

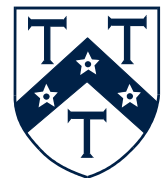
*occasional paper*

South East European Studies  
at Oxford

Recognizing Kosovo's independence:  
Remedial secession or earned sovereignty?

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OCCASIONAL PAPER No. 11/10  
OCTOBER 2010



**SEESOX**  
South East European Studies  
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## Abstract

This paper examines the main justifications for recognising Kosovo's independence: 'remedial secession' and 'earned sovereignty'. Our paper begins by examining the applicability of the doctrine of remedial secession to Kosovo, the justifications for which can be seen clearly in the decade from 1989 to 1999. However, we argue that the doctrine of remedial secession was insufficiently ripe, in political and legal terms, to be used in 1999 to support Kosovo's independence. An opposing approach is that of 'earned sovereignty' which aims to provide for the managed devolution of sovereign authority and functions from a state to a sub-state entity, resulting either in independence or rehabilitated autonomy within the host state. Based on the case of Kosovo, we propose an alternative explanation to this observed path towards 'recognisable' statehood: 'remedial sovereignty' whereby a people realise statehood by invoking remedial secession and undergoing a transitional period of mediated international administration, characterized by elements of sovereignty which are externally designed and internally earned. Therefore, we propose 'remedial sovereignty' as a useful paradigm to provide the international community with a framework to confer statehood on those peoples for whom there is no other choice, thereby resolving the 'recognition dilemma' experienced in the aftermath of the Kosovo's declaration of independence.

# Recognizing Kosovo's independence: Remedial secession or earned sovereignty?

## I. Introduction

Kosovo's declaration of independence on 17 February 2008 met a divided international response. While seventy UN member states have recognised Kosovo's independence (including 22 EU states), other states continue to withhold recognition. Most significantly, Russia and China refuse to recognize Kosovo as an independent state and supported Serbia's initiative to request an Advisory Opinion from the International Court of Justice (ICJ) on the 'Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo'.<sup>1</sup> The ICJ announced its Advisory Opinion on 22 July 2010, concluding that

'the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.'<sup>2</sup>

Indeed, the ICJ Advisory Opinion responded in this restrictive manner to the 'narrow and specific' question posed. It deliberately avoided pronouncing on 'the validity or legal effects of the recognition of Kosovo'<sup>3</sup> by UN Member States and did not examine systematically the justifications put forward by states that recognize Kosovo. Accordingly, this paper aims to analyze and evaluate the legal and political grounds invoked by states which recognize Kosovo as an independent state.

States that support and recognize Kosovo's independence justify their recognition with regard to a number of factors, including: human rights abuses under Milošević; a decade of international administration; Kosovo's statehood capacity; the exhaustion of future status negotiations; and Kosovo's commitment to respect minority rights and accept 'supervised independence'. Furthermore, most countries emphasize that Kosovo's independence is the only way to promote regional peace and stability and describe Kosovo as a *sui generis case*, which does not constitute a precedent for other cases. By contrast, states that withhold recognition support Serbia's sovereignty and territorial integrity and argue that international law does not allow secession outside the colonial context and that 'unilateral secession' – secession in the absence of host state consent – should not have effect and sets a negative precedent.

Legal doctrine holds that 'secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally'.<sup>4</sup> Accordingly,

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<sup>1</sup> UN General Assembly, Resolution 63/3, 5, UN Doc. A/RES/63/3, (8 October 2008).

<sup>2</sup> I.C.J., 'Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo', Advisory Opinion, 22 July 2010, para. 122.

<sup>3</sup> ICJ Advisory Opinion on Kosovo, para. 51.

<sup>4</sup> James Crawford, *The Creation of States in International Law*, 2<sup>nd</sup> ed., OUP, Oxford, 2006, p.390

the decision to bestow or withhold recognition has legal and political consequences in the international and domestic spheres. Internationally, recognition opens the path for membership of international organizations and participation in global economic, political and security structures. For post-conflict situations such as Kosovo, such international participation is vital for political stability and economic development. Regionally, the resolution of contested borders promotes stability and integration. Indeed, Kosovo's Deputy Prime Minister Hajredin Kuçi commented: 'The recognition of Kosovo is as important as the declaration of independence. This is a crucial issue for the new state of Kosovo and its functioning.'<sup>5</sup>

In view of the political and legal significance of recognition, and the controversy surrounding the recognition of Kosovo's Unilateral Declaration of Independence, this paper examines the justifications put forward by states that recognize Kosovo's independence. To contextualize this endeavour, we examine two theoretical approaches that suggest procedures for regulating the recognition of contested territories and sovereignty-based disputes: remedial secession and earned sovereignty. 'Remedial secession' is a scheme by which, corresponding to the varying degrees of oppression inflicted upon a particular group by its governing State, international law may recognize a continuum of remedies ranging from the protection of individual rights, to minority rights ending with secession as the ultimate remedy.<sup>6</sup> While remedial secession considers the genesis of conflicts and focuses on the implications of host state oppression which may necessitate international intervention, earned sovereignty 'entails the conditional and progressive devolution of sovereign powers and authority from a state to a sub-state entity under international supervision.'<sup>7</sup> Both of these approaches have been formulated to serve different functions: first as a description of state practice, second as an explanation for particular cases, and finally as a prescription for other, similar contexts.

This paper considers the explanatory power of these two doctrines in relation to the recognition of Kosovo, by analyzing the extent to which these approaches reflect the international response to Kosovo over twenty years, with a particular focus on analyzing the statements recognizing the 2008 Declaration of Independence. Based on our analysis of the Kosovo case, we develop a new theory, 'remedial sovereignty' which synthesizes the two approaches to provide a more comprehensive understanding of the conditions under which an oppressed people claiming self-determination can 'earn' their sovereignty under international supervision and acquire international recognition, despite the constraints of international politics and the limits of international law.

## **II. Remedial secession**

The theoretical basis for 'remedial secession' is located in international law and normative theory, reflecting the increased salience of human rights considerations during state

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<sup>5</sup> <http://www.timesonline.co.uk/tol/news/world/europe/article3392492.ece>

<sup>6</sup> Lee Buchheit, *Secession: The Legitimacy of Self-Determination*, YUP, New Haven, Connecticut, 1978, p.222

<sup>7</sup> Williams, P. R., & Pecci, F. J., 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination', *Stanford Journal of International Law*, Vol. 40, No. 1, 2004, p. 4.

creation. This was formulated initially as the negative duty to apply collective non-recognition to states created in violation of jus cogens (compelling law) by ethnic cleansing (a crime against humanity) and the UN Charter prohibition on territorial aggrandizement by use of force. Accordingly, collective non-recognition serves as a veto against states created by the violators of human rights. If this concept is inverted, can the international community recognize states created as a remedy of last resort to end 'persistent and serious violations of human rights' by allowing an oppressed people to secede from an abusive host state? This question is addressed by the remedial position.

A number of legal scholars explicitly discuss the doctrine of remedial secession<sup>8</sup>, often described more technically as 'a qualified right to unilateral secession', the legal basis for which stems from the enshrinement of the right of self-determination. The 1970 Declaration on Friendly Relations addresses, *inter alia*, self-determination and proponents of the remedial secession doctrine claim that an inverted reading of the 'safeguard clause' of Principle V gives rise to the doctrine. According to this inverted reading, a state which does not conduct itself 'in compliance with the principle of equal rights and self-determination of peoples' and is not 'possessed of a government representing the whole people belonging to the territory without distinction' is not protected by the safeguard clause and may be exposed to actions which, in the name of the principle of self-determination may dismember or impair, totally or in part, its territorial integrity or political unity'.<sup>9</sup> Based on an analysis of the 1970 *travaux préparatoires*, Cassese argues that the Declaration on Friendly Relations 'links external self-determination to internal self-determination in exceptional circumstances'.<sup>10</sup>

Following the end of the Cold War, the remedial secession doctrine attracted increased consideration in judicial decisions, including Katanga, Loizidou v. Turkey and Quebec. Significantly, Serbia's initial written contribution to the ICJ Kosovo Advisory Opinion denounced the doctrine.<sup>11</sup> A significant number of states addressed remedial secession in their ICJ written and oral pleadings. Indeed, the counsel for the UK reminded the court that:

Remedial self-determination was left open by the Canadian Supreme Court which did not need to decide it, given the advanced position of Quebec within Canada. But you would need to decide it before you could answer the question in the negative, against Kosovo. I stress that Quebec has never had its distinct status negated and then constitutionally denied, nor two thirds of its people chased violently from their homes and lands.

When the ICJ announced its Advisory Opinion, it acknowledged that a number of participants raised the remedial secession doctrine, in 'every instance only as a secondary argument'

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<sup>8</sup> See David Raic, *Statehood and the Law of Self-Determination*, Brill, Leiden, 2002; Buchheit, *Secession: The Legitimacy of Self-Determination*, YUP, New Haven, Connecticut, 1978; Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence*, OUP, Oxford, 2008.

<sup>9</sup> Eduardo Jiménez de Aréchaga, 'International law in the past third of a century', *Recueil des cours*, Vol.159, No.1, 1978, p.110.

<sup>10</sup> Antonio Cassese, *Self-determination of Peoples: A Legal Appraisal*, CUP, Cambridge, 1995.

<sup>11</sup> In their written comments to the ICJ, Finland, Ireland, Poland and the UK referred to remedial secession explicitly. Serbia, Argentina, Cyprus, Spain, Iran, Romania, Russia, Slovakia came out against the doctrine. Texts available on ICJ website: <http://www.icj-cij.org>

describing it as a subject on which 'radically different views were expressed'. The Opinion also acknowledged that certain participants questioned whether 'the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo.'<sup>12</sup> Nonetheless, the Court concluded that it was not 'necessary to resolve these questions in the present case' and emphasized that remedial secession was 'beyond the scope of the question posed by the General Assembly.'<sup>13</sup>

Following an analysis of potential state practice of remedial secession, Jure Vidmar investigated the application of the doctrine in Bangladesh, the Baltic Republics and Kosovo. He suggests that remedial secession has the following function in international law: although not a legal entitlement, remedial secession confers political and normative legitimacy on oppressed secessionist groups and may encourage states to recognise their independence.<sup>14</sup>

Parallel to the growing consideration of remedial secession in legal doctrine, normative theories of secession are a product of the post-Cold War era, and were undoubtedly shaped by that era. Allen Buchanan launched the contemporary debate about the morality of secession in 1991 but his initial theories were superseded by his 2004 magnum opus entitled '*Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*', where he proposes a justice-based re-organization of international law, incorporating a 'just cause' theory of secession as a 'remedial right only'.<sup>15</sup> Buchanan identifies three forms of injustice that give rise to the remedial right to secede: 1) large-scale and persistent violations of basic individual human rights; 2) unjust annexation of a legitimate state's territory or 3) the state's persistent violations of intrastate autonomy agreements.<sup>16</sup>

It is useful to analyze these criteria of remedial secession according to a re-formulation of the just war principles, an innovative approach first formulated by Bruno Coppieters.<sup>17</sup> It is submitted that the following re-interpretation of Coppieters principles makes his framework more effective for the analysis of secessionist claims. First, the principle of just cause holds that unilateral secession must be a necessary means of redressing grave injustices, including violations of human rights, autonomy agreements or unjust annexation. Respect for the principle of last resort means that autonomy arrangements and negotiations should be exhausted. The principle of legitimate authority requires the seceding state to affirm its representative nature, adherence to the rule of law and to the principles of human rights. The principle of right intentions prescribes that the primary intention of unilateral secession should be a good faith attempt to redress a severe injustice. According to the principle of

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<sup>12</sup> ICJ Advisory Opinion on Kosovo, para. 82.

<sup>13</sup> ICJ Advisory Opinion on Kosovo, para. 83.

<sup>14</sup> Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice', *St. Antony's International Review*, Vol. 6, Number 1, 2010, p.43.

<sup>15</sup> Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, OUP, Oxford, 2004, Chapter 8.

<sup>16</sup> Buchanan, *Justice, Legitimacy and Self-Determination...*, p.351-353

<sup>17</sup> Bruno Coppieters & Richard Sakwa, eds. *Contextualizing Secession: Normative Studies in Comparative Perspective*, OUP, Oxford, 2003, p.192

proportionality, the total cost of unilateral secession should correspond with the expected benefits. Finally, the chance of success principle obliges states to assess the extent to which they can expect international recognition, a major contributing factor in this instance can be the support of a powerful ally. Synthesizing these proposals, the following conditions can be identified as conditions that facilitate (or block) 'remedial secession': a) violations of autonomy agreements by the host state; b) unjust annexation of territory; c) human rights abuses perpetrated by the host state; d) international intervention to mediate a status outcome; e) support of powerful countries; f) exhaustion of negotiations; g) a commitment from the seceding entity to uphold minority rights.

### III. Earned sovereignty

The concept of earned sovereignty was initially developed as a policy prescription and conflict resolution strategy for Kosovo in November 1998 by the Public International Law and Policy Group (PILPG) and the International Crisis Group (ICG). Reflecting the remedial position, their 1998 memorandum reasoned that Kosovars were entitled to heightened sovereignty because of past abuses by the Serbian Regime, but were 'required to earn full sovereignty at the end of an interim period by demonstrating their commitment to democratic self-government, to the protection of human rights, and the promotion of regional security.'<sup>18</sup> Accordingly, they recommended that the international community should intervene and oversee a three-to-five-year period of transition.<sup>19</sup> During this transitional period, the memorandum envisaged that the people of Kosovo should assume increasing levels of sovereign authority and functions from Serbia, subject to minority rights compliance and respect for the territorial status quo.<sup>20</sup> Thereafter, Kosovo's status should be determined by a referendum.<sup>21</sup> This initial approach was described as 'intermediate sovereignty', but was referred to subsequently as phased recognition, provisional statehood, conditional independence, supervised independence. Since these positions converge around the 'earned sovereignty', that term will be used in this paper.<sup>22</sup>

Williams *et al* hold that this approach informed the Rambouillet Peace Accords and UN Security Council Resolution 1244.<sup>23</sup> Thereafter, the earned sovereignty approach was further developed by a number of expert commissions and think tanks, including the International Independent Commission for Kosovo (the Goldstone Commission).<sup>24</sup> Earned Sovereignty arguably influenced the UN doctrine of 'standards before status' and Ahtisaari's

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<sup>18</sup> Paul R. Williams, 'Earned Sovereignty: The Road to Resolve the Conflict over Kosovo's Final Status', *Denver Journal of International Law and Policy*, Vol. 31, 2002, p. 400

<sup>19</sup> Williams, P. R, 'Earned Sovereignty: The Road to Resolve the Conflict over Kosovo's Final Status', p. 398.

<sup>20</sup> ICG, *Intermediate Sovereignty as a Basis for Resolving the Kosovo Crisis*, International Crisis Group Balkans Report no. 46, 09 November 1998.

<sup>21</sup> Williams, P. R, 'Earned Sovereignty: The Road to Resolve the Conflict over Kosovo's Final Status', p. 398.

<sup>22</sup> *Ibid*, p. 391

<sup>23</sup> *Ibid*, p. 389-390

<sup>24</sup> IICK, *The follow-up of the Kosovo Report: Why conditional independence?*, Independent International Commission on Kosovo, 2001.

2007 status recommendation of 'supervised independence' for Kosovo.<sup>25</sup> While the approach was refined in response to developments in Kosovo, seven contemporaneous 'sovereignty conflicts' also drew on elements of earned sovereignty to resolve their disputes.<sup>26</sup> In recognition of this, the PILPG published several academic papers in 2003 to facilitate the application of the earned sovereignty to other contexts and conflicts.

This generalized 'earned sovereignty' approach is defined by three core elements: shared sovereignty, institution building, and a determination of final status.<sup>27</sup> The first element, *shared sovereignty*, is characterized by the shared exercise sovereign authority and functions over a defined territory, by a sub-state entity and the host state or international community.<sup>28</sup> The underlying logic is that shared sovereignty provides a 'cooling-off period' during which violence is suspended and both the central authorities and aggrieved peoples postpone the consideration of a final status by focusing on short-term goals such as public services and rebuilding institutions. Thus, the second element, *institution building*, involves the establishment of political and economic infrastructure and the strengthening or construction of institutions for self-government.<sup>29</sup> These institutions are often constructed with the assistance of the international community.<sup>30</sup> Once institution-building is sufficiently advanced, a third element, the *determination of final status* is initiated, often under international community mediation, with options ranging from substantial autonomy to full independence.<sup>31</sup>

Acknowledging the historical diversity of different conflicts and the need to provide flexibility in dealing with the political fragilities of peace processes Williams et. al. proposed three additional 'optional' elements: phased sovereignty, conditional sovereignty, and constrained sovereignty.<sup>32</sup> *Phased sovereignty* involves the measured devolution of sovereign functions and authority from the parent state (or international community) to the sub-state entity during the period of shared sovereignty and prior to the determination of final status.<sup>33</sup> The timing and extent of the devolution of authority and functions may be correlated with the development of institutional capability or made conditional on the

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<sup>25</sup> UNMIK, *Kosovo Standards Implementation Plan*, Prishtina, 31 March 2004; Letter dated 7 October from Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/635, 30 November 2004, p.7.

<sup>26</sup> The nine territories in question were Northern Ireland, Serbia and Montenegro, East Timor, Bougainville, Bosnia-Herzegovina, Kosovo, Sudan, Israel/Palestine and Western Sahara. For an overview see: Paul R. Williams, Michael P. Scharf, & James R. Hooper, 'Resolving Sovereignty-based Conflicts: The Emerging Approach of Earned Sovereignty', *Denver Journal of International Law and Policy*, Vol. 31, 2002, pp. 349-387.

<sup>27</sup> Williams, P. R., & Pecci, F. J., 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination', p. 4.

<sup>28</sup> James R. Hooper, & Paul R. Williams, 'Earned Sovereignty: The Political Dimension', *Denver Journal of International Law and Policy*, Vol. 31, 2002-03, pp. 355-372.

<sup>29</sup> The Public International Law & Policy Group (PILPG)

<http://www.publicinternationallaw.org/areas/peacebuilding/earnedsov/index.html>.

<sup>30</sup> Hooper, J. R., Williams, P. R., 'Earned Sovereignty: The Political Dimension', p. 363.

<sup>31</sup> Ibid, p. 365.

<sup>32</sup> Williams, P. R., & Pecci, F. J., 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination', p. 4.

<sup>33</sup> Paul R. Williams & James R. Hooper, 'Earned Sovereignty: The Political Dimension', *Denver Journal of International Law and Policy*, Vol. 31, 2002, p.366.



fulfilment of certain conditions such as democratic reform and the protection of human rights.<sup>34</sup> These benchmarks identified during *conditional sovereignty* vary depending on the characteristics of the conflict and generally include conditions, such as protecting human and minority rights, developing democratic institutions, strengthening rule of law and promoting regional stability.<sup>35</sup> Once the final status has been determined, *constrained sovereignty* applies limitations on the sovereign authority and functions of the new state, such as continued international administration and/or military presence, and limits on the right of the state to undertake territorial association with other states.<sup>36</sup> Williams et al argue that the core and optional elements of earned sovereignty should be adopted by mutual consent. However, they acknowledge that, in some cases, the international community may impose these elements against the will of the host state or sub-state entity, as illustrated by Kosovo.<sup>37</sup>

#### **IV. Decennial theories and developments in Kosovo 1989-2009**

Both remedial secession and earned sovereignty address different decades of the Kosovo case. The conditions of remedial secession can be identified between 1989 and 1999, when Serbia substantively abolished Kosovo's autonomy and subjected Kosovo-Albanians to a systematic denial of their basic human rights, including general discrimination, mass dismissal of ethnic Albanians from public office and commercial enterprises, interference with the judiciary, arbitrary arrests and imprisonment, torture and mistreatment and disproportionate use of force.<sup>38</sup> Following seven years of passive resistance, the Kosovo-Albanians radicalised around their grievances and began to support the Kosovo Liberation Army (KLA). This in turn exacerbated a 'dynamic of violence' that created a humanitarian emergency by 1998 as Serbian state-sponsored violence took on the form of ethnic cleansing. In response to these developments, NATO intervened and UN Security Council Resolution 1244 placed Kosovo under international administration, effectively removing Serbia's sovereignty over Kosovo.

As outlined above, earned sovereignty was promulgated with reference to these events, initially as a policy prescription in 1998, and then reflected in the approach taken by the Rambouillet Accords and Resolution 1244. Accordingly, the elements of earned sovereignty provide useful reference points for examining Kosovo's ongoing decade of international administration from 1999. During this time, institutions of self-government were consolidated for Kosovo's 'future status' - be that wide autonomy within Serbia, or independent statehood. Upon the exhaustion of extensive UN-sponsored negotiations, Kosovo declared its independence in 2008. Countries that support Kosovo's independence justify their recognition with reference to the above events, which reflect elements of the

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<sup>34</sup> Ibid, p. 366.

<sup>35</sup> Williams, P. R., & Pecci, F. J., 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination', p. 9-10.

<sup>36</sup> Williams, P. R., & Hooper J. R., 'Earned Sovereignty: The Political Dimension', p. 370.

<sup>37</sup> Williams, P. R., & Pecci, F. J., 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination', p. 10.

<sup>38</sup> Marc Weller, *Contested Statehood: Kosovo's Struggle for Independence*, OUP, Oxford, 2008, p.60-4.

remedial secession and earned sovereignty approaches. The following section examines each development in turn from the perspective of the relevant doctrine. A subsequent section considers the extent to which these doctrines were invoked in the recognition statements of countries that recognize Kosovo.

#### 4.1 Abolition of autonomy

The abolition of autonomy is one of the key remedial conditions identified by Buchanan<sup>39</sup> and carries legal significance as the right to (internal) self-determination is considered a right *jus cogens*. Furthermore, the safeguard clause indicates that the denial of internal self-determination may convert into an external right of self-determination.<sup>40</sup> Although earned sovereignty does not address violations of autonomy agreements and human rights abuses, these conditions constitute the root of the problem that earned sovereignty aims to resolve. According to the normative shift from 'sovereignty as authority over territory' to 'sovereignty as responsibility',<sup>41</sup> we suggest that these conditions are significant as they weaken the sovereign legitimacy of the host state, thereby providing the sub-state entity with a reasonable justification to 'earn' its sovereignty.

Kosovo presents a clear case of the abolition of autonomy, particularly in view of Kosovo's extensive autonomy, amounting to quasi-republican status under the 1974 Constitution of Yugoslavia. The gradual centralization of power in Belgrade from 1988-1990 introduced constitutional amendments to reduce the competencies of the Kosovo Assembly and Belgrade finally abolished the Assembly in July 1990, thereby removing 'the last vestiges of Kosovo's autonomous status.'<sup>42</sup> However, the significance of the violation of autonomy agreements is unclear. During the 1990s, UN General Assembly resolutions repeated demands for the restoration of Kosovo's autonomy, but politicians were unwilling to raise the issue at international conferences on Yugoslavia in 1991, 1992 and 1995, due to Serbia's insistence that Kosovo was an 'internal' matter.<sup>43</sup> However, in 1999 Clinton justified the NATO intervention by explaining that:

In 1989 Serbia's leader Slobodan Milošević... stripped Kosovo of the constitutional autonomy its people enjoyed, thus denying them their right to speak their language, run their schools, shape their daily lives. For years, Kosovars struggled peacefully to get their rights back. When President Milošević sent his troops and police to crush them, the struggle grew violent...

Similarly, the UN Secretary-General the violation of Kosovo's autonomy as constituting the 'root cause of the crisis':

Before there was a humanitarian catastrophe in Kosovo, there was a human rights catastrophe. Before there was a human rights catastrophe, there was a political

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<sup>39</sup> Buchanan, *Justice, Legitimacy and Self-Determination*...p.351-353.

<sup>40</sup> Cassese, *Self-determination of Peoples: A Legal Appraisal*, CUP, Cambridge, 1995.

<sup>41</sup> Jennifer Welsh, ed., *Humanitarian Intervention and International Relations*, OUP, Oxford, 2006, p.2.

<sup>42</sup> Noel Malcolm, *Kosovo: A Short History*, OUP, Oxford, 2002, p.246.

<sup>43</sup> Richard Caplan, *Europe & the Recognition of New States in Yugoslavia*, CUP, Cambridge, 2005, p. 140.

catastrophe: the deliberate, systematic and violent disenfranchisement of the Kosovar Albanian people.<sup>44</sup>

During the Security Council debate on Kosovo in February 2008, Panama emphasised that 'Kosovo enjoyed an autonomy very much like the autonomy of the old republics of greater Yugoslavia, and an attempt was made to deprive it of that autonomy'.<sup>45</sup> Significantly, the abolition of autonomy was not explicitly mentioned in the recognition statements, but the issue was touched upon with reference to the dissolution of Yugoslavia and the right of self-determination.

## 4.2 Human rights abuses

David Raic rightly identifies human rights abuses as the 'catalytic agent' for the remedial secession, but the challenge is to identify appropriate thresholds.<sup>46</sup> By contrast, earned sovereignty articulates a conflict resolution mechanism once human rights violations have been committed, rather than incorporating causal factors. Following the abolition of Kosovo's autonomy, a number of discriminatory laws were introduced against the Albanians in Kosovo, constituting a 'persistent and serious' violation of their human rights. Beginning in 1989, new laws prohibited Albanians from the unauthorized sale of private property and restricted Albanian-language education.<sup>47</sup> During the 1990s, international monitoring bodies such as the CSCE and the UN Special Rapporteur for Human Rights chronicled the discrimination suffered by Kosovo-Albanians. These reports 'filtered up' through the Commission on Human Rights, the Third (Humanitarian) Committee of the United Nations General Assembly, to the agenda of the General Assembly plenary sessions.<sup>48</sup> Accordingly, the UN General Assembly adopted twelve resolutions between 1992 and 1998, summarizing the findings of the monitoring mechanisms and condemning FRY/Serbian abuses of human rights in Kosovo. A frequently-repeated operative clause condemned:

'...the large-scale repression by the police and military of the Federal Republic of Yugoslavia against the defenceless ethnic Albanian population and the discrimination against the ethnic Albanians in the administrative and judiciary branches of government, education, health care and employment, aimed at forcing ethnic Albanians to leave.'<sup>49</sup>

The CSCE mission chronicled the Albanian passive resistance movement and the establishment of parallel administrative structures, including parallel economy.<sup>50</sup> Significantly for remedial secession, there was little international support for Kosovo's independence at this point. In December 1992, the EC declared that 'the autonomy of Kosovo within Serbia must be restored.'<sup>51</sup> Despite the abolition of Kosovo's autonomy and

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<sup>44</sup> Secretary-General Addresses High-Level Meeting on Balkans SG/SM/6992, 14 May 1999.

<sup>45</sup> UNSC Meeting-Record, S/PV.5839, 18 February 2008, p.21, Panama.

<sup>46</sup> David Raic, *Statehood and the Law of Self-Determination*, p.372.

<sup>47</sup> Marc Weller, *The Crisis in Kosovo 1989-1999*, International Documents and Analysis, Vol. I, Documents and Analysis Publishing Ltd, Cambridge, 1999, p.62-63

<sup>48</sup> Weller, *Contested Statehood*, p.57.

<sup>49</sup> UNGA Resolution - Situation of Human Rights in Kosovo, (A/RES/49/204 – 13 March 1995), 49/204.

<sup>50</sup> CSCE Mission to Kosovo, *Report on Kosovo Stalemate*, 16 November 1992.

<sup>51</sup> *Statement of Edinburgh European Council meeting*, 12 December 1992.

international reports of grave, widespread and persistent abuses of human rights in Kosovo, international action was limited to human rights advocacy, implying that the remedial conditions were not taken into consideration at this point.

However, the escalation of violence in 1997-9 transformed the Kosovo issue 'from a human rights problem into a humanitarian crisis.'<sup>52</sup> In June 1998, the EU condemned the 'wide-spread house-burning and indiscriminate artillery attacks of whole villages [indicating] a new level of aggression on the part of the Serbian security forces' and viewed these practices as 'a new wave of ethnic cleansing.'<sup>53</sup> By September 1998, the UN Secretary-General concluded that 'the level of destruction points clearly to an indiscriminate and disproportionate use of force against civilian populations.'<sup>54</sup> The Serbian authorities, who were now perpetrating extreme human rights violations up to and including crimes against humanity (ethnic cleansing) crossed the threshold to make the international community take action.

During 1998, the UN Security Council adopted three resolutions, all calling for an 'enhanced status for Kosovo' a substantially greater degree of autonomy and meaningful self-determination.'<sup>55</sup> Accordingly, US Ambassador Hill was tasked with mediating a political solution. The Rambouillet Accords were drafted by 23 February 1998 and provided for wide powers of self-government for Kosovo, respecting the territorial integrity of the FRY for three years before holding a referendum on status.<sup>56</sup> While representatives of the Kosovo-Albanians signed the Accords, the FRY and Serbia refused to sign, prompting NATO's military campaign against the FRY on 24 March 1999.<sup>57</sup> Although ultimately unsuccessful, the Rambouillet Accords set the precedent for diminishing Yugoslav sovereignty and building up Kosovo's sovereignty, reflecting the earned sovereignty approach.<sup>58</sup>

In the UN Security Council meeting that discussed Kosovo's Declaration of Independence in 2008, a number of countries drew on the human rights dimension of the remedial doctrine to justify recognizing Kosovo's independence. The UK attached particular significance to the cumulative effect of Belgrade's actions, explaining that Resolution 1244:

'deprived Belgrade of the exercise of authority in Kosovo' not just because the 'then regime in Belgrade... unilaterally deprived Kosovo of its powers of self-government' but since it 'tried in 1999 to expel the majority population from the territory of Kosovo.'<sup>59</sup>

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<sup>52</sup> Weller, *Contested Statehood*, p.66.

<sup>53</sup> Declaration of the EU on Kosovo, (11.June.1998), in Weller, *Crisis in Kosovo*, p.230

<sup>54</sup> UNSG Report, S/1998/912, 3 October 1998.

<sup>55</sup> See: 1998 UNSC/Res. 1160; 1199; 1203

<sup>56</sup> Draft 'Interim Agreement for Peace and Self-Government In Kosovo Rambouillet', 23 February 1999.

Text at: <http://jurist.law.pitt.edu/ramb.htm>

<sup>57</sup> Jure Vidmar, 'International legal responses to Kosovo's declaration of independence', *Vanderbilt Journal of Transnational Law*, Vol. 42 Number 3, 2009, pp.793.

<sup>58</sup> Williams, P. R, 'Earned Sovereignty: The Road to Resolve the Conflict over Kosovo's Final Status', p. 403.

<sup>59</sup> UNSC Meeting-Record, S/PV.5839, 18 February 2008, p.12, UK.

The USA described Serbian actions as ‘ethnic cleansing’ and explained that, in response to ‘that humanitarian disaster and clear threats to international peace and security, NATO led a military intervention that stopped the violence and brought peace to Kosovo’.<sup>60</sup> From this analysis, it seems that, in the immediate post-Cold war period, revoking autonomy and pursuing discriminatory policies was not a sufficient cause to remove authority: evidence of more extensive suffering and human rights violations was needed to justify intervention and *de facto* secession.

### **4.3 The international administration of Kosovo**

Kosovo’s experience of international administration after 1999 is of particular significance for analyzing earned sovereignty and remedial secession. Indeed, developments during this decade were invoked as fundamental reasons for recognizing Kosovo’s independence. The ‘earned sovereignty’ approach incorporates three core elements and three optional elements, which are drawn from the same set of events, but emphasize different aspects of these events and official documents. For instance, Resolution 1244 (1999) and the 2001 Constitutional Framework provide the umbrella mandate for ‘shared sovereignty’. However, the devolution of sovereignty to the Kosovo authorities was ‘phased’ and made conditional on the satisfactory fulfilment of certain benchmarks, whereupon Kosovo’s final status could be determined. In view of the extensive powers vested in the Special Representative of the Secretary-General (SRSG) under Resolution 1244 and Kosovo’s unilateral acceptance of ‘supervised independence’ in February 2008, Kosovo’s institutions experience protracted ‘constrained sovereignty’. Following from this analysis it is clear that the six elements of earned sovereignty overlap and operate in parallel, making them difficult to ‘unbundle’ for analytical purposes. By contrast, remedial secession provides limited guidance for such transitional periods, and focuses instead the exhaustion of judicial and political methods before secession is deemed a remedy of last resort to redress the grievances of an oppressed people.

### **4.4 Shared sovereignty**

Security Council Resolution 1244 (1999) was the founding document of the post-war order in Kosovo. Despite the resolution’s preambular commitment to the territorial integrity of the Federal Republic of Yugoslavia (FRY) the ‘operative paragraphs created a situation that is not easily reconciled with the principle of territorial integrity’.<sup>61</sup> The resolution demanded that the FRY end ‘violence and repression in Kosovo’ and withdraw from Kosovo ‘all military, police and paramilitary forces’.<sup>62</sup> The Security Council authorized the deployment, under UN auspices, of ‘international civil and security presences’.<sup>63</sup> Resolution 1244 reflects elements of the earned sovereignty approach, by mandating the UN-led civil presence with governing the transitional administration and overseeing the development of institutions of self-government in Kosovo. The UN was then to devolve sovereign authority

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<sup>60</sup> UNSC Meeting-Record, S/PV.5839, 18 February 2008, p. 17, USA.

<sup>61</sup> Vidmar, ‘International legal responses to Kosovo’s declaration of independence’, p. 796.

<sup>62</sup> UNSCR 1244, 10 June 1999.

<sup>63</sup> *Ibid.*

and functions to these new institutions and facilitate a political process designed to determine Kosovo's future status, building on the approach of the Rambouillet Accords.<sup>64</sup>

The international civil and security presence mandated by Resolution 1244 created the structures to implement 'shared sovereignty'. Accordingly, the UN Interim Administration Mission in Kosovo (UNMIK) was established, which vested supreme authority over legislative, executive and judicial bodies in the SRSG. UNMIK was structured according to four 'Pillars'.<sup>65</sup> Pillar I dealt with Humanitarian affairs led by UNHCR until 2000, and was replaced in 2001 by 'Law Enforcement and Justice', under the UN. Pillar II, civilian administration was coordinated by UNMIK. Pillar III, Democratization and Institution-Building, was administrated by OSCE. The EU was responsible for Pillar IV, mandated with economic reconstruction and development. With such a broadly-mandated international administration, UNMIK was an unprecedented example of the expanding role of international society in state-building by intervention.

#### **4.5 Institution-building and phased sovereignty**

To facilitate institution-building, Resolution 1244 mandated the civil administration to organize and oversee 'the development of provisional institutions for democratic and autonomous self-government'.<sup>66</sup> Reflecting the application of phased sovereignty, UNMIK was charged with 'transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities'.<sup>67</sup> In 2001, UNMIK introduced the 'Constitutional Framework for Provisional Self-Government' which established a 'comprehensive legal framework for self-government for Kosovo'.<sup>68</sup> The Constitutional Framework identified the Provisional Institutions of Self-Government (PISG) as including: the Assembly; the President of Kosovo; the Government; the Courts. The 'Constitutional Framework' provided that the SRSG should 'facilitate the transfer of powers and responsibilities to the PISG. This gradual process began in 2002 and UNMIK completed the transfer of the prescribed PISG responsibilities by the end of 2003'.<sup>69</sup> Despite international reports of progress, for Kosovo-Albanians 'the period of ineffective and increasingly unpopular international administration appeared to stretch on endlessly'.<sup>70</sup> As Wilde points out, UNMIK had been established to solve a governance problem - human rights violations under the Milošević regime — but ended up 'creating a sovereignty problem'.<sup>71</sup>

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<sup>64</sup> Ibid.

<sup>65</sup> Kosovo ICJ Written Contribution, April 2009, p. 79. Text available at: <http://www.icj-cij.org/search/index.php?p2=2&str=international>

<sup>66</sup> UNSCR 1244 (1999), operative para.11.

<sup>67</sup> UNSCR 1244 (1999), operative para.11.

<sup>68</sup> UNMIK, *Constitutional Framework for Provisional Self-Government in Kosovo*, Introduction [http://www.unmikonline.org/pub/misc/FrameworkPocket\\_ENG\\_Dec2002.pdf](http://www.unmikonline.org/pub/misc/FrameworkPocket_ENG_Dec2002.pdf).

<sup>69</sup> UNSG Report on UNMIK S/2004/71, 26 January 2004, para.5.

<sup>70</sup> Weller, *Contested Statehood*, p.185.

<sup>71</sup> Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *American Journal of International Law*, Vol. 95, No.3, 2001, p.605

#### 4.6 Conditional sovereignty and final status negotiations

Resolution 1244 did not define the future territorial status of Kosovo but rather called for a political process leading toward a final settlement. In April 2002, SRSG Michael Steiner outlined a series of benchmarks which 'should be achieved before launching a discussion on status.'<sup>72</sup> Accordingly, Kosovo provides a detailed example of the linkage between conditional sovereignty and final status negotiations and illustrates the problems associated with making these aspects coterminous. The benchmarks that formed the basis of the 'standards before status' policy incorporated critical areas such as 'rule of law, functioning democratic institutions, the economy, freedom of movement, the return of internally displaced persons and refugees and contributions to regional stability'.<sup>73</sup> Following consultations with the PISG, UNMIK unveiled the 'Kosovo Standards Implementation Plan' in March 2004.<sup>74</sup> However, it is unclear whether the level of complexity of this 117-page document represented 'conditional sovereignty' or reflected a 'delaying tactic' to avoid addressing Kosovo's status. While Kosovo's politicians were increasingly frustrated by this complex policy, popular frustration with the delayed status rose.

On 16 March 2004, riots erupted in Kosovo, triggered by the deaths of three Albanian boys, reportedly chased into the Mitrovica River by Kosovo-Serbs with dogs.<sup>75</sup> Over 51,000 people participated in 33 separate incidents across Kosovo, resulting in 19 fatalities (8 Serbs, 11 Albanians).<sup>76</sup> The OSCE chronicled 954 people injured, 4,100 people displaced, 550 houses and 27 Orthodox churches and monasteries burnt.<sup>77</sup> Concerning the impact of the March riots on Kosovo's future status, the earned sovereignty approach implies that such behaviour would undermine Kosovo's claim to deserve full sovereignty. Indeed, Belgrade claimed that the riots exposed Kosovo's unsuitability for statehood.<sup>78</sup> In response, Albin Kurti, leader of the pro-independence 'Vetevendosje' (Self-Determination) Movement, commented that 'Kosovo's unresolved status is the root cause of the inter-communal tensions and resultant instability.'<sup>79</sup>

Significantly, the 2001 Goldstone Report had warned that the Constitutional Framework established an 'indefinite protectorate' in which 'tension between the international administration and Kosovar demands for self-determination could easily reach breaking point.'<sup>80</sup> Facing this scenario, the UN Secretary-General (UNSG) viewed the March riots as the failure of UNMIK and commissioned a comprehensive re-evaluation of UN strategy in Kosovo. Indeed, two UNMIK officials later commented that violence had 'advanced the independence agenda as nothing else in the previous five years' leading to a change in how

<sup>72</sup> UNSC Meeting-Record, S/PV.4518, 24 April 2002, p.3.

<sup>73</sup> UNSG Report on UNMIK S/2002/436, 22 April 2002, para. 54.

<sup>74</sup> Text available at [http://www.unmikonline.org/pub/misc/ksip\\_eng.pdf](http://www.unmikonline.org/pub/misc/ksip_eng.pdf)

<sup>75</sup> OSCE Mission in Kosovo, 'Human Rights Challenges following the March Riots in 2004', p.4.

<sup>76</sup> James Ker-Lindsay, 'From autonomy to independence: the evolution of international thinking on Kosovo, 1998-2005', *Journal of Balkan and Near Eastern Studies*, Vol. 11, Number 2, 2009, p. 150.

<sup>77</sup> OSCE Mission in Kosovo, 'Human Rights Challenges following the March Riots in 2004', p. 4.

<sup>78</sup> Iain King & Whit Mason, *Peace at Any Price: How the World Failed Kosovo*, CUP, NY, 2006, p.190.

<sup>79</sup> Irish Times, 5 January 2005.

<sup>80</sup> IICK, *The follow-up of the Kosovo Report: Why conditional independence?*, p. 23.

the international community weighed the costs and benefits of maintaining the status quo.<sup>81</sup> Ambassador Kai Eide prepared two reports to the UNSG, identifying the flaws of the complex 'standard before status' policy. His second report recommended beginning the process for determining Kosovo's future status.<sup>82</sup> Accordingly, the UN Security Council authorized the initiation of the future status process and Martti Ahtisaari was appointed as UN Special Envoy for Kosovo (UNOSEK) to oversee the process.<sup>83</sup>

Although proponents of earned sovereignty identify the Determination of Final Status as a core element, their analysis simply observes that the options range from substantial autonomy to full independence and that the international community often mediates a negotiated settlement, which may be ratified by a referendum.<sup>84</sup> By contrast, the remedial position emphasizes that secession may only be permitted as a remedy of last resort. Accordingly, all judicial and political mechanisms should be exhausted, which in practice revolves around the 'exhaustion of negotiations'. The Future Status negotiations for Kosovo occurred in two different phases. First, the Vienna Future Status Negotiations convened between February 2006 and March 2007 and Ahtisaari made his recommendation and proposal at the end of this phase. When Serbia and Russia called for renewed negotiations, an additional round of Troika-led negotiations was held between August and December 2007.

Following seven months of the Vienna Negotiations, Ahtisaari presented his proposal to the two parties in February 2007. Weller explains that 'Kosovo embraced the proposal in principle, offering modest suggestions for amendment.'<sup>85</sup> In contrast, Serbian Prime Minister Kostunica rejected the agreement and called on Ahtisaari to re-engage in negotiations on the basis of the 'substantive autonomy model'.<sup>86</sup> Significantly, the call for more discussions was also echoed by the Russian Government.<sup>87</sup> Nonetheless, Ahtisaari claimed that the threshold had been met, announcing 'it is my firm view that the potential of negotiations is exhausted.'<sup>88</sup> Ahtisaari sent his Comprehensive Proposal and a separate Recommendation to the UNSG, who fully endorsed both documents and presented them to the Security Council on 26 March 2007.<sup>89</sup>

Concerning Kosovo's future status, Ahtisaari recommended 'independence, supervised initially by the international community.' In justifying his position, Ahtisaari invoked the remedial conditions:

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<sup>81</sup> King and Mason, *Peace at Any Price*, p. 215.

<sup>82</sup> Letter dated 7 October from Secretary-General addressed to the President of the Security Council, UN Doc. S/2005/635, 30 November 2004, p. 7.

<sup>83</sup> Weller, *Contested Statehood*, p. 189.

<sup>84</sup> Williams, P. R., & Pecci, F. J., 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination', p. 19.

<sup>85</sup> Weller, *Contested Statehood*, p. 210.

<sup>86</sup> *Ibid*, p. 211.

<sup>87</sup> Ker-Lindsay, *Kosovo*, p. 63.

<sup>88</sup> UNOSEK Press Conference, 10 March 2007.

<sup>89</sup> Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council S/2007/168



After years of peaceful resistance to Milošević's policies of oppression — the revocation of Kosovo's autonomy, the systematic discrimination against the vast Albanian majority in Kosovo and their effective elimination from public life — Kosovo-Albanians eventually responded with armed resistance. Belgrade's reinforced and brutal repression followed, involving the tragic loss of civilian lives and the displacement and expulsion on a massive scale of Kosovo-Albanians from their homes, and from Kosovo. The dramatic deterioration of the situation on the ground prompted the intervention of the North Atlantic Treaty Organization (NATO), culminating in the adoption of resolution 1244 (1999)...<sup>90</sup>

Ahtisaari also emphasized the cumulative effect of earned sovereignty:

For the past eight years, Kosovo and Serbia have been governed in complete separation... [UNMIK's] assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo...<sup>91</sup>

In his recommendation, Ahtisaari applied both the earned sovereignty and remedial secession approaches to justify a move away from the UN deference to the territorial integrity of its member states. In his Comprehensive Proposal for the Kosovo Status Settlement (CSS), Ahtisaari outlined prescriptions for Kosovo's future status, including constitutional, economic and security provisions. Ahtisaari's CSS also described the supervisory role envisaged for the international presence, ultimately providing that all 'authority vested in UNMIK shall be transferred en bloc to the authorities of Kosovo'.<sup>92</sup> However, Ahtisaari's CSS met a divided response. While the EU and the US lobbied the Security Council in favour of a draft resolution to endorse the Ahtisaari package, Serbia and Russia insisted on holding a new round of negotiations, highlighting the difficulty of establishing a threshold for the exhaustion of negotiations

Between August and December 2007, a mediating Troika of senior diplomats from Russia, the US and the EU held a new round of status talks. In total, the Troika held ten negotiation sessions, including a final, intensive three-day conference. Serbia took full advantage of the opportunity to start negotiations afresh and put forward a series of concrete suggestions for autonomy, offering Kosovo 'most competencies and symbols that are normally reserved only for sovereign countries'.<sup>93</sup> Kosovo re-iterated its demands for independence, having negotiated Ahtisaari's CSS in good faith in the belief that it was the definitive settlement'.<sup>94</sup> On 7 December, the Troika sent its report to the Secretary-General stating that 'both parties were fully engaged' but that 'neither side was willing to cede its position on the basic question of sovereignty'.<sup>95</sup> Emerging from a UN Security Council meeting on the Troika report the United States and certain EU states issued a joint statement 'that the

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<sup>90</sup> UNSC S/2007/168, 'Report of the Special Envoy of the Secretary-General on Kosovo's future status', 26 March 2007), p. 3.

<sup>91</sup> Ibid, p.3

<sup>92</sup> UNSC S/2007/168, 26 March 2007, p. 9.

<sup>93</sup> Weller, *Contested Statehood*, p. 225-7.

<sup>94</sup> Weller, *Contested Statehood*, p. 223.

<sup>95</sup> Report of the EU/U.S./Russia Troika of Kosovo, 4 December 2007.

Text available at: <http://www.ico-kos.org/pdf/Report%20of%20the%20EU-US-Russia%20Troika%20on%20Kosovo.pdf>.

potential for a negotiated solution is now exhausted.<sup>96</sup> Media reports suggested that the EU and the United States had decided to implement the Ahtisaari Plan without a Security Council resolution and forecast Kosovo's imminent unilateral declaration of independence.<sup>97</sup>

#### **4.7 Constrained sovereignty in an independent Kosovo**

Convened in an extraordinary meeting on 17 February 2008, Kosovo elected representatives met and adopted a Declaration of Independence. The authors of the Declaration proclaimed Kosovo as 'an independent and sovereign state' and undertook to cooperate fully with [international] presences', to accept fully Ahtisaari's CSS.<sup>98</sup> As identified by the earned sovereignty approach, constrained sovereignty involves continued limitation of the sovereign authority and functions of the new state, such as continued international administrative and/or military presence.<sup>99</sup> The new international presence reflects this approach as it was established to supervise Kosovo's independence and support weak governance sectors, namely justice and security. The International Civilian Office (ICO) supervises the implementation of the Ahtisaari plan, decentralization, cultural and religious heritage, and community affairs.<sup>100</sup> Meanwhile, the EU Rule of Law mission (EULEX) is tasked to mentor, monitor and assist the consolidation of Kosovo institutions, judicial authorities and law enforcement agencies while strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service.<sup>101</sup> In the military sphere, the NATO-led Kosovo Force (KFOR) continues to provide overall security services for Kosovo.

However, this period of constrained sovereignty is complicated by the unfinished mission of UNMIK and the new international presence, which is divided between organizations that are status supportive (ICO) and status-neutral (UNMIK, OSCE and EULEX). Indeed, the UNSG acknowledged that, 'UNMIK has been confronted with a substantially changed situation in Kosovo and has faced fundamental challenges to its authority and role.'<sup>102</sup> Accordingly, the 'conflicting positions' of multiple international organizations constrain Kosovo's exercise of sovereign authorities and functions in the sectors of justice and rule of law and in North Kosovo, where UNMIK and OSCE facilitate the continuation of Serbian parallel structures.

### **V. Justifications invoked by states recognizing Kosovo**

To date, Kosovo has been recognized by 70 out of 192 UN Member States (37%). Recognition statistics show that most of recognitions come from member states of

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<sup>96</sup> Informal comments to the Media by the Permanent Representatives of Belgium, France, Italy, United Kingdom, United States of America, Slovakia and Germany on the situation in Kosovo. Text available at: <http://www.un.org/webcast/stakeout2007.html>.

<sup>97</sup> Vidmar, 'International legal responses to Kosovo's declaration of independence', p. 803.

<sup>98</sup> *Kosovo Declaration of Independence*, 17 February 2008. Text available at: <http://www.assembly-kosova.org/?cid=2,128,1635>.

<sup>99</sup> Williams, P. R., & Hooper J. R., 'Earned Sovereignty: The Political Dimension', p. 370.

<sup>100</sup> For more see: <http://www.ico-kos.org/?id=2>.

<sup>101</sup> European Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, *Official Journal of the European Union*, L 42/92, 16 February 2008.

<sup>102</sup> UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/458, 15 July 2008.

Western multilateral and regional political, economic and security organizations.<sup>103</sup> For instance, Kosovo is recognized by 22 out of 27 European Union Member States (82%). Meanwhile, 85% of NATO Member States 70% of Council of Europe Member States and 63% of OSCE Member States have recognized Kosovo's independence. Despite the general expectation that most Arab states would recognize Kosovo, only 17 out of 57 Member States of the Organization of Islamic Conference and only 8 out of 22 Arab League Member States conferred recognition.

Of significance for the foregoing theoretical analysis, most countries that recognize Kosovo justify their response by invoking elements incorporated by remedial secession and earned sovereignty. However, a significant number invoke regional peace and stability, which is not directly covered by these two theoretical perspectives. Considering that some states do not make their statements public and that certain countries provide only a factual recognition without any justification, forty statements provide sufficient information for analysis. Based on a thematic analysis of these statements, the table on the following page was compiled to illustrate the explicit invocation of particular conditions.

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<sup>103</sup> *Who recognized Kosova as an Independent State?*, available at: <http://www.kosovothankyou.com/statistics/>

## Conditions invoked by countries that recognize Kosovo's independence

<i>Conditions invoked</i>	<i>Total</i>	<i>Countries</i>
The right to self-determination in the process of dissolution of Yugoslavia	5	Albania, Slovenia, Burkina Faso, San Marino, and United Arab Emirates
The will of people (majority)	5	Costa Rica, Afghanistan, Australia, Ireland, and Saudi Arabia
The human rights abuses	5	Australia, Ireland, Costa Rica, Canada, and Samoa
The international humanitarian intervention and administration	9	Austria, Peru, Ireland, Switzerland, Sweden, Canada, Burkina Faso, and Malta
Exhaustion of final status negotiations	13	Luxemburg, Austria, Ireland, Costa Rica, Peru, Iceland, Croatia, Hungary, Bulgaria, Macedonia, Montenegro, Canada, and Malta
Statehood capacities	9	USA, Turkey, Costa Rico, Canada, Norway, Burkina Faso, Montenegro, Macedonia, and Dominican Republic
Acceptance of 'Supervised Independence' and Ahtisaari Proposal	17	USA, Estonia, Italy, Luxemburg, Switzerland, Ireland, Sweden, Finland, Japan, Canada, Hungary, Croatia, Norway, and San Marino, Sierra Leone, and Costa Rica
Regional peace and security	25	USA, France, Albania, Turkey, Australia, Senegal, Luxemburg, Switzerland, Austria, Sweden, Japan, Finland, Canada, Hungary, Croatia, Bulgaria, Korea, Burkina Faso, San Marino, Macedonia, Montenegro, Saudi Arabia, Lithuania, Samoa, Dominican Republic and Costa Rica

Costa Rica provides the clearest articulation of the remedial secession doctrine, understanding that 'after the crimes against humanity (ethnic cleansing) perpetrated by the regime of Slobodan Milošević, the decision of the authorities and of people of Kosovo not to remain part of the Republic of Serbia is explicable'. Costa Rica also acknowledged that the 'possibilities of reaching a negotiated solution between the Belgrade and Pristina authorities have been exhausted' and congratulated 'the authorities and inhabitants of the Republic of Kosovo for their success in building a democratic and peaceful independent Kosovo.'<sup>104</sup>

<sup>104</sup> Full text available at: <http://www.rree.go.cr/ministerio/index.php?stp=131&langtype=espanol&SID=>

Similarly, Ireland acknowledged that: the legacy of the conflict of the late 1990s made the return of Serb dominion in Kosovo unthinkable, and also undermined the prospects for a long-sought compromise.<sup>105</sup>

However, only three other countries explicitly noted human rights abuses, suggesting that this is not that dominant international consideration. By contrast, seventeen countries made explicit reference to the exhaustion of negotiations, indicating a broad support base for independence as a remedy of last resort. Of significance, Montenegro and Macedonia issued a common statement acknowledging that 'the declaration of independence of Kosovo came after the failure of the international community efforts for Belgrade and Pristina negotiations to result in solution for Kosovo status.'<sup>106</sup> However, it is questionable whether the emphasis on the exhaustion of negotiations was more concerned with establishing a last resort for remedial secession, or for promoting regional stability and development. Hungary stated:

It has become clear that the status quo in Kosovo was unsustainable and moving forward in the settlement was necessary for the lasting stability and development of the region. It has also become evident that there was no optimal solution acceptable to both sides, and the potential for further negotiations had been exhausted.<sup>107</sup>

Significantly, twenty-five recognition statements justified Kosovo's independence as crucial for regional peace and stability in the Balkans, reflecting a variety of geostrategic perspectives and the primary concern to contain the threat posed to international peace and security by protracted sovereignty-disputes and contested territories. Since European countries bemoan the 'migration burden' of the Balkan conflicts, it is not surprising that Switzerland states that the 'clarification of the status of Kosovo is a precondition for the stability as well as for the economic and political development of the whole of the Western Balkans.'<sup>108</sup> Reflecting the security concerns of the Islamic world, Saudi Arabia hoped that recognizing Kosovo would 'positively contribute to enhancing the pillars of security and stability in Kosovo and its neighbouring countries.'<sup>109</sup> Asian countries also advocated the promotion of peace and stability in the Balkans, with Korea expecting that 'Kosovo's independence will contribute to promoting to the peace and stability of the region as well as its democratic development and economic recovery.'<sup>110</sup>

Twenty-three countries acknowledged elements of 'earned sovereignty', which include international administration, the successful development of statehood capacities (reflecting

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<sup>105</sup> Full text available at: <http://foreignaffairs.gov.ie/home/index.aspx?id=42938>.

<sup>106</sup> Full text available at: <http://www.vlada.mk/?q=node/1252>.

<sup>107</sup> Full text available at:

[http://www.mfa.gov.hu/kum/en/bal/actualities/spokesman\\_statements/Kosovo\\_recognition\\_080319.htm](http://www.mfa.gov.hu/kum/en/bal/actualities/spokesman_statements/Kosovo_recognition_080319.htm).

<sup>108</sup> Full text available at: <http://www.eda.admin.ch/eda/en/home/recent/media/single.html?id=17497>.

<sup>109</sup> Full text available at: <http://www.spa.gov.sa/English/print.php?id=656348>.

<sup>110</sup> Full text available at:

[http://www.mofat.go.kr/webmodule/htsboard/template/read/engboardread.jsp?typeID=12&boardid=302&eqno=306110&c=TITLE&t=&pagenum=1&tableName=TYPE\\_ENGLISH&pc=undefined&dc=&wc=&lu=&vu=&iu=&du=](http://www.mofat.go.kr/webmodule/htsboard/template/read/engboardread.jsp?typeID=12&boardid=302&eqno=306110&c=TITLE&t=&pagenum=1&tableName=TYPE_ENGLISH&pc=undefined&dc=&wc=&lu=&vu=&iu=&du=).

the Montevideo criteria for statehood) and Kosovo's acceptance of 'supervised independence' and the stipulations of the Ahtisaari Proposal regarding respect for minority rights and cultural heritage. The recognition statement of the USA articulated these elements most clearly explaining how Kosovo has

'worked to rebuild its war-shattered society, establish democratic institutions, hold successful elections for a new government, and foster prosperity. As an independent state, Kosovo now assumes responsibility for its destiny.... in its declaration of independence, Kosovo has willingly assumed the responsibilities assigned to it under the Ahtisaari Plan. The United States welcomes this unconditional commitment to carry out these responsibilities and Kosovo's willingness to cooperate fully with the international community during the period of international supervision to which you have agreed.'<sup>111</sup>

Canada also echoed the elements of earned sovereignty but emphasized that:

Kosovo is a unique case, as illustrated by its recent history characterized by war and ethnic cleansing, the role subsequently played by the United Nations and NATO in administering the territory and providing for its security, and the ongoing role that international organizations such as the European Union will play in assisting Kosovo with its transition to full independence.... We welcome the commitment made by Kosovo to ensure the protection of the rights of Serbian and other minorities, including their right to safety [and] welcomes Kosovo's commitment to ensure the protection of religious and cultural heritage sites.<sup>112</sup>

This analysis of the invocation of remedial secession and earned sovereignty in the context of Kosovo reflects a normative shift towards making state sovereignty conditional on respect for human rights.<sup>113</sup> The shift from 'sovereignty as authority over territory' towards 'sovereignty as responsibility' gives rise to three concepts that are closely related. The first - humanitarian intervention - empowers external actors to intervene in the state and to prevent human rights abuses. The second - remedial secession - could empower an oppressed people to claim secession as a remedy of last resort. The third - earned sovereignty - empowers the international community to supervise and recognize independence, provided that the new state complies with democratic and human rights norms.

## **VI. In lieu of a conclusion: Towards remedial sovereignty?**

The foregoing analysis confirms that the doctrines of remedial secession and earned sovereignty possess explanatory power for the different phases of the Kosovo issue. Remedial secession provides a theoretical framework for evaluating the root causes of the governance and sovereignty problems emanating from the abolition of autonomy and gross violations of human rights, culminating in ethnic cleansing. However, remedial secession

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<sup>111</sup> Full text available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2008/02/20080218-3.html>.

<sup>112</sup> Full text available at: <http://www.international.gc.ca/media/aff/news-communicues/2008/385954.aspx?lang=en>.

<sup>113</sup> Welsh, ed., *Humanitarian Intervention and International Relations*, OUP, Oxford, 2006, p.2

provides limited guidance in resolving the problems it so accurately predicts. This 'gap' is addressed by earned sovereignty, which identifies six elements for analysis. Although they overlap, a cautious application of these elements to Kosovo facilitates a comprehensive analysis of the different phases and shifting focus of the international administration of Kosovo, including supervised independence. Our analysis of the recognition statements confirms that elements of remedial secession and earned sovereignty were considered and invoked by the international community. However, it is significant that the most frequently invoked condition – the promotion of regional stability – is not incorporated into either theory.

Accordingly, the causal factors, development and conclusion of Kosovo's path towards 'recognizable' independence can be explained more accurately by what we describe as 'remedial sovereignty'. *Remedial sovereignty* is a process by which an oppressed people realise statehood by invoking remedial secession and undergoing a transitional period of mediated international administration, characterized by elements of sovereignty which are externally-designed and internally-earned. Externally-designed sovereignty relates to the set of actions and norms imposed by the international administration in order to create the political, economic and social infrastructure whereby the entity consolidates its statehood capacities with functioning democratic institutions, a self-reliant market economy, the capacity to make and implement law and contribute to regional stability. Meanwhile internally-earned sovereignty refers to the efforts of people within the entity to comply with all conditionality mechanisms to achieve the above described statehood capacities and to engage in good faith with final status negotiations.

Both remedial secession and earned sovereignty exhibit certain weaknesses that can be overcome by our approach of '*remedial sovereignty*'. Russia's invocation of remedial secession to justify its recognition of Abkhazia and South Ossetia in 2008 illustrated the risk that the doctrine can be abused by states who wish to weaken an opponent or, in extreme cases, incorporate the territory of a neighbouring state. Similarly, the current formulation of earned sovereignty does not limit its application to only the most severe cases. Accordingly, there is a risk that regions which acquire powers via decentralization or enhanced autonomy within functioning democracies may claim that they have 'earned' a right to exercise their sovereignty externally. By emphasizing the vital link between these two doctrines, we limit the potential for abuse and territorial fragmentation to cases when internationally-supervised sovereignty is granted only as a remedy of last resort to address gross violations of human rights. However, it is important that this new approach is subject to rigorous procedural review as the risks of protracted governance are just as serious as the risks of premature exit.

Since our observations about remedial secession and earned sovereignty are mainly generated from the Kosovo case, the analysis could be challenged by arguments that Kosovo is a 'unique case'. Indeed, most supporters of Kosovo's independence insist that Kosovo is a unique case. Coppetiers points out that this use of the term 'unique', rather

than an exception, has significant implications.<sup>114</sup> Whereas unique cases do not refer to general principles, exceptions do and can constitute a precedent for such principles.<sup>115</sup> By invoking a sui generis case, states claim that the Kosovo falls outside the general normative framework and cannot be guided by existing principles. In contrast, Russia insists that 'any speculation about the uniqueness of the Kosovo case is just an attempt to circumvent legal rules.'<sup>116</sup> Countries with internal separatist problems, such as China, Russia and Spain are extremely unwilling to recognize a situation which may exacerbate their own problems. Fear of the Kosovo precedent was heightened by Russia's controversial recognition of Abkhazia and South Ossetia in 2008, leading to a 'recognition dilemma'. Remedial sovereignty challenges the weaknesses of the remedial secession and earned sovereignty approaches and views support for Kosovo's independence as arising from the fulfilment of the relevant conditions. It remains to be seen whether other cases can fulfil the same conditions.

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<sup>114</sup> Bruno Coppieters, '*Kosovo and the Principles of Just Secession*', CEPS Policy Brief No 147, November 2007, p. 3. Text available at: <http://www.ceps.eu/book/what-just-secession-kosovo-unique>.

<sup>115</sup> Ibid, p.3

<sup>116</sup> Weller, *Contested Statehood*, p.113.



## About the authors

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# ABOUT SEESOX

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