

January 2003

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Recommended Citation

Paul R. Williams, Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status, 31 Denv. J. Int'l L. & Pol'y 387 (2003).

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Keywords

Sovereignty, Politics

**EARNED SOVEREIGNTY:
THE ROAD TO RESOLVING THE CONFLICT OVER
KOSOVO'S FINAL STATUS**

PAUL R. WILLIAMS*

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

– Independent International Commission on Kosovo

Chaired by Justice Richard Goldstone

INTRODUCTION

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

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

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

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

As noted in the introductory note³, the conflict-resolution approach of earned sovereignty essentially seeks to resolve the centuries-old tension between self-determination and sovereignty by managing the devolution of sovereign authority and functions from a state to a sub-state entity. In some instances the sub-state entity may acquire sufficient sovereign authority and functions which will then enable it to seek international recognition, while in others the sub-state entity may only acquire sufficient authority and functions to enable it to operate within a stable system of internal autonomy.⁴

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

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

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

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

3. See Paul R. Williams, Michael P. Scharf & James R. Hooper, *Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty*, 31 DENV. J. INT'L L. & POL'Y 349 (2004)

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

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

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

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

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

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

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

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

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

OVERVIEW

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

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

The key elements of the 1998 PILPG approach involved the creation of a system whereby the people of Kosovo, through legitimate political bodies, would be entitled to exercise certain sovereign rights, while simultaneously retaining specified links to the Federal Republic of Yugoslavia⁸ (FRY).⁹ As a condition for

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

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

7. *Id.*

8. On February 4, 2003, the Federal Republic of Yugoslavia officially changed its name to Serbia and Montenegro. See Vesna Peric Zimonjic, *Politics – Yugoslavia: A Country Disappears*, INTER

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

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

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

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

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

10. *Id.* at 38.

11. *Id.*

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

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

14. See Radio Netherlands, "Walker: 'Racak Massacre Was Not Faked,'" (June 14, 2002) at <http://www.mw.nl/hotspots/html/icity020613.html> (last visited Jan. 2, 2003).

15. Rambouillet Accords, Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, U.N. Doc. S/1999/648 (June 7, 1999) available at http://www.un.org/peace/kosovo/99648_1.pdf (last visited Jan. 2, 2003) [hereinafter Rambouillet Accords]. It is useful to note that while the concept of earned sovereignty was originally articulated as "intermediate sovereignty," and subsequently referred to as "conditional independence," the most descriptive reference to the concept is "earned sovereignty".

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

final decision.¹⁷

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

The U.N. Security Council then adopted Resolution 1244 to provide a framework for the interim administration of Kosovo by the United Nations.²⁰ While retaining the core elements of the Rambouillet Accords, Resolution 1244 gave a primary role to the U.N. mission in overseeing the development of democratic institutions (an added and now necessary element to the approach of earned sovereignty).²¹ The United Nations was then to devolve sovereign authority and functions to these new institutions and to facilitate a political process designed to determine Kosovo's future status based on the process described in the Rambouillet Accords.

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

In response to the perceived failure of the United Nations to articulate a clear plan for transferring sovereign authority and functions to Kosovo as required under Resolution 1244, the Goldstone Commission renewed the call for earned sovereignty for the people of Kosovo.²² The key elements of the Goldstone proposal, termed conditional independence, included the prompt holding of a referendum to ascertain the will of the people, the initiation of U.N.-sponsored talks between the Kosovar Albanians and the Kosovar Serbs, the development of mechanisms to protect minority and human rights, arrangements for the continued presence of international security forces, and the phased transfer of effective administration from the United Nations to the legitimate national and municipal authorities.²³

17. *Id.*

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

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

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

21. *Id.* at para. 10.

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

23. *Id.*

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

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

In light of the dangers posed by a halt to the process of earned sovereignty for Kosovo, the Goldstone Commission issued a second, more detailed, proposal for conditional independence.²⁵ The basic elements of the proposal included the rapid devolution of authority to Kosovar institutions, and substantial limiting of SRSG authority to include only protection of minorities, guarantee of human rights and the guarantee of border integrity. The SRSG powers were to be exercised only when the locally elected officials fail to meet their obligations. According to the Commission, the presence of the international community should be diminished and the sovereign authority of Kosovo should continue to grow as the government and people of Kosovo proved themselves capable of meeting the above commitments. As Kosovo fully met these commitments, the member states of the international community would grant it international recognition.

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

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

22. See generally Regulation No. 2001/9 *On a Constitutional Framework for Provisional Self-Government*, U.N. Interim Administration Mission in Kosovo, 56th Sess., U.N. Doc. UNMIK/REG/2001/9 (2001) available at <http://www.unmikonline.org/regulations/2001/reg09-01.htm> (last visited Jan. 2, 2003).

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

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

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

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

THE COMPETITION FOR SOVEREIGNTY OVER KOSOVO

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

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

27. *Id.* at i.

28. Press Release, United Nations Mission in Kosovo, Address to Security Council by Michael Steiner, Special Representative of the Secretary-General (July 30, 2002), available at <http://www.unmikonline.org/press/2002/pressr/pr792.htm> (last visited Mar. 22, 2003).

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

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

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

32. See *id.* at 283.

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

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

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

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

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

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

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

36. *See id.* at 326.

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

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

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

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

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

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

38. MALCOLM, *supra* note 27, at 341-42.

39. *See id.* at 343-45.

40. MALCOLM, *supra* note 27, at 345-46.

41. *See id.* at 346.

42. *Id.* at 347.

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

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

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

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

EARNED SOVEREIGNTY AS AN APPROACH TO RESOLVING THE KOSOVO CONFLICT

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

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

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

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

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

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

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

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

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

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

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

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

48. *Id.*

49. See *id.*

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

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

The report sought to base the approach of intermediate sovereignty upon the basic principles of international law, which provide that all self-identified groups with a coherent identity and connection to a defined territory are entitled to collectively determine their political destiny in a democratic fashion, and to be free from systematic persecution. The report then reasoned that in cases where self-identified groups are effectively denied their right to democratic self-government and are consequently subjected to gross violations of their human rights, the most reasonable course of action is for the international community to support international status for the sub-state entity in order to ensure the protection of those rights.⁵² While this proposition remains the subject of debate among international lawyers, it is increasingly accepted as a viable means for protecting a population from further gross violations of human rights in certain circumstances.

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

50. *Id.*

51. *Id.* at i.

52. *Id.* at ii.

53. *Id.* at 28-29.

54. *Id.* at 29-32.

55. PUBLIC INTERNATIONAL LAW & POLICY GROUP, *supra* note 5, at 33-35.

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

The key themes of the 1998 PILPG proposal were that the people of Kosovo had to a certain degree earned a right to increased sovereignty because of the long history of human rights violations perpetrated against them by the Serbian regime. Given the circumstances of their situation, it appeared that the only means for adequately protecting those rights would be some form of international status for Kosovo.

In order to ensure, however, that the attainment of international status for Kosovo did not have negative consequences in the region, or lead to additional violations of human rights, it was necessary to establish a process whereby the international community could manage the development of an independent Kosovo and ensure the protection of its interests in regional stability. The corollary element was that the Kosovars, while entitled to heightened sovereignty because of past abuses by the Serbian regime, would be required to earn full sovereignty at the end of an interim period by demonstrating their commitment to democratic self-government, the protection of human rights, and promotion of regional security. While not explicitly stated in the 1998 PILPG Report, the report provided support for the notion that certain specified limits on sovereignty might continue after Kosovo had attained international recognition.⁵⁹

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

THE INITIAL INTERNATIONAL RESPONSE

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

56. *Id.* at 33.

57. *Id.* at 35-36.

58. *Id.* at 36-38.

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

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

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

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

Europe marshaled political and public support for the use of air strikes against Serbian forces,⁶³ and dispatched Ambassador Richard Holbrooke on a mission to the FRY to negotiate an arrangement for the deployment of international monitors. The resulting Holbrooke/Milosevic deal provided for the stationing of unarmed monitors⁶⁴ and the provision for unarmed NATO over flight.⁶⁵ The weakness of the deal aside, the primary effect was to temporarily diffuse international support for the use of force to protect Kosovar Albanians by prying sovereign control over Kosovo from Yugoslavia.

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

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

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

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

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

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

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

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

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

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

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

RAMBOUILLET AND THE NEGOTIATION OF EARNED SOVEREIGNTY

Using the now credible threat of force, the United States and its allies convened the Rambouillet peace talks in early February 1999.⁷¹ The approach developed by the international community during the talks was based in large part on the approach of earned sovereignty.

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

The primary focus of the Rambouillet Accords was to create democratic self-government in Kosovo. The Rambouillet Accords sought to promote democratic self-government by creating a comprehensive Constitution under the authority of which there would be the democratic election of a President and an Assembly and the subsequent appointment of a prime minister and government. Strong local governments would also be created. The Constitution also provided for a full range of powers to be exercised by the central government, which included taxation, economic regulation and development, property rights, social policy, environmental protection, local self-government, and the power to conduct foreign relations in specified areas. To ensure the participation of minority representatives in the government, the Accords established a quota system for such representatives in the Assembly and for the adequate inclusion of minority representatives in Government positions.⁷³

The Accords also provided for the interim retention of significant elements of sovereignty by the FRY, including the rights to ensure the territorial integrity of the FRY, maintain a common market, operate the customs services, establish monetary policy, provide for defense, and conduct foreign policy.⁷⁴

To prevent future atrocities against the Kosovar Albanians, and to protect the Serbs from acts of retribution, the Accords included numerous provisions on the protection of human rights. The cornerstone of the protections for human rights

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

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

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

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

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

was the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and its Protocols, directly into Kosovar law.⁷⁵ Additional protections included the creation of an Ombudsman office with extensive authority to monitor the protection of minority and human rights and fundamental freedoms throughout Kosovo.⁷⁶ The Accords also provided explicit protection for such rights as the use of national community symbols, language, cultural and religious association, and the right to be free from discrimination.⁷⁷

The Accords provided for the complete withdrawal of all Yugoslav Army forces and the substantial reduction of Serbian police forces in Kosovo, as well as the transformation of the Kosovo Liberation Army into the Kosovo Protection Corps modeled after the American National Guard. Security was to be provided by the deployment of an extensive international force. The international force would be responsible for providing both internal and external security.⁷⁸ Importantly, the Accords expressly provided there would be no change in the borders of Kosovo.⁷⁹

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

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

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

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

75. *Id.* at ch. 1, art. 6.

76. *Id.* at ch. 6.

77. *Id.* at ch. 1, art. 7.

78. Rambouillet Accords, *supra* note 13, at ch. 7.

79. *Id.* at ch. 1, art.1(6)(a).

80. *Id.* at ch. 1, art.1(6)(c).

81. Rambouillet Accords, *supra* note 13, at ch. 8, art. 3.

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

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

THE NATO AIR CAMPAIGN

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

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

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

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

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

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

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

UN RESOLUTION 1244: SWAPPING SERBIAN SOVEREIGNTY FOR UN SOVEREIGNTY

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

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

83. *Id.* at Annex 2, para. 4.

84. *Id.* at Annex 2, para. 5.

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

The substance of Resolution 1244 focused on: 1) displacing FRY sovereignty from Kosovo⁸⁶; 2) replacing it with interim U.N. and NATO sovereign responsibilities⁸⁷; 3) establishing substantial autonomy and democratic self-governance⁸⁸; 4) "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords,"⁸⁹ and 5) preparing in the final stage to oversee "the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement."⁹⁰

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

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

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

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

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

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

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

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

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

91. *Id.* at para. 3.

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

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

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

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

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

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

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

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

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

95. *Id.* at para. 10.

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

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

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

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

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

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

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

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

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

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

101. S.C. Res. 1244, *supra* note 18, at paras. 5, 6, 9-11.

102. *Id.* at para. 11.

103. *Id.*

104. *Id.* at para. 11, Annex 1, Annex 2, para. 8.

105. S.C. Res. 1244, *supra* note 18, at pmb1.

106. *Id.* at Annex 2, para. 8 (emphasis added).

the Rambouillet Accords.¹⁰⁷

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

THE EROSION OF SERBIAN SOVEREIGNTY

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

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

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

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

107. *Id.*

108. Rambouillet Accords, *supra* note 13, at pmb1.

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

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

111. *Id.* at § 6.

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

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

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

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

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

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

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

115. These powers include: providing basic local conditions for sustainable economic development; licensing of building and other development; the implementation of building regulations and building control standards; public services including fire and emergency services; management of municipal property; pre-primary, primary and secondary education; social services and housing; licensing of services and facilities including: entertainment, food, markets, street vendors, local public transport and taxis, hunting and fishing and restaurants and hotels; naming and renaming of roads, streets and other public places; and such other activities as are necessary for the proper administration of the municipality and which are not assigned elsewhere by law. See *Regulation No. 2000/45*, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/REG/2000/45 (2000), available at <http://www.unmikonline.org/regulations/2000/rcg45-00.htm> (last visited Jan. 3, 2003).

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

FINDING SPACE FOR KOSOVO SOVEREIGNTY: GOLDSTONE PROPOSAL I

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

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

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

116. The Goldstone Commission, was created at the initiative of the Swedish government and funded by that government as well as the Government of Canada, and numerous foundations. Members of the Commission included key foreign policy makers and commentators from Japan, the United States, Russia, Canada, France, the United Kingdom, Germany and the Czech Republic. The Commission was chaired by Judge Richard Goldstone of the South African Constitutional Court, and Co-Chaired by Carl Tham of Sweden. The report was presented to the Secretary-General of the United Nations on October 23, 2000.

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

118. *Id.* at 272-3.

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

120. *Id.*

121. *Id.*

member states of the international community.¹²²

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

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

In response to the Goldstone proposal, and efforts by influential former policy makers, the United States and the United Nations renewed their efforts to craft province-wide institutions capable of absorbing the transfer of sovereign authority from the United Nations to the people of Kosovo. These efforts met stiff resistance by the European Union and some European states who had come to believe that an independent Kosovo might further destabilize the region and promote increased separatism in Europe.

CONSTITUTIONAL FRAMEWORK FOR PROVISIONAL SELF-GOVERNMENT

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

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

122. *Id.*

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

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

The Constitutional Framework set forth three sets of guiding principles for the future governance of Kosovo. First, it required the domestic institutions of Kosovo to “exercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework.”¹²⁵ Second, it required those institutions to “promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation.”¹²⁶ To ensure the protection of human rights throughout Kosovo, the Constitutional Framework required that the provisions on rights and freedoms set forth in a number of international human rights treaties and instruments would be directly applicable in Kosovo as part of the Constitutional Framework.¹²⁷ Finally, the Constitutional Framework provided that the Kosovar institutions must “promote and respect the principle of the division of powers between the legislature, the executive and the judiciary.”¹²⁸ These principles represent an expansion of the core themes of earned sovereignty relating to the protection of human rights and the basic principles of democratic governance.

The Constitutional Framework then enumerated the responsibilities of the Provisional Institutions of Self-Government. These include economic policy, trade, administrative and operational customs, education, health, environmental policy, infrastructure, agriculture and forestry, tourism, and “good governance, human rights and equal opportunity.” The institutions also possess specific duties in the fields of local administration, judicial affairs, mass media, and emergency preparedness. The Constitutional Framework further stipulated that any external relations conducted by the provisional institutions must be conducted with the coordination of the SRSG, and that the powers must be exercised in alignment with international standards.¹²⁹

With respect to the allocation of authority, the Constitutional Framework set the foundation for the implementation of a process of phased sovereignty as suggested in the Goldstone report by creating democratic institutions for the governance of Kosovo, while initially retaining most of the authority for decision-making within the purview of the SRSG. For instance, while the new Kosovar Parliament possessed the authority to establish economic and fiscal policy, and to regulate most areas of state activity, the SRSG retained authorities such as approval of the budget, operation of the customs service, the setting of monetary policy, the appointment and dismissal of judges, and conduct of the international

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

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

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

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

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

affairs of Kosovo.¹³⁰ The Constitutional Framework was clear that, consistent with Resolution 1244, the powers retained by the SRSG should be increasingly turned over to the people of Kosovo as the new institutions mature and become effective.¹³¹

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

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

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

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

130. See *Regulation 2001/9*, *supra* note 22, at ch. 8.

131. *Id.* at chs. 6, 14.2

132. See *Regulation 2001/9*, *supra* note 22, at ch. 9.4.

133. *Id.* at ch. 5.6.

134. *Id.* at pmb1.

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

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

POLITICAL CHANGES IN SERBIA AND LULL IN ACCUMULATION OF KOSOVO SOVEREIGNTY

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

With the collapse of Milosevic's authoritarian, nationalist rule and its replacement by a more Western-focused government, the international community became increasingly concerned that efforts to increase Kosovar self-governance could destabilize Serbia. The election of a pro-independence government in Montenegro also dampened the willingness of the international community to support further devolution of sovereign authority and functions to Kosovo. Moreover, although the Serbian public became increasingly aware of the atrocities committed by Serbian forces against Kosovar civilians, there was no abatement in the nationalist pull to retain Kosovo within Serbia. Growing political violence in southern Serbia and Macedonia reinforced the Serbian desire to retain Kosovo and the fear of the international community that an increasingly sovereign Kosovo could lead to greater instability in the Balkan region. In particular, the European Union objected to any efforts that might be deemed as leading toward a resolution of final status for fear of undermining the democratic transformation in Serbia.¹³⁶

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

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

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

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

GOLDSTONE PROPOSAL II

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

In rejecting the stability through accommodation model of an indefinite protectorate, the Goldstone proposal cited several reasons that this protectorate was actually increasing and prolonging instability. The Commission argued that the indefinite protectorate implied by the Constitutional Framework would not, as some argued, allay tension in the region by ruling out independence. Rather, the protectorate would increase tension between the people of Kosovo and the international administration of the SRSG. Moreover, by maintaining the undefined nature of Kosovo's status, the international protectorate model would encourage both nationalist hopes for a greater Albania, or for a greater Yugoslavia, and was in fact already serving as a catalysts for ethnic violence, both within and outside Kosovo.¹⁴⁰

Goldstone II argued for the rapid devolution of important powers from the SRSG to the Kosovar government relating to such matters as customs, the judiciary, the police, public and state owned property, transportation, civil aviation, housing and property matters, and regulation of municipal boundaries. The Goldstone commission also argued that the undefined residual powers of Chapter 12 of the Constitutional Framework should also be exercised by the Kosovar government.¹⁴¹

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

138. *Id.* at 20-21.

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

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

141. *Id.* at 25

Coupled with the devolution of powers, Goldstone II proposed that the relevant Kosovar institutions be permitted to negotiate with the NATO-led Kosovo Force (KFOR) international security presence in Kosovo, and that they be empowered to enter into negotiations with international agencies and foreign governments, and presumably be entitled to establish some form of foreign mission. In particular, the Goldstone commission thought it necessary for the Kosovar government to be able to enter into relations with neighboring states. Absent such authority, it is feared the Kosovar authorities would have little or no incentive to behave in a responsible manner toward its neighboring states.¹⁴²

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

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

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

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

142. *Id.* at 26.

143. THE FOLLOW-UP OF THE KOSOVO REPORT, *supra* note 1, at 25.

144. *Id.* at 27-28.

145. *Id.* at 28.

146. THE FOLLOW-UP OF THE KOSOVO REPORT, *supra* note 1, at 26.

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

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

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

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

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

The Goldstone Commission sought to rebut the three main arguments presented against earned sovereignty. First the Commission addressed the concern that the nascent democracy in Serbia would be jeopardized by reopened discussions about Kosovo's future, which could fuel extremist sympathy. Here, the Commission argued that, in fact, postponing the resolution would actually increase the difficulty of resolving the issue in the future, once support for the new democratic administration had subsided.¹⁵²

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

147. *Id.* at 27.

148. *Id.*

149. *Id.*

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

151. *Id.*

152. *Id.*

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

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

ICG PROPOSAL

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

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

The ICG proposal argued that a resolution of Kosovo's final status was crucial to stability in the region. ICG believed that the uncertain process for determining a final status was a significant obstacle to the normalization of relations between the Albanian and Serb communities, and that it prolonged the view of each group that the other was a threat. The proposal further argued that continued uncertainty threatened the political investment of the international community in Kosovo, and caused the unnecessary extension of the peacekeeping presence.¹⁵⁶

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

153. *Id.*

154. *Id.*

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

156. ICG, *supra* ii.

stability and slow the transition to a non-nationalist state. Second, ICG argued that a determination of Kosovo's final status would not jeopardize regional stability by encouraging other separatist movements in the region as Kosovo's case was dissimilar to other regional groups, given its history as a defined state within the former Yugoslavia and its status as a UN protectorate. Finally, the ICG observed that while some argued international consensus on Kosovo was not strong enough to withstand reopening the issue, in fact, "the international consensus has become a recipe for inertia."¹⁵⁷

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

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

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

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

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

157. ICG, *supra* ii.

158. *Id.* at p. iv.

159. *Id.* at p. iii.

160. International Crisis Group, *supra* note 149, at. ii-3.

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

With respect to the nature of the proposed trusteeship, the ICG argued it should be less intrusive than the current SRSG arrangement, with the trustee simply exercising veto powers either at large or in specifically defined areas. Like the 1998 PILPG and Goldstone II proposals, ICG argued that the Kosovo government should be permitted to exercise immediate responsibility for foreign policy, the budget and matters of law and order.¹⁶²

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

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

The ICG argued that conditional independence, or earned recognition, was the only final status option that satisfied all the key ingredients necessary for a stable final status. While ICG recognized that Kosovo was not yet prepared to exercise full sovereignty, it reasoned that through a process of conditional independence it would be able to earn this right and gradually prove itself capable of full independence. According to the ICG, conditional independence would also solidify Kosovo's status as an entity outside the sovereign control of the FRY. International aid and investment, currently discouraged by the uncertainty in Kosovo, would increase with a certain final status, and would remain in Kosovo as it would be unimpeded by fears that a fledgling nation might prove itself unworthy of such inflow. The ICG also argued that by "remaining on probation, Kosovo Albanians would have a strong incentive to ensure that Kosovo would cease to be a factor of regional instability."¹⁶⁵

The ICG then addressed a number of arguments that had been presented against the approach of earned sovereignty. First, the ICG disputed the notion that maintaining an uncertain prospect for independence preserved stability. Rather, in the view of the ICG, it was the lack of certainty over Kosovo's future that was a

161. *Id.* at 12.

162. *Id.* at 12-13.

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

164. *Id.* at iv.

165. ICG *supra*, 13-14.

major contribution factor to regional instability. The ICG also argued that the fear of retaliation from the Serb community, which was frequently invoked as an argument against earned sovereignty was unfounded as the democratically elected Serbian government was unlikely to call for mass emigration in the face of final status. Another argument often presented regarding Serbia is that final status for Kosovo would lead to an increase in nationalist sentiment in Serbia, at the expense of moderates and stability. ICG rebutted this claim by noting that, if the goal was long-term stability, preservation of an unstable entity and, with it, the possibility of another change to Serbia's geography and demographics would only prolong the transition to a stable democracy. Finally, the ICG rebutted the claim that Kosovo would set a precedent for other separatist movements in the region by presenting the key difference between Kosovo and other areas, that "Kosovo's interim status is underpinned by a UN Resolution that leaves the question of final status open."¹⁶⁶

UNMIK'S STANDARDS BEFORE STATUS APPROACH

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

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

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

166. ICG *supra*, 6-9.

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

168. *Id.*

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

170. Press Release, United Nations, Highlights Of The Introductory Remarks At A Press Conference By Michael Steiner, Special Representative Of The Secretary-General In Kosovo, June 27,

Specifically, the benchmarks covered the areas of functioning democratic institutions, rule of law, freedom of movement, refugee returns and reintegration, economic reform and development, property rights, dialogue with Belgrade, and the responsible operation of the Kosovo Protection Corps.¹⁷¹

For each of these categories, UNMIK set forth goals, benchmarks, and specific actions to be taken by the local community. For instance, with respect to freedom of movement, UNMIK set the goal that "all communities can circulate freely throughout Kosovo, including city centers, and use their language."¹⁷² The benchmark for measuring the attainment of this goal was the "unrestricted movement by minorities without reliance on military or police."¹⁷³ The required local action included "policy and sustained action by [local institutions] to promote FOM [freedom of movement] publicly" and "[u]nprompted condemnation by holders of public office of obstruction and violence"¹⁷⁴

With respect to the process for resolving final status, the United Nations determined that it was necessary to meet these benchmarks before discussions on final status could commence.¹⁷⁵ In essence, the UN determined that phase four of earned sovereignty could not commence in the case of Kosovo until after the conditions had in fact been met to a substantial degree. As explained by SRSG Steiner, the rationale behind this approach was that "Kosovo can only advance towards a fair and just society when these minimum pre-conditions are met."¹⁷⁶ Moreover, Mr. Steiner argued, these standards also mirrored those that were required to be considered for integration into Europe: "I offer this to you as an 'exit strategy' which is, in reality, an 'entry strategy' into the European integration process. The benchmarks complement the preconditions that Kosovo needs to meet to qualify for the Stabilisation and Association process."¹⁷⁷ According to the United Nations press office, "the Parliament in Kosovo, the population, the political leaders and the government had agreed to concentrate on the benchmark of a respected society before talking about the status issue."¹⁷⁸

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

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

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

172. *Id.*

173. *Id.*

174. *Id.*

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

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

177. *Id.*

178. See *Highlights*, *supra* note 160.

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

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

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

CONCLUSION

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

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

The benchmarks established in the third phase for increased transfer of

179. See Naegele, *supra* note 133.

180. *Id.*

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

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

