

EARNED SOVEREIGNTY: AN EMERGING CONFLICT RESOLUTION APPROACH

Paul R. Williams & Karen Heymann***

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I. INTRODUCTION¹

There are currently over fifty sovereignty-based conflicts throughout the world, and nearly a third of the Specially Designated Global Terrorists listed by the United States Treasury Department are associated with sovereignty-based conflicts and self-determination movements.² To date, the “sovereignty first” international response to these conflicts has been unable to stem the tide of violence, and in many instances may have contributed to further outbreaks of violence. To remedy this, the international community is utilizing an evolving process where sovereignty exists as a spectrum with a range of varying sovereign statuses as part of that continuum.

Under the doctrine of earned sovereignty, there are three core elements and three optional elements. The core elements of shared sovereignty, institution

* Paul R. Williams, J.D., Ph.D., holds the Rebecca Grazier Professorship of Law and International Relations, American University, Washington College of Law. Between 1991-1993, Professor Williams served as an Attorney-Advisor in the United States Department of State’s Office of the Legal Advisor for European Affairs. During the course of his legal practice, Professor Williams has assisted nearly a dozen states and sub-state entities in international peace negotiations, and has advised numerous governments across Europe, Africa and Asia on matters of public international law.

** Karen Heymann is a 2004 J.D. and M.A. Candidate and student at the American University Washington College of Law, in Washington, D.C. Ms. Heymann received her B.A. from Earlham College in Richmond, Indiana. Ms. Heymann is active in self-determination studies as well as public international legal theory and international human rights litigation.

1. This article is an expanded version of a presentation delivered as part of a panel discussion at the 2003 Annual Meeting of the American Branch of the International Law Association. The panel was organized and chaired by Professor Valerie Epps of Suffolk University Law School, Boston, Massachusetts.

2. See U.S. Department of the Treasury, Office of Foreign Assets Control, *Cumulative List of Recent OFAC Actions 2002*, available at <http://www.treas.gov/offices/enforcement/ofac/actions/2002cum.html> (last visited Jan. 17, 2004).

building and final status necessarily exist in order to guide the sub-state structure from the intermediate phase through discussions of final status. The optional elements—conditional sovereignty, phased sovereignty, and constrained sovereignty—provide suggestions for shared sovereignty during both the intermediate phase and final status.

Earned sovereignty is a conflict resolution process that creates an opportunity for the parties to agree on basic requirements that the emerging entity must meet during an intermediate phase in order to attain or discuss final status. Rather than forcing the negotiating parties to determine during negotiations whether the sub-state entity may or may not be capable or allowed to exist as an independent state, earned sovereignty allows the parties to make evaluations of the effect of independence on the parent state as well as emerging state's success at meeting certain benchmarks before determining final status. The core elements of earned sovereignty—shared sovereign power, institution building, and final status—form the structure of this process. An emerging state will gain varying external and internal powers as it progresses in institution building throughout intermediate status where sovereign rights are shared with the parent state or third party, which will finally lead to a pre-determined or future determined final status. The optional elements of this process provide options for intermediate status—conditional and phased—as well as for final status—constrained sovereignty.

The process of earned sovereignty has evolved without name or structure through its use by international negotiators and state parties to agreements. State parties to peace agreements have already used this process in an attempt to resolve the conflicts in Kosovo, Northern Ireland, Bosnia, Serbia/Montenegro, East Timor and Papua New Guinea. Presently negotiators have proposed similar solutions for the Western Sahara and the Israel/Palestine conflicts, and the involved parties have been discussing similar proposals for Sri Lanka, Somalia, and Kashmir.

The purpose of this article is two-fold. It attempts to first define and add structure to this evolving process and second to spur interest and debate among those involved in the field. Section one provides an overview of the different core and optional elements that make up the earned sovereignty process. Section two outlines fundamental principle that sovereign authority and functions are both plentiful and severable as internal and external autonomous rights rather than an all or nothing grant of independence. The need for monitoring and enforcement bodies is then detailed in section three of the article.

II. ELEMENTS OF THE PROCESS

As stated above, the earned sovereignty process allows the parties to negotiate for individual rights that the sub-state entity will possess in different forms of shared sovereignty until they meet the conditions for final status or until final status is determined. Therefore, earned sovereignty is characterized as encompassing six elements—three core elements and three optional elements.

A. Core Elements

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

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

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

The suggested Roadmap for Peace in Israel and Palestine is centered on the need for institution building. The Roadmap requires comprehensive institution building prior to any further discussions of Palestinian provisional statehood. The Roadmap provides that the Quartet will assist the Palestinians in constructing a number of institutions necessary for assuming greater attributes of sovereignty. In particular the Roadmap provides for the restructuring of

security services, the establishment of an Interior Ministry, the appointment of an interim prime minister or cabinet with executive decision-making capacity, the adoption of a Palestinian constitution, and the creation of an election commission.

The final core element of earned sovereignty is the determination of the final status of the sub-state entity and its relationship to the state. The parties may agree upon final status during the initial negotiations, but it may also be determined at a later, agreed upon date. This flexibility in final status decisions allows the parties to wait to discuss final status until either the parties and violence has subsided or until the parties meet certain conditions agreed upon in the initial agreement. In some instances, such as East Timor the final status is determined during the initial stages of the process, whereas in others such as Kosovo it occurs after a period of shared sovereignty and institution building.

At some point during the process of earned recognition, it will be necessary to determine the final status of the sub-state entity. The options for final status range from substantial autonomy to full independence. While the nature of final status is frequently determined by a referendum, it may also be determined through a negotiated settlement between the state and sub-state entity, often with international mediation. Invariably the determination of final status for the sub-state entity involves the consent of the international community in the form of international recognition.

Kosovo and East Timor represent both routes for determining final status. In the Rambouillet Accords, the final status of Kosovo was to be determined three years later by an international conference, which would take into consideration the will of the people for independence. On the other hand, the East Timorese rejection by referendum of the proposal for autonomy within Indonesia settled the question of final status in favor of total independence for East Timor.

B. Optional Elements

The first optional element is phased sovereignty. Phased sovereignty entails the accumulation by the sub-state entity of increasing sovereign authority and functions over a specified time period prior to the determination of final status. In order to enhance the relationship between shared sovereignty and institution building some earned sovereignty agreements have incorporated the element of phased sovereignty. Phased sovereignty involves the measured devolution of sovereign functions and authority from the parent state or international community to the sub-state entity during the period of shared sovereignty. The negotiating parties may correlate the timing and extent of the devolution of authority and functions with the development of institutional

capacity and/or conditioned on the fulfillment of certain conditions such as democratic reform and the protection of human rights.

The Bougainville Agreement, which ended the conflict between the Bougainville sub-state and Papua New Guinea, implements the optional element of phased sovereignty. The Agreement gives heightened autonomy for Bougainville with the gradual grant of increasing control over a wide range of powers, functions, personnel and resources based on guarantees contained in the National Constitution.

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

The case of Kosovo provides the most detailed example of conditional sovereignty. In 2002, the United Nations Security Council adopted a proposal by UNMIK identified as "standards before status." In brief, the United Nations had determined that before Kosovo could undertake final status negotiations to secure independence it must meet a number of standards or benchmarks. According to UNMIK, the general prerequisites of the standards before status approach required the parties to fully comply with and implement Resolution 1244 and the Constitutional Framework, which included multi-ethnicity, acceptance, security, and fairness under normal conditions.³ Specifically, the benchmarks covered the areas of functioning democratic institutions, rule of law, freedom of movement, refugee returns and reintegration, economic reform and development, property rights, dialogue with Belgrade, and the responsible operation of the Kosovo Protection Corps.

The last optional element, constrained sovereignty, involves continued limitations on the sovereign authority and functions of the new state, such as continued international administrative and/or military presence, and limits on the right of the state to undertake territorial association with other states. The Dayton Accords, which ended the Bosnian conflict, were structured around the concept of constrain sovereignty. The Dayton Accords required many of the sovereign authorities and functions of the independent state of Bosnia to be

3. U.N. Mission in Kosovo, *Standards Before Status*, May 2002, available at http://www.unmikonline.org/pub/focuskos/apr02/benchmarks_eng.pdf (last visited Jan. 17, 2004); see also Press Release, *U.N. Mission in Kosovo, Highlights Of The Introductory Remarks at a Press Conference By Michael Steiner, Special Representative Of The Secretary-General In Kosovo*, June 27, 2002, available at <http://www.unog.ch/news2/documents/newsen/pc020627.htm> (last visited Jan. 17, 2004).

managed by an internationally appointed High Representative for an indeterminate period.⁴ The Accords also provided for the deployment of international military forces to maintain internal security. While conditionality is not explicit, the pattern of practice in Bosnia indicates that the international civilian authority will be discontinued only upon such a time as Bosnia can adequately function as an independent state.

III. SOVEREIGNTY AS A BUNDLE OF RIGHTS

In order to best utilize the process of earned sovereignty, which allows for negotiation on individual sovereign rights and responsibilities, the international community has begun to re-shape the historical concept of sovereignty. There are several different meanings of the term sovereignty.⁵ In the context of this discussion, sovereignty is concerned with establishing the status of a state entity in the international system as well as determining its internal governing rights. Under the conventional view, an entity qualified as a sovereign state if it had a territory, a population, a government, and international recognition.⁶ If an entity did not qualify as a sovereign state, it was deemed a dependent or subordinate territory of a sovereign state. Thus, an entity was either sovereign or it was not. There was no concept of an intermediate status such as that suggested by earned sovereignty.

States perceive sovereignty as a "ticket of general admission to the international arena."⁷ A sovereign state is accepted as an equal of other states. It is entitled to political independence, territorial integrity, and virtually exclusive control and jurisdiction within that territory.⁸ The state's sovereign acts are generally immune from civil suit in other states, its representatives are entitled to diplomatic immunity from both civil and criminal actions, and its ruler is entitled to absolute head of state immunity. It can enter into agreements with other States. It can be a member of international organizations. Dependent or subordinate territories, in contrast, do not customarily possess any of these rights in the international system.⁹

The international community's unwillingness to consider partially sovereign options for conflict resolution has hindered diplomats in their effort

4. See generally Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, Dec. 14, 1995, 35 I.L.M. 75 (1996).

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

6. *Id.* at 14-15.

7. MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 12 (Pennsylvania State Univ. Press 1995).

8. KRASNER, *supra* note 5, at 20-21.

9. KRASNER, *supra* note 5, at 16-17.

to construct creative means for resolving conflicts involving attempts at self-determination or secession. For example, one scholar argues that the Western powers' inability to move beyond this black and white perception of sovereignty was partly responsible for both Bosnia's collapse.¹⁰ The adoption of historical conceptions of sovereignty was disastrous in the Yugoslavia negotiations because the opposing parties were unable to move beyond the preservation of Yugoslavia as a state. This perception has also made it difficult to resolve conflicts in Sierra Leona and Chechnya. Moreover, the ability to move beyond the statist/secessionist norm may aid in the resolution of self-determination conflicts, which are spawning ground of terrorist movements. Terrorism is a mechanism too frequently used by self-determination and thus solving these sovereignty-based conflicts may in turn reduce terrorism.

To remedy this, it is necessary for the international community to further develop sovereignty existing as a spectrum and to recognize a range of varying sovereign statuses and rights as part of that spectrum. The international community must therefore recognize that states have both external and internal powers, which are made up of individual rights that are both plentiful and severable. The external sovereign rights may include:

- 1) The right to territorial integrity;
- 2) The right to defend the state through the use of force;
- 3) The right to govern by establishing, applying and enforcing law;
- 4) Eligibility for 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 international agreements;
- 8) The duty to respect other nations; and
- 9) The obligation to abide by international law.

A state or sub-state's internal governing rights may consist of:

- 1) Taxation;
- 2) Determining governing structures and political policies;
- 3) Providing for social welfare;
- 4) Regulating the judicial system;
- 5) Creating internal law; and
- 6) Managing state infrastructures.

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

The concept of earned sovereignty enables negotiation on each of these points. As an example, the intermediate phase entity may not have the capability to defend itself externally or have a grant of sovereign immunity, but it does have the legal right to govern itself, lay taxes and law, to be represented in international organizations, and to sign international agreements. With this in mind, the importance of using new concepts of sovereignty becomes apparent. Negotiations that would normally be shut down by the first mention of independence may now proceed as a negotiation for individual sovereign rights without the weight of the term "independence." Thus, the parties may discuss those external and internal rights that the new entity will possess as well as those that will not be granted to the new entity. In the end, the term independence is irrelevant. The importance is placed instead on the individual rights possessed by the new entity.

IV. ENFORCEABILITY/MONITORING

The key to any successful negotiation is the ability to enforce and monitor the implementation of the agreement. Earned sovereignty is unique in that it inherently entices compliance. Through the use of the optional elements, the state must comply with the agreement before it will gain further internal or external sovereign rights and responsibilities. Because of this concept's nature, however, monitoring and enforcement play an important role. Regional or international monitoring groups, or a combination of the two, are necessary for the optional element of phased sovereignty in order to guarantee that both parties meet their stated agreements for the sovereign powers delegated in the next phase of sovereignty. Conditional sovereignty will require a monitoring agent who will determine whether the parties have met the specified conditions. Although the monitoring/enforcement body is not as involved for constrained sovereignty agreements, a body is needed to assure that the parent state is not denying the sub-state entity its guaranteed rights under the agreement.

Earned sovereignty naturally facilitates enforcement and monitoring by setting specific guidelines. The guidelines provide the monitoring group with a symbolic checklist for determination of the success or failure of each tenet of the agreement.

In many situations, the parties decide that objectives of a monitoring mechanism are best met when the monitors are international. In these cases, the monitoring mechanism might be the United Nations, a regional body such as the Organization of American States or the Organization for Security and Cooperation in Europe, an ad hoc group of nations, or combinations of the above. Papua New Guinea provides an example of this because the international Truce Monitoring Group and the presence of a United Nations Political Office for Bougainville augment the domestic mechanisms.

V. CONCLUSION

There are currently over thirty active civil wars in the world, the resolution of which generally results in the extermination or expulsion of the losing party. The resolution of these conflicts stops the constant cycle of violence. Thus, the changing face of international conflicts necessitates the exploration and development of evolving conflict resolution processes such as earned sovereignty. No longer do states fight wars until one-side surrenders. The new self-determination conflicts last for decades where neither side will give up because each side in the conflict has valid concerns and plenty of financial backing. While it is not always difficult to get the conflict parties to sit at the negotiating table, it is often hard to keep them there. The consideration of sovereign rights as individual negotiating points as well as the ability to consider and discuss the core and optional elements allows for flexibility in negotiation to combat this problem.