A DEFENSE OF UNILATERAL OR MULTI-LATERAL INTERVENTION WHERE A VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW BY A STATE CONSTITUTES AN IMPLIED WAIVER OF SOVEREIGNTY

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I. INTRODUCTION

This paper seeks to defend United States intervention in states that violate international human rights law. To explain the modern framework behind the legal justifications for intervention, it is necessary to review the historical development of international human rights law, the concept of sovereignty, and the continuing conflict between the two principles.

II. INTERNATIONAL HUMAN RIGHTS LAW

A. Definition

It has been customary to call *humanitarian law* that considerable portion of international public law that owes its inspiration to a feeling for humanity and that is centered on the protection of the individual.[1] The concept of an international law of *human rights* reflects a general acceptance that how a state treats individual human beings is not always the state's business alone and, therefore, not exclusively within its domestic jurisdiction, but is a matter of international concern.[2]

B. Origins

The development of human rights law emanates from the ancient distinction between the morality of the decision to instigate war and the morality of the means of waging that war.[3] The concept has evolved from centuries of warfare in which combatants (states) have increasingly turned against civilian populations as a means of waging war or of countering internal conflicts. As the "staggering cruelty practiced in the wars of the last 150 years continually prodded the human conscience, the law has been evolved to improve its protection for civilians and combatants."[4] The evolution of this concept derives from a split in the perception of the

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1. JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 11 (1975).

2. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. a (1987).

3. *See generally*, Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 918 (1994).

4. *Id.* at 918. *See also*, JUDITH G. GARDAN, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 124 (1993).

underlying activity of conflict.[5] The term *jus ad bellum* refers to the threshold question of whether the reasons for fighting a war in the first place are just, while *jus in bello* refers to whether the war is being fought justly or unjustly.[6] International human rights law disregards the sovereign state's prerogative to engage in warfare and focuses mainly on the *jus in bello*. As will be discussed, the essential parameters of human rights law are sometimes allegedly breached when the promotion of *jus in bello* necessarily encroaches upon the state's claim of sovereignty in its *jus ad bellum*.[7]

C. Codification of International Human Rights Law

The intentional systematic employment of genocide, both within and without the borders of Nazi Germany, generally awakened states and jurists to the need for a more concrete establishment of international human rights law. The experience of World War II resulted in the expansion and codification of the laws of war in the four Geneva Conventions of 1949.[8] The Conventions provide for treatment of the sick and wounded (both in the armed forces and at sea); for treatment of prisoners of war; and for protection of civilian persons in time of war.[9] Despite the broad application of these Conventions, there remained a strong impediment to the protection of international human rights within the domestic jurisdiction of individual states since almost all of the provisions applied only to international wars.[10] Regardless of the growing idea that international human rights law should permeate beyond the borders of sovereign states, the traditional notion of state sovereignty was still powerful at the drafting in 1949. Hence, protection of the sovereignty concept still dominated this codification of international human rights law, and prevented a more substantially enforceable protection of domestic human rights abuses.

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5. Lopez, *supra* note 3, at 918.

6. *Id.*

7. *Id.*

8. *Id.* at 921.

9. INT'L COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF AUG. 12, 1949 (photo. reprint 1981) [hereinafter GENEVA CONVENTIONS].

10. Lopez, *supra* note 3, at 924 (stating that the Geneva Convention describes *international war* as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.") *Id.*

Another codification attempt occurred following World War II in the form of the International Military Tribunal at Nuremberg, Germany.[11] As a result of the proceedings, the Geneva Conventions of 1949 incorporated criminal prosecution as an essential enforcement mechanism of both domestic and international human rights abuses. Violations of the Protocols of the Geneva Conventions during international conflicts were designated as *grave breaches*, which signatory states were required to punish.[12] Again, the problem in applying the Nuremberg Charter through the Geneva Conventions, is that article 2 of each of the four Conventions applies the provisions only to "all cases of declared war . . . between two or more of the High Contracting Parties."[13]

A further codification of international human rights, with subsequently much greater enforcement capability than found in the Geneva Conventions, is in the United Nations Charter (U.N. Charter) which states that "[t]he purposes of the United Nations is [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all . . . ."[14] Unlike the failed Covenant of the League of Nations, human rights were woven in as an important, indeed a guiding thread, throughout the fabric of the U.N. Charter.[15] The enforcement of applicable U.N. Charter provisions and the prior codifications of international human rights law will be addressed following discussion of the concept of sovereignty and its conflict with international human rights law. A review of this continuing legal dialectic is essential before demonstrating how sovereignty is steadily losing its status as the bedrock of public international law to international human rights.

III. SOVEREIGNTY

A. Definition

Sovereignty is the principle that "except as limited by international law or treaty, each state is the master of its own territory . . ." and that

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11. *See* CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, The London Agreement, Aug. 8, 1945, *reprinted in* REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 420-28 (1949) [hereinafter NUREMBERG CHARTER].

12. Lopez, *supra* note 3, at 922.

13. GENEVA CONVENTIONS *supra* note 9, at 23.

14. U.N. CHARTER art. 1, para. 3.

15. JAN MARTENSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, A COMMENTARY 18 (Asbjorn Eide et al. eds. 1992).

"[e]ach sovereign state can only be legally bound by those commitments it willingly makes to other sovereign states, and by those few principles which are viewed as binding on all states."[16] Sovereignty has traditionally been viewed as an absolute power that may be wielded by the sovereign, within its own territorial jurisdiction. Until modern times,[17] the sovereignty principle has implied that a state is answerable to no other entity but itself when dispensing authority within its own borders or when engaging in warfare with other sovereign states.[18]

B. The Historical Development of the Sovereignty Principle

Despite the role that sovereignty has traditionally played in preserving the notion of unnaccountability for a state's internal affairs, there is another side to the sovereignty coin. States have always been limited in the legitimacy of their sovereign status by their reciprocal respect for the concept.[19] In other words, an act by a state in contravention of a legitimate agreement or treaty, could result in other states' collective retaliatory disregard of that outlaw state's sovereign status.[20] Such retaliatory disregard historically resulted in effects ranging from disenchanted states becoming reluctant to enter trade agreements and treaties with the outlaw state, to sanctions, and to outright hostility.

The notion that a state's sovereignty is dependent upon its respect for the sovereignty of other states has customarily included the

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16. Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards A People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L. L. & POL.'Y 1, 1 (1993).

17. Here the phrase *modern times* refers generally to the period following World War II, with the subsequent creation of international human rights treaties such as the Geneva Conventions of 1949, the Universal Declaration of Human Rights, and the United Nations Charter.

18. *See generally*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206(b) (1987).

19. Early in 1988, the United States Defense Department became aware of a ship approaching the Gulf with a load of Chinese-made Silkworm missiles en route to Iran . . . the Defense Department . . . argued for permission to interdict the delivery. The State Department, however, countered that such a seizure on the high seas, under universally recognized rules of war and neutrality, would constitute . . . an act of war against Iran . . . the delivery ship with its cargo of missiles was allowed to pass. Deference to systemic rules had won out over tactical advantage.

THOMAS M. FRANCE, THE POWER OF LEGITIMACY AMONG NATIONS 3 (1990).

20. Report of the Commission Appointed Under Article 26 of the Constitution of the ILO to Examine the Complaints Concerning the Observance by Greece of Human Rights Conventions, *cited in* B. G. Ramcharan, Washington College of Law Conference, *The Role of International Bodies in the Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U.L. REV. 99, 106 (1983). (Claiming that a state cannot use its sovereignty to brush aside performance of an obligation under international law).

maintenance of respect for agreements entered into with other sovereign states.[21] Whether the agreement is a trade pact or a military alliance, is a voluntary cession by the contracting states of a portion of absolute authority to determine its own actions. Thus, while a sovereign state has the customary ability to act as it will, it may also agree to waive its absolute ability to exercise that will. The notion of a state's ability to waive sovereignty and to be bound by that waiver has been a pervading theme throughout the attempts to codify the sovereignty principle in modern times.

C. Recognition of Sovereignty in the Codification of International Human Rights Law

Even in modern times, the codification of human rights law would not have been possible without the incorporation of the sovereignty principle into provisions of the various treaties and conventions following World War II. Without this inclusion, states would have been extremely reluctant to enter into binding agreements, since there would be no definable boundary as to how much of a state's sovereignty could be ceded to the tenets of the agreement. Independent states that were subject to colonialization in the past have been particularly fearful of entering into international agreements that even hint at restrictions upon their sovereignty.[22]

The four Geneva Conventions attempted to cut through the sovereignty barrier. Article 3, which is common to all four Conventions, applies in the case of an armed conflict not of "an international character."[23] It prohibits "violence to life and person, the taking of hostages, outrages upon personal dignity, and the denial of judicial guarantees . . . ."[24] On its surface, this indicates an intention by the drafters, and subsequent compliance by the state signatories, to bypass sovereignty in applying the Geneva Convention's humanitarian provisions within the sovereign states themselves. However, interest in the protection

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21. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206, cmt. e (1987). "[S]tatus as a legal person . . . to make contracts and enter into international agreements . . . ." *Id.* at (b).

22. During the first few decades after World War II, the movement away from sovereignty often was not perceptible. Indeed, in the wake of decolonization, the role of sovereignty in international law appeared strengthened by . . . their aggressive assertion of . . . [sovereignty by new nation-states]. These developments, however, masked a slow but steady diminution in the realities of sovereign power . . . .

Grossman and Bradlow, *supra* note 16, at 6.

23. GENEVA CONVENTIONS, *supra* note 9, art. 3 at 24, 52, 75, 154 (1949).

24. GENEVA CONVENTIONS, *cited in* Lopez *supra* note 3, at 924.

of sovereignty has permeated the codification.[25] As a result, no specific enforcement procedure was included. Concern for the preservation of sovereignty seems to have prevailed over internal application of international human rights law in the initial drafting of the Geneva Conventions.

The U.N. Charter does not contain a specific definition of sovereignty, but does continue to adhere to the historical principle of sovereignty.[26] There is, however, an important caveat to the U.N. Charter's recognition of this principle. Article 2, paragraph 7 of the Charter refers to the U.N.'s lack of authority to intervene in a states domestic affairs, but also reads that "this principle shall not prejudice the application of enforcement measures under Chapter VII."[27] By becoming signatories adhering to the Charter's provisions, member states have demonstrated a commitment to waive sovereignty under the purview of Chapter VII.[28] For the first time, state parties to an organization or treaty, are denied the sovereignty cloak as a defense to nonconformity with an agreement's provisions.

IV. VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW CREATES AN IMPLIED WAIVER OF SOVEREIGNTY BY THE VIOLATING STATE

A. Modern Examples of Sovereignty Prevailing Over International Human Rights Law

There now seems to exist a paradigm that the once impregnable barrier of sovereignty can now become quite malleable in the face of persistent international human rights law violations. Historic examples of scenarios where nations such as the United States have foregone intervention, despite what could be argued as an implied waiver of

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25. *Id.* "Although the Geneva Conventions generally contain extensive provisions for the enforcement and implementation of their norms in an international context, in an internal conflict article 3 provides only that the ICRC may offer its services to the parties, an offer that may be refused." *Id.*

26. (4) All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations . . . .

(7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII U.N. Charter.

U.N. CHARTER art. 2, §§ 4, 7 (emphasis added).

27. *Id.* at art. 2, § 7.

28. *See generally,* U.N. CHARTER art. 2, § 7.

sovereignty, help to convey the importance in acting when a violating state's veil of sovereignty can be pierced.

A glaring example of a foregone but necessary intervention, occurred during the Khmer Rouge seizure of Cambodia.[29] The rampant massacres did not cease until actual intervention in 1979 by the unlikely savior of the occupying forces from Vietnam.[30] Despite international condemnation of Cambodias human rights abuses, the United States lacked the means or political will to intervene. China supported the regime in Cambodia, and the United States likely felt itself in no position to become embroiled in another conflict in Southeast Asia. However, the fact that intervention by other states did not occur prior to Vietnam's role is even less dubious than the tragic reality that subsequent accountability has not been forthcoming.[31]

Although international politics and lack of military means played roles in denying United States intervention, the tragedy of Cambodia demonstrates two undeniable developments. First, that intervention, even by a brutal totalitarian power, brought the Khmer Rouge genocide to a near halt. Second, Vietnam's use of the Pol Pot regime's human rights violations (even as an unsuccessful pretextual argument for intervention) demonstrates the growing recognition by states that the sovereignty barrier can potentially be pierced by way of claiming persistent international human rights violations.[32]

Another example of sovereignty prevailing over intervention, despite an implied waiver of sovereignty based on human rights abuses, is the Castro regime in Cuba. Since Fidel Castro seized power in 1959, his regime has maintained authority through politically-motivated

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29. Barbara Crossette, *Before Rwanda, Before Bosnia; Waiting for Justice in Cambodia*, N.Y. TIMES, Feb. 25, 1996, at §§ 4, 5.

> [F]rom April 17, 1975, until January 7, 1979 . . . the Khmer Rouge . . . waged a manic campaign to . . . start over as an ethnically pure Khmer nation purged not only of its minorities but also of its professional middle class . . . it was estimated that up to one million Cambodians, in a population of about 7.5 million, died. *Id.*

30. *See generally* 1979 U.N.Y.B. 271, 272, U.N. Sales No. E.82.I.1. (regarding how Vietnam dubiously claimed the intervention was initiated on behalf of persistent human rights violations).

31. Crossette, *supra* note 29, at 5 (stating that "[t]he International Criminal Tribunal system is already overstretched and underfinanced in the former Yugoslavia and Rwanda"). *Id.*

32. *See Questions Concerning Asia; Democratic Kampuchea and Vietnam*, 1979 U.N.Y.B. 271, 272, U.N. Sales No. E.82.I.1. "[V]ietnam transmitted a declaration . . . , [t]hese documents charged that . . . Pol Pot . . . had usurped power, transformed the revolutionary forces into mercenaries for the Chinese authorities, and threatened the Kampuchean people with extermination . . . and called for support . . . from all governments and national and international organizations." *Id.*

imprisonment, torture, execution, and through repression of emigration, the media, and any political dissent.[33] The United Nations General Assembly (U.N.G.A.), in addition to its broad condemnation of the type of violations orchestrated by the Castro regime,[34] has specifically singled out Cuba's flagrant disregard for international human rights law.[35]

The U.N.'s condemnation of Cuba's human rights violations provides a likely basis for arguing an implied waiver of sovereignty since Cuba is a signatory to the U.N. Charter. Although the Security Council has not authorized such an intervention, Cuba's violations render its sovereignty an incapable defense were the United States to intervene unilaterally on behalf of international human rights law. Despite the possibility of claiming Cuba's implied waiver of sovereignty, political and economic factors commit the United States to a policy of continued recognition of Cuba's sovereignty.

Two political factors have smothered past arguments and efforts at intervention. First, in 1962, the United States promised never to invade Cuba in exchange for removal of Soviet Intercontinental Ballistic Missles (ICBMs) during the Cuban Missile Crisis. It is now debatable whether this foreign policy obligation was inherited by Russia following the demise of the Soviet Union. Second, diplomatic and trade tension would likely result from certain Organization of American States (OAS) member states that fear potential future intervention based on their own international human rights violations.[36] However, recent criminal acts of this outlaw regime, such as the shooting down of civilian aircraft in international airspace,

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33. *See generally, Situation of Human Rights in Cuba; Report of the 3rd Committee.* G.A. Res. 50/198, U.N. Doc. A/50/635/add.3 (1996).

34. *Id.*

35. (20) The United Nations Commission on Human Rights has repeatedly reported on the unacceptable human rights situation in Cuba and has taken the extraordinary step of appointing a Special Rapporteur . . . .

(21) The Government of Cuba has consistently refused access to the Special Rapporteur and formally expressed its decision not to implement so much as one comma of the United Nations Resolutions appointing the Rapporteur . . . .

(22) The United Nations General Assembly passed Resolution 1992/70 . . . Resolution 1993/48/142 . . . and Resolution 1994/49/544 . . . referencing the Special Rapporteur's reports to the United Nations and condemning violations of human rights and fundamental freedoms in Cuba.

H.R. 927, 104th Cong., 1st Sess. § 2 (1995).

36. *See generally*, Stephen J. Schnably, *The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala*, 25 U. MIAMI INTER-AM. L. REV. 393, 402 (1994).

have finally begun to task the patience of United States lawmakers reluctance at some form of intervention.[37]

From the end of World War II through the collapse of the Soviet Union in 1991, the prolonged proxy wars of the struggle between the democratic and communist blocs often masked gross human rights violations.[38] Even when atrocities received international attention and subsequent condemnation, intervention often carried with it the threat of potential escalation among the major powers. The geo-political consequences inherent in this Cold War paradigm prevented intervention even when the United States possessed sufficient military capability and could have argued that the violating state had impliedly waived its sovereign status on the basis of international human rights violations.

The Cold War and its bloody proxy battles, such as Nicaragua and others, now seem a past period. With the strategic and political restraints of the Cold War, no longer a near total albatross, a new paradigm of foreign policy is foreseeable. For instance, the United States can now intervene in more places where it perceives there has been an implied waiver of sovereignty, without fearing retaliation from a now non-existent Communist bloc. A necessary first step, however, is for other states to recognize that the sovereignty principle is no longer a viable cloak for international human rights abuses. This new interpretation is significantly aided by the modern transformation of the very meaning of the phrase, *sovereignty*.

B. The Traditional Meaning of Sovereignty is No Longer Viable

The traditional notion of sovereignty as an inviolable, impenetrable barrier that neatly defines a nation's physical and political boundaries is now an outdated concept. One author states that:

> [T]he Second World War provided members of the international community with a powerful and tragic lesson in the dangers inherent in an international legal order based on a notion of absolute sovereignty. The

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37. H.R. 927, 104th Cong., 1st Sess. § 2 (1995). The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1995. "A Bill to seek international sanctions against the Castro government in Cuba, to plan support of a transition government leading to a democratically elected government in Cuba . . . and for other purposes." *Id.* This controversial Bill penalizes foreign companies that do business with Cuba. Following the downing of Brothers to the Rescue aircraft on February 24, 1996, the Bill sailed through Congress, and was subsequently signed into law by President Clinton. *See* George Rodrique, *House Oks Tighter Cuba Sanctions; Clinton Expected to Sign Bill*, WASH. BUREAU OF THE DALLAS MORNING NEWS, Mar. 7, 1996, at 11A.

38. *See* Grossman & Bradlow, *supra* note 16, at 9.

> contemporary international order severely limited the ability of the international community to intervene in the internal affairs of sovereign states. This lesson provided the impetus for the creation of international organizations . . . given some ability to compel member states to comply with their rules and decisions.[39]

In addition to the voluntary cession of a portion of a state's sovereignty to international organizations, treaties, and agreements, there has been a de facto demographic alteration in the historical definition of sovereignty. Borders are becoming less rigid. Technology is leading to a new international consciousness,[40] and modern United States military capability, as well as that of other states, is becoming more efficiently designed for rapid intervention and nation-building missions.

Borders between states can no longer simply be maintained at just physical checkpoints. Communications technology has led to the rapid dissemination of information in an almost uncontrollable torrent throughout the globe.[41] The ability of individual states to control the spread of information, and effectively regulate communication between individuals or organizations within and without their borders, significantly undermines the previously established parameters of a states authority. In addition, the limitless dissemination and communication to all points on the globe creates a sense of international community that did not exist during the formative centuries of the sovereignty principle.[42]

Besides the limits imposed on sovereignty by communications technology, economic interdependence has also served to erode the sovereignty principle. The Maastricht Treaty, signed by the member states of the European Community, was designed to form a *super state* out of a once solely economic union.[43] Of all the post-World War II treaties, this has been the most ambitious with its near complete cession of sovereignty by its member states, both in foreign and domestic affairs.[44] In response to the potential trading juggernaut of the European Union, the United States Congress passed the North American Free Trade Agreement (NAFTA) in

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39. Grossman & Bradlow, *supra* note 16, at 2-4.

40. *Id.* at 12.

41. *Id.* at 11. "Human rights and other social activists can use facsimiles and E-mail to inform the world of developments in their countries." *Id.*

42. *Id.* at 12.

43. *Europe after Maastricht; Not the Union They Meant*, 329 ECONOMIST, Nov. 6, 1993, at 56.

44. *Id.*

1993.[45] Despite domestic pressure against the treaty for fear of an exodus of United States industry and jobs to Mexico, the Congress recognized that economic strength cannot be sustained from within a state's own borders alone.[46] As a result of NAFTA, the level of trade has increased throughout Canada, the United States, and Mexico. In fact, Congress is now considering an expansion of NAFTA to other states in the western hemisphere.[47] Comprehensive trade agreements have often been historical predecessors to the loosening of borders and stronger political ties between states.[48]

Sovereignty as a feasible defense to legitimate intervention should not be limited by the reality that the majority of current conflicts are civil in nature.[49] If a state is violating the international human rights of its citizens, and the facts are known to the outside world, it seems a fallacy for the violating government to claim that its sovereignty has been violated upon legitimate intervention.[50]

These factors demonstrate that the sovereignty principle, embedded even in modern codifications,[51] is no longer viable as a defense to legitimate intervention based on that state's international human rights

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45. North American Free Trade Agreement, *done* Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

46. *See* David S. Broder & Michael Weisskopf, *Business Prospered in Democratic-Led 103rd Congress*, WASH. POST, Sept. 25, 1994, at A1, *cited in* G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 883 n.259 (1995).

47. Broder & Weisskoph, *supra* note 46, at 883.

48. Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 478 (1991). The Germanic Confederation in 1871 ". . . was more in the nature of a treaty community than any sort of real political union. But it and the early nineteenth century Customs Union were steps in that direction." *Id.*

> WTO dispute resolution decisions will automatically come into force as a matter of international law in virtually every case. The new judges of international trade thus have jurisdiction to rule that governments must amend or repeal domestic laws that are inconsistent with world trade norms or risk imposition of trade sanctions.

Shell, *supra* note 46, at 832.

49. Ernie Regehr, *Warfare's New Face; Civil War has Become the Norm in Warfare*, 41 WORLD PRESS REV. 14 (1994). "All three dozen wars raging in the world today are fights within single states – none is a fight between states . . . . They are . . . a consequence of failed states . . . ." *Id. See* Binaifer Nowrojee, *Recent Development: Joining Forces: United Nations and Regional Peacekeeping--Lessons from Liberia*, 8 HARV. HUM. RTS. J. 129 (1995). "[P]laces such as Somalia, Yugoslavia, and Liberia . . . reflect . . . war in today's world – internal conflicts fueled by political, ethnic, religious, and economic antagonisms no longer contained by Cold War politics." *Id.*

50. Grossman & Bradlow, *supra* note 16, at 1.

51. U.N. CHARTER art. 2, § 7.

violations. If a state commits human rights violations on a persistent basis, these acts are not likely to go unnoticed by the general population of that state. Unlike the time of Nazi Germany, human rights violations committed virtually anywhere in the post-Cold War world cannot go unnoticed for long, even if witnessed by only a few.[52] Communications technology and the reach of the global media are simply too pervasive and unregulated to be thoroughly silenced by any single state.[53] This spread of global awareness, coupled with the proliferation of massive trade pacts and voluntary cessions of sovereignty, are indicative of a new international consciousness[54] that has reduced the once formidable principle of sovereignty into a more malleable concept.

C. A State's Implied Waiver of Sovereignty

A state has impliedly waived its sovereignty when it is no longer in compliance with international human rights law. International human rights law applies to all states as a universal principle of *jus cogens*, regardless of whether a particular state is a non-signatory to such treaties and agreements.[55]

When a state commits human rights abuses against nationals of another state, or against its own population, it has waived its sovereignty specifically under the Nuremberg Charter[56] and the United Nations Genocide Convention.[57] The Nuremberg proceedings were begun to bring the Nazi leaders and their subordinates to justice.[58] Nuremberg was key in

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52. Grossman & Bradlow, *supra* note 16, at 12. *See also* Donatella Lorch, *Burundi After Mutiny; Horror Stories Everywhere*, N.Y. TIMES, Nov. 21, 1993, at 3. "Even though all communication lines were cut, loyal ministers, using newly bought cellular phones, managed to mobilize Burundians through Rwandan radio broadcasts." *Id.*

53. Grossman & Bradlow, *supra* note 16, at 12.

54. Nowrojee, *supra* note 49, at 129. "The slow, but evident, erosion of an absolute position on sovereignty is leading to an emerging right, and perhaps even duty, for states to intervene on humanitarian grounds." *Id.*

55. *See* MARTENSON, *supra* note 15, at 20. "The spirit and philosophy of the UDHR [Universal Declaration of Human Rights] . . . not exclusive of one group or another but aims at the protection of the human rights of every person." *Id.* U.N. CHARTER art. 2, para. 6. "The organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security." *Id.*

56. *See* NUREMBERG CHARTER, *supra* note 11.

57. *See generally*, SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, 99th Cong., 1st Sess., EXEC. REP. 99-2, (1985).

58. Lopez, *supra* note 3, at 922. "The establishment of an International Military Tribunal . . . introduced criminality, albeit retroactively, into humanitarian law for the first time." *Id.*

that it was designed to recognize that human rights abuses committed even within a sovereign's domestic arena, were nonetheless criminal acts. Seizing upon the invaluable precedent of Nuremberg as a tool to penetrate the sovereignty veil, the U.N.G.A. adopted the fundamental principles of Nuremberg in the United Nations Genocide Convention of 1948.[59] The Convention is but one important, specific example of the codification of this modern legal philosophy of accountability. It has come full circle from its inception at Nuremberg to the recently created International Criminal Tribunal for crimes against humanity in the former Yugoslavia.[60]

The U.N. Genocide Convention and the principles established at Nuremberg do not provide for a specific preemptive enforcement provision. However, they do lay a framework for establishing the illegitimacy of a violating state's sovereignty defense, and the legitimacy of another state's preemptive intervention. If the community of nations provides for international military tribunals to punish offenders within a violating state, it is reasonable to infer that preemptive action is even more legitimate and desirable to prevent the offenses. The question remaining should be not whether actual enforcement should occur, but how will it occur?

V. AUTHORIZATION OF THE UNITED STATES TO ENFORCE INTERNATIONAL HUMAN RIGHTS LAW

A. United States Multilateral Enforcement of International Human Rights Law

Following the inception of the U.N., Congress committed the United States to its multilateral goals and service through enactment of the United Nations Participation Act (UNPA) of 1945.[61] As a significant portion of its commitment, the United States has provided massive funding and military support, in accordance with Article 43 of the U.N. Charter.[62]

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59. Henry T. King, Jr., *Nuremberg and Sovereignty*, 28 CASE W. RES. J. INT'L L. 135, 136 (1996). "[N]uremberg penetrated the veil of national sovereignty to recognize individuals as having rights independent of nation-state recognition . . . . The United Nations Genocide Convention was designed to secure adherence to the international human rights recognized at Nuremberg . . . ." *Id.*

60. *Resolution 827*, S/Res. 827, U.N. SCOR, 3217th mtg. (1993) (establishing an International Criminal Tribunal on the former Yugoslavia by vote of the Security Council).

61. United Nations Participation Act, Pub. L. No. 264, ch. 583, 59 Stat. 619 (1945) (codified as amended at 22 U.S.C. § 287 (1958)), [hereinafter UNPA], *cited in* Gregory L. Naarden, *U.N. Intervention after the Cold War: Political Will and the United States*, 29 TEX. INT'L L.J. 231, 236 (1994). "The UNPA outlined the character of the United States' participation in the UN's system of collective security." *Id.*

62. *Id.*

Congress authorized the President to commit armed forces, facilities, or assistance, but subject to congressional approval of a special agreement with the U.N.[63] This was probably an attempt by Congress to limit the President's ability to commit forces under a U.N. mandate without congressional approval. As subsequently observed during the Cold War, congressional power to restrict executive deployment of armed forces atrophied due to the rapidity in which conflicts erupted versus the slow process of congressional hearings and votes.

The effectiveness of congressional control of the President's deployment power under UNPA eroded significantly by the Korean conflict in 1950. After the U.N. Security Council authorized U.N. member states to counter North Korean aggression,[64] President Truman deployed United States troops without waiting for Congress to approve a special agreement with the U.N. President Truman merely sidestepped the constitutional question of executive action requiring congressional approval by "not referring to the conflict as a war."[65] Today, a debate continues in Congress over whether the United States military should continue to play a role in peacekeeping operations. House and Senate Republicans argue that the United States spends a disproportionate amount on peacekeeping; that American peacekeepers are prominent targets for extremist groups abroad; and that generally the United Staes is better off withdrawing into the quiet nest of isolationism.[66]

However, it is vital for international human rights law that the United States remain the military backbone of U.N. peacekeeping operations. Withdrawal of United States military and financial support would set back enforcement of international human rights law to its nonexistent position prior to Nuremberg. Although Congress may choose to abrogate its obligations under the U.N. Charter,[67] the international obligation would continue based on its original adherence to the Charter. Outlaw regimes and fanatical extremist groups could interpret United

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63. U.N. CHARTER art. 43. "All members . . . undertake to make available to the Security Council, . . . in accordance with a special agreement . . . armed forces, assistance, and facilities . . . ." *Id.*

64. Naarden, *supra* note 61, at 236-7.

65. S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/1511 (1950), *quoted in* Naarden, *supra* note 61, at 241 (regarding Security Council authorization for U.N. member states to repel North Korean aggression).

66. *See* Ruth Wedgewood, *Peacekeeping, Peacemaking, & Peacebuilding: The Role of the United Nations in Global Conflict: The Historical Evolution of the United Nations in Global Conflict: Creating, Defining, & Expanding the Role of the United Nations: The Evolution of United Nations Peacekeeping*, 28 CORNELL INT'L L.J. 631, 638 (1995).

67. *See* U.N. CHARTER art. 43.

States intransigence as meaning they have free reign to commit unnaccountable acts of terrorism and genocide.

Congressional Republicans may claim there is no need to provide troops and military aid to U.N. peacekeeping operations, and that other nations troops are more expendable. However, with the end of the Cold War, the role played by U.N. authorized deployments has changed from a primarily peacekeeping role, to one of *peacemaking*.[68] Rampant human rights abuses now tend to occur within states embroiled in civil wars (the former Yugoslavia); in territories where government has simply ceased to exist (Somalia); and where *juntas* have seized power illegally (Haiti). The function of all committed U.N. member states armed forces is no longer just *peacekeeping*. They must be ready to meet the need for rapid deployment and potentially prolonged nation-building missions, in what is essentially a restorative occupation of *peacemaking*.

The U.N. itself lacks the military, intelligence, and communications technology necessary for low-risk, rapid intervention.[69] Instead, the U.N. must rely on the military contribution from its member states.[70] The United States has the most efficient capability for complex, rapid intervention designed to minimize bloodshed and maximize success.[71] Since the end of the Cold War, the United States military has been ordered to steadily refocus strategy towards smaller scale, regional conflicts.[72]

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68. Naarden, *supra* note 61, at 242. *See also* Wedgewood, *supra* note 66, at 635 (stating that "[i]n Somalia, and in elements of the Yugoslav operation, the Security Council authorized peace keepers to operate even without the consent of the parties, under Chapter VII enforcement authority").

69. Wedgewood, *supra* note 66, at 636.

> The United Nations lacks real-time intelligence . . . and lacks satellite phones to communicate straight to the field. For example, in the Rwanda emergency, Secretary Boutros-Ghali had no direct link to the head of UNAMIR troops. The U.N. Department of Peacekeeping Operations was never set up to be a military command center. *Id.*

70. *See* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T ST. DISPATCH. Vol. 6, No. 5, (Aug. 28, 1995). Absolute cost to the United States remains a small portion of its national security expenses, a far cheaper choice than taking an isolationist stance until forced to confront crises after they have spread to directly threaten United States interests. *See* Wedgewood, *supra* note 66, at 636. "There is now a sense that intervention . . . must be contracted out to a coalition . . . who are militarily able." *Id.*

71. TIM RIPLEY, MODERN UNITED STATES ARMY 6 (1992). "United States military planners now work on the basis of a forward presence to be reinforced in a crisis by rapidly deployed forces from the continental United States." *Id.*

72. *Id.* at 13. "United States army chiefs have stated that small, mobile and highly trained light forces will be of increasing importance in a world where low-level regional conflicts are likely to be the most prevalent form of warfare." *Id.*

This effort at United States military adjustment has already borne results for the enforcement of international human rights law. Where the U.N. Security Council has recognized the need for intervention, sovereignty has been pierced, and the initial rapid deployment of United States peacemaking forces has resulted in mostly successful transitions to the U.N.'s peacekeeping authority.[73]

One notable failure, however, occurred in Somalia. The problem resulted not from a flaw in the goals of intervention, but in the confused chain of command.[74] In fact, the initial success of the Somalia intervention in providing food, relief, and protecting the population against factional violence, demonstrates the need for the United States armed forces to be the spearhead of any multilateral intervention, and for the maintenance of a unified chain of command.

Congressional budget trimming on future intervention and funding for human rights operations can only harm the growing trend of multilateral action in dealing with international human rights abuses. If multilateral consensus dwindles, customary international law could revert back to the old pure sovereignty defense. Then, international human rights law could potentially evaporate into an extinct legal concept.

B. United States Unilateral Enforcement of International Human Rights Law

Multilateral intervention is not always feasible in certain circumstances. Despite a desire by the United States to take collective action,[75] it is sometimes necessary for the United States, or other states, to act unilaterally to enforce international human rights law. The most succinct example of the need for unilateral action can occur when a Permanent Security Council member state vetoes a resolution for

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73. *See* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T. ST. DISPATCH, *supra* note 70, at 662. Recent peacekeeping successes include Mozambique, El Salvador, Cambodia, and Namibia, all countries where the U.N. helped bring long, bloody conflicts to an end and then assisted in the establishment of more democratic and stable governments. *Id.*

74. *United States military participation in United Nations-authorized Peacekeeping Operations: Hearings Before the Senate Subcomm. on Airland Force of the Comm. on Armed Sev.*, 104th Cong. (1995) (testimony of John R. Bolton on May 3, 1995).

> After the point of effective transition of responsibility from the United States-led Unified Task Force ("UNIFAF") to the second U.N. operation . . . there were really separate chains of command . . . . Moreover the mission of the United States forces (and the U.N. force generally) was not well defined, positioning them somewhere between traditional peace keepers and peace enforcers. *Id.*

75. *See* BUREAU OF PUBLIC AFFAIRS, U.S. DEP'T ST. DISPATCH, *supra* note 70, at 660. Burden sharing of funding and military force, spreads the sometimes expensive cost among participating states. *Id.*

intervention.[76] In the wake of the Cold War, the threat of the veto power used against United States interests has been minimized since Russia is for the moment more willing to accommodate United States interests in its quest to maintain loan guarantees. China frequently abstains in what may be an effort to ensure continuation of its most favored-nation trading status with the United States. However, the current geo-political situation is not frozen indefinitely. Elections, coups, and changes in strategic interests, all can play a role in the unpredictable future of global politics and subsequently U.N. Security Council voting.

Since the United States favors multilateral action, if unilateral intervention is deemed necessary for whatever reason, the United States can attempt a subsequent ratification by the U.N.[77] The Somalia intervention[78] demonstrates United States eagerness to obtain subsequent ratification for unilateral action. The United States, however, has not always been dissuaded from unilateral action in its enforcement of international human rights law when it perceives its interests as paramount to international obligations.

One argument supporting unilateral action is that, despite a bias towards the maintenance of sovereignty (except at the behest of the U.N. Security Council under Chapter VII), the U.N. Charter, itself, supports unilateral action when necessary. Article 2(4) of the Charter requires member states to refrain from infringement on another state's sovereignty, yet "[a]rticles 55 and 56 . . . [require] each U.N. member to take joint and separate action to insure the 'universal respect for, and observance of, human rights and fundamental freedoms.'" [79] Thus, under the UNPA, enacted by Congress to bind the United States to the U.N. Charter, the United States, and other states, have a treaty obligation to intervene unilaterally when violations of international human rights law occur. Not only is this argument a defense for United States unilateral intervention, it also presents such intervention as a binding obligation.

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76. U.N. CHARTER art. 27, § 3 (stating that,"[d]ecisions of the Security Council . . . shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.") *Id.*

77. Byron F. Burmester, *On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights*, 1994 UTAH L. REV. 269, 270 (1994) (Inferring that "[a] state that employs force against another state will attempt to define its acts as being justified under the Charter.")

78. *Id.* at 269 (claiming that the United States entered Somalia not at the request of the U.N., but rather, after unilaterally volunteering, the U.N. quickly ratified the United States offer, authorizing the newly formed multilateral force to use all means necessary.)

79. Burmester, *supra* note 77, at 275 (explaining articles 55 and 56 of the U.N. CHARTER).

A second strong defense for unilateral intervention arises from what could be interpreted as a violating state's implied waiver of sovereignty. If a state forfeits its sovereignty through human rights abuses, and an intervening state is merely trying to eliminate the violations, then the intervening state has not violated international law. Critics may charge that this justification can be used by any aggressor state trying to cloak the illegality of its intervention. Yet, subsequent actions taken by the intervening state can demonstrate for itself the true nature of the intervention.[80] International organizations, such as the U.N., can choose to ratify the action or request that member states use multilateral force to eject the intervening state. It is more practical to support swift unilateral intervention to halt human rights violations, than to favor an endless dialogue over motives, funding, and consequences.

VI. CONCLUSION

The codifications and precedents of the last fifty years have provided strong authority that a state forfeits its sovereignty when committing human rights abuses. Through international organizations, treaties, and growing customary international law, states are learning that sovereignty is no protective barrier for torture, rape, political imprisonment, enslavement, and murder. The U.N. can provide a powerful legitimacy in its authorization of intervention. However, the United States remains the predominant enforcement power of both Security Council Resolutions and of its own interest in preserving international human rights. Elements in the United States Congress and elsewhere should understand that the funding, military backing, and general support of the United States in peacemaking operations is a vital deterrent against international chaos. Indeed, preservation of international human rights law is a more important United States interest than is the harm to international stability that would ensue in a decline of respect for international human rights law.

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80. *Id.* at 284. "[I]t is not relevant that the United States justified intervention in Panama by claims that General Noriega violated international drug laws. To the contrary, the United States returned the lawfully elected government to office, thus demonstrating its altruistic motives by its actions." *Id.*