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Sovereignty, Power, and Human Rights Treaties: An Economic Analysis

JoonBeom Pae*

I. INTRODUCTION

¶1 Given the importance of international human rights law in the legal academy, it is surprising that there is a dearth of legal writings dealing with this subject from the economic perspective.¹ One possible reason for this rarity is the conceptual difficulty involved in the incorporation of seemingly individual rights into a model assuming the state as a rational entity.² However, such a conceptual difficulty can be avoided if we regard a state's control over its human rights policy as a tradable resource; with states trading or pooling this resource with each other to maximize their welfare. Treating state sovereignty as tradable property is nothing new in law and economics literature.³ A state has autonomy to determine its human rights policy, and such a power can be treated as that state's sovereignty assets.⁴ States often trade their sovereignty assets, such as human rights control, in exchange for economic or political benefits in the international political market.⁵ Sometimes, states pool their assets to define the global or regional standard for human rights protection.⁶

¶2 When conceptualized as a state's property, human rights control is subject to the same limitations as when private property is "affected with a public interest."⁷ Misuse of 'human rights control' property (or human rights abuse) generates negative externalities

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¹ "Despite its importance within the legal academy, virtually nothing has been written from a theoretical perspective by economically oriented scholars on international human rights law." Alan O. Sykes, *The Economics of Public International Law* 58 (Univ. of Chi. Law & Econ., Olin Working Paper No. 216, 2004), available at http://ssrn.com/abstract_id=564383.

² One possible answer is suggested by Professors Jack L. Goldsmith and Eric A. Posner. Professor Goldsmith and Posner suggest that people's altruistic interests on the individual level influence government action especially in democratic states where voter preference matters. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 109 (2005).

³ "The assets traded in this international "market" are not goods or services per se, but assets peculiar to states: components of power." Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 13 (1999).

⁴ "[T]he unique feature of states is their possession of governmental regulatory authority in the broad sense." *Id.* at 13-14.

⁵ "In international society, the equivalent of the market is simply the place where states interact to cooperate on particular issues – to trade in power – in order to maximize their baskets of preferences." *Id.* at 13.

⁶ International law itself is the process of defining, exchanging, and pooling of states' regulatory authorities. See *id.* at 14.

⁷ Property right is no longer *juris privati* when clothed with public interest. *Garner v. Louisiana*, 368 U.S. 157, 182-183 (1961).

beyond mere altruistic concerns; such as threats to national security and regional or global stability, an influx of refugees, or the spread of disease.⁸ Since an abusing state does not internalize these externalities (which are borne by other states), such human rights-abusing policies become relatively cheaper than policies that respect human rights. Therefore, given the difficulty of political bargaining regarding human rights issues, human rights protection is often under-produced compared to the level that might have been achieved without such externalities.⁹

13 Economic literature suggests two main ways to solve the externality problem. The first is the market, and the second is the institutionalization.¹⁰ The market approach enables parties to voluntarily reduce externalities through trade and negotiation.¹¹ Once rights are clearly defined and entitled, externalities with regard to such rights are reduced to an economically efficient level as long as the transaction costs are minimal.¹² On the other hand, the institutionalization approach monopolizes rights-defining and enforcing functions.¹³ Monopolization can reduce the cost of defining and enforcing rights, making the threat of punishment credible to parties who infringe such rights.¹⁴ Negative externalities are prohibited and reduced by credible coercion from the monopolized institution.¹⁵

14 Part I of the following analysis will first lay out theoretical tools and Part II will discuss different concepts of sovereignty. Human rights control will be viewed as a type of sovereignty right. In Part III, the externality assumption will be explained and justified; i.e. the assumption that human rights abuses generate economically relevant negative externalities. Based on that assumption, Part IV will discuss the market approach, trading human rights control in the international political market, as a solution to decreasing negative externalities caused by human rights abuses. The author will argue that the international political market, in which a state's legal sovereignties are traded, is an economically efficient method to solve problems related to human rights abuses, provided that the transaction costs in the international political market are

⁸ See Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AM. J. INT'L L. 619, 624-625 (2005) ("The growing willingness of states to intervene in the domestic affairs of other states frequently has a far more self-interested basis. Governments increasingly understand that they often cannot afford to look the other way; that fundamental threats to their own security, whether from refugees, terrorists, the potential destabilization of an entire region, or a miasma of disease and crime, may well have their origins in conditions once thought to be within a state's exclusive domestic jurisdiction."). See also William W. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 HARV. HUM. RTS. J. 249, 250 (2004) ("Evidence from the post-Cold War period indicates that states that systemically abuse their own citizens' human rights are also those most likely to engage in aggression.").

⁹ With the positive transaction cost, externality cannot be reduced to zero. Note that the existence of an externality does not mean that common goods (e.g. human rights protections) are under-supplied than economically efficient level. It can be economically efficient even though each party has different effects. For discussions of externality issues resolved through private bargaining, see generally, RONALD HARRY COASE, *THE FIRM, THE MARKET, AND THE LAW* (1988).

¹⁰ There are two main ways to solve externality problems: the first is bilateral persuasion; the second is through institutionalization. See Dunoff & Trachtman, *supra* note 3, at 14-15.

¹¹ Through private bargaining, parties voluntarily internalize any remaining externalities, if such bargaining cost is lower than the cost of externality. See Bruce Yandle, *Property Rights or Externality?*, in PROPERTY RIGHTS, COOPERATION, CONFLICT, AND LAW 259, 270 (Terry L. Anderson & Fred S. McChesney eds., 2003).

¹² *Id.*

¹³ See Fred S. McChesney, *Government as Definer of Property Rights, Tragedy Exiting the Commons?*, in PROPERTY RIGHTS, COOPERATION, CONFLICT, AND LAW, *supra* note 11, at 227, 230-233.

¹⁴ *Id.*

¹⁵ *Id.*

minimal. Based upon the notion of behavioral sovereignty, part V will discuss how the power of the states affects the market analysis by changing the price of sovereignty assets; i.e. we will see how state power can change the price of sovereignty assets in the international political market. As will be shown in the analysis, certain sovereignty assets held by weaker states cannot be traded in the international political market, because such assets have negative values.

¶15 When the sum of the market price and the transaction costs are higher than the costs of violence, states will turn to violence.¹⁶ Market analysis combined with a “might makes rights”¹⁷ limitation shows that the market approach will be pursued only when the sum of the market price and the transaction costs are lower than the costs of violence. However, the market approach is still an efficient way to solve the problems of human rights abuses. Part VI will show that current human rights treaties have played significant roles in reducing the transaction costs, thus making the market approach cheaper relative to the costs of violence.

¶16 Violence is inevitable, since it is often the last resort to enforce a state’s rights with respect to international relations.¹⁸ As explained in Part V, war sometimes helps facilitate the international political market by placing a cap on the negotiation costs. However, war should only be allowed when the problem of opportunistic behavior is minimal.¹⁹ The regional enforcement and post-war building activities under UN authority will be effective devices to reduce such opportunistic behavior problems, which can facilitate an efficient use of force in the future.²⁰

¶17 Finally, Part VII will consider the institutionalization of human rights regimes as a possible alternative to the market approach. The benefits of institutionalization derive from the monopolization of functions such as defining and enforcing human rights.²¹ However, the institutionalization is not costless.²² Initial agreement can be difficult due to the rent-seeking behavior of states.²³ In addition, running such institutions also requires political and economic resources. The agency cost and the information cost involved in the institutionalization cannot be ignored.²⁴ Thus, the “nirvana”²⁵ approach

¹⁶ The costs of violence and the costs of negotiation can be compared vis-à-vis each other, because “bargaining for a transfer also consumes resources in a way that is not directly productive, [and thus] bargaining differs quantitatively rather than qualitatively from fighting.” See David Haddock, *Force, Threat, Negotiation, The Private Enforcement of Rights*, in PROPERTY RIGHTS, COOPERATION, CONFLICT, AND LAW, *supra* note 11, at 168, 169.

¹⁷ “Might makes rights” refers to property rights established by private enforcement. See John Umbeck, *Might Makes Rights: A Theory of The Formation And Initial Distribution of Property Rights*, 19 ECON. INQUIRY 38 (1981).

¹⁸ “Violence is usually more costly than a threat of violence. But the credibility of threat often must be established through occasional fits of actual violence.” See Haddock, *supra* note 16, at 188.

¹⁹ The possibility of opportunistic behaviors makes the private enforcement too expensive to be exercised. See DAVID D FRIEDMAN, *LAW’S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW* 275-276 (2000).

²⁰ Avoiding opportunistic behavior problems can be described as a legitimate use of force. For suggested principles regarding legitimate use of force, see U.N. HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, *A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY*, 62-67 (2004) (hereinafter UN REPORT).

²¹ McChesney, *supra* note 13.

²² Professor McChesney discussed various types of costs incurred in government definition of property rights. See *id.* at 238-240.

²³ *Id.*

²⁴ *Id.*

²⁵ Comparing the ideal norm with an existing imperfect institutional arrangement is called a “nirvana fallacy” by Harold Demsetz. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1-2 (1969). Economic analysis should be based on a comparative institution approach, which attempts to assess which alternatives seem best to minimize the economic problems. See *id.*

with regard to the institutionalization should be scrutinized and the institutionalization should be justified only when the benefits exceed the costs of institutionalization.

II. THE CONCEPT OF SOVEREIGNTY AND HUMAN RIGHTS CONTROL

¶8 Under international law, states have a right to autonomy.²⁶ A sovereign state is free to independently determine its own policy within the scope of sovereign prerogatives.²⁷

“Legal sovereignty implies that each state has the legal competence to, inter alia, participate in the international system on an equal footing with other states, conclude treaties on the basis of consent, exclude other states from interfering in its internal affairs, govern the affairs of its domestic territory, and control its borders.”²⁸

¶9 Liberal theory treats the state in international relations as analogous to the individual property holder at the national level.²⁹ The UN charter is sometimes regarded as the guardian of this legal sovereignty right.³⁰

¶10 International legal sovereignty, however, does not guarantee that legitimate domestic authorities are able to exercise their sovereignties in a full scale, presiding over internal matters with a power to fully enforce their policies.³¹ Realists may disagree with the existence of legal sovereignty, because they believe that “[s]tates interact in an environment of anarchy” absent any central government that can enforce the legal sovereignty right granted to each state.³² Rather, realists argue that states primarily guard their own sovereignty with their own forces.³³ In the real world, states are rarely on equal footing with respect to international relations.³⁴ Powerful states often set the terms of international law favorably to their political interest, and even the decisions made by international organizations reflect the states’ underlying power by weighing voting rules either directly or indirectly according to the power of such states.³⁵ However, a radical view of “power decides everything” also fails to explain why even the weakest states still maintain legal sovereignty under the auspices of international law, and why forceful annexation or colonization has rarely succeeded since the declaration of the UN charter³⁶

²⁶ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 287-295 (6th ed. 2003) (defining the concept of sovereignty in general).

²⁷ MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 177 (2nd ed. 1993).

²⁸ Richard H. Steinberg, *Who Is Sovereign?*, 40 *STAN. J. INT’L L.* 329, 329 (2004).

²⁹ STEPHEN KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 14 (1999).

³⁰ JANIS, *supra* note 27, at 178-179.

³¹ KRASNER, *supra* note 29, at 36-42, 220-238.

³² Kenneth W. Abbott, *International Relations Theory, International Law, and The Regime Governing Atrocities in International Conflicts*, 93 *AM. J. INT’L L.* 361, 364 (1999).

³³ *Id.* at 364.

³⁴ Steinberg, *supra* note 28, at 333.

³⁵ *Id.*

³⁶ Professor Harold Koh persuasively argues that the process of constant interactions can lead to compliance, but his theory implicitly assumes the existence of certain norms to which states do comply. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599 (1997). When a powerful state can influence the norm itself and make the norm as favorable as possible to its own interest, then such a state has no reason not to comply. Thus, he doesn’t fully explain why a powerful state would initially agree to allow legal sovereignty to even the weakest states. States’ compliance to international

¶11 The notion of “behavioral sovereignty” suggested by Professor Steinberg reconciles these seemingly opposite views.³⁷ Behavioral sovereignty is the actual extent to which a state can exercise, with its own force, its legally granted authority.³⁸ From a behavioral perspective, “there are gradations in the extent to which states are able to exercise their legal sovereignty.”³⁹ All states have the legal rights to govern their domestic affairs and to control their own borders, but the degree of actual autonomy varies in proportion to the distribution of power among those states.⁴⁰ For example, the United States, arguably the most powerful state in the world, exercises the full extent of its legal right to autonomy (or, arguably, more than what it is legally allowed, even infringing on the legal sovereignty of others), while other weaker states like “Burundi, Columbia, Venezuela, Haiti, Liberia, Peru, Rwanda, Uganda, and several other states have had substantial swaths of territory in the hands of rebels or lawless gangs in the last decades.”⁴¹ Thus, one can say that the United States’ behavioral sovereignty is greater than its legal sovereignty, while weaker states exercise behavioral sovereignties which are less than what they are legally entitled to under current international law. In an extreme example, one state can have behavioral sovereignty with no legal sovereignty. Palestine, for example, is not legally an independent state, but, for all practical purposes, it exercises behavioral sovereignty over its people and territory.⁴² On the other hand, a government in exile has only legal sovereignty without any power to exercise behavioral sovereignty.⁴³

¶12 These two sovereignty concepts mutually constitute each other. For example, when a state effectively controls certain territory for a long time without any legal rights, international law bestows upon the state a right of legal sovereignty over the territory.⁴⁴ Likewise, when insurgents have taken and controlled a substantial territory by armed rebellion, international law sometimes grants the insurgents a right to self-determination, which is a type of legal sovereignty.⁴⁵ Thus, a behavioral sovereignty can develop into a

norms can also be explained by the game theory. Cooperation (or tit for tat) is often the best strategy in an “indefinite games” situation. *See* RICHARD DAWKINS, *THE SELFISH GENE* 203-233 (1989). But this analysis also assumes that the players initially have similar powers to allow retaliation. When a state is powerful enough to make the other state’s retaliation unlikely, there can’t be an indefinite game at the first place.

³⁷ *See* Steinberg, *supra* note 28.

³⁸ *Id.* at 329.

³⁹ *Id.* at 340.

⁴⁰ *Id.* at 331-332.

⁴¹ *Id.* at 332, 337.

⁴² Despite of a unilateral declaration of a State of Palestine, “[t]he proclaimed ‘State of Palestine’ is not and has never actually been an independent state, as it has never had sovereignty over any territory in history.” Wikipedia, State of Palestine, http://en.wikipedia.org/wiki/State_of_Palestine.

⁴³ “A government in exile is a political group that claims to be a country’s legitimate government, but for various reasons is unable to exercise its legal power,” Wikipedia, Government in exile, http://en.wikipedia.org/wiki/Government_in_exile.

⁴⁴ Effective control doctrine sometimes gives a state the right to claim sovereignty over the controlled area without any initial entitlement of legal sovereignty. *See* *Island of Palmas (U.S. v. Neth.)*, Hague Ct. Rep. 2d (Scott) 83 (Perm. Ct. Arb. 1911).

⁴⁵ “[T]he creation of Bangladesh, the breakup of key parts of the former Soviet Union, and the breakup of the Yugoslavia” are examples where insurgents’ control has arguably developed into a legal sovereignty. Michael Davis, *Where World-Views Collide: Sovereignty and Intervention in an Age of Crisis and Terror* 24-25 (Mar. 17, 2005) (unpublished colloquium paper, on file with the Harvard Law School Workshop on International Law: A Seminar on New Scholarship).

legal sovereignty and legal sovereignty can be taken away when the lack of behavioral sovereignty is persistent.

¶13 However, legal sovereignty and behavioral sovereignty are two separate concepts, even though they are mutually constitutive. Collapsing those two concepts into one can lead us to a conclusion either too idealistic or too realistic.⁴⁶ Later on in this discussion, the concept of legal sovereignty will be used to analyze the efficient solution for human rights protection, while the behavioral sovereignty acts as a restraint on that analysis. Ignoring one or the other may result in inefficient or unfeasible policies.

III. EXTERNALITIES AND THE UNDERSUPPLY OF HUMAN RIGHTS PROTECTION

¶14 The UN Charter prohibits the threat or use of force against the autonomy of other states, except in self-defense and internationally sanctioned reactions to threats to peace.⁴⁷ Abhorrence of war is so great that the international community often fails to allow military actions even when humanitarian intervention is necessary.⁴⁸ Despite of this lack of public enforcement, why does international law try to put some restrictions on the state's discretion to determine its own human rights policy? The common argument for such restrictions is the existence of important negative externalities generated by human rights abuses.⁴⁹

¶15 When a state makes a decision regarding human rights issues, the state often does not consider the possible negative effect on other states.⁵⁰ Significant abuses of human rights may impose threats to people in other states as well as to domestic citizens.⁵¹ Refugees from the abusing state often flow into other states unless certain action is taken.⁵² Moreover, a state that systemically abuses human rights at home is more likely to engage in international aggression that may increase national security concerns in other states.⁵³ A state violating the human rights of its own people is able to wage war more cheaply, because such a state can "force individuals to fight or support the military

⁴⁶ "For example, not distinguishing between legal and behavioral sovereignty may lead powerful states to impose international obligations that weaker states cannot fulfill... NGO, for example, will not fully achieve their international goals by engaging weaker states to champion causes that powerful states will not." Steinberg, *supra* note 28, at 344-345.

⁴⁷ U.N. Charter art. 2, para. 4.

⁴⁸ Kofi Annan, the UN Secretary General, lamented about the consequence of the international community's inaction in the face of mass murder in Kosovo and the genocide in Rwanda. He also warned that the inability of the current system to protect common interest and thus increase global welfare might invite other alternatives to replace it. See Press Release, Kofi Annan, Implications of International Response To Events in Rwanda, Kosovo Examined by Secretary-General, U.N. Doc. GA/9595 (Sept. 20, 1999).

⁴⁹ "An externality occurs when a decision causes costs or benefits to stakeholders other than the person making the decision, often, though not necessarily, from the use of common goods (for example, a decision which results in pollution of the atmosphere would involve an externality). In other words, the decision-maker does not bear all of the costs or reap all of the gains from his or her action." Wikipedia, Externality, <http://en.wikipedia.org/wiki/Externality>.

⁵⁰ "Transnational externalities involve an action in one country that creates a benefit or cost in another, and there is no market compensation." See Todd Sandler & Keith Hartley, *Economics of Alliances: The Lessons for Collective Action*, 39 J. ECON. LITERATURE 869, 869 (Sept. 2001). Transnational externalities have increased significantly due to "growing populations, the fragmentation of nations, enhanced monitoring abilities and cumulative industrial pressure on the ecosphere." See *id.*

⁵¹ "[T]he growing willingness of states to intervene in the domestic affairs of other states frequently has a far more self-interested basis." Slaughter, *supra* note 8, at 625.

⁵² *Id.*

⁵³ Burke-White, *supra* note 8, at 250.

apparatus in its war-making activities[,]” while on the other hand, human rights respecting states must bear a higher political cost of war.⁵⁴ These negative externalities on regional stability seem to be recognized in the European Convention.⁵⁵ Moreover, the abusing policy enables a state to produce certain goods more cheaply (such as slave labor to produce goods for export), which negatively affects the relative competence of complying states in the global market. Therefore, pure altruism is not the only source of externalities generated by human rights abuses in other states.⁵⁶

¶16

Externalities often lead to either under-protection or over-abuse of human rights, because a state bears only a portion of the cost of human rights abuses.⁵⁷ The remaining burden, which will be borne by other states, can be simply ignored in a state’s decision making process and therefore the abusing policy becomes cheaper than what it would have been if the state had borne the full cost of human rights abuses. If the transaction costs are high enough to make political bargaining impossible between the abusing state and the affected state, externalities cannot be reduced through the international political market, and become economically irrelevant.⁵⁸ Thus, human rights protection tends to be under-produced compared to the level that might have been achieved without such negative externalities. In other words, if the abusing state was required to pay damages to the affected states or if the affected states could have stopped such abuses by compensating the abusing state, then the actual level of abuses would have been lower than the current level.

IV. A MARKET APPROACH AS A SOLUTION TO THE HUMAN RIGHTS PROBLEM

¶17

Does the current international human rights regime provide a proper solution for the problem of the undersupply of human rights protection? In the following analysis, the market approach (or Coasian approach) will be explained first as a solution for

⁵⁴ They also value the loss of life highly than states which abuse human rights. Thus, general cost of war becomes higher than that of abusing states. *See id.* at 266.

⁵⁵ “[T]he adoption of a European Convention...was...an affirmation of the belief that government respecting human rights are less likely to wage war on their neighbors.” HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW, POLITICS, MORALS* 786-787 (2d Ed. 2000).

⁵⁶ “L&E identifies additional reasons why states have interests in binding other states to observe humanitarian norms in internal conflict. For example, states may experience various types of externalities as a result of human rights violations in internal conflicts in other states. First, as ongoing conflicts in Kosovo and the Congo dramatically illustrate, internal conflict often produces direct externalities, such as significant refugee problems and the potential contagion of armed conflict into neighboring states. Less direct externalities include possible demonstration effects: rebellion in one state may encourage rebellion in another and violation of human rights in one state may increase the likelihood of violation in another. Finally, citizens in other states might experience moral externalities, in which concern for human suffering is perceived as a preference. This preference is satisfied when human rights are respected. While some may express theoretical concern about these “derivative” preferences, which relate to the protection of others, the important reason why they cannot be dismissed is simply that people act to satisfy them: therefore, a theory of rational choice would be incomplete without accommodating derivative preferences.” Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in International Conflict*, 93 AM. J. INT’L L. 394, 404 (April 1999). *See also* GOLDSMITH & POSNER, *supra* note 2, at 109-110.

⁵⁷ To the extent that human rights protection represents public goods, it tends to be under-produced by the market. Dunoff & Trachtman, *supra* note 3, at 16. However, the under-supply is not the problem of the externality itself, but the problem of bargaining-failure between parties. *See generally*, David De Meza, *Coase theorem*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 270 (Peter Newman ed. 1998).

⁵⁸ An externality is economically irrelevant if “the effects [do not] impose enough cost on recipients to cause them or others to discover mutually beneficial ways to reduce the harmful effect.” *See* Yandle, *supra* note 11, at 264.

externality problems;⁵⁹ then, the same analysis will be applied in the context of international human rights regimes.⁶⁰ To simplify things, this analysis is based on the assumption of legal sovereignty. A limitation of the analysis under the behavioral sovereignty concept will be considered later.

¶18 In a world where transaction costs are minimal, well-specified definitions of property rights will be enough to solve externality problems, because anyone who is negatively affected can negotiate with the externality producers.⁶¹ Even though externalities would still exist, the amount would be voluntarily agreed upon by their producers and recipients.⁶² For example, an airport generates noise to its neighbors, which constitutes an externality if the users – airline companies – don’t pay damages to the neighbors. If it is clear that the neighbors have the right not to be disturbed by such noise, then the airline company must either stop its business or voluntarily pay money to the neighbors to purchase a right to generate noise. The airline business becomes expensive due to this purchase, the number of flights thereby decreases, and thus noises decrease as well until it reaches the economically efficient level. The same level of noise can be voluntarily achieved even if airline companies have a right to generate noise. The neighbors must either move into another area, or voluntarily pay airlines to develop noise decreasing techniques. Either way, the total effect of noise will decrease to economically efficient levels.

¶19 An analogous analysis can be made in the context of international relations and human rights regimes. Professors Dunoff and Trachtman suggest the concept of an international political market where “like economic markets, the international system is formed by the interactions of . . . states.”⁶³ The utilitarian states can trade their sovereignty for other benefits.⁶⁴ For example, states trade their own jurisdiction with another state through extradition treaties, or states trade their power to control a specific part of internal policy for pecuniary or non-pecuniary benefits (e.g. foreign aid or trade favors).⁶⁵ The assets traded in this international political market are “sovereignty” rather than goods or services, but this fact does not change the analysis.⁶⁶ Thus, defining the clear scope of legal sovereignty is enough to solve the externality problems created by human rights abuses under the market approach. A state affected by human rights abuses in another state can negotiate with the violating state to decrease the level of abuse. Even though human rights abuses cannot be eliminated, they will be reduced voluntarily to an economically efficient level.⁶⁷

⁵⁹ See generally, COASE, *supra* note 9.

⁶⁰ The author assume in this analysis that the externality generated by human rights abuses is economically relevant: external effects are great enough to make states trade their resources in return for the abusing state’s sovereignty assets of human rights control. As discussed above, economically irrelevant externalities need not to be resolved. See Yandle, *supra* note 11, at 264.

⁶¹ *Id.* at 270.

⁶² *Id.*

⁶³ See Dunoff & Trachtman, *supra* note 3, at 13.

⁶⁴ *Id.*

⁶⁵ Criminal sanctions against individuals for certain crimes through international criminal courts can be also viewed as a transfer of state jurisdiction (paying a sovereign cost) to the international institution.

⁶⁶ Professor Abbott defines “sovereignty cost” as the symbolic and material cost of diminished national autonomy. A state pays sovereignty costs in exchange for other benefits in the international political market. See Abbott, *supra* note 32, at 375.

⁶⁷ Zero level abuse is not an economically viable level as well, so we cannot eliminate human rights abuses.

¶20 Like the airline hypothetical discussed above, if international law grants exclusive sovereignty to a state, then a state can determine its human rights policy and other states are not allowed to intervene in such decisions. Any state that has concerns about human rights abuses in foreign states must pay money or give other benefits to the abusing states in exchange for the abandonment or change of the abusing policies. On the other hand, if international law grants the negatively affected states a right not to be disturbed by other states' human rights abuses, then the abusing state must either stop its abusive policies or pay a price to the affected states in exchange for maintaining them. Either way, the level of human rights abuses will be voluntarily reduced.

¶21 Under the market approach, protecting and enforcing a property right should be guaranteed.⁶⁸ Otherwise, parties can resort to options other than trade which generally result in inefficient distribution.⁶⁹ Therefore, war as a form of forceful usurpation, should not be allowed. Just like theft or robbery is not an efficient means of transferring properties, neither is war an effective way to distribute sovereignties.⁷⁰ States must divert resources to build their armed forces for offensive or defensive purposes.⁷¹ Moreover, war generally incurs the cost of value diversion by channeling the asset from the state that values it the most to one that may value it less but has greater power.⁷² Thus, as long as the transaction costs are low enough to allow trades of assets in the international political market, protecting legal sovereignty, and thus prohibiting war generally, is an efficient solution to increase global welfare and to solve the externality problems created by human rights abuses.

¶22 Current human rights sentiments under the UN Charter seem to resonate with a market-oriented approach based on the concept of legal sovereignty. According to the UN Charter, a state has an almost absolute right to control its internal matters including human rights policies, and other states are not allowed to intervene in such matters.⁷³ States must rely on peaceful means, such as negotiation, to solve a dispute with other states, and disputes with regard to human rights problems are no exception.⁷⁴ Unlike the self-defense exception, which is important to protect sovereignty rights, the use of force for humanitarian causes is not explicitly allowed under the UN Charter without the approval of the Security Council.⁷⁵ Thus, in most cases, a state has to rely on the international political market to solve the problems of human rights abuses unless such problems amount to extreme humanitarian crises.⁷⁶ In many cases, human rights conditions have actually been improved through negotiation rather than through

⁶⁸ The *ex-ante* remedy of "property rule" in the Calabresi-Melamed model requires strong entitlements. Such entitlements should be protected by harsh rules (e.g. criminal sanctions) to eliminate any incentive to adopt options other than trade. See generally Guido Calabresi & Douglas A. Melamed, *Property Rules, Liability, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁶⁹ *Id.*

⁷⁰ For an analogous analysis about a theft, see FRIEDMAN, *supra* note 19, at 567-568.

⁷¹ *Id.*

⁷² "[Violence] induces diversion of resources from useful production to struggles over ownership." Haddock, *supra* note 16, at 170.

⁷³ U.N. Charter art. 2, para. 7.

⁷⁴ U.N. Charter art. 2, para. 3.

⁷⁵ The UN Charter explicitly authorizes the use of force for self-defense in Article 51. But humanitarian intervention in case of human rights crises is permissible only under narrow circumstances. See U.N. Charter art. 2, para. 4.

⁷⁶ For those narrow circumstances that might allow humanitarian intervention, see UN report, *supra* note 20, at 62-67.

humanitarian intervention. For example, human rights conditions have been improved in South America largely due to monetary and political aid from the United States.⁷⁷ Several African countries have also witnessed the improvement of human rights conditions through various forms of developmental aid and other political benefits provided by developed states.⁷⁸

¶23 Therefore, the lack of humanitarian intervention does not necessarily mean that the current system is working inefficiently. To the contrary, the market approach suggests that any type of humanitarian intervention should generally not be allowed.⁷⁹ Otherwise, states may resort to war or the forceful usurpation of sovereignty rights, which is generally less efficient in distributing resources (i.e. sovereignties) than the market. Or, if one argues that norms are developed to grant the states a right not to be disturbed by human rights abuses, then every human rights abuse must have been strongly prohibited. But many human rights abuses have gone unpunished, and arguably, rights not to be disturbed are not granted to the affected states under the current human rights regime.

V. MIGHT MAKES A DIFFERENCE.

¶24 The market approach discussed above has limited applicability. It assumes that international law can enforce sovereignty rights as property, once it clearly defines who is entitled to what. However, loosening such an assumption requires a different frame of analysis.⁸⁰ When parties are not within the same borders, not subject to the same application of government force, qualitatively different controversies arise and in such controversies, law has less importance.⁸¹ In international relations, where self-help is the guiding principle, sovereignty rights will be distributed based on the power and interests of the states when the right to abuse clashes with the right not to be disturbed.⁸² However, this does not mean that international law has no teeth. Rather, it means that international law cannot make a state give up a right that it can protect with its own fists.⁸³ State power sets certain limitations in applying a market-oriented approach.⁸⁴ Based upon the economic model developed by Professor Haddock, the following analysis

⁷⁷ The decrease in human rights violations in Latin America can be partly attributable to the U.S. policy under the Carter administration to deny aid for governments that violated human rights. *See generally* Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT' L ORG. 633 (2000).

⁷⁸ For example, human rights violations in Kenya were decreased largely due to the threat to cut off aid by the U.S. Congress. To recover such monetary and political benefits, Kenya had to adopt multiparty elections and the accession to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997. *See generally* Hans Peter Schmitz, *Transnational Activism and Political Change in Kenya and Uganda*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGES* 39 (Thomas Risse, Steve Ropp & Kathryn Sikkink eds., 1999).

⁷⁹ Under the market approach, states shall not intervene with the sovereignty of another state even in the case of humanitarian crisis, because the market approach implicitly assumes that negotiation costs are always lower than the cost of violence.

⁸⁰ *See e.g.*, David W. Leebron, *A Game Theoretic Approach to the Regulation of Foreign Direct Investment and the Multinational Corporation*, 60 U. CIN. L. REV. 305 (1991).

⁸¹ *Id.*

⁸² For the economic analysis about how property rights will be distributed when parties rely on violence, *see generally* Haddock, *supra* note 16, at 168-194.

⁸³ For a general analysis about how violence sets a limitation on the ability to contract, *see generally* Umbeck, *supra* note 17.

⁸⁴ *Id.*

area that A does not control, between Z and Ob for example, human rights abuses can persist regardless of A's human rights policy.

¶28 In such cases, trading legal sovereignty rights may not be an efficient solution because, even if A changes its policy in accordance with B's request, A has no power to enforce such a policy anyway. In other words, A is conveying zero value sovereignty rights in exchange for money paid by B. Thus, B has no reason to negotiate with A. Rather, it would be more efficient for B to intervene in A's uncontrolled jurisdiction if B can more cheaply control such an area. (Or B can join other states collectively—Kantian peace⁸⁶— in patrolling such jurisdiction through an international institution.)

¶29 For example, let us assume that the Afghan government failed to control a terrorist camp within its own borders before the military action of the United States in 2002.⁸⁷ In that case, sanctions would have been ineffective if the Afghan government did not have enough resources to control the area in the first place. Not only would sanctions not have helped improve the situation, but monetary aid would also have been inefficient if the money could not improve the Afghan government's control over the area. In such a case, it is not reasonable for the United States to trade with the Afghan government, because the conveyed sovereignty would have zero value compared to the money paid. Thus, trade in the international political market would have not been an efficient solution. Instead, allowing military intervention would have been efficient if a state that was concerned about the area could have improved conditions more cheaply than the sovereign state.

¶30 On the other hand, some states may be able to exercise more rights than those to which they are legally entitled. Even though it is disputable whether international law allows more rights than legal sovereignty, we can expect that the sovereignty price of powerful states will be more expensive than that of other states.

¶31 This view can be distinguished from the sovereignty view suggested by Andrew Moravcsik.⁸⁸ Under Moravcsik's model, sovereignty cost is uniform, and the decision to join human rights treaties depends solely on the benefit derived from such treaties.⁸⁹ However, under the behavioral sovereignty model discussed above, the price of sovereignty varies depending on the power of the states; and decisions to join human rights treaties depend both on the sovereignty value surrendered to and the benefits derived from such treaties. The difference in the sovereignty value of each state can partly explain why some states with better human rights conditions sometimes refuse to join human rights treaties. With a higher price to pay, some powerful states may refuse to join such treaties when the benefit derived is minimal.

⁸⁶ John R. Oneal & Bruce Russett, *The Kantian Peace: The Pacific Benefits of Democracy, Interdependence, and International Organizations*, 52 *World Politics* 1, 1 (1999).

⁸⁷ Even though this assumption is too simplistic to explain the actual situations at that time, this simplification can deliver valuable insights which can help in understanding the relationship between behavioral sovereignty and the market approach.

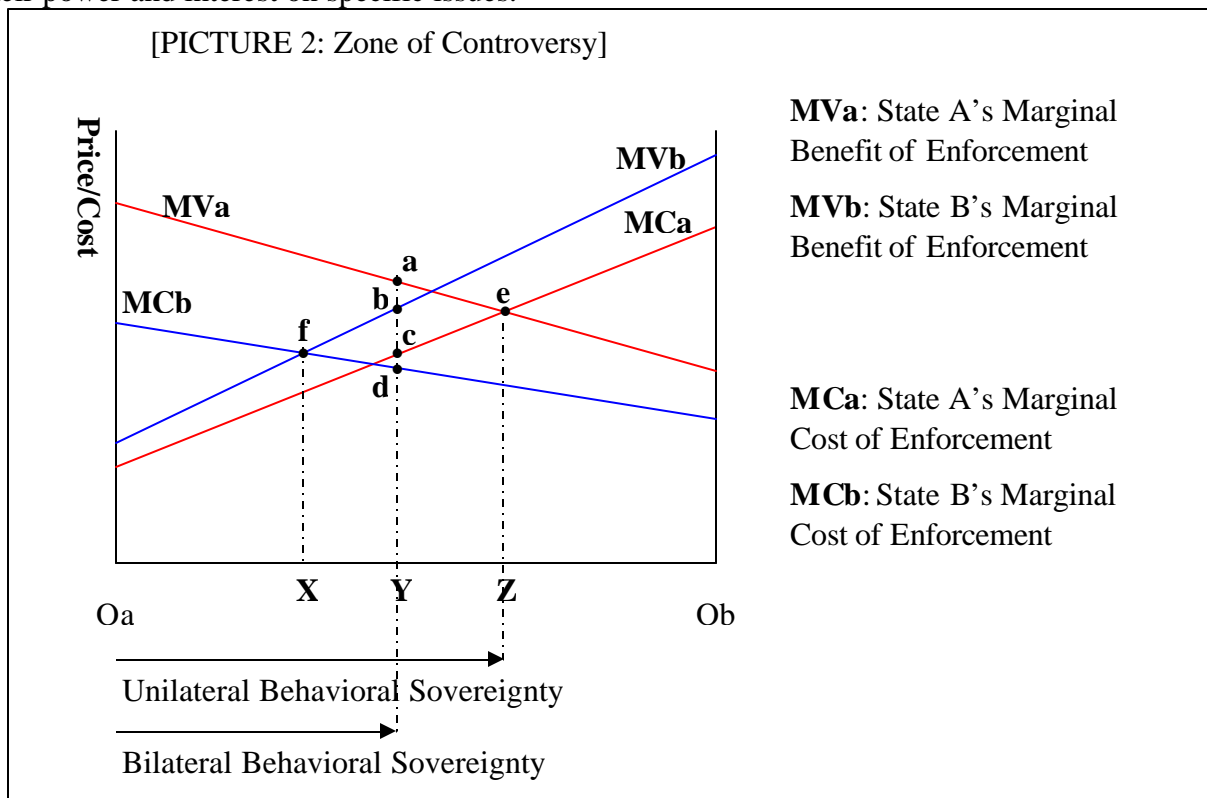
⁸⁸ See Andrew Moravcsik, *The Origin of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *Int'l Org.* 217 (2000).

⁸⁹ *Id.* at 228.

B. Determining Bilateral Behavioral Sovereignty under the Zone of Controversy Model.

¶32 Legal sovereignty is not guaranteed in the real world.⁹⁰ States have to protect their sovereignty with their own forces, and thus “security is often their overriding goal, and self-help their guiding principle.”⁹¹ Thus, the actual behavioral sovereignty can be much less than what a state could afford without any conflict, especially when the right to autonomy clashes with another state’s right not to be disturbed.

¶33 Returning to the hypothetical discussed above, B comes into play to claim the right to intervention (exercise of a right not to be disturbed). (See picture 2.) If A does not resist, B can claim jurisdiction on the area between Ob and X. However, A is able to enforce its jurisdiction on the area between Oa and Z, and thus the area between X and Z becomes the “zone of controversy”⁹² in which conflicts over rights/jurisdiction are inevitable. The zone of controversy will be distributed to State A and State B based on their power and interest on specific issues.



¶34 The zone of controversy model implies that even powerful states cannot claim the whole sovereignty because it becomes more costly to claim additional jurisdiction. For example, it may be easy to temporarily claim jurisdiction over a specific area for specific issues, but it becomes harder to claim general sovereignty over the entire country, as witnessed in the United State’s war against Iraq. The more the powerful state (B) claims the right to intervene, the weaker it becomes economically, because its marginal cost increases while the marginal benefit decreases. But, the weaker state (A) becomes stronger as it loses more, because the state becomes more serious about the encroachment

⁹⁰ KRASNER, *supra* note 29, at 36-42.

⁹¹ Abbott, *supra* note 32, at 364.

⁹² Haddock, *supra* note 16, at 175.

of its sovereignty and its power to enforce marginal rights becomes greater. Concentrating a state's power on a small area of jurisdiction is much easier than defending every bit of legal sovereignty, while maintaining this power during forceful occupation is difficult. The final distribution of jurisdiction will be made where both states' lost profits are equal, i.e., the point "Y" where the area of triangle 'ace' equals the area of triangle 'abd.' Thus, the behavioral sovereignty of A decreases from point 'Z' to point 'Y.' Let us call this area the bilateral behavioral sovereignty simply to distinguish it from the behavioral sovereignty that can be achieved without any conflict with other states.

¶35 The situation discussed above is not common these days because the cost of humanitarian intervention is usually higher than its benefit, considering the general abhorrence of military action by the international community.⁹³ Moreover, military intervention is costly and much more difficult than defense. However the model suggests that if such intervention involves a lower cost relative to peaceful alternatives, then B will infringe on A's legal sovereignty and compete for the jurisdiction with its own force.⁹⁴ For example, military intervention may incur lower costs relative to peaceful means, especially if such intervention is short in duration and thus elicits less serious revulsion from A or A's people. Likewise, B will be willing to fight to take A's legal sovereignty if significant stakes are involved, such as national security concerns, imminent threats to its own citizens, or a massive amount of externalities. Moreover, the model implies that B can take away A's legal sovereignty if B is strong enough to overcome any costs that might be incurred during the military actions.⁹⁵ Whatever the situation is, this model shows that the distribution of sovereignty rights will be based on the power and interests of competing states in the case of armed conflicts.

¶36 But, we have to note that "might makes rights is not a claim of a normative superiority."⁹⁶ Rather, "[i]n fact, it is undesirable when contrasted with an ideal world, as it induces diversion of resources from useful production to struggle over ownership."⁹⁷ Negotiation in the international political market also involves costs which must be diverted from productive uses.⁹⁸ If negotiation costs are higher than the cost of violence, war will be economically more efficient than the international political market. "Cost cannot be avoided when valuable resources are to be reallocated. The best that can be hoped is for the cost to be minimized."⁹⁹ Therefore, "might makes rights" is deficient only if it works no better than the competing peaceful alternatives, not because we wish it were wrong.¹⁰⁰

⁹³ War between states is "one of the six clusters of threats with which the world must be concerned now and in the decades ahead." See UN REPORT, *supra* note 20, at 2.

⁹⁴ If the threats from human rights abuses are great, and the use of power is proportionate to the threats, humanitarian intervention can be justified. See *id.* at 106. Moreover, the cost of violence can be reduced by establishing the legitimacy of military action. However, even in such cases, if negotiation is cheaper than violence, a state has no reason to rely on its force.

⁹⁵ Such an implication explains the superpower exception. "[S]uperpowers, however, have rarely sought Security Council approval for their [military] actions. That all States should seek Security Council authorization to use force is not a time honored principle" See *id.* at 62.

⁹⁶ Haddock, *supra* note 16, at 170.

⁹⁷ *Id.*

⁹⁸ Negotiation cost is also a loss to society. *Id.* at 169.

⁹⁹ *Id.* at 176.

¹⁰⁰ *Id.*

C. Relations of War and Peace: War Caps the Cost of Peaceful Alternatives

¶37 States generally prefer negotiation over war.¹⁰¹ But, when the negotiation cost exceeds the cost of war, it is reasonable that states are willing to take military action to enforce their rights, because “whether the resolution would be violent depend[s] upon the cost to the parties of narrowing the perceived probability distribution in alternative ways.”¹⁰² A state’s power can play a significant role in determining whether to rely on force or other peaceful alternatives. Normative factors such as the legitimacy of the regime or popular support can have significant effect on the cost of violence, but it is also hard to deny that state power is still an important factor in deciding between violence and other peaceful alternatives.¹⁰³ Even though international law mandates that states use peaceful alternatives,¹⁰⁴ a state will abide by this rule only when the alternatives provide greater benefits than violence — a calculus that includes both short- and long-term considerations, including various forms of international pressure in support of international legal norms.¹⁰⁵ Conversely, international law cannot force a state to give up a right that it can protect with its own fists.¹⁰⁶

¶38 How do these limitations change our analysis based on the market approach discussed above? These limitations of international law affect the transaction costs of the international political market by narrowing the negotiation range of an agreement. When might makes rights, the negotiation cost will not exceed the cost of war.¹⁰⁷ The abusing state can withhold the trade until the opposing state gives up most of its trade benefits. However, if such opportunistic behavior increases the negotiation cost above the cost of war, the opposing states will employ military action instead of giving up all of their trade benefits by negotiation. Thus, opening the possibility of using violence up front can reduce the transaction costs, as long as the threat of force is credible.

¶39 The negotiation cost will be relatively low for small and weak states because the “hold-out” problem can be alleviated by threats of force from the affected states. As the cost of violence is relatively low against a small and weak state, a small increase in transaction costs can make the opposing state turn to violence. Thus, small states tend to make an agreement easily instead of adopting brinkmanship strategy.¹⁰⁸

¹⁰¹ The number of armed conflicts between states has been stably low since 1945. See UN REPORT, *supra* note 20, at 11.

¹⁰² Haddock, *supra* note 16, at 175.

¹⁰³ Powerful states will have a lower marginal cost to enforce their rights, while the lack of legitimacy or popular support will increase the marginal cost. See *generally id.* at 172-176.

¹⁰⁴ “All Members shall settle their international dispute by peaceful means in such a manner that international peace and security, and justice, are not endangered.” U.N. Charter art. 2, para. 3.

¹⁰⁵ See Umbeck, *supra* note 17, at 40.

¹⁰⁶ For example, states often go to ICJ to resolve territorial disputes only when they can accept ICJ’s decision. If they think the stakes are too high and they have enough power to protect their interest with their own force, then they will resort to armed force instead of negotiation or third party resolution.

¹⁰⁷ If the negotiation cost is higher than the cost of war, states will choose violence over negotiation.

¹⁰⁸ “*Brinkmanship* is the policy or practice of pushing a dangerous situation to the brink of disaster in order to achieve the most advantageous outcome. It occurs in: International politics; Foreign policy; and (in contemporary settings) in Military strategy involving the threatened use of nuclear weapons. This maneuver of pushing a situation to the brink succeeds by forcing the opposition to back down and make concessions. This might be achieved through diplomatic maneuvers by creating the impression that one is willing to use extreme methods rather than concede. During the Cold War, the threat of nuclear force was often used as such an escalating measure.” Wikipedia, Brinkmanship, <http://en.wikipedia.org/wiki/Brinkmanship>.

¶40 However, when powerful states abuse the human rights of their own people, successful negotiation is often difficult.¹⁰⁹ The opposing states cannot easily use violence to enforce their rights not to be disturbed, because war against a powerful state is very costly. With virtually no threat of military action, the abusing state tends to wait until the opposing states give up every exchange benefit they expect. The hold-out problem increases the negotiation cost, but not over the cost of violence. Therefore, abuses tend to continue unless the externality generated by human rights abuses is significant enough to override such a high cost of negotiation or war.¹¹⁰

D. *The Movement Toward Efficient Use of Violence*

¶41 As discussed above, in a nirvana, protecting the absolute right of sovereignty can be an efficient solution for the externality problems generated by human rights abuses.¹¹¹ However, in the real world where the transaction costs are not minimal and where sovereignty rights are not absolute, it may be inefficient to rely solely on the market. Allowing humanitarian intervention is inevitable when the international political market does not work, and such a use of force is sometimes more efficient.¹¹² If the use of force can be an efficient way to distribute sovereignty assets, why does the international community show such strong opposition to the use of force? One of the answers can be found in the opportunistic behaviors that usually accompany military action against other states.

¶42 Human Rights Watch points out problems with opportunistic behavior when it reports that “a common concern is that military intervention might become a pretext for military adventures in pursuit of ulterior motives.”¹¹³ The state that engages in military action is not only enforcing its right, but also judging what the damage was and what the proper remedy is. If the attacking state has the option to impose punishment that makes itself better off at the expense of the attacked state, it becomes less clear whether the attacking state is violating international law or simply trying to alleviate the damages.¹¹⁴

¶43 Several devices that may decrease such opportunistic behaviors have been suggested to reduce the danger of violence while ensuring effective enforcement.¹¹⁵ One such device is post-conflict peace-building under UN authority.¹¹⁶ If a state that employs

¹⁰⁹ For example, the Clinton administration renewed China’s most favored nation status continuously despite the record of its human rights abuses. See David E. Sanger, *Support Shrinks for China’s Trade Status*, N.Y. TIMES, June 4, 1999, at A19.

¹¹⁰ Human rights abuses in Russia or China have been overlooked by the liberal states due to their power and importance in international community. For example, “even though Human Rights Watch brief provides evidence of at least three disappearances per week in Chechnya and details new cases of extrajudicial killings, forced disappearance and torture”, the United States has largely overlooked Russian human rights practices due to Russia’s important role in international society. Burke-White, *supra* note 8, at 278.

¹¹¹ Steinberg, *supra* note 28, at 344.

¹¹² In this sense, the doctrine of humanitarian intervention which is seemingly inconsistent with the literal reading of the U.N. Charter can serve as a reconciliatory device between the ideal system and real limitations. “Contemporary arguments about the rights of international organizations or groups of states to use force, if necessary, to put an end to massive violations of human rights have been justified by reference to this doctrine.” See THOMAS BUERGENTHAL & DINAH SHELTON & DAVID STEWART, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 4 (2002).

¹¹³ Human Rights Watch, *World Report 2000, The Critique of Military Intervention*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW, POLITICS, MORALS*, *supra* note 55, at 659, 659-660.

¹¹⁴ See FRIEDMAN, *supra* note 19, at 275-276.

¹¹⁵ See UN REPORT, *supra* note 20, at 59-74.

¹¹⁶ *Id.* at 70-74.

military action is not allowed to control the sovereignty so obtained, the concern of opportunistic behavior will be lessened. If the UN implements peace agreements, determines the proper amount of compensation, and rebuilds the communities, the maneuvering state will be prohibited from reaping more benefits from military action than curing the human rights problems.¹¹⁷ Humanitarian intervention based on regional agreements is another effective device, because it is harder for one state to persuade its neighbors to take military action for its own cause rather than on behalf of pure human rights concerns.¹¹⁸ In addition, such regional enforcement can avoid the problem of inaction shown by the Security Council.¹¹⁹ These two suggestions are separate in the sense that one deals with the question of how to transfer the autonomy (discretion) of the abusing states, while the other focuses on the question of how to enforce the autonomy already so obtained. But, those suggestions serve the same purpose – the reduction of opportunistic behavior.

¶44 Even when there are no opportunistic behavior problems, the use of force should still be avoided. Violence often leads to another type of violence, thus generally impairing the stability of the global society.¹²⁰

“Inter-state [war] in [one] region fuels and exacerbates internal wars, making them more difficult to bring to a close. Such rivalry, by promoting conventional weapons build-ups, diverts scarce resources that could be used to reduce poverty, improve health and increase education.”¹²¹

¶45 As a state that abuses its own people generates externalities against other states, so does a state that prefers violence over negotiation.

¶46 How can we reconcile these two oxymoronic positions regarding the use of force: one encouraging it as the effective enforcement mechanism in international society, and the other discouraging the use of force as the source of externalities endangering world peace? The answer suggested by the market approach discussed above is allowing military action only when the international political market fails. It seems that current international law resonates with such a conclusion. Human Rights Watch advocates nonconsensual military intervention only when it is the last feasible option to avoid genocide or comparable mass slaughter.¹²² The “force as a last resort” rule is also recognized by United Nations.¹²³

¶47 War is not an efficient method of distributing sovereignty assets when negotiation is available because war generally incurs a value diversion and encourages early consumption of resources rather than productive investment.¹²⁴ However, a state may adopt violence to reap additional benefits other than alleviating human rights conditions,

¹¹⁷ For the role of peacekeepers, see UN REPORT, *supra* note 20, at 70.

¹¹⁸ Regional or sub-regional missions are suggested as possible alternatives for collective enforcement under the UN authority. See Davis, *supra* note 45, at 19-21.

¹¹⁹ See Rosalyn Higgins, *Peace and Security Achievements and Failures*, 6 EUR. J. INT'L L. 445 (1995).

¹²⁰ UN REPORT, *supra* note 20, at 31.

¹²¹ *Id.*

¹²² Human Rights Watch, *supra* note 113.

¹²³ UN Report, *supra* note 20, at 66.

¹²⁴ See FRIEDMAN, *supra* note 19, at 567-568. See also Haddock, *supra* note 16, at 170.

even when the improvement of these conditions can be negotiated with an abusing state in the international political market. Therefore, the market approach based on private enforcement implies that violence should be prohibited except when the problem of opportunistic behavior is minimal and negotiation in the international political market is difficult. Current international law seems to be consistent with this conclusion. The general guideline of “use force only when the market fails,” supported by regional agreement and post-conflict control under UN authority, will ease the movement toward an efficient use of violence from the current inability to react against human rights crises.

VI. HUMAN RIGHTS TREATIES : PROPERTIZING HUMAN RIGHTS CONTROL

¶48 Current human rights treaties bestow rights on individuals, not on states.¹²⁵ These treaties seem to divert from the “Westphalian” notion of the state as the principle actor in international politics.¹²⁶ However, as states pool their authority to define the proper level of human rights protection, one can argue that the Westphalian notion of the state is not totally ignored in current human rights treaties. With pooled sovereignties, the international community, not an individual state, defines specifically what each state should do to protect human rights. Even though the rights are bestowed on individuals, the state is the entity that must surrender its sovereignty assets. Thus, states are still the principal actors, defining, trading, and pooling their sovereignty assets in the international political market.¹²⁷

¶49 Interestingly, enforcement clauses are rarely included in such covenants.¹²⁸ This lack of enforcement can be justified, however, if these treaties are devices to stimulate the international political market by making human rights control a tradable property. Such a property right is protected not by the global government but by the state’s own power. The focus is on clarifying the definition of the violation and the scope of human rights, because clarity can reduce transaction costs in the international political market.¹²⁹

¶50 States that fail to sign a treaty are sorted out so that other states can easily identify who the primary negotiating parties are. States that have already signed the treaty are generally required to submit reports regarding their human rights conditions,¹³⁰ and these reports again help narrow down the number of potential negotiating parties among the ratifying states. By clarifying the identity of the negotiating parties and the scope of the

¹²⁵ “The idea of human rights is used to affirm that all individuals, solely by virtue of being human, have moral rights which no society or state should deny.” DAVID SIDORSKY, *Contemporary Reinterpretations of the Concept of Human Rights*, in *ESSAYS ON HUMAN RIGHTS* 89 (1979).

¹²⁶ “In the Westphalian system, the interests and goals of nation-states were widely assumed to transcend those of any individual citizen or even any ruler.” Wikipedia, Westphalian sovereignty, http://en.wikipedia.org/wiki/Westphalian_sovereignty.

¹²⁷ Dunoff & Trachtman, *supra* note 3, at 13-14.

¹²⁸ As Louis Henkin explains, the principal element of horizontal enforcement is missing in human rights treaties. A state cannot legally respond to other states’ violations of treaties by retaliation or the threat of retaliation. Louis Henkin, *International Law: Politics, Values and Functions*, 216 *COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L.* 13, 251 (Vol. 4, 1989).

¹²⁹ For example, if we can define clearly who is violating what kind of human rights, the affected states may at least know with whom they should negotiate. If it is not clear who is violating what, then a negotiation option cannot even be pursued.

¹³⁰ Under the International Covenant on Civil and Political Rights (hereinafter ICCPR) for example, the States Parties have to submit reports on the measures taken to improve human rights conditions, and all those submitted reports must be presented to the Secretary-General of the United Nations. ICCPR, art.40, paras 1-2.

violations, international human rights covenants have helped reduce transaction costs in the international political market. Thus, due to those treaties, a state can buy human rights control in other states more cheaply using the international political market.

¶51 Professors Jack Goldsmith and Eric Posner argue that modern human rights treaties have not significantly affected the level of human rights protection, because accession or ratification of these treaties have no correlation with the degree of respect for human rights covered by them.¹³¹ Two empirical studies show that there is no statistically meaningful relationship between the accession of treaties and the degree of human rights conditions.¹³² As Goldsmith and Posner correctly point out, “liberal states that object to human rights abuses and are willing to devote resources to ending them do not distinguish between human rights abusers that have ratified human rights treaties and those that have not.”¹³³ However, Goldsmith and Posner wrongfully conclude that there should be some positive relationship between ratification and human rights conditions in order for modern human rights treaties to be effective.¹³⁴ On the contrary, the market approach implies that no such relationship is required to prove the efficiency of modern human rights treaties.

¶52 The goal of the modern treaties is decreasing the transaction costs. As discussed above, accession and ratification are ways to decrease the transaction costs by distinguishing potential negotiating parties. The liberal states’ primary focus must be on those states that failed to ratify the treaties, and states that ratified human rights treaties might have evaded the attention of liberal states unless they have been constantly reported as notorious human rights abusers. Therefore, a positive relationship between ratification and human rights conditions may not be found even though modern human rights treaties are effective in decreasing the level of human rights abuses in non-ratifying states. Rather, there should be a negative relationship if the overt human rights abusers among ratifying states are excluded from the analysis.¹³⁵ As Professor Oona Hathaway shows, states that ratify treaties sometimes experience a diminution in the pressure for real improvements in human rights practices, because the main focus of negotiation shifts from those states to non-ratifying states.¹³⁶ This analysis also explains why mere “truth-telling” can be an effective device in improving human rights conditions.¹³⁷ Truth-telling facilitates trade in the international political market by identifying potential negotiating parties.

¶53 The same analysis can be applied to the Inter-American model. The Inter-American Commission’s function of “*in loco*” visits, where the Commission talks with

¹³¹ GOLDSMITH & POSNER, *supra* note 2, at 121-122.

¹³² For the empirical analysis, see Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

¹³³ GOLDSMITH & POSNER, *supra* note 2, at 121.

¹³⁴ *Id.*

¹³⁵ The empirical study by Hathaway finds a negative relationship between ratification and human rights conditions in some cases. “[C]ountries with poor human rights ratings are sometimes more likely to have ratified the relevant treaties than are countries with better ratings, a finding that is largely unexplained by either the normative or the rationalist theories.” Hathaway, *supra* note 132, at 1978.

¹³⁶ *See id.* at 2006-2009.

¹³⁷ “Those who argue that international norms are transforming sovereignty – including many proponents of international criminal law – must recognize that some states still prefer domestic to international approaches and ‘truth telling’ and reconciliation to prosecution. The Truth Commission in South Africa, with its broad amnesty powers, is the best example.” Abbott, *supra* note 32, at 373.

governments about human rights abuses, and its disclosure of reports on its members' human rights conditions have served as a negotiating tool.¹³⁸ Lack of cooperation among states and lack of financial resources make meaningful enforcement unlikely, even if a member's violations of human rights treaties are reported to the General Assembly.¹³⁹ However, the Inter-American model has worked as a procedural system for clarifying the dispute and facilitating negotiation in the international political market. Most of the improvement of human rights conditions has been achieved through bilateral negotiations led by the powerful hegemon, the United States.¹⁴⁰

¶54 In sum, the above analysis shows that current human rights treaties play two important roles in the international political market. First, human rights treaties provide well-specified definitions of legal sovereignty with respect to human rights control and thus facilitate trades of sovereignty assets in the international political market. Second, human rights treaties decrease transaction costs by identifying potential negotiating parties through the ratification and reporting process. The reduction in negotiation costs will make violence more expensive relative to trade in the international political market. By propertizing human rights control in the international political market, current human rights treaties have contributed to the efficient distribution of sovereignty assets, thus improving human rights conditions even without collective enforcement.

VII. MARKET APPROACH V. INSTITUTIONALIZATION.

¶55 Some scholars criticize current human rights treaties as being enforced only selectively against small and weak states, arguing that this selectivity hurts the legitimacy of international human rights treaties.¹⁴¹ Others argue that some treaties are not even enforced at all, thus establishing only norms rather than laws.¹⁴² These scholars even conclude that international human rights law is simply a myth if not backed up by institutionalized enforcement.¹⁴³ Both points are legitimate, but as explained earlier, they do not necessarily lead to the conclusion that current international human rights treaties are inefficient.

¶56 Will it be more efficient to institutionalize international human rights regulatory bodies to increase the level of enforcement? Could such a movement increase the level of human rights protection in general? To answer such questions, we have to review the potential benefits and costs of the institutionalization. Only when the benefit of institutionalization exceeds the cost, should the institutionalization be justified.

¹³⁸ The Inter-American commission viewed itself more as a political organization that focuses on communicating gross violations of human rights among its members. Cecilia Medina, *The Inter-American Commission on Human Rights and The Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 Hum. Rts. Q. 439, 440 (1990), in INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW, POLITICS, MORALS, *supra* note 55, at 872.

¹³⁹ *Id.* at 874.

¹⁴⁰ See Lutz & Sikkink, *supra* note 77.

¹⁴¹ One of the common arguments is that the double standard in human rights policy can undermine the legitimacy of human rights norms. See Julie A. Mertus, *Bait and Switch? Human Rights and U.S. Foreign Policy*, FOREIGN POLICY IN FOCUS REPORT (Mar. 2004), <http://www.fpif.org/papers/2004rights.html> (last visited at Nov. 03, 2006).

¹⁴² Rationalists often argue that international law is not actually a binding law, but an efficient norm. See Dunoff & Trachtman, *supra* note 3, at 51-52. CLS theorists even argue that the lack of enforcement in current human rights regimes only excuses violations rather than prevents or remedies them. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 99, 199 (2002).

¹⁴³ See GOLDSMITH & POSNER, *supra* note 2, at 119-126.

- ¶57 Potential benefits of institutionalization include the lower cost of defining human rights abuses, the lower cost of defending state autonomy, and the economy of scale achieved by monopolization.¹⁴⁴ First, the costs of defining what constitutes a human rights abuse decrease when a monopolized judicial body decides the meaning of covenants without negotiation.¹⁴⁵ Any developing issues can be resolved more cheaply through a single judicial body. Moreover, a monopolized judicial body makes the liability rule available, and *ex ante* definitions of human rights can be sometimes avoided.¹⁴⁶
- ¶58 Second, institutionalization can decrease enforcement costs by monopolizing the force.¹⁴⁷ Threat becomes more credible while the actual use of force becomes less common.¹⁴⁸ Moreover, the legal sovereignty rights of states are guaranteed under the institutionalized system, so a state's cost of defense decreases as well. The saved cost in armed force will enable member states to spend more resources on the improvement of human rights, and thus institutionalized enforcement of human rights treaties become cheaper to achieve.
- ¶59 Third, states may enjoy economies of scale.¹⁴⁹ The potential gains from economies of scale are twofold.¹⁵⁰ With a single institutionalized body, states can avert the risk of evasion, detrimental regulatory competition, and other unjustified judicial inconsistencies.¹⁵¹ Coordinated rule-making, surveillance, and enforcement activities can provide additional efficiency that cannot be achieved without institutionalization.¹⁵² Second, there may be technological economies of scale, relating to specialized organization.¹⁵³ For example, with a significant learning curve achieved through monopolization, the European Court of Human Rights is now maintaining its reputation as the most reliable human rights court in the world,¹⁵⁴ and a large volume of case law has been developed to clarify the meaning of the European Conventions.¹⁵⁵
- ¶60 The European model of institutionalization has been widely acclaimed as the “most advanced and effective” international human rights regime in the world today.¹⁵⁶ In fact, the European model has been very successful, although it has not been perfect, in implementing and enforcing human rights.¹⁵⁷ However, if one argues that every human rights convention should follow the European model based on the benefits mentioned above, he is committing a nirvana fallacy.¹⁵⁸ The market approach is not always less

¹⁴⁴ The costs involved in centralizing the authority to define rights and enforce them are discussed in detail by Professor McChesney. See McChesney, *supra* note 13, at 227-253.

¹⁴⁵ *Id.* at 229-231

¹⁴⁶ The liability rule requires extensive institutionalization or tribunals for assessing damages, and compulsory jurisdiction to enforce such a remedy. See Dunoff & Trachtman, *supra* note 3, at 25-26.

¹⁴⁷ McChesney, *supra* note 13, at 231-232

¹⁴⁸ Haddock, *supra* note 16, at 171.

¹⁴⁹ Dunoff & Trachtman, *supra* note 3, at 15-17.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ STEINER & ALSTON, *supra* note 55, at 786.

¹⁵⁵ *Id.*

¹⁵⁶ See Andrew Moravcsik, *supra* note 88, at 243.

¹⁵⁷ *Id.*

¹⁵⁸ See Harold Demsetz, *supra* note 25.

efficient when we consider both the benefits and the costs of institutionalization.¹⁵⁹ The possible costs of institutionalization include the high initial cost in developing the agreed-upon institution itself, the cost of running such an institution, the increase in information costs, rent-seeking behavior, and agency costs.¹⁶⁰

¶161 The member states of the European Convention share a similarity in state preferences.¹⁶¹ Member states have adopted similar political systems based on democracy and have relatively concentrated wealth distribution among states.¹⁶² In addition, they share similar cultural heritage and traditions.¹⁶³ Forming an initial agreement is less expensive when parties have similar preferences.¹⁶⁴ In addition, geographical concentration reduces the agency costs involved in institutionalization.¹⁶⁵ Moreover, as the economic block increases mutual transactions, each member becomes more “asset specific” to the other member states.¹⁶⁶ Therefore, the initial cost of institutionalization was less expensive for the European region compared to other regions in the world. Without such social and political conditions that the European Convention shared among its member states, institutionalization can be a disaster, suffering from huge amounts of negotiation costs and rent seeking behavior.

¶162 Rent-seeking costs exist because a state will spend resources to influence the transnational standards in order to make them as close as possible to its current domestic regulations.¹⁶⁷ If the international rules are exactly the same as the domestic rules of a certain state, then that state is practically giving up nothing by such institutionalization. As having initial rights close to its domestic regulation decreases the cost of commitment, states will spend resources to influence the political process to get a favorable initial assignment of rights.¹⁶⁸ For example, let us assume that we have adopted a human rights treaty that allows the right to polygamy.¹⁶⁹ Western states would have to pay a huge

¹⁵⁹ Concededly, market approach and institutionalization cannot be dichotomized. However, for the simplification of analysis, the degree of institutionalization will not be discussed in this Note.

¹⁶⁰ For an analogous discussion about costs of government as definer of rights, see McChesney, *supra* note 13, at 238-249.

¹⁶¹ “The Preamble of the European Convention refers...to the ‘European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law’”, STEINER & ALSTON, *supra* note 55, at 787.

¹⁶² The convergence of GDP per capita among EU members had occurred before the Maastricht Treaty created the European Union. See Ville Kaitila, *Convergence of Real GDP per capita in the EU15, How Do The Accession Countries Fit In?* (EUR. NETWORK OF ECON. POLICY RESEARCH INST., Working Paper No.25, Jan. 2004), available at <http://www.enepri.org/Publications/WP025.pdf>.

¹⁶³ STEINER & ALSTON, *supra* note 55, at 787.

¹⁶⁴ Group homogeneity can decrease the cost of monitoring agent, thus decreasing the cost of enforcing the agreement. See Terry L. Anderson & Peter J. Hill, *The Evolution of Property Rights*, in PROPERTY RIGHTS, COOPERATION, CONFLICT, AND LAW, *supra* note 11, at 118, 136.

¹⁶⁵ As the geographic size of the collective unit becomes larger, it becomes more costly to enforce the agreement. See *id.*

¹⁶⁶ Higher asset specificity often leads to a higher incentive to form institution, because the value as a group is much greater than the stand alone value. Dunoff & Trachtman, *supra* note 3, at 39-43.

¹⁶⁷ The cost of commitment depends on the degree of divergence of a state’s practice from the requirements of the treaty. See Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1833 (2003).

¹⁶⁸ “Having the initial rights assigned favorably not only confers a valuable resource, but the rights bestow the ability to realize additional exchange value when higher-value users appear.” See McChesney, *supra* note 13, at 239-240.

¹⁶⁹ “In social anthropology, polygamy is the practice of marriage to more than one spouse simultaneously (as opposed to monogamy where each person has only one spouse at a time).” Wikipedia, Polygamy, <http://en.wikipedia.org/wiki/Polygamy>.

political cost to conform to such a treaty, while Arab nations that have already maintained such practices would suffer less difficulty.¹⁷⁰ Moreover, such Arab nations would be in a better position for future negotiations with regard to other human rights issues due to this initial savings of resources. It is conceivable that the European human rights model has suffered fewer rent seeking problems because each member state had already adopted similar rules regarding domestic human rights. But, one can expect that when the domestic systems and rules of laws are diverse among member states, the rent-seeking behavior can be so extreme as to render institutionalization unlikely.

¶63 Moreover, institutionalization requires that member states contribute sufficient political and economic resources to run the monopolized system.¹⁷¹ First, member states must surrender a part of sovereignty that has positive value. As discussed above, it is of no use to transfer a legal sovereignty which a state cannot exercise with its own power anyway. If a lot of member states are politically unstable and maintain a minimal value of legal sovereignty, institutionalization would be unfeasible.

¶64 Contributing part of the autonomy of each member state is necessary, but may not be sufficient for institutionalization because running a monopolized system necessarily consumes economic resources. Running a transnational body is not a free option. For example, the African Commission is still suffering from a lack of resources and thus cannot handle all the human rights violations.¹⁷² Therefore, unless the accumulated wealth of the states involved is enough to run the institution, simply adopting the European model may be neither feasible nor efficient.

¶65 Information cost is another factor to consider.¹⁷³ Detailed information of a state's real concern about human rights abuses (i.e. the amount of actual externality) may not be known to the independent human rights tribunal. Information is naturally costly even for states, but negotiating states in the international political market can keep the fruit of the negotiation while the institution often cannot.¹⁷⁴ Overall, the incentive to procure the requisite information is likely to be greater for interested states.¹⁷⁵ This is more so when the interest is combined with a political purpose other than pure human rights concerns.¹⁷⁶ A state can exaggerate its concerns about human rights violations in other states and a court may uphold such a position even when it is not economically efficient. Conversely, the violating state may underplay the effect of its abusing policy and argue that such a policy is inevitable. The fact that the information is costly and the independent tribunal has less incentive to find out the actual stakes for each state may lead to the inefficient distribution of resources – the over- or under-enforcement of human rights.

¶66 Finally, agency cost can be significant.¹⁷⁷ An angelic theory of human rights institutions may guarantee the optimal amount of enforcement with objective evaluations.

¹⁷⁰ “In Islam a man is allowed to be married to four women at one time, given that he can support them equally in every way. Muslim polygamy, in practice and law, differs greatly throughout the Islamic world.” *Id.*

¹⁷¹ Institutions can allocate sovereignty only after they have ownership of it. *See* McChesney, *supra* note 13, at 235.

¹⁷² Chidi Anselm Odinkalu, *The Individual Complaints Procedures of the African Commission on Human And People's Rights: A Preliminary Assessment*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT, LAW, POLITICS, MORALS*, *supra* note 55, at 928-929.

¹⁷³ For general discussions of information cost, *see* McChesney, *supra* note 13, at 239.

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ Opportunistic behavior problems can be dire when a state wants to use human rights treaties as a political tool to achieve different goals.

¹⁷⁷ *See* McChesney, *supra* note 13, at 240.

However, a human theory of human rights institution will often involve judges and staff who care more about their self-interest than the ideal notion of human rights.¹⁷⁸ They may have less incentive to care about the optimal configuration of human rights and more incentive to care about the interest of their own states or their own careers. An institution can determine human rights issues inefficiently due to the political pressure, or sometimes an institution can even abuse its power over individual states.¹⁷⁹ Thus, especially when a region is politically unstable and opportunistic behaviors are common, it is reasonable for states to oppose to a monopolized enforcing body, because each state can be the very victim of such an institution. With monopolized power, the institution is often the very abuser of state's rights.¹⁸⁰ For example, in the Inter-American system, member states show an ambivalent attitude toward the increase of the power of Inter-American Court of Human Rights.¹⁸¹ States might worry that as the institution becomes stronger, it may threaten their own autonomy or even worse, their own existence. In such circumstance, institutionalization may no longer an efficient option.

¶67 As the costs and benefits differ depending on the circumstances, a system that works efficiently in one area does not necessarily perform to the same degree of efficiency in another area. Thus, considering the benefits and costs in certain social and political contexts is important before considering institutionalization as an alternative to market approach.

VIII. CONCLUSION

¶68 We may not have to be too skeptical about the effectiveness of current human rights regimes. Even though the lack of enforcement is often regarded as a problem, it does not necessarily lead to the lack of efficiency of current human rights treaties. Rather, those treaties have been under undue criticism which they may not deserve. By facilitating the trade of human rights control in the international political market, those treaties have played an important role in improving human rights conditions even without collective enforcement.

¶69 The market analysis of human rights treaties implies that the default rule should be against any type of war, because the property rule can distribute the sovereignty asset (i.e. human rights control) more efficiently than violence. But, the self-help nature of international relations also implies that a few revisions of the market approach are required. First, the distribution of sovereignty assets would be based on behavioral sovereignty rather than legal sovereignty, because unenforceable sovereignty will not be traded in the international political market. Second, the use of force should be allowed as an efficient method of distribution, but only when the international political market is not available and opportunistic behavior problems regarding use of force can be avoided. Current international law adopting a "force as a last resort" rule supported by other devices that can reduce opportunistic behaviors (for example, post-conflict control under

¹⁷⁸ The fallacy of the publicly interested government can be applied here as well. David D. Haddock, *Sizing Up Sovereigns: Federal Systems, Their Origins, Their Decline, Their Prospects*, in ENVIRONMENTAL FEDERALISM 1-21 (Terry L. Anderson & Peter J. Hill. Lanham, MD eds., 1997).

¹⁷⁹ See generally McChesney, *supra* note 13, at 241-249

¹⁸⁰ Government is often the biggest threat to private citizens. See Haddock, *supra* note 16, at 186-87. Likewise, if the transnational body is too powerful, it can become a threat to each member state and its people.

¹⁸¹ STEINER & ALSTON, *supra* note 55, at 869.

UN authority or military intervention under regional agreement) can be an economically efficient solution for human rights problems generating a significant amount of externality.

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Finally, institutionalization of human rights enforcement can be considered as a possible alternative — or a supplement — to the market approach, but such institutionalization must be pursued only when the benefit derived from it exceeds the cost. Institutionalization has benefits, but is not costless. Thus, ideally rhetoric favoring institutionalization should not be disregarded, but be scrutinized.