 1987 elections). A new political party had emerged that represented a wide base of Kashmiri Muslims, including both pro-independence and pro-Pakistan supporters. *Id.* The party, titled the Muslim United Front ("MUF"), was the favorite to win the election. *Id.* Muslim Kashmiris believed that the loss of the election to the NC, and the reelection of Farooq Abdullah, was the result of obvious fraud. *Id.*

59. See Sengupta, *supra* note 39 (affirming that out of 2,400 militants in Kashmir today, 1,400 are non-Kashmiris and the two deadliest groups operate out of Pakistan); see also *Backgrounder*, *supra* note 56 (noting that Pakistan used "civilian discontent" to begin the insurgency).

60. See *Backgrounder*, *supra* note 56 (noting that the insurgency began in Kashmir with the explosion of two bombs in Srinagar by the Jammu and Kashmir Liberation Front on July 31, 1988).

61. See *infra* notes 62-67 and accompanying text (outlining the effect of the Kargil crisis on Indo-Pakistani relations).

62. See INT'L. CRISIS GROUP, *supra* note 12, at 2 ("The current situation can best be seen as a continuation of the hostilities that have marked India-Pakistan relations since the Kargil crisis."). The purpose of the meeting was to create "confidence-building measures," and at the end of the meeting, Pakistan consented to overlook the U.N. resolution calling for a plebiscite as long as India would cease to refer to Kashmir as "an integral part of India." *Id.* at 1.

Pakistani troops into the Kashmir region of Kargil, and India responded with troops of its own.<sup>63</sup> Later that year, Musharraf staged a coup in Pakistan and assumed power.<sup>64</sup> India responded by significantly reducing diplomatic relations with Pakistan.<sup>65</sup> After a December 2001 attack on the Indian parliament, India withdrew its ambassador from Pakistan.<sup>66</sup> This was the end of official diplomatic relations between the two countries.<sup>67</sup> Fortunately, both sides continue to attempt confidence-building measures such as those

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63. See *id.* (recounting Pervez Musharraf's infiltration of two sectors of Jammu and Kashmir; Kargil and Drass). The ten-week war resulted in over 1,000 casualties. See Sengupta, *supra* note 39 (estimating the total casualties from the Kargil war).

64. See Gregory R. Copley, *Pakistan Under Musharraf*, DEF. & FOREIGN AFF. STRATEGIC POL'Y, Jan. 2000 (detailing Musharraf's "almost inevitable" coup, which ousted Prime Minister Nawaz Sharif). "As soon as Gen. Musharraf was given the post of [Army Chief of Staff], his close acquaintances noted that it would only be a matter of time before Gen. Musharraf . . . became intolerant of the Naza Administration's lack of planning and its failure to stay focu[s]ed." *Id.*; see also Barry Bearak, *For the Newest Nuclear Powers, a Little Chat*, N.Y. TIMES, July 15, 2001, § 4, p. 5 (confirming Musharraf's overthrow of Prime Minister Sharif in October 1999).

65. See INT'L. CRISIS GROUP, *supra* note 12, at 2 (indicating the deterioration of diplomatic relations between India and Pakistan).

66. See *id.* (providing an explanation for India's withdrawal of its ambassador from Pakistan). India accused two Pakistan-based paramilitary groups, Jaish-i-Mohammad and Lashkar-i-Taiba, of attacking the Parliament. *Id.* See generally Wiseman, *supra* note 17 (discussing terrorist attacks and history of Kashmir insurgency).

67. See INT'L. CRISIS GROUP, *supra* note 12, at 2 (relaying the fallout of December 2001 attack on the Indian Parliament). Although Pakistan immediately countered India's movement of troops to the Line of Control, President Musharraf publicly denounced the attack and banned five different Islamic extremist groups, including the two groups suspected of committing the attack. *Id.* Musharraf ordered the offices of the five groups sealed and arrested 2,000 Islamic extremists. *Id.*

proposed at Kargil.<sup>68</sup> Unfortunately, the efforts have not been entirely successful.<sup>69</sup>

#### 4. A New Beginning

Just as scholars believe that the 1987 election was the flash point of the present insurgency, many Kashmiris believe that the elections of October 2002 may represent the beginning of new hope for Kashmir.<sup>70</sup> The six-year tenure of the Kashmiri state assembly ended in 2002.<sup>71</sup> The resulting election brought the defeat of the NC, the party of the Abdullah family that had dominated the corrupt political scene in Kashmir for over fifty years.<sup>72</sup> Kashmiris saw the election as a step towards peace because they had overcome the fraudulent elections of the past.<sup>73</sup> In fact, the new Kashmir government is already making important moves toward peace.<sup>74</sup>

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68. See *Timeline: Conflict Over Kashmir*, CNN.COM, May 24, 2002 (detailing the attempts by all sides of the conflict at peace talks, troop withdrawal and cease fires), *at* <http://asia.cnn.com/2002/WORLD/asiapcf/south/05/24/kashmir.timeline/index.html> 1 (last visited Sept. 3, 2003); see also AHMAR, *supra* note 10, at 46, Table 12 (listing confidence building measures between India and Pakistan from July 1972 and 1992).

69. See *Timeline: Conflict Over Kashmir*, *supra* note 68 (emphasizing the continuous actions of the Indian government, the Pakistani government, and paramilitaries after peace overtures); see also AHMAR, *supra* note 10, at 33 (confirming that for every two steps made towards peace, there are four steps away from peace).

70. See Majumder, *supra* note 55 (noting that Kashmiri citizens are accepting the results of the October 2002 election "with wonder, enthusiasm and even a faint sense of optimism about the future of this disputed state . . ."). But see AHMAR, *supra* note 10, at 30 (positing that post-election posturing in India or Pakistan could lead at best to confidence building measures). It is unlikely that this "posturing" will lead to any kind of substantive solution. *Id.*

71. See Rajyasri Rao, *Q&A: Kashmir Assembly Elections*, BBC NEWS, Oct. 23, 2002 (explaining the backdrop of the recent elections in Kashmir), *at* [http://news.bbc.co.uk/1/hi/world/south\\_asia/2249016.stm](http://news.bbc.co.uk/1/hi/world/south_asia/2249016.stm) (last visited Sept. 3, 2003).

72. See Majumder, *supra* note 55 (specifying that the election brought about the defeat of Omar Abdullah, the ruler of the NC); see also Ashok Sharma, *Indian Parties Try to Form Coalition in Kashmir*, WASH. POST, Oct. 27, 2002, at A26 (explaining the significance of the recent elections).

73. See Majumder, *supra* note 55 (quoting a local journalist's response to the recent elections as being "one of the fairest elections in Kashmiri history."). All of

The constant atmosphere of death, torture, and a withering economy, along with the present postures of the leaders of both India

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the parties in the election were pro-India. *Id.* The Islamic militant groups fighting for independence or accession to Pakistan, including the All-Party Hurriyat Conference, boycotted the election and threatened voters, as they have for years. *See* Rao, *supra* note 71 (“They believe that the only vote that counts is a plebiscite to decide whether Kashmir is to remain part of India or not.”). Regardless of the threats of violence, there was a forty-six percent voting percentage rate. *Id.* India claims that such a high rate of participation confirms that people are still willing to be a part of the democratic process of India. *Id.*

74. *See* Alex Perry, *Peace in the Balance*, TIME, Dec. 16, 2002, at 84 (describing the coalition administration created by the Congress Party and the People’s Democratic Party). The People’s Democratic Party (“PDP”), led by Mufti Mohammed Sayeed, agreed to form a coalition government with the Congress party, India’s main opposition party, and with two smaller parties, the People’s Democratic Front and the Panthers Party. *Id.* The parties announced several goals in their “Common Minimum Programme” (“CMP”). *See* Interview on Doordarshan Television, with New Delhi of the Congress party, the People’s Democratic Party, People’s Democratic Front, and Panthers Party, *Programme of New Kashmir Coalition Government Issued*, BBC MONITORING S. ASIA, Oct. 27, 2002 (outlining the commitments made in the CMP by all members of the coalition government). Ensuring development of all three regions of Kashmir, removing poverty, and the restoration of “peace and normalcy” were three of the items on the CMP. *Id.* The coalition believes that its victory is the result of Kashmir’s vote for peace. *See* Shujaat Bukhari, *Talks Soon with Elected Representatives, Others in J&K*, THE HINDU, Dec. 28, 2002 (recalling Chief Minister Sayeed’s belief that the Kashmiri people voted for peace in the October 2002 election). One of the pledges of the PDP was to hold talks with all sides of the conflict, including pro-Pakistan groups. *See* Edward Luce, *Kashmir’s New Leader Frees Separatist Politician*, FIN. TIMES, Nov. 12, 2002, at 4 (noting the important electoral pledge made by the incoming government). A senior member of the coalition stated, “Mufti Sayeed wants to open a new chapter in the Kashmir dispute by persuading militant groups that it is worthwhile talking.” *Id.* As a show of faith, Chief Minister Sayeed freed Yassin Malik, a leading separatist and leader of the Jammu & Kashmir Liberation Front, from detention less than one month after the election. *Id.* The Jammu and Kashmir Liberation Front played a central role in creating the insurgency after the 1987 election. *Id.* By December 2002, the Indian Deputy Prime Minister, L. K. Advani, agreed to hold a dialogue with not only elected representatives but also with those parties that did not choose to participate in the 2002 election, namely paramilitary forces. *See* Bukhari, *supra* note 74 (outlining statements made by both Deputy Prime Minister Advani and Jammu and Kashmir Chief Minister Sayeed regarding the proposed dialogue). *But see* Victoria Burnett, *Prayers for Peace at Pakistan Border*, BOSTON GLOBE, Dec. 29, 2002, at A6 (noting Deputy Prime Minister’s Advani’s challenge to Pakistan to “face India in out-and-out war instead of what he called a proxy war through extremist groups in Kashmir”).



and Pakistan, may lead to the possibility of peace.<sup>75</sup> Reports from Kashmir indicate that Kashmiri citizens are growing weary of fighting and being fought over.<sup>76</sup> It is becoming clear that this is not Kashmir's war, but Kashmiris are being made to suffer the consequences.<sup>77</sup> Furthermore, Indian Prime Minister Vajpayee and Pakistani President Musharraf may be the first two leaders of their respective countries who could bring peace.<sup>78</sup>

## B. LEGAL STRUCTURES FOR RESOLVING SELF-DETERMINATION CONFLICTS

The proper way to ensure that the Kashmir people can freely pursue their right to self-determination is to make legal proposals for conflict resolution.<sup>79</sup> Plebiscites and earned sovereignty provide both the popular consultation of the will of the people and a legal method by which all three parties to the conflict can compromise.<sup>80</sup> This results in the establishment of an intermediate legal status for Kashmir that assures the exercise of self-determination by requiring a plebiscite.<sup>81</sup>

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75. *Compare Backgrounder, supra* note 56 (claiming that 26,226 people were killed between 1988 and 2000), *with Gershman, supra* note 29 (noting that the reports of casualties range from 35,000 to 70,000).

76. *See Whitlock, supra* note 41 (commenting on the changing attitudes of individuals in Kashmir towards the war).

77. *See id.* (quoting a Kashmiri citizen, "[w]e are very patriotic about Kashmir, but this is not our war. It is a war between two countries. Neither the Indian army nor the Pakistani army are good for us.").

78. *See Fathers, supra* note 54 (explaining the two different postures of the leaders, their present initiatives for peace, and their power to bring about change). Not only is Prime Minister Vajpayee one of India's most respected and popular politicians, but he has the backing of the Bharatiya Janata Party, a Hindu right-wing party. *Id.* "If anyone has the credibility to sell Indian Hindus a compromise with both Muslim Pakistan and the predominantly Muslim Kashmiris, it is Vajpayee." *Id.* President Musharraf, on the other hand, is in a tougher position because he is attempting to restore the international reputation of Pakistan as well as its internal stability. *Id.*

79. *See Blay, supra* note 6, at 275 (confirming that self-determination is a legal concept).

80. *See AHMAR supra* note 10, at 30 (reinforcing the idea that all parties must compromise in this situation).

81. *See infra* Part III (proposing recommendations for ending the violence including a plebiscite approving any peace agreement).

### *1. Plebiscites or Referendums*

Self-determination by its definition requires a free choice by the people regarding their domestic or international future.<sup>82</sup> Plebiscites, or referendums, are the legal mechanisms most widely used to ensure self-determination.<sup>83</sup> A plebiscite can function as more than a vote on independence.<sup>84</sup> Plebiscites can also function as a general consultation of the people's will regarding a particular proposal.<sup>85</sup> There are two forms of plebiscites: internal and international.<sup>86</sup> Internal, or domestic, plebiscites use popular consultation to approve constitutional amendments or other internal changes to the country's legal structure.<sup>87</sup> They are part of the inherent rights of an individual as a citizen of that country.<sup>88</sup> International plebiscites, on the other hand, are generally the result of international instruments, such as peace agreements or treaties, which lay the framework for the proposed vote.<sup>89</sup> Absent an international instrument, the international

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82. See BEIGBEDER, *supra* note 52, at 18 (explaining the implication of popular consultation within the definition of self-determination). "Both external and internal self-determination imply a democratic process, *i.e.* a free and clear choice by the population of the territory or country through a plebiscite, referendum or through elections." *Id.*

83. See Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167, 194 (2001) (stressing the importance of determining the will of the people); see also Dr. Ghulam Nabi Fai, *The Kashmir Dispute: Solution Through Plebiscite*, Kashmiri American Council (1997) (noting the necessity of an impartial vote to end the dispute), available at <http://www.geocities.com/indianfas/kashmir/solution.htm> (last visited Sept. 3, 2003).

84. See BEIGBEDER, *supra* note 52, at 19 (stating that the definition of an international plebiscite is "the consultation of a people by means of a vote as to its wishes on an important public question.") (emphasis added).

85. See *id.* at 33 (discussing the difference between international plebiscites and local elections).

86. See *id.* at 19 (explaining that there are important distinctions between international and internal plebiscites).

87. See *id.* (confirming the definition of an internal plebiscite).

88. See *id.* (noting the "rights" of national democratic populations).

89. See *id.* (defining possible references to an "international plebiscite").

plebiscite generally occurs when the future status of a territory in the international community is at stake.<sup>90</sup>

Plebiscites function as a legally enacted choice between options.<sup>91</sup> An international plebiscite requires monitoring in order to confirm that there is no tampering with the results by government leaders or threats to those participating.<sup>92</sup> There are many different methods of monitoring.<sup>93</sup> In bilateral plebiscites, where there is no specific international intervention, the country's authorities may authorize international observers to certify the fairness of the vote.<sup>94</sup> In multilateral plebiscites, the state's government authorizes monitoring by intergovernmental organizations ("IGOs") such as the United Nations or the Organization of American States.<sup>95</sup> The organizations will then report on the fairness and objectivity of the election or plebiscite.<sup>96</sup>

## 2. *Earned Sovereignty: A Possible Solution*

The international legal community recognizes that inherent difficulties exist with the term "sovereignty."<sup>97</sup> Traditionally,

90. See BEIGBEDER, *supra* note 52, at 19 *id.* (detailing a possible objective of an international plebiscite).

91. See *supra* note 8 and accompanying text (defining what is meant by the term "plebiscite").

92. See Huang, *supra* note 83, at 194 (emphasizing that election observer missions are typically used to ensure (1) proper registration of voters and inability to tamper with voting lists; (2) the ability to freely exercise the right to vote and free and fair counting of the votes; and (3) the free flow of information to the voters during the campaign).

93. See BEIGBEDER, *supra* note 52, at 34 (discussing the various forms of election monitoring).

94. See *id.* (detailing those instances where bilateral monitoring occurs).

95. See *id.* (explaining who performs multilateral plebiscite monitoring). Most of the leaders of the IGOs are themselves subject to reelection, so it is important to use individuals renowned for their independence and competence. *Id.*

96. See *id.* at 34-35 (noting the general objectives of an international monitoring presence, including assurances of legitimacy).

97. See Lorie M. Graham, *Self-Determination for Indigenous Peoples After Kosovo: Translating Self-Determination "into Practice" and "into Peace"*, 6 ILSA J. INT'L & COMP. L. 455, 465 (2000) (stating that redefining sovereignty will be "the defining issue in international law for the 21st century"); see also HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE

sovereignty is defined as independence, and, until recently, that definition has remained stringent.<sup>98</sup> Either a region is sovereign and independent, or it is not, and, therefore, has no sovereign rights.<sup>99</sup> Problems arise when solutions to conflicts cannot turn on such a black-or-white distinction.<sup>100</sup>

The cultural conflicts of the past fifty years have led to an expansion of the term sovereignty.<sup>101</sup> Unfortunately, the propensity of international lawyers to adhere to the strict stigma of the term “sovereignty” remains.<sup>102</sup> Thus, in conflict negotiations the parties often have a difficult time understanding that different levels of sovereignty can be gained at varying phases – not necessarily ever leading to total independence or statehood.<sup>103</sup> Often parties will walk

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ACCOMMODATION OF CONFLICTING RIGHTS 14-15 (1992) (discussing the conflict in the defining the term sovereignty and the implications of the definition).

98. See *id.* at 15 (stating that sovereignty is usually defined as, “the fundamental authority of a state to exercise its powers without being subservient to any outside authority”); see also STEPHEN D. KRASNER, *Problematic Sovereignty*, in PROBLEMATIC SOVEREIGNTY 1, 6 (Stephen D. Krasner ed., 2001) [hereinafter *Problematic Sovereignty*] (“Some of the confusion that has been associated with the concept of sovereignty can be dispelled if it is recognized that the different rules and characteristics that have been associated with sovereignty do not necessarily go together. They can be unbundled.”); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 220 (1999) [hereinafter ORGANIZED HYPOCRISY] (stating that international legal sovereignty refers to the rights of countries that have legal independence).

99. See HANNUM, *supra* note 97, at 15 (noting the absolute quality that some writers give to the term “sovereignty”).

100. See BALKANS REPORT NO. 46, *supra* note 14, at 17-20 (stating that Kosovo was entitled to self-determination and the right to attain international status, but citing the need to preserve territorial integrity as the basis for using intermediate, or earned, sovereignty in Kosovo); see also Graham, *supra* note 97, at 458 (supporting the idea of pooling the principles of sovereignty and autonomy in order to create a new environment for resolving self-determination conflicts).

101. See HANNUM, *supra* note 97, at 26 (welcoming the new, fluid concept of sovereignty).

102. See Scharf, *supra* note 2 (manuscript at 2) (noting that international lawyers tend to adhere to the traditionally accepted definition of sovereignty).

103. See Interview with Paul Williams, Ph.D., Professor of Law and International Relations, American University Washington College of Law, Washington, D.C. (Mar. 3, 2003) (discussing Professor Williams’ negotiation experiences and views on earned sovereignty).

away from negotiations simply because they cannot get past the use of the term sovereignty.<sup>104</sup>

Sovereignty is now evolving into a set of powers that may be given and refused.<sup>105</sup> Although the conventional legal rules of sovereignty generally control, innovative solutions are emerging as an appropriate substitute in certain situations.<sup>106</sup> A new theory, attaining "legal sanctification," is arising to fit the need – "earned sovereignty."<sup>107</sup> Although rooted in sources of international law such as scholarly writings and general principles, thus far the international community has applied newly emerging theories such as earned sovereignty only in peace agreements and has not yet made such theories the subject of treaties or customary international law.<sup>108</sup>

104. See Scharf, *supra* note 2 (manuscript at 2-3) (observing that the inability to see beyond the legally accepted definition of sovereignty may have been at the root of many conflicts, such as Bosnia); see also Interview with Paul Williams, *supra* note 103 (noting the trouble caused by an inability to negotiate outside of the terms "independence" or "sovereignty").

105. See ORGANIZED HYPOCRISY, *supra* note 98, at 220 n.1 (referring to sovereignty as a bundle of properties and attributes).

106. See *Problematic Sovereignty*, *supra* note 98, at 5 (noting that in the face of conflict, traditional legal boundaries of sovereignty may be broken); see also Graham, *supra* note 97, at 457 (quoting U.S. Deputy Secretary of State Strobe Talbott: "While self-determination at Versailles meant 'the dismant[ling] of empire[s] and the formation of a whole new cluster of nation-states,'" the Balkans of today require "new answers to those old questions about nationhood, statehood, democracy, and self-determination."").

107. See Scharf, *supra* note 2 (manuscript at 3) ("Conversely, where diplomats have experimented with new conceptions of sovereignty without legal sanctification, the rule of law and role of international lawyers in the policy making process have suffered."). But cf. INDEPENDENT INT'L COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED 271-79 (2000) [hereinafter THE KOSOVO REPORT] (describing earned independence but using the term "conditional independence").

108. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 48-56 (7th rev. ed. 1997) (outlining the requirements which must be met before a legal standard considered customary international law, and providing an overview of additional sources of international law); see also Statute of the International Court of Justice, June 26, 1945, arts. 38, 59, Stats. 1055, 1060 (listing the four sources of international law applied in decisions of the International Court of Justice decisions), available at [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasic\\_statute.htm](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasic_statute.htm) (last visited Sept. 6, 2003).

Earned sovereignty requires an initial grant of sovereignty rights and allows future grants of power to be conditioned upon the ability of the sub-state's citizens to meet certain standards.<sup>109</sup> The creation of "earned sovereignty" achieves two goals.<sup>110</sup> It allows the international legal community to address other creative forms of conflict resolution without the "sovereignty" stigma by creating a new intermediate legal status, and it begets better negotiations because parties are willing to listen to what the sub-state may "earn" and what the "price" may be.<sup>111</sup>

Earned sovereignty, as a legally accepted form of resolution, allows the parties to agree on basic requirements that the emerging state must meet before the parent state will grant various sovereign powers, such as the right to govern and sign international instruments.<sup>112</sup> It is also a formula for progressive devolution of

109. See Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y (forthcoming 2003) (manuscript at 2, on file with the American University International Law Review) (providing an overview of the basic premise of earned sovereignty).

110. See INDEPENDENT INT'L COMMISSION ON KOSOVO, THE FOLLOW-UP OF THE KOSOVO REPORT: WHY CONDITIONAL INDEPENDENCE? 25 (2001) (on file with the American University International Law Review) [hereinafter WHY CONDITIONAL INDEPENDENCE?] (defining conditional independence); see also Interview with Paul Williams, *supra* note 103 (outlining the major premises behind earned sovereignty).

111. 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, 250 (1998) (affirming the principle of earned sovereignty by noting that if a state were to condition its cessation of hostilities on the ability of the other party to meet certain conditions, that party would likely meet those conditions if it were presently being subjected to extended hostilities). As an example, Amley provides the following:

A's offer to stop tipping the boat if B will row is unlikely to be perceived by B as a carrot unless A actually is tipping the boat at the time the offer is made. A tips the boat in order to shift B's expectation baseline, so that B will perceive the offer to stop tipping the boat as a reward.

*Id.*; see also Interview with Paul Williams, *supra* note 103 (noting that, based on his own negotiations experience, earned sovereignty enables compromise).

112. See WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 25 (discussing the basic theory behind conditional independence); see also THOMAS C. HELLER & ABRAHAM D. SOFAER, *Sovereignty: The Practitioners' Perspective*, in PROBLEMATIC SOVEREIGNTY 24, 26-27 (listing the various sovereignty rights and obligations which come with recognized sovereignty, including: (1) the right to territorial integrity; (2) the right to defend the state through the use of force; (3) the

power.<sup>113</sup> The concept allows for greater negotiation power regarding democratic principles and the protection of human rights, because the sub-state is able to obtain sovereign powers while promising to protect democracy and human rights.<sup>114</sup> The end goal of earned sovereignty, or conditional independence, is to put political responsibility back in the hands of the people.<sup>115</sup>

Earned sovereignty contains five key elements: (1) shared sovereign authority of state and sub-state functions; (2) attainment of *de facto* and *de jure* levels of sovereign authority; (3) increasing, or decreasing, levels of sovereignty over time as the specified conditions are met; (4) internationally supervised or mediated resolution of final status; and (5) possible international recognition conditioned on the ability to meet continuing limitations.<sup>116</sup>

The theory of earned sovereignty is still relatively new in international legal theory, but the international community has already supported its use in various proposals for Kosovo.<sup>117</sup> The United Nations Mission in Kosovo ("UNMIK") supported the use of earned sovereignty when it laid out its "standards before status" approach.<sup>118</sup> The two central statements of the approach were that a

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right to govern by establishing, applying and enforcing law; (4) eligibility for membership in international organizations; (5) the capacity to act as a legal entity for owning, purchasing, transferring property, etc.; (6) grant of sovereign immunity for noncommercial activities and consular relations; (7) capacity to sign agreements; (8) the duty to respect the territorial integrity of other sovereign nations; and (9) the obligation to abide by international law).

113. See WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 28-29 (providing a general overview of the different processes of conditional independence).

114. See Williams, *supra* note 109 (manuscript at 2) (noting the benefits of earned sovereignty).

115. See WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 28 (discussing that conditional independence is not only a process, but also an end goal).

116. See Williams, *supra* note 109 (manuscript at 2) (establishing the five basic elements of earned sovereignty).

117. See BALKANS REPORT NO. 46, *supra* note 14, at 1 (proposing earned sovereignty as a legal option for Kosovo); see also WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 28 (supporting the use of conditional independence for the determination of Kosovo's future status).

118. See Press Release, United Nations Mission in Kosovo, Address to the Security Council by Michael Steiner, Special Representative of the Secretary-General, UNMIK/PR/792 (July 30, 2002) [hereinafter UNMIK/PR/792]

return to Serbian control was not in Kosovo's future, and that UNMIK would establish a set of "benchmarks" that Kosovar institutions must meet.<sup>119</sup>

## II. ANALYSIS

The international legal community continually fights for preservation of territorial integrity, which, in turn, necessitates a denial of secession.<sup>120</sup> Where a self-identified group of people with a territorial connection repeatedly is denied the right to exercise self-determination and can articulate a legitimate basis for its secession, however, the group may legally be entitled to self-determination.<sup>121</sup> If that group is systematically refused basic human rights and access to the democratic process, that group may legally be entitled to secession and international recognition.<sup>122</sup> According to these

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(emphasizing the importance of the U.N. Mission in Kosovo's message that Kosovo must reach the standards demanded by its people and the international community before the parties can reach any determination regarding its future status), available at <http://www.unmikonline.org/press/2002/pressr/pr792.htm> (last visited Sept. 6, 2003).

119. See *id.* (describing what Kosovo will not be in the future, as well as setting benchmarks for attainment of future sovereignty); see also Williams, *supra* note 109 (manuscript at 2) (establishing the five basic requirements of earned sovereignty).

120. See G.A. Res. 15414, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) [hereinafter Res. 15414] (declaring the incompatibility of the disruption of territorial integrity with the principles of the U.N. Charter); see also Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 508 (1994) (explaining that the protection of territorial integrity conflicts with the right to secede, and arguing that this impedes the ability of secession to gain the status of customary international law); BALKANS REPORT NO. 46, *supra* note 14, at 8 (highlighting the attitude of the international community's attitude towards secession and self-determination).

121. See BALKANS REPORT NO. 46, *supra* note 14, at 8-9 (noting that there are circumstances in which secession may be appropriate); see also Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153, 160 (1994) (confirming that scenarios exist where the only available method of protecting the rights of a people is secession). Kolodner argues, however, that the right to self-determination does not necessarily grant the right to secede. *Id.* If this were the case, the international system would become "fragmented, politically unstable, incapable of addressing global problems, and economically unfit to provide the necessities of life to many of the world's inhabitants." *Id.*

122. See Haile, *supra* note 120, at 508 (confirming that secession may be appropriate where there are serious violations of human rights); see also BALKANS



guidelines, Kashmir is entitled to international recognition and secession.<sup>123</sup>

The conflict in Kashmir, at its simplest level, is essentially a sub-entity of a state fighting to determine its future status.<sup>124</sup> As in Kashmir, the people of East Timor and Kosovo fought for self-determination amidst larger conflicts between two nations.<sup>125</sup> Not only were the people in East Timor and Kosovo fighting for the right to self-determination, but also, as in Kashmir, they were fighting for the protection of human rights.<sup>126</sup> The conflicts in East Timor<sup>127</sup> and

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REPORT NO. 46, *supra* note 14, at 2 (outlining the basic legal requirements for self-determination and international recognition).

123. *See supra* Part I.A (affirming the historical denial of human rights and access to democratic institutions experienced by Kashmir).

124. *See supra* Section I.A.1 (presenting the origin of the Kashmir conflict).

125. *See infra* notes 127-128 (noting that the East Timorese were the subject of a battle between Portugal and Indonesia and that the Albanians and Serbs fought over the Kosovars).

126. *See id.* (detailing the conflicts in East Timor and Kosovo as essentially responses to egregious human rights abuses).

127. *See* IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR: THE UNITED NATIONS, THE BALLOT AND INTERNATIONAL INTERVENTION 15 (2001) (outlining the history of the fight between Portugal and Indonesia's over East Timor). Portugal considered East Timor to be a province until 1975, when it recognized East Timor's right to self-determination. *Id.* The Portuguese never implemented their plan for transition due to the breakout of civil war in East Timor. *See* Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31, 52 (2002) (discussing the Indonesian Army's invasion of East Timor in December 1975). Indonesia then annexed East Timor as an Indonesian province. *Id.* Neither Portugal nor the Fretilin, the prominent independence political group in East Timor, accepted the incorporation. *Id.* at 52-53. The East Timorese resistance campaign, coupled with a brutal Indonesian counter-insurgency force, resulted in the death of 200,000 East Timorese people. *See* Anthony L. Smith, *East Timor* (noting that 200,000 individuals were killed out of a pre-invasion population estimate of 800,000), at [http://www.selfdetermine.org/conflicts/timor\\_body.html](http://www.selfdetermine.org/conflicts/timor_body.html) (last visited Sept. 6, 2003). While some states accepted the Indonesian annexation of East Timor, most of the international community scorned Indonesia for clearly violating international law. *Id.* East Timor continued an unsuccessful fight for independence against Indonesian President Suharto until his resignation in 1998. *Id.* Suharto's successor, B.J. Habibie, succeeded in proposing a new plan for resolving the East Timor situation. *Id.*

Kosovo<sup>128</sup> are comparable to Kashmir in this respect, and the legal framework applied in each case may provide similarly applicable solutions for Kashmir.

## A. PLEBISCITES AND REFERENDUMS

### *1. The Plebiscite: East Timor Successes and Failures*

The purpose of a plebiscite is to function as a legally binding dispute resolution through democratic means.<sup>129</sup> The U.N. Secretary-General's involvement as moderator of the East Timor plebiscite confirms the United Nations' acceptance of plebiscites as legal solutions to self-determination conflicts.<sup>130</sup> The Secretary-General not only approved of the plebiscite, but he also acted as a signatory to the Agreement Regarding the Modalities for the Popular

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128. See BALKANS REPORT NO. 46, *supra* note 14, at 4-7 (providing an overview of the Balkans' history prior to the crisis in Kosovo). After World War II, the new Yugoslav constitution provided that Kosovo would be an Autonomous Province within the Republic of Serbia. *Id.* at 4-5. Over the years, Serbia granted Kosovo additional rights of self-rule. *Id.* at 5. This changed abruptly after Tito's death, however. *Id.* The Kosovar Serbs began fighting for a return to the days when Kosovar Serbs ran the country. *Id.* Slobodan Milosevic's assumption of the Serbian presidency in 1987 marked the beginning of systematic aggression against Kosovar Albanians. *Id.* at 6. This began with the removal of Kosovar Albanians' participation rights in the federal government and led to egregious human rights abuses, such as police violence, detention, torture, mass starvation, and disappearances. *Id.* at 6-7. Although the Kosovar Albanians initially instituted a program of passive resistance, their resistance turned to violence after the international community ignored their plight during the Dayton Accords. See WILLIAM G. O'NEILL, KOSOVO: AN UNFINISHED PEACE 22 (Int'l Peace Acad. Occasional Paper Series 2002) (noting that after the Bosnian Serbs received partial territorial recognition at the Dayton Accords, some Albanians concluded that perhaps violence does pay). The conflict continued until the U.N. Security Council passed Resolution 1244, effectively taking control of Kosovo out of the hands of the Serbs and establishing a U.N. protectorate. *Id.* at 29-31.

129. See Gregory H. Fox, *Election Monitoring: The International Legal Setting*, 19 WIS. INT'L L.J. 295, 303 (2001) (stating that "international law has taken a significant leap forward in positing a link between democratization and effective implementation of norms").

130. See *Questions of East Timor: Report of the Secretary-General*, U.N. GAOR, 53d Sess., Annex II, at 24, U.N. Doc. A/53/951 (1999) (detailing the U.N. Secretary-General's role as the primary facilitator of the East Timor ballot).

Consultation of the East Timorese Through a Direct Ballot, which laid out the plebiscite's framework and structure.<sup>131</sup>

The international community, however, routinely expresses concern regarding the "winner take all" nature of plebiscites.<sup>132</sup> The concern is that plebiscites result in further violence rather than in a solution.<sup>133</sup> While scholars view a plebiscite as "the most democratic interpretation of the concept of self-determination," it does not itself embody democracy.<sup>134</sup> The problem is that plebiscites occur only once.<sup>135</sup> In democracies, the political majority and minority populations routinely shift, thereby ensuring that the minority does not always lose.<sup>136</sup> In a plebiscite, however, there is usually only a single vote held, and the determination of the winner occurs before the vote due to the existence of a large majority.<sup>137</sup> Rather than using a plebiscite to make a final determination on the future of a region, some scholars argue that the plebiscite should elect representatives to

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131. See *id.* (providing the exact questions to be put before the voters on the ballot, the date of the vote, and security arrangements).

132. See *Competing Claims: Self-Determination, Security and the United Nations*, (Nov. 29–Dec. 1, 2000) [hereinafter *Competing Claims*] (recalling statements by individuals participating in the project, "Self-Determination, Security and the United Nations," regarding the "winner take all" outcome of plebiscites), at  
[http://www.ipacademy.org/Publications/Reports/Research/PublRepoReseCompClaims\\_body.htm](http://www.ipacademy.org/Publications/Reports/Research/PublRepoReseCompClaims_body.htm) (last visited Sept. 6, 2003).

133. See *id.* (noting concerns expressed at the project conference, including violence occurring before or after plebiscites).

134. See Rudrakumaran, *supra* note 4, at 34 (discussing various theoretical properties of plebiscites).

135. See *id.* (noting that because no future possibility exists for the minority to become the majority, with plebiscites, the minority lacks adequate access to address its grievances).

136. See *id.* (examining how new ruling majorities arise as a result of periodic elections).

137. See *id.* (arguing that a plebiscite is not necessarily a democratic method of self-determination). The plebiscite denies the minority democracy, in that there is no ability to exercise influence in the form of compromises or coalitions. *Id.* at 35. Not only is the minority going to lose the initial plebiscite, but also the plebiscite will "deprive future generations of democratic rights and confer extraordinary rights on the present population in that the latter decides for the former." *Id.*

a type of "constitutional congress" that would then meet to determine and agree upon integration, accession, or secession.<sup>138</sup>

The use of a plebiscite can be successful, but the parties must carefully construct the framework agreement that acts as plebiscite guidelines.<sup>139</sup> The East Timor plebiscite provides a good model for the basic requirements of a secure U.N.-monitored plebiscite.<sup>140</sup> These requirements include: (1) unqualified consent of all the parties; (2) a detailed layout of all aspects of the plebiscite and monitoring efforts; (3) international support; and (4) adequate security arrangements.<sup>141</sup> All interested parties should establish these details through negotiated agreements.<sup>142</sup>

The plebiscite in East Timor evidences both the positives and possible negatives to the use of a plebiscite.<sup>143</sup> On the positive side,

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138. See *Competing Claims*, *supra* note 132 ("Possible alternatives include processes in which voters choose delegates to constitution-making assemblies, in which the details of living together can be carefully negotiated.").

139. See Jennifer Toole, *A False Sense of Security: Lessons Learned from the United Nations Organization and Conduct Mission in East Timor*, 16 AM. U. INT'L L. REV. 199, 251-65 (2000) (discussing the faulty provisions in the agreement providing for the plebiscite in East Timor).

140. See *id.* (providing an overview of the basic requirements of a secure international plebiscite in the context of East Timor). Some scholars argued that the role the United Nations played in East Timor failed and that IGOs are in better positions to fulfill such a role. *Id.* at 251. The comment addresses the security failures that occurred in the East Timor plebiscite. *Id.* at 249. The author argues that, despite these failures, the United Nations is likely the best agency to undertake these endeavors. *Id.* at 253-54; see also BEIGBEDER, *supra* note 52, at 272-73 (noting the potential bias of NGOs as well as their potential inability to independently fund international elections). *But cf.* Amley, *supra* note 111, at 238 (addressing the inability of the United Nations to easily modify a mediating proposal after their enactment).

141. See Toole, *supra* note 139, at 251-55 (proposing that, in taking into account the mistakes in East Timor, there are specific steps that future plebiscites should take).

142. See *id.* at 255 (stressing the requirement that all parties involved negotiate the details of the plebiscite agreement).

143. See Craig Skehan, *Alatas Gives Vote Seal of Approval*, THE AGE (Melbourne), Sept. 1, 1999, at 13 (confirming that Indonesia's Foreign Minister, Ali Alatas, endorsed the referendum and its outcome as a success). Foreign Minister Alatas proclaimed the referendum's success. *Id.* The numbers of voters, along with their enthusiasm and lack of intimidation, were symbolic of a successful referendum. *Id.*

the referendum provided the people with a free choice between two alternatives.<sup>144</sup> They could form a special autonomous region under the rule of Indonesia or they could form an independent state.<sup>145</sup>

Unfortunately, East Timor is also a good example of possible plebiscite downfalls that can occur when the parties do not carefully lay out the details in the agreement.<sup>146</sup> The May Fifth Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor detailed the forthcoming plebiscite, but there was no consultation of the East Timorese leaders.<sup>147</sup> If there had been consultation of these leaders, the East Timorese might have objected to giving Indonesia control over security.<sup>148</sup> This mistake cost hundreds of East Timorese people their lives.<sup>149</sup>

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144. See Agreement Between the United Nations and the Governments of Indonesia and Portugal Regarding the Modalities for the Popular Consultation Through a Direct Ballot, U.N. SCOR, 53d Sess., Annex II, at 24, U.N. Doc. S/1999/513 (1999) [hereinafter East Timor Modalities] (affirming the existence of two choices for the referendum).

145. See *id.* (proposing the following questions: "Do you accept the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia?" or "Do you reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia?"). The people of East Timor chose independence. See Minh T. Vo, *For UN and East Timor, A Chance to Start Over*, CHRISTIAN SCIENCE MONITOR, Oct. 15, 1999, at 7 (proclaiming that the East Timorese people "overwhelmingly" decided on independence).

146. See Toole, *supra* note 139, at 241-45 (discussing the "fatal flaws" of the East Timor agreement).

147. East Timor was not a signatory to any of the main instruments addressing its future status. See Agreement Between Indonesia and Portugal on the Question of East Timor, U.N. SCOR, 53d Sess., Annex I, at 4, U.N. Doc. S/1999/513 (1999); East Timor Modalities, *supra* note 144; Agreement Between the United Nations and the Governments of Indonesia and Portugal Regarding Security Arrangements, U.N. SCOR, 53d Sess., Annex III, at 29, U.N. Doc. S/1999/513 (1999).

148. See Toole, *supra* note 139, at 216 (describing the campaign of violence and intimidation launched against the East Timorese people after the vote); see also Report of the High Commissioner for Human Rights on the Human Rights Situation in East Timor, U.N. ESCOR, 4th Special Sess., paras. 14-46, U.N. Doc. E/CN.4/S-4/CRP.1 (1999) (detailing the human rights abuses by the Indonesian militia including wanton killings, forced displacement, rape, involuntary disappearances, and destruction of property).

149. See Toole, *supra* note 139, at 245-46 (specifying the consequences that followed the East Timorese plebiscite).

## 2. Possible Legal Application for Kashmir

The facts present in the Kashmir conflict closely mirror those in East Timor prior to the United Nations approval of the East Timor plebiscite as a means to ensure the legal right to self-determination.<sup>150</sup> Thus, there is little doubt whether a plebiscite would be a suitable legal option to secure self-determination in Kashmir.<sup>151</sup> The United Nations Security Council determined in 1948 that a plebiscite was the appropriate legal manner by which to decide the future of Kashmir.<sup>152</sup> Since 1948, scholars have echoed the legality of this solution for Kashmir.<sup>153</sup> Although India argues that the 1949 U.N. plebiscite order became moot after the Simla Agreement, popular consultation of the people through a plebiscite is inherent in the definition of self-determination.<sup>154</sup>

A long-standing obstacle of the promised plebiscite for Kashmir is the requirement of total demilitarization before any vote can take place.<sup>155</sup> As witnessed in East Timor, the parties may need to work with the inability to demilitarize and alternatively use an international electoral monitoring force to ensure a free and fair plebiscite for Kashmir.<sup>156</sup> The parties should consider the possibility

150. See Amardeep Singh, *The Right of Self-Determination: Is East Timor a Viable Model for Kashmir?*, 8 No. 3 HUM. RTS. BRIEF 9, at 11-12 (noting that the uncertain legal status, U.N. Security Council resolutions calling for a plebiscite, and egregious human rights violations are common to both the Kashmir and East Timor conflicts).

151. See *infra* notes 152-154 and accompanying text (noting the clear legality of a plebiscite for Kashmir).

152. See S.C. Res. 726, U.N. SCOR, 3d Sess., at B.6-B.11, U.N. Doc. S/726 (1948) [hereinafter S.C. Res. 726] (calling for a free and fair plebiscite on the question of whether Kashmir should accede to Pakistan or to India). S.C. Res. 726 did not provide for the option of Kashmiri independence. *Id.*

153. See BEIGBEDER, *supra* note 52, at 129 ("Under the principle of self-determination, the fate of Kashmir should be decided by its people . . .").

154. See *id.* (explaining that regardless of India's opinion, a plebiscite is still a viable legal option for Kashmir).

155. See Khan, *supra* note 29, at 514-15 (recognizing the ongoing problem of the demilitarization requirement). India fears that giving in to separatists in Kashmir would lead to similar demands from separatists in Punjab and other parts of India. *Id.*

156. See Toole, *supra* note 139, at 220-31 (discussing the different forms of electoral assistance that the United Nations may undertake depending on the

that a military presence along each side of the border is important to the resolution of the dispute.<sup>157</sup> Otherwise, the Indian government may effortlessly ignore the violence and price of the war that initially led to their support for peace.<sup>158</sup>

Legal constraints exist with any U.N. electoral monitoring.<sup>159</sup> While in some cases the United Nations may intervene without the parent country's consent, the U.N. Charter and the 1996 Resolution on the Respect for the Principles of National Sovereignty and Non-interference in the International Affairs of States in their Electoral Process emphasizes the need for a formal written request of electoral assistance.<sup>160</sup> Although India may eventually agree to a plebiscite, Kashmir likely falls within the sphere of conflicts where formal request is not legally necessary.<sup>161</sup>

The primary obstacle to the use of a plebiscite is the ability to negotiate an agreement regarding the choices the plebiscite would

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requirements of the situation). The most comprehensive form designates the United Nations as the election administrator with the power to organize the entire election and ensuring security. *Id.* at 228-29.

157. See ROBERT G. WIRSING, INDIA, PAKISTAN, AND THE KASHMIR DISPUTE ON REGIONAL CONFLICT AND ITS RESOLUTION 227 (1994) ("Immediate demilitarization of the LOC [Line of Control], when settlement itself is postponed to a future date, may put the military cart before the political horse.")

158. See *id.* (making the logical connection that force may sometimes ensure compliance).

159. See Toole, *supra* note 139, at 232-33 (noting that the United Nations must respect the domestic jurisdiction of a state before interfering in the electoral process).

160. See *id.* (detailing the self-imposed legal constraints on U.N. intervention); see also U.N. CHARTER, art. 2, para. 7 (articulating that the United Nations does not have the authorization to interfere in issues that are essentially domestic in nature). The United Nations can still take peace enforcement action through its Chapter VII powers. *Id.* Chapter VII provides the U.N. Security Council with the power to address threats to peace. *Id.* art. 39.

161. See Toole, *supra* note 139, at 233 (explaining that there are two basic exceptions to the consent requirement). "The U.N. may choose to intervene without consent for external self-determination elections or as part of a peace enforcement mission." *Id.* If the Security Council determines under its Chapter VII powers that intervention in Kashmir is necessary, it may intervene without consent. See U.N. CHARTER, art. 39 (vesting power in the Security Council to intervene where it finds a threat to international peace).

offer.<sup>162</sup> Any agreement would have to involve assent by the Kashmiri people and Indian and Pakistani representatives.<sup>163</sup> The main problem with the need for an agreement is that the parties have never been able to agree to the options for a plebiscite.<sup>164</sup> It is important to note, however, that the parties to the East Timor dispute were not able to reach any agreement until General Suharto stepped down from power in Indonesia.<sup>165</sup> Change of power in Kashmir may bring such a similar, swift solution.<sup>166</sup>

## B. EARNED SOVEREIGNTY OR CONDITIONAL INDEPENDENCE

### *1. The Lessons Learned from Kosovo*

In Kosovo, several organizations advanced the idea of earned sovereignty.<sup>167</sup> In the end, the lawyers at the Rambouillet Accords employed the new theory, which was then incorporated into the Constitutional Framework for Provisional Self-Government (the "Framework").<sup>168</sup> The International Crisis Group ("ICG"), the

162. See SUMIT GANGULY, *THE CRISIS IN KASHMIR: PORTENTS OF WAR, HOPES OF PEACE* 142-43 (1997) (noting that the different parties to the conflict have different opinions on the possible options a plebiscite may present).

163. See WIRSING, *supra* note 157, at 231 (outlining the fact that each of the parties has significant interests and opinions in the conflict).

164. See *id.* (highlighting the fact that India refuses to consider a plebiscite and Pakistan refuses to consider independence for Kashmir as an option).

165. See Smith, *supra* note 127 (stating that resolution of the East Timor conflict could not occur until after Suharto left power). Suharto's successor, BJ Habibie, was open to political compromise, including the notion of East Timor's independence. *Id.*

166. See *supra* notes 74-78 and accompanying text (discussing changes occurring in Kashmir since the elections in October 2002).

167. See A KOSOVO ROADMAP, *supra* note 21, at 17-21 (presenting the International Crisis Group's proposal for Kosovo's final status); see also THE KOSOVO REPORT, *supra* note 107, at 271-79 (providing an additional proposal for utilizing earned sovereignty in Kosovo).

168. See *Constitutional Framework for Provisional Self-Government*, U.N. Interim Admin. Mission in Kosovo, U.N. Doc. UNMIK/REG/2001/9 (2001), at Preamble [hereinafter *Framework*] (calling for the gradual transfer of sovereign rights to the Kosovo people after the Provision Institutions of Self-Government meet the necessary conditions for a peaceful life in Kosovo), *available at*



Independent International Commission on Kosovo ("Kosovo Commission"), and the Public International Law and Policy Group ("PILPG") all provided specific plans for the application of earned sovereignty to Kosovo.<sup>169</sup> In fact, the ICG argued that, "[in Kosovo] [c]onditional independence is the only solution that meets all the key criteria for ensuring internal and regional stability simultaneously."<sup>170</sup> Additionally, the United States, the European Union, Russia, and the United Nations initially proposed the use of conditional independence as a legally viable solution to end the Israel/Palestine conflict.<sup>171</sup>

There are numerous benefits to using earned sovereignty as an accepted legal outcome to self-determination struggles.<sup>172</sup> In accordance with the U.N. Charter requirements regarding the peaceful settlement of disputes without endangering justice, peace, or security, earned sovereignty has the ability to resolve conflicts without resorting to the extremes of independence or secession.<sup>173</sup>

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<http://www.unmikonline.org/regulations/2001/reg09-01.htm> (last visited Aug. 31, 2003).

169. See A KOSOVO ROADMAP, *supra* note 21, at 17-21 (presenting the ICG proposal for Kosovo's final status); see also THE KOSOVO REPORT, *supra* note 107, at 271-79 (outlining the Kosovo Commission plan for conditional independence).

170. A KOSOVO ROADMAP, *supra* note 21, at 13.

171. See Middle East Quartet, *Joint Statement*, Sept. 17, 2002 (detailing the three-phased approach to granting statehood to Palestine), *available at* <http://www.state.gov/p/nea/rt/15207.htm> (last visited Aug. 30, 2003). The plan conditions Palestinian statehood on the ability of Palestine to cease all terrorist activities against Israel, Israeli withdrawal from Palestinian areas, the drafting of a Palestinian Constitution, and further efforts regarding internal Palestinian reforms. *Id.*

172. See U.N. CHARTER, art. 73 (declaring the importance of ensuring cultural respect, just treatment, and self-governance for Non-Self-Governing Territories ("NSG")). Although the international community has not yet named Kashmir a NSG, one could classify it as either a non-self-governing territory or some other legal entity requiring protection. See Singh, *supra* note 150, at 11 (analyzing Kashmir's uncertain legal status); see also Williams, *supra* note 109 (manuscript at 2) (detailing the substantive benefits of earned sovereignty).

173. See U.N. CHARTER art. 2, para. 3. (outlining a principle tenet of the United Nations); see also WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 25 (suggesting conditional independence for Kosovo, which was a self-determination conflict).

This methodology provides an additional option outside of the traditional legal dispute resolution mechanisms.<sup>174</sup>

Earned sovereignty can promote and ensure human rights, minority rights, and the creation of valid democratic structures.<sup>175</sup> It protects human and minority rights by conditioning the grant of full sovereignty or the further grant of individual sovereign powers on the protection of these rights.<sup>176</sup> Earned sovereignty also supports the building of feasible democratic structures for popular representation of the people.<sup>177</sup> In Kosovo, UNMIK conditioned independence upon successfully providing basic democratic institutions for self-government.<sup>178</sup>

Conditioning sovereign powers on specific requirements also forces responsibility on the people.<sup>179</sup> If the people are unwilling to work to protect human and minority rights, as well as to create viable

174. See THE KOSOVO REPORT, *supra* note 107, at 263-79 (analyzing five possible methods to bring peace and stability to Kosovo). These methods included: the establishment of a protectorate, full independence, partition, autonomy with a state, and conditional independence. *Id.* The Kosovo Commission determined that conditional independence provided the best alternative solution. *Id.* at 271-79.

175. See Williams, *supra* note 109 (manuscript at 2) (explaining that by creating certain criteria to serve as conditions for independence, earned sovereignty can better protect minority rights and democratization).

176. See *id.* (manuscript at 11) (noting the 1998 proposal to condition the exercise of sovereign rights by Kosovo on the guarantee of protection to minorities in Kosovo).

177. See BALKANS REPORT NO. 46, *supra* note 14, at 9-10 (demonstrating the importance of creating democratic institutions). The U.N. General Assembly holds that where the government does not adequately represent the people, the people are entitled to exercise the right to self-determination. *Id.* at 10; see also G.A. Res. 2625, U.N. GAOR, 25th Sess., Annex I, U.N. Doc. A/8028 (1971) (providing the text of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations), available at <http://www.dal.ca/~wwwlaw/kindred.intllaw/friendlyrelations.htm> (last visited Sept. 7, 2003).

178. See UNMIK/PR/792, *supra* note 118, sec. VII (confirming that further devolution of powers to Kosovo depends on the ability of Kosovar citizens to meet the conditions set out by UNMIK).

179. See WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 25 (observing that if the international community retained total control over Kosovo, the Kosovars would have no incentive to act responsibly towards their international neighbors).

governing structures, their state will not gain further sovereign powers.<sup>180</sup> Thus, the people must constantly reaffirm their support for the initiatives through action.<sup>181</sup> The constant affirmation is vitally important in sub-states with a history of fighting for self-determination.<sup>182</sup>

There are two main arguments against the use of earned sovereignty.<sup>183</sup> Earned sovereignty requires immediate discussions regarding the powers the sub-state will initially hold, the speed with which specified powers would devolve, and the determination of final status.<sup>184</sup> In the context of Kosovo, however, scholars argued that immediate discussions on Kosovo's status would affect Serbia and potentially create an opportunity for reigniting violence.<sup>185</sup> Officials in Serbia argued that such immediate discussions would undermine the progress of Serbian democracy by diverting attention away from democracy to Kosovo's status.<sup>186</sup> The Kosovo Commission rebutted this argument by observing that the longer the plan put off discussions on Kosovo's final status after the initial

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180. *See id.* at 28 (arguing that Kosovo should achieve sovereignty and independence if it maintains neighboring territorial integrity, protects human rights, and preserves the cultures of its minorities).

181. *See id.* at 26-27 (noting that Kosovar institutions are responsible to ensure the required protections of minority rights).

182. *See* Interview with Paul Williams, *supra* note 103 (claiming that the responsibility inherent in earned sovereignty is essential in these types of conflicts).

183. *See* WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 28-31 (addressing the three main arguments the Kosovo Commission anticipated from critics of conditional independence). The third argument concerns the ability to get the proposal past Russia's U.N. Security Council veto. *Id.*

184. *See id.* at 28 (countering the first argument against the use of conditional independence in Kosovo).

185. *See id.* at 29-31 (discussing the main arguments advanced against the use of conditional independence in Kosovo); *see also* Williams, *supra* note 109 (manuscript at 35) (reviewing the Kosovo Commission's posture on the arguments against earned sovereignty).

186. *See* WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 28-29 (acknowledging the possible problems that could arise in Serbia during talks of Kosovo's future status).

Security Council resolution, the more difficult it would be to raise support for the discussions in the future.<sup>187</sup>

The second major argument against the use of earned sovereignty in Kosovo was the domino theory.<sup>188</sup> Scholars and states worried that allowing conditional independence for Kosovo would induce a fight for similar results in Montenegro.<sup>189</sup> The Kosovo Commission maintained, however, that conditional independence in Kosovo would not give rise to the domino theory, arguing that earned sovereignty is a legal rule that simply is not applicable to every fact situation.<sup>190</sup> It is similar to arguing that one legal rule applies to every factual situation, a scenario that has never been the case.<sup>191</sup> Each new factual situation requires a unique and nuanced application of the general rule.<sup>192</sup> In addition, while slippery slopes exist in domestic law and are a genuine concern, international legal history does not show that grants of sovereignty immediately lead to a watershed of claims.<sup>193</sup> Finally, there is no other legal option that would not also lead to a domino effect – if one were to occur.<sup>194</sup>

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187. See Martin Woollacott, *There is a Dangerous Lack of Clarity on Kosovo's Future: The International Community Does Have Other Responsibilities*, THE GUARDIAN (London), Nov. 9, 2001, at 18 (confirming that Kosovo will begin to “fester” if movement is not made on the issue of its status).

188. See WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 30 (stating that the second argument against conditional independence is the domino theory).

189. See *id.* (discussing the possibilities that other regions, such as Montenegro or Vojvodina in Serbia, may pursue a similar remedy).

190. See *id.* at 30 (responding to the domino theory argument and maintaining that other states cannot necessarily make the same legal claims of systematic abuse of human rights that existed in Kosovo).

191. See RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 186 (4th ed. 2001) (affirming that different factual situations can lead a court to different decisions).

192. See Interview with Paul Williams, *supra* note 103 (discussing the possible domino effect created by granting earned sovereignty powers).

193. See *id.* (responding that after the proposal made for Kosovo at Rambouillet, there was no watershed effect).

194. See WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 30 (stating that “it is difficult to see why any of the alternative options proposed are less likely to generate domino-type consequences for Kosovo’s neighbours”).

Another important drawback to earned sovereignty is its cost.<sup>195</sup> Financing self-determination solutions, however, is not a problem unique to earned sovereignty.<sup>196</sup> The tenets of earned sovereignty allow for the protection of basic human and minority rights, but neutral parties must monitor the success of these conditions.<sup>197</sup> In addition, earned sovereignty usually requires an ongoing international presence or monitoring unit.<sup>198</sup> When groups consider earned sovereignty as a possible solution, provisions for international monitoring aid, as well as bilateral aid, must accompany it.<sup>199</sup>

Kosovo also evinced a major complication with earned sovereignty's core concept of granting specific levels of sovereignty.<sup>200</sup> The Framework set up by a Special Representative to the U.N. Secretary General ("SRSG") distributed initial sovereign powers to Kosovo while reserving specific authority to the SRSG.<sup>201</sup> Although the Framework did not embody earned sovereignty as proposed by PILPG and the Kosovo Commission, it did apply the essential earned sovereignty component by initially granting only partial sovereignty.<sup>202</sup> This created "the illusion of self-rule rather

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195. See Amley, *supra* note 111, at 260 (discussing the need for funds in order to facilitate awards-based strategies).

196. See *id.* (confirming that the need to ensure distribution, receipt by the proper parties, and appropriate consumption, is costly).

197. See Williams, *supra* note 109 (manuscript at 11) (noting the need for monitoring missions in order to ensure the protection of minority rights in Kosovo).

198. See WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 27 (outlining the requirement of an international monitoring and security presence to oversee the implementation of conditions placed on Kosovo).

199. See *id.* (noting that monitoring aid requires the presence of international assistance to ensure the protection of borders and minorities).

200. See *id.* at 25 (explaining that the Framework's partial grant of sovereignty left the Kosovars with few more powers than those of a colony).

201. See Framework, *supra* note 168, at chs. 5 & 8 (detailing in Chapters 5 and 8 the responsibilities of the Kosovar government and the powers reserved to the SRSG).

202. See WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 20 (explaining the plan set out by the Framework for a partial grant of sovereignty to Kosovo). See generally Framework, *supra* note 168, at chs. 5 & 8 (noting the overall plan built into the Framework).

than the reality.”<sup>203</sup> The Kosovo Commission expressed concerns that this type of plan would lead to conflict not between the warring parties, but between the Kosovar citizens and the international monitoring group.<sup>204</sup> The Kosovo Commission also argued that the powers reserved by the SRSG were not conducive to the promotion of Kosovo and its people, which in turn was not conducive to earned sovereignty.<sup>205</sup> One could solve the problems with devolved sovereignty in Kosovo by adopting a rapid devolution of sovereign power with limits imposed by specific conditions agreed upon by the involved parties.<sup>206</sup> Thus, the Commission proposed that the only way to get a new state to act responsibly is to give it responsibility.<sup>207</sup>

Finally, any agreement using earned sovereignty as a legal concept should clearly define each condition or obligation.<sup>208</sup> Without specific definitions, it is too easy for the agreement to cause further conflict in the future.<sup>209</sup> “Rather than providing criteria for evaluating performance by each side, each benchmark will itself become a focal

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203. WHY CONDITIONAL INDEPENDENCE?, *supra* note 110, at 20. While the government of Kosovo had authority over the judiciary, economy, local administration, and the media, the SRSG still had, for example, the power to dissolve the assembly, remove judges, and to oversee all external relations. *Id.*

204. *See id.* at 21 (expressing concern that once Kosovo gets a taste of self-rule, the local politicians will rely on its power of approval by the electorate to fight for further sovereign powers and less interference by the international community).

205. *See id.* at 25 (pointing out that UNMIK’s plan for Kosovo succeeds in creating a colonial dependency rather than a self-governing state). The Commission saw “no convincing reason” why the Kosovars themselves should not have control over the range of powers reserved to the SRSG. *Id.*

206. *See id.* at 25-26 (proposing a solution to the problem created by the reservations of power by the SRSG).

207. *See id.* at 20-21 (pointing out that awarding a sub-state too little power will likely lead to distrust and conflict between the sub-state and the monitoring commission).

208. *See* Dennis Ross, Editorial, *Mapping Out Peace in the Mideast: ‘Quartet’ Needs to Alter Plan to Move from Conflict to Bush’s Solution*, L.A. TIMES, Dec. 20, 2002, at 2 (outlining problems with the lack of clearly defined obligations in the Israeli-Palestinian peace plan proposed by the United States, the European Union, Russia, and the United Nations).

209. *See id.* (describing the possible problems that could arise if the agreement is not stated specifically).

point for debate—and that will lead to one more dead-end in peacemaking.”<sup>210</sup>

## 2. Possible Legal Application for Kashmir

The U.N. Charter proclaims that its central purpose is to strengthen international peace and security while promoting principles of self-determination.<sup>211</sup> Traditionally only territories subject to colonial, alien, or racist domination had the legal right to independence.<sup>212</sup> The legal community restricted independence to these specific situations in an attempt to retain territorial integrity.<sup>213</sup> Furthermore, international law principally rejects any general right to state secession.<sup>214</sup> Recently, however, the international legal community began to support the right of “remedial secession.”<sup>215</sup> The

210. *Id.*

211. See U.N. CHARTER art. 1 (emphasizing the purpose of the United Nations as an international peacekeeping organization).

212. See Scharf, *supra* note 2 (manuscript at 11) (explaining the traditional terms for a grant of independence). The international community also required that the new state respect the principle of *uti possidetis*, which limits the boundaries of the emerging state to its colonial boundaries. *Id.*

213. See Huang, *supra* note 83, at 185 (noting the denial of self-determination claims by groups after the end of the Cold War on the premise of preserving sovereignty and territorial integrity in international law); see also Graham, *supra* note 97, at 465 (“[T]he defining issue in international law for the 21st century is finding compromises between the principles of self-determination and the sanctity of borders.”).

214. See J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151, 198-99 (1999) (discussing the reluctance of international law theorists to even contemplate a right to secede).

215. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, Annex to G.A. Res. 2625, U.N. GAOR, 25th Sess., Annex, Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Principles] (“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity or sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples”); see also BALKANS REPORT NO. 46, *supra* note 14, at 2 (affirming the right to secede when self-identified groups have experienced severe human rights abuses due to an effective denial of their right to self-government). The group must affirmatively demonstrate, however, that it meets this criterion. *Id.*

Kashmir situation meets the requirements for remedial secession, and therefore the international community may seek remedial secession as a solution to Kashmir's claims for self-determination.<sup>216</sup> Thus, earned sovereignty provides an ideal legal solution for Kashmir because it recognizes Kashmir's right to self-determination and sovereign powers without the use of secession, which would effectively destroy India's territorial integrity.<sup>217</sup>

There are considerable benefits to the use of earned sovereignty in Kashmir that may outweigh the obstacles to its use.<sup>218</sup> Earned sovereignty furthers compromise by taking into consideration the concerns of each party.<sup>219</sup> By allowing for the protection of Kashmiri human rights, a withdrawal of leadership by the Hindu majority state, and the ability to protect territorial integrity and secularism, earned sovereignty effectively addresses the parties' concerns.<sup>220</sup> The

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*But see* Huang, *supra* note 83, at 227 (arguing that the international community should judge a group's right to self-determination on a case-by case basis). The principle of self-determination is not an automatic right for all parties that claim it. *Id.*

216. *See* Scharf, *supra* note 2 (manuscript at 12-13) (stating that where a defined "people" repeatedly is denied human rights and the right to democratic self-government, the people have the right to remedial secession); *see also supra* Part I.A and accompanying notes (describing the instances of human rights abuse and denial of democratic processes to the Kashmiri people); Universal Declaration of Human Rights, art. 21, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) (mandating that the will of the people should serve as the basis of governmental authority); Fox, *supra* note 129, at 297-301 (discussing the emerging right to democratic governance).

217. *See supra* Part I.B.2 (outlining the fundamental principles of earned sovereignty); *see also* Oloka-Onyango, *supra* note 214, at 199 (discussing that international legal scholars call for less "extreme" forms of self-determination and the need to bring secession within the constraints of international law). There is a need for a new formulation of secession that meets the needs of self-determination, but does not provide full secession. *Id.* *But see* Graham, *supra* note 97, at 465 (stressing the idea that in Kosovo, the severity of the treatment of the Kosovar people legitimized the need to set aside concerns of territorial integrity).

218. *See infra* notes 219-222 and accompanying text (discussing the benefits of using earned sovereignty as a legal bargaining tool in Kashmir).

219. *See supra* notes 112-115 and accompanying text (explaining the process by which the parties may negotiate the conditions and sovereign powers granted to the sub-state).

220. *See supra* Part I.B.2 (defining the guidelines for earned sovereignty and its effects on the parties to a conflict); *see also* AHMAR, *supra* note 10, at 30 (considering some of the conditions that could be set for earned independence).



primary objectives in resolving the Kashmiri crisis are to bring two nuclear powers back from the brink of war, avoid secession, and restore Kashmir to its pre-insurgency economic level.<sup>221</sup> The legal give and take of earned sovereignty achieves this objective while considering the demands of each party.<sup>222</sup>

Another significant benefit to earned sovereignty is that it grants the sub-state the necessary legal status to gain recognition in the international community.<sup>223</sup> Over the years, there have been several instances of states ratifying treaties and participating in international organizations as full members without sovereign rights.<sup>224</sup> International representation for Kashmir as a sub-state entity with varying levels of sovereign powers, may be an essential component to Pakistani approval of any Kashmir agreement.<sup>225</sup> Furthermore, earned sovereignty also allows a sub-state entity to become a party to the agreement itself.<sup>226</sup> International law recognizes the sovereign

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Some of these objectives could include (1) requiring both Pakistan and Kashmir to control the amount of anti-India propaganda; (2) withdrawal of Indian and Pakistani troops from the Line of Control; and (3) changing the present policies of both India and Pakistan regarding the use of nuclear force. *Id.*

221. See Declaration on the Right of Peoples to Peace, G.A. Res. 11, annex, U.N. GAOR, 39th Sess., Annex, Supp. No. 51, at 22, U.N. Doc. A/39/51 (1984) (emphasizing the right of all people to live without the threat of nuclear war); see also *supra* notes 11 and 27-36 (noting the major interests of the parties).

222. See Heller & Sofaer, *supra* note 112, at 26-27 (listing the various sovereignty rights and obligations that states may use to negotiate).

223. See Scharf, *supra* note 2 (manuscript at 4) (outlining the legal benefits of a sovereign state).

224. See *id.* (manuscript at 5) (noting that India and the Philippines were founding members of the United Nations even though they did not have formal independence). In addition, member states of entities such as the European Union effectively have only quasi-sovereignty because they give certain sovereign right to the Union. *Id.* This does not strip these states of international legal representation. *Id.*

225. See Ganguly, *supra* note 38, and accompanying text (explaining the principles behind the Pakistani involvement in Kashmir).

226. See *Problematic Sovereignty*, *supra* note 98, at 5 (describing the benefits of sovereignty and the exercise of its legal power); see also Heller & Sofaer, *supra* note 112, at 27 (arguing that the right to make international agreements is exclusive to states with sovereign powers).

right of states to exercise sovereignty and sign on to agreements.<sup>227</sup> The participation of Kashmir as a signatory to any agreement is essential, and earned sovereignty grants them the legal power to sign such an agreement.<sup>228</sup>

There are many inherent obstacles to overcome before Kashmir could apply the concept of earned sovereignty as a legal solution.<sup>229</sup> First, while the parties do not initially need to determine final status, there does need to be some consideration of the extent to which powers would devolve to Kashmir.<sup>230</sup> Although it is clear that maintaining the status quo is not an option,<sup>231</sup> Pakistan, India, and Kashmir all have very different opinions regarding the future status of Kashmir.<sup>232</sup> While the Kashmiri representatives would likely agree with the devolution of specific sovereign powers, the Pakistanis believe that the central goal of the conflict is not independence, or even heightened autonomy.<sup>233</sup> Rather, Pakistan believes that Kashmir should accede to Pakistan, but similarly, India maintains that

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227. See *Problematic Sovereignty*, *supra* note 98, at 5 (noting that exercising sovereignty in signing treaties enhances a state's capacity to deal with international issues); see also Heller & Sofaer, *supra* note 112, at 25 (commenting that states bind themselves in agreements through a legal exercise of their sovereign powers).

228. See Heller & Sofaer, *supra* note 112, at 27 (explaining that signing on to an agreement is a legal right of sovereign states); see also Williams, *supra* note 109 (manuscript at 2) (listing the requirements of earned sovereignty, which includes sharing sovereign rights).

229. See *infra* notes 230-242 and accompanying text (examining the problems that may exist for application of earned sovereignty to Kashmir).

230. See Williams, *supra* note 109 (manuscript at 2) (detailing that attainment of certain levels of *de facto* and *de jure* sovereignty satisfies one of the five basic elements of earned sovereignty).

231. See Rahman, *supra* note 51, at 163 (noting that maintaining the status quo would necessitate the maintenance of terrorism, intimidation, ethnic violence, and coercion).

232. See *id.* at 161 (explaining that India is reluctant to release Kashmir for fear of giving up secularism and that Kashmir fights for independence); see also WIRSING, *supra* note 157, at 231 (assessing the Pakistani position that independence is not an option for Kashmir, nor is remaining with India).

233. See WIRSING, *supra* note 157, at 231 ("Decades of struggle with India over Kashmir, from [Pakistan's] perspective, would have been wasted were Kashmir to emerge independent of both India and Pakistan.").

Kashmir is vital to their sustained territorial integrity.<sup>234</sup> Such a wide difference of belief will affect the extent to which the parties will allow India to devolve powers *de jure* to Kashmir.<sup>235</sup> If there can be no agreement that any powers will devolve, earned sovereignty will fail.<sup>236</sup>

Second, earned sovereignty requires some type of outside monitoring group.<sup>237</sup> The main problem is that India refuses to allow multilateral discussions regarding Kashmir.<sup>238</sup> India considers Kashmir a regional matter, and they argue that the Simla Agreement supports such regionalism.<sup>239</sup> Additionally, Pakistan has such a historical stake in Kashmir that it may refuse to entrust its interest to international monitoring and peace negotiators.<sup>240</sup>

Third, there is a significant fear that special treatment of Kashmir will lead to a domino effect for other Indian provinces, eventually culminating in a total dissolution of the sub-continent.<sup>241</sup> The same arguments against the domino effect proffered by the Kosovo

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234. See *id.* (discussing Pakistani distaste for Kashmir's independence); see also AHMAR, *supra* note 10, at 28 (examining India's present attitude towards Kashmir).

235. See Interview with Paul Williams, *supra* note 103 (confirming that the extent to which powers can devolve is a case-by-case analysis).

236. See Williams, *supra* note 109 (manuscript at 2) (stating that the doctrine of earned sovereignty relies on the ability to devolve certain levels of sovereign authority to the sub-state).

237. See *id.* (naming the five basic criteria of earned sovereignty and the need for international intervention or mediation for final status); see also UNMIK/PR/792, *supra* note 118 (stating UNMIK's determination that Kosovo had not yet met the required standards for status).

238. See WIRSING, *supra* note 157, at 223 (noting that India is unlikely to agree to a proposal whereby Kashmir is entrusted to an international group).

239. See The Simla Agreement, *supra* note 49 (providing for settlement of the conflict through regional means); see also AHMAR, *supra* note 10, at 35 (emphasizing that Indians reject the possibility for external help in the settlement of the conflict).

240. See WIRSING, *supra* note 157, at 223 (stating that the international community has routinely ignored Pakistan's requests for international monitoring and therefore may cause Pakistan concern regarding protection of Pakistani interests in future international involvement).

241. See *id.* at 231 (describing the effect an independent Kashmir could have on both India and Pakistan).

Commission and PILPG apply equally to Kashmir because (1) the facts in Kashmir closely resemble those in Kosovo at the time of Rambouillet, and (2) it is unlikely that any other solution would not cause a domino effect as well.<sup>242</sup>

### III. RECOMMENDATIONS

The U.N. Security Council continually affirms that the situation in Kashmir is an ongoing threat to international peace and security.<sup>243</sup> The threat stems from the illegal denial of self-determination.<sup>244</sup> General principles of international law impose a duty on all states to refrain from actions that may deprive the right of self-determination to those people deserving of it.<sup>245</sup> Thus, the actions currently pursued by the Indian Security Forces and Pakistani paramilitary groups are illegal by international standards.<sup>246</sup> The parties must step outside the paths of illegality presently pursued and create a compromise completely couched in international law.<sup>247</sup> Granting the long promised plebiscite provides the first step towards legally resolving

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242. See *supra* notes 188-194 (outlining the arguments against the belief that a domino effect would occur and confirming that there is no guarantee that any solution would not lead to a domino effect).

243. See S.C. Res. 307, U.N. SCOR, 1621st Mtg., S/RES/307 (1971) (stating that the situation in Kashmir "remains a threat to international peace and security.").

244. See AHMAR, *supra* note 10, at 31 ("The solution to the Kashmir dispute is not entirely the need for socioeconomic and political reforms but also the right of the Kashmiris to self-determination.").

245. See Declaration on Principles, *supra* note 215 (codifying the principle that the prevention of the exercise of self-determination, freedom, and independence through forcible action is a violation of international law). "Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal right and self-determination of their right to self-determination and freedom and independence." *Id.*

246. See International Covenant on Civil and Political Rights, *supra* note 1, art. 6 (negating the ability of any signatory to derogate from the right to life); see also *India's Secret Army in Kashmir*, *supra* note 18 (recognizing the international law violations by both India and Pakistan).

247. See Interview with Paul Williams, *supra* note 103 (discussing the necessity of applying international law in Kashmir in order to move outside the present state of violation).

the Kashmir conflict.<sup>248</sup> The second step requires the negotiating parties to apply the legal concept of earned sovereignty to the factual situation that exists in Kashmir.<sup>249</sup> Thus, earned sovereignty should serve as a legally accepted intermediate status, while also providing for the devolution of many sovereign powers to Kashmir with the understanding that Kashmir may never achieve total independence.<sup>250</sup>

#### A. ENSURING THE APPROVAL OF THE PEOPLE IN KASHMIR

Although there are inherent problems with plebiscites, the resolutions passed by the U.N. Security Council legally grant a plebiscite to the people of Kashmir.<sup>251</sup> There will be no long-standing resolution of the conflict until the government of India consults the Kashmiri people.<sup>252</sup> Therefore, the parties should agree to subject any agreement for Kashmir to approval by plebiscite.<sup>253</sup> Not only does this ensure the legal right of self-determination, but it also acts as the legal approval of the agreement.<sup>254</sup> Much like the terms of ratification for the U.S. Constitution, the agreement would have no binding legal

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248. See Kolodner, *supra* note 121, at 158 (explaining that Kashmir is an example of a situation where the continued denial of the right to self-determination leads to ongoing uncertainty).

249. Compare *supra* note 128 (summarizing the modern history of Kosovo), with *supra* Part I.A (describing the conflict in Kashmir).

250. See generally AHMAR, *supra* note 10, at 30 (confirming that you must provide a solution that addresses the root cause of the conflict). It is unreasonable to believe that using force or controversial elections to quell uprisings will solve the underlying cause of the violence. *Id.*

251. See *supra* note 42 and accompanying text (providing a timeline of Security Council resolutions affirming the need for a plebiscite concerning Kashmir's status).

252. See generally Toole, *supra* note 139, at 219-21 (accepting that where there is a fight for self-determination, a free and fair vote is necessary).

253. See S.C. Res. 726, *supra* note 152 and accompanying text (declaring the legal necessity of a plebiscite in Kashmir via Security Council resolutions).

254. See *Question of East Timor: Report of the Secretary-General*, U.N. SCOR, 53rd Sess., Annex I, art. 1, U.N. Doc. S/1999/513 (1999) (reporting the Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor and submitting the proposed constitutional framework for East Timor to the people for approval), available at <http://www.antenna.nl/~ipjet/un-agreements.html> (last visited Sept. 2, 2003).

authority until the parties appropriately assented to the document.<sup>255</sup> The text of the Kashmir plebiscite could closely resemble the text of the Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor; however, there must be a more exacting provision on the safety and security of the Kashmiri citizens.<sup>256</sup> Additionally, neither Pakistan nor India may ignore the third option of independence for Kashmir.<sup>257</sup> In order to resolve further violence, the plebiscite must provide Kashmiri citizens the following options: (1) accession to Pakistan; (2) heightened autonomy through earned sovereignty in India; or (3) an independent Kashmiri state.<sup>258</sup>

As an additional step, the negotiating parties should sponsor a popular vote to elect representatives to a Kashmiri constitutional congress.<sup>259</sup> As stated above, the valley of Kashmir is Muslim, but Jammu and Ladakh, although smaller than the Kashmir valley, contain a significant number of Sikhs and Hindus, and all three groups make up the population of Jammu and Kashmir.<sup>260</sup> This step, taken prior to any negotiations, ensures fair acceptance, via plebiscite, of the final agreement embodying earned sovereignty.<sup>261</sup>

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255. See U.S. CONST., art. VII (specifying the number of states that must ratify the Constitution prior to its effect).

256. See *supra* notes 139-149 and accompanying text (examining the successes and failures of the East Timor plebiscite).

257. See S.C. Res. 726, *supra* note 152 (noting that the plebiscite suggested by the U.N. Security Council did not include an option for Kashmiri independence).

258. See generally *India's Secret Army in Kashmir*, *supra* note 18 (proclaiming that there is violence on behalf of groups that hold all three of these beliefs).

259. See *Competing Claims*, *supra* note 132 (proposing the use of plebiscites to elect representatives of each cultural group).

260. See Srivastava, *supra* note 15 and accompanying text (explaining the cultural make-up of the Jammu and Kashmir region).

261. See *Competing Claims*, *supra* note 132 (attempting to avoid the problem of majority-rule decision by involving all groups in structuring the agreement).

## B. CREATING RESPONSIBILITY AND AWARDS

The international community should recommend earned sovereignty as the legal solution to the Kashmir conflict.<sup>262</sup> The Kashmir crisis requires the use of a new norm, one outside the historical legal options of sovereignty or secession.<sup>263</sup> International legal scholars agree that solutions advocating the deconstruction or abandonment of sovereignty are misguided and unreasonable because real change requires the transformation of sovereignty rather than its destruction.<sup>264</sup> Thus, although Kashmir may have a legal right to international promotion of secession, other legal dispute resolution methodologies, employing new transformations of sovereignty, will prevent the human rights abuses in Kashmir without destroying territorial integrity.<sup>265</sup>

The people of Kashmir, as well as the government of India and Pakistan, routinely call for opposite solutions to the conflict.<sup>266</sup> The best solution is to offer awards for compromise.<sup>267</sup> Therefore, the parties should initially grant specific sovereign powers to Kashmir

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262. See Interview with Paul Williams, *supra* note 103 (discussing appropriate options for the resolution of Kashmir).

263. See Huang, *supra* note 83, at 186 (noting that where the fight for self-determination caused a conflict by the fight for self-determination, gross human rights violations, and a massive loss of life, the international community attempts to find peaceful means of resolution in order to avoid threats to international peace and security); see also Scharf, *supra* note 2 (manuscript at 19) ( "International support for transitional independence in the form of [earned] sovereignty must be recognized as a valid remedy when the state's actions extinguish that presumption, thus resolving the tension between territorial integrity and self-determination." ).

264. See Heller & Sofaer, *supra* note 112, at 26 (comparing the deconstruction of sovereignty to the transformation of sovereignty and discussing the benefits of transformation).

265. See Res. 15414, *supra* note 120 and accompanying text (affirming importance of territorial integrity).

266. See GANGULY, *supra* note 162, at 131-45 (detailing the opinions of the interested groups of the options for Kashmir).

267. See Amley, *supra* note 111, at 254 (confirming that using rewards to achieve objectives is an obvious tactic for dealing with parties as long as the parties are willing to cooperate).

and condition the grant of further sovereign powers on the ability of all parties to respect fundamental norms of international law.<sup>268</sup>

Furthermore, new legal concepts of sovereignty and acceptable self-determination outcomes must attain legal sanctification or the rule of law itself will suffer.<sup>269</sup> As in U.S. domestic common law, and further evidenced in customary international law, applying a legal concept in factually appropriate situations provides the best means of solidifying the legal concept.<sup>270</sup> The precedent for the application of earned sovereignty is constantly expanding and its use in Kashmir would further strengthen its recognition in international law.<sup>271</sup> Sufficient factual similarity exists to legally justify extending the application of earned sovereignty to Kashmir.<sup>272</sup> Kashmir, because of its historical, religious, and geographical ties does not have access to the typical legal solutions in a fight for self-determination – secession, statehood, or total dependence.<sup>273</sup> Earned sovereignty is the ideal approach to Kashmir because it permits a legal solution between total sovereignty and statehood, secession, and sub-state status.<sup>274</sup>

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268. See BALKANS REPORT NO. 46, *supra* note 14, at 1 (proposing a similar solution to the conflict in Kosovo).

269. See Heller & Sofaer, *supra* note 112, at 39 (positing that when groups such as the International Court of Justice and individual scholars claim the existence of a legal norm when the norm does not exist, the reputation of international law suffers).

270. See Graham, *supra* note 97, at 457 (“[T]he evolution of self-determination as a legal construct is continuously shaped by the realities of practice.”).

271. See A KOSOVO ROADMAP, *supra* note 21 (presenting the ICG proposal for Kosovo’s final status); see also THE KOSOVO REPORT, *supra* note 107, at 271-73 (outlining the Kosovo Commission’s plan for conditional independence); Middle East Quartet, *supra* note 171 (detailing a joint statement from the European Union, the United Nations, and Russia in outlining the three-phased approach to granting statehood to Palestine); Scharf, *supra* note 2 (manuscript at 19) (confirming that, “[T]he time has come to embrace *de jure* the new reality of [phased] sovereignty that is emerging from diplomatic practice.”) (emphasis added).

272. Compare Part I.A (providing the history of the Kashmir conflict), with *supra* note 128 (outlining the background behind the conflict in Kosovo).

273. See WIRSING, *supra* note 157, at 259 (arguing that the correct solution for Kashmir did not exist).

274. See Huang, *supra* note 83, at 187 (claiming that non-colonial fights for self-determination may include state incorporation, heightened autonomy, freedom within the federation, or total independence).



## CONCLUSION

Until recently, a legal solution for Kashmir did not exist.<sup>275</sup> The evolution of the term sovereignty away from the stringent notions of independence and secession into the legally accepted intermediate status of earned sovereignty creates a viable resolution.<sup>276</sup> Negotiating an agreement based upon the idea of earned sovereignty allows India to retain its territorial integrity, permits Pakistan to gain important ground in separating Kashmir from India without granting total independence to Kashmir or allowing accession to Pakistan, and provides the Kashmiri people with important international recognition and sovereign rights.<sup>277</sup> The approval of an agreement couched in earned sovereignty via plebiscite presents Kashmir with its long awaited and long promised plebiscite.<sup>278</sup> Kashmir is a perfect example of the fact that resolution of future ethnic conflicts will come only with continued scholarly discourse and legal codification of conflict resolution options such as earned sovereignty.<sup>279</sup>

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275. See WIRSING, *supra* note 157, at 259 (claiming that a “right” solution for Kashmir did not exist).

276. See *supra* notes 97-115 and accompanying text (detailing the stringent notion of sovereignty and the evolving idea of sovereignty as a set of rights).

277. See *supra* notes 218-222 (outlining the possible outcomes that earned sovereignty enables).

278. See *supra* notes 151-158 (recognizing Kashmir’s legal right to a plebiscite); see also Part I.A (outlining the history of the Kashmir conflict and the numerous promises of a plebiscite).

279. See Interview with Paul Williams, *supra* note 103 (examining the need for continued discourse on solutions to sovereignty based conflicts).