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Feeling Good or Doing Good: Inefficacy of the U.S. Unilateral Sanctions Against the Military Government of Burma/Myanmar

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FEELING GOOD OR DOING GOOD: INEFFICACY OF THE U.S. UNILATERAL SANCTIONS AGAINST THE MILITARY GOVERNMENT OF BURMA/MYANMAR

THIHAN MYO NYUN*

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The title of this Article is inspired by ERNEST H. PREEG, *FEELING GOOD OR DOING GOOD WITH SANCTIONS: UNILATERAL ECONOMIC SANCTIONS AND THE U.S. NATIONAL INTEREST*, *infra* note 28. To me, the phrase “feeling good or doing good” captures the essence (and perhaps the enigma) of sanctions.

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INTRODUCTION

Economic statecraft has long played an important role in international relations.¹ During the Cold War and its immediate aftermath, economic sanctions became one of the most frequently utilized means of carrying out United States foreign policy.² Positioned somewhere between diplomacy and military engagement, sanctions are imposed to dissuade military adventures, impair military potential, destabilize foreign governments, and pursue both modest as well as major policy changes in target countries.³ The controversy over economic sanctions, however, is not a dispute about the ends sought; almost everyone agrees that promoting democracy and human rights, limiting nuclear proliferation, and deterring terrorism are good aims. Rather, the disagreement is about

1. DAVID A. BALDWIN, *ECONOMIC STATECRAFT: THEORY AND PRACTICE* (1985).

2. Richard N. Haass, *Sanctioning Madness*, *FOREIGN AFF.*, Nov./Dec. 1997, at 74 (1997).

3. GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 4–9 (2d ed. 1990) [hereinafter HUFBAUER ET AL., *SANCTIONS RECONSIDERED*]; see also *infra* notes 43–46 and accompanying text.

whether economic sanctions are the most effective means to achieve some of these foreign policy ends.

Further complicating the debate is the United States' reliance on unilateral sanctions as its sanctions policy of choice in the post-Cold War era. Unilateral sanctions are attractive foreign policy tools because they represent non-military remedies for unacceptable behavior of foreign governments and offer immediate responses to domestic demands to "do something."

The U.S. use of unilateral sanctions to bring about transcendent changes (such as promoting human rights or restoring democracy) in target countries has only increased since the end of the Cold War.⁴ This is an alarming development given that the behavioral effects of economic sanctions on a target country remain unclear.⁵ This particular turn in sanctions policy adds another layer of complexity to questions about the effectiveness of economic sanctions and their corresponding political, economic, and social costs.

A cursory glance at the literature on the efficacy of economic sanctions reveals the following consensus: although most analysts assert that economic sanctions are ineffective instruments of foreign policy,⁶ they disagree as to what factors determine whether economic sanctions are likely to be successful at promoting the foreign policy ends sought.⁷ What, then, is the proper framework—political, economic, social, legal, or humanitarian—to analyze the efficacy of unilateral sanctions in promoting democracy and human rights? To answer this question, this Article first

4. HOSSEIN G. ASKARI ET AL., *ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY* 1–3 (2003) ("[F]rom 1990 to 1998, the United States unilaterally imposed twelve sanctions . . . [and] was party to thirty-six other sanctions as a coalition member."); see also NATIONAL ASSOCIATION OF MANUFACTURERS, *A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES 1993–1996* (1997) (stating that the United States imposed or threatened economic sanctions sixty-one times against thirty-five different nations, affecting forty-two percent of the world's population).

5. See *infra* Part I of this Article for a more detailed discussion of the use of unilateral sanctions to promote foreign policy goals.

6. See BALDWIN, *supra* note 1, at 51 ("The two most salient characteristics of the literature on economic statecraft are scarcity and the nearly universal tendency to denigrate the utility of such tools of foreign policy."); Robert Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L SEC. 90, 93 (1997) (arguing that economic sanctions have been successful only on rare occasions); DANIEL W. DREZNER, *THE SANCTIONS PARADOX: ECONOMIC STATECRAFT AND INTERNATIONAL RELATIONS* 9–21 (1999) (providing a more detailed analysis of the literature on economic sanctions).

7. Even the Hufbauer study, which is perhaps the most authoritative empirical study on the topic, uses only political and economic factors to predict the efficacy of the economic sanctions. See GRAY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES* (2d ed. 1990) [hereinafter HUFBAUER ET AL., SUPPLEMENT]. Additional legal, social, and humanitarian variables must be considered, depending on the unique context of each sanctions episode, so as to facilitate a more thorough analysis.

presents and critiques the analytical framework derived from Professor Gary Clyde Hufbauer's empirical studies.⁸ The Article then supplements this framework with a list of additional episode-specific variables. Finally, the Article applies this new framework to analyze the U.S. comprehensive unilateral sanctions against the Union of Myanmar, formerly known as Burma.⁹

Part I of the Article presents a general overview of the use of sanctions as economic statecraft. To narrow the scope of the sanctions analysis, I first distinguish sanctions accompanied by military action from those that are not, as well as unilateral from multilateral sanctions. My goal is to limit the analysis to the U.S. use of comprehensive unilateral sanctions to promote transcendent foreign policy goals in target countries—democracy and human rights in the case of Myanmar. Second, I survey the literature to provide a better understanding of the philosophy behind economic sanctions and to further examine the foreign policy goals sought by the sanctions, the sender's motives, and the message sent by the sanctions. Last, I briefly describe U.S. unilateral sanctions practice by highlighting the relevant statutory measures and the types of sanctions typically imposed.

Part II frames the U.S. unilateral sanctions policy analysis in the Burmese context. A thorough understanding of the domestic and international considerations of target countries—whether they are historical, political, economic, legal, social, or cultural—is indispensable to formulating, adopting, and implementing an effective sanctions policy. With this goal in mind, I attempt to illuminate the major events in Myanmar since its independence,¹⁰ concentrating especially on the

8. See HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 35–83; HUFBAUER ET AL., SUPPLEMENT, *supra* note 7; Gary Clyde Hufbauer, *Trade As a Weapon* (Fred J. Hansen Inst. for World Peace, Working Paper, 1999); see also Gary Clyde Hufbauer et al., *U.S. Economic Sanctions: Their Impact on Trade, Jobs, and Wages* (Peterson Inst. for Int'l Econ., Working Paper, 1997).

9. The official English name for the country, as applied by the United Nations, is the "Union of Burma" for the period before 1989 and the "Union of Myanmar" after 1989. See Central Intelligence Agency, The World Factbook, Burma, available at <http://www.cia.gov/library/publications/the-world-factbook/geos/bm.html> (last visited May 3, 2008). Setting symbolic overtures aside, the question of whether it was legitimate for the military regime to change the name of the country, or whether it is appropriate for certain powerful countries not to acknowledge the change, is not the most pressing of problems facing the people of Myanmar. Hence, these are discussions for another paper, if ever an opportunity should arise. For this Article, I will use Myanmar to refer to the country and Burmese to refer to its people.

10. Reconstruction of Myanmar's post-independence history, due to a dearth of reliable and accurate sources, is a daunting task that deserves a treatment of its own. My brief account of the major developments in Myanmar is drawn from my studies while growing up in Myanmar, tainted perhaps with some socialist twist, and distilled from my many conversations with my grandfather, U Kyaw

democracy uprisings in 1988 and their aftermath, which brought about world-wide condemnation and subsequent sanctions from the United States. Part II goes on to describe the response to the human rights conditions in Myanmar, which is further divided into three realms: the international, regional, and U.S. response. The international response to the government in Myanmar spans from denunciations by the United Nations to suspension of financial assistance from the World Bank and the IMF.¹¹ The regional response consists of mixed policies of sanctions and engagements, and, in some cases, total cooperation. The U.S. disapproval of human rights conditions in Myanmar culminated with the Burmese Freedom and Democracy Act of 2003,¹² which imposed comprehensive sanctions against the country.

Part III of the Article begins the analysis of the political and economic variables that are regularly implicated in determining whether sanctions are likely to succeed. It starts by using the political and economic framework developed in the Hufbauer empirical study as a guidepost,¹³ and then tests the conclusions drawn in the Hufbauer study in the context of the Myanmar sanctions. Confining the efficacy analysis to political and economic variables alone, however, is woefully inadequate. Thus, in Part IV, I suggest additional legal, social, and humanitarian variables that might better approximate the efficacy of the sanctions when considered in an episode-specific manner.

This Article argues that the U.S. unilateral sanctions against Myanmar have been largely ineffectual and, more alarmingly, that the U.S. sanctions may have done more harm than good. Instead of ushering in a decade of political and economic change, the U.S. sanctions have frozen the existing political situation in place without providing the flexibility to develop creative solutions to break the political deadlock. The military government remains firmly entrenched while the economy languishes unreformed and unstable. Moreover, a decade of sanctions have imposed costs on the

Nyun, who, at one time or another, was a finance minister, an ambassador, and an election commission member, but a career civil servant first and foremost.

11. See *infra* notes 93–97 and accompanying text.

12. Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, §§ 1–9, 117 Stat. 864 (2003) (codified at 50 U.S.C. § 1701 (2000)).

13. See HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 39–40. The usual political suspects include the nature of the foreign policy goal sought, the presence of companion policy measures, the duration of the sanctions, the extent of the international cooperation, the presence of international assistance to the target country, the political and economic health of the target country, and prior relations between the sender and the target. Likewise, economic factors such as relative economic size, trade linkage, types of sanctions used, and costs on both sender and the target are usually assessed.

Myanmar civilian population, alienated the moderates within the military government, made harder any prospects of building a civil society that empowers people, and weakened the pro-democracy movement, making positive political change even less likely.

An immediate reassessment of U.S. unilateral sanctions policy against Myanmar is needed because, while imposing their destructive costs on the people of Myanmar, the sanctions have failed to bring about meaningful change. Reassessment is especially necessary in light of the recent U.S. response—readily resorting to more sanctions and criticism in place of actual policy—to the Myanmar military government’s brutal crackdown on the peaceful demonstrations led by Buddhist monks. Likewise, the Myanmar regime’s bullish refusal in the aftermath of Cyclone Nargis to allow U.S. personnel to assist in humanitarian relief efforts suggests its misplaced paranoia, the United States’ limited leverage over the regime, and how far relations between the two countries have deteriorated. Instead of feeling good about the existing sanctions, the United States must lead the international community in formulating a new approach grounded in diplomacy and dialogue, rebuild trust, and once again become an important player in helping to improve the standard of living of the Burmese people.

I. SANCTIONS AS ECONOMIC STATECRAFT

The use of economic sanctions in international relations dates back to ancient Greece.¹⁴ In response to violations of sacred Athenian lands and the kidnapping of three Aspasian women, Pericles instituted the Megarian decree (432 BC), banning all trade between Megara and Athens and eventually leading to the outbreak of the Peloponnesian War.¹⁵ Since the Megarian decree, economic sanctions have come in various shapes and forms: the castle sieges of antiquity, Colonial America’s trade embargoes

14. See HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 4–5; see also ASKARI ET AL., *supra* note 4, at 5–8; DREZNER, *supra* note 6, at 6.

15. See THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 73 (Rex Warner trans., Penguin Books 1972) (“In particular the delegates from Megara, after mentioning a number of other grievances, pointed out that, contrary to the terms of the treaty, they were excluded from all the ports in the Athenian empire and from the market of Athens itself.”). Because of Thucydides’ minor treatment of the decree in his accounts, historians disagree as to Pericles’ true motivations behind the decree. Some historians have interpreted the decree as a failed attempt at deterrence by Pericles to ward off a military conflict with Sparta, while others have suggested that Pericles intended to punish Megara for its support of Corinth, which was an ally of Sparta. Nevertheless, both factions agree that the Megarian decree was a critical development in the outbreak of the Peloponnesian War. For a detailed discussion of Pericles’ motivations behind the Megarian decree, see ASKARI ET AL., *supra* note 4, at 5–7.

against Britain, and naval blockades during the American Civil War.¹⁶ Sanctions episodes before the Cold War were invariably linked to military conflict; economic sanctions served as either prologues to or compliments of warfare-related measures.¹⁷ During the Cold War and its aftermath, however, economic sanctions have been transformed into a stand-alone policy that resides somewhere between diplomacy and military action.¹⁸

Many questions must be addressed to analyze the efficacy of unilateral sanctions in promoting transcendent goals: What is an economic sanction? What is the difference between unilateral and multilateral sanctions? Why are sanctions used? What are the various types of sanctions? What is the U.S. unilateral sanctions practice?

First, it is critical to come to a consensus on a clear definition of economic sanctions, because a second-level inquiry into the effectiveness of a sanctions episode depends on the scope of the definition used. For instance, it may be inappropriate to include sanctions that are used in concert with military action when defining economic sanctions because the success or failure of this type of sanctions may ultimately depend on the military outcome.

Second, unilateral sanctions must be distinguished from multilateral sanctions, keeping in mind that “more is not necessarily merrier.”¹⁹ Moreover, economic interdependence between nations, rather than a strict unilateral/multilateral distinction, may play a more prominent role in determining the efficacy of a particular sanctions episode.

Third, when answering the question of why unilateral sanctions are instituted widely, it is essential to understand the theory behind economic

16. For a perspective on the historical uses of economic sanctions, see ASKARI ET AL., *supra* note 4, at 4–13; see also GEOFF SIMONS, *IMPOSING ECONOMIC SANCTIONS: LEGAL REMEDY OR GENOCIDAL TOOL?* (1999).

17. ASKARI ET AL., *supra* note 4, at 14 (indicating that all the historical sanctions episodes analyzed in their study were associated with a military conflict); see also HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 5 (pointing out that most of the sanctions episodes prior to World War I “foreshadowed or accompanied warfare”).

18. See Steve Chan & A. Cooper Drury, *Sanctions As Economic Statecraft: An Overview*, in *SANCTIONS AS ECONOMIC STATECRAFT: THEORY AND PRACTICE* 3 (Steve Chan & A. Cooper Drury eds., 2000) (“Economic statecraft offers an appealing substitute to military force given a general reluctance to resort to war due to its destructive and possibly counter-productive [sic] consequences.”); HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 4–9 (tracing the historical evolution of the use of economic sanctions); see also ASKARI ET AL., *supra* note 4, at 29 (“A strict concern with the separation of economic sanctions from the involvement of military actions might be correlated with the Cold War mentality and the concern that even the slightest military provocation could eventually escalate to a full-blown nuclear assault.”).

19. HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 95 (“In general, the greater the number of countries needed to implement sanctions, the less likely it is that they will be effective.”).

sanctions in general and the attractiveness of unilateral sanctions in particular, as well as unintended consequences that are normally not taken into consideration. The underlying assumption that economic hardship will lead to political change in a target country is unreasonable in many situations because of tenuous links between cause and effect.

Fourth, the unique nature of each sanctions episode,²⁰ as well as the different forms of sanctions that are traditionally employed,²¹ need careful consideration. Symbolic sanctions, instituted for the sake of doing something, may make the constituents in the sender country feel good, but may not actually do any good in the target country. Worse even, they may unintentionally harm the general population in the target country.

Last, the major statutory and regulatory programs in the U.S. unilateral sanctions arsenal require a brief investigation.

A. *Economic Sanctions Defined and Distinguished*

Two observations compel our inquiry to define economic sanctions and to classify various forms among them. First, the end of the Cold War sparked a proliferation in the use of economic sanctions. During this period, the United States has played a leading role in employing sanctions—both unilateral and multilateral—to achieve its foreign policy goals.²² Furthermore, the imposition of economic sanctions against weaker nations whose policies are adverse to U.S. interests will most likely increase in the future, especially considering the costs of military intervention.²³ Second, there is disconnect between the historical and modern conceptions of economic sanctions. The commonly accepted notion that economic sanctions lie somewhere between diplomacy and military engagement is a modern concept. Historical use of economic sanctions, on the other hand, “foreshadowed or accompanied warfare.”²⁴

20. The characteristics that make each sanctions episode unique depend primarily on the foreign policy goals sought, the motive behind the sanctions, and message sent by the sanctions. See HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 6–12.

21. *Id.* at 36–38. “There are three main ways in which a sender country tries to inflict costs on its target: by limiting exports, by restricting imports, and by impeding finance, including the reduction of aid.” *Id.* at 36.

22. See *supra* note 4 and accompanying text; see also James Schlesinger, *Fragmentation and Hubris*, 49 NAT’L INT. 3, 8 (1997).

23. See DREZNER, *supra* note 6, at 7 (“What is noteworthy . . . is not just the frequency with which sanctions are used but their centrality; economic sanctions are increasingly at the core of U.S. foreign policy.” (citing Haass, *supra* note 2, at 74) (omission in original)). For a detailed discussion on changing U.S. interests and post-Cold War trends in the use of sanctions, see MEGHAN L. O’SULLIVAN, *SHREWD SANCTIONS: STATECRAFT AND STATE SPONSORS OF TERRORISM* 11–35 (2003).

24. See *supra* note 17 and accompanying text.

Due to these observations, it is necessary to better understand how economic sanctions work.

1. Economic Sanctions Defined

Economic sanctions can be defined, depending on the particular role one would like sanctions to play in international affairs, in two different ways. Economic sanctions can either encompass every measure designed to inflict economic deprivation or include only the most comprehensive of embargoes imposed for well-defined political reasons. A broad definition based solely on the ends would take into consideration only the economic deprivation inflicted upon a target country, and not the means employed to bring about that deprivation. As a result, any measure—economic or military—that disrupts the economic activity of an adversary would qualify as an economic sanction. Conversely, a definition based on the means, which is commonly accepted today, narrows the scope of what constitutes economic sanctions by focusing only on trade-disrupting measures. Hufbauer and colleagues define economic sanctions as “the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations.”²⁵

A further synthesis of the literature reveals the following definition, which will be used for this Article: economic sanctions are the actual or threatened withdrawal of normal trade or financial relations, imposed by the sender against the target, for foreign policy purposes.²⁶ Under this approach, economic sanctions are limited to restrictions on trade, investment, and other cross-border economic activity that reduce the target country’s revenues, thereby facilitating the desired change without resorting to military action. Because one of the primary rationales behind economic sanctions is to avoid military conflict altogether, measures that are used in concert with military engagement are not considered economic sanctions under this definition.²⁷ Likewise, diplomatic protests and

25. HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 2 (stating that customary means “levels of trade and financial activity that would probably have occurred in the absence of sanctions”).

26. *Id.*; see ASKARI ET AL., *supra* note 4, at 14 (“Economic sanctions are coercive measures imposed by one country, or coalition of countries, against another country, its government or individual entities therein, to bring about a change in behavior or policies.” (quoting DIANNE E. RENNACK & ROBERT D. SHUEY, *ECONOMIC SANCTIONS TO ACHIEVE U.S. FOREIGN POLICY GOALS: DISCUSSION AND GUIDE TO CURRENT LAW* (1998))); see also Chan & Drury, *supra* note 18, at 2–3 (sanctions are defined as “the actual or threatened withdrawal of economic resources to effect policy change by the target”).

27. See *supra* notes 17–18 and accompanying text.

economic coercions that are meant to obtain general leverage in trade negotiations are not economic sanctions. In addition, threatened or actual retaliations within the international trading system that are undertaken in the course of trade disputes are outside the parameters of economic sanctions. The reduction and suspension of economic aid and other trade preferences, depending on whether they are considered “carrots” or “sticks,” can sometimes be within the confines of economic sanctions.²⁸

2. *Unilateral and Multilateral Sanctions Distinguished*

Sanctions nomenclature classifies the country or coalition of countries imposing the sanctions as the “sender,” while the country subjected to economic sanctions is designated as the “target.”²⁹ In addition, sanctions episodes are divided into two categories: unilateral and multilateral. The distinction between unilateral and multilateral sanctions is based solely on the number of senders participating in a given sanctions episode. Multilateral sanctions are imposed by more than one country and enjoy international support; unilateral sanctions, on the other hand, are imposed by a country acting alone, or almost alone, in applying the sanctions.³⁰

While most contemporary analysts agree that unilateral sanctions—even when wielded by the United States—are ineffective tools in compelling target countries to change their policies,³¹ the debate over the efficacy of multilateral sanctions has yielded conflicting conclusions. Hufbauer and colleagues, drawing from their case studies, argue that “the greater the number of countries needed to implement sanctions, the less likely it is that they will be effective.”³² Some analysts, on the other hand, maintain that multilateral sanctions are more likely to succeed than

28. See ERNEST H. PREGG, *FEELING GOOD OR DOING GOOD WITH SANCTIONS: UNILATERAL ECONOMIC SANCTIONS AND THE U.S. NATIONAL INTEREST* 216 (1999) (stating that the reason why reduction of financial assistance to target country governments is not considered economic sanctions is because economic aid is a positive incentive—or “carrot”—and thus an alternative to the punitive “stick” of sanctions on normal commerce); see also HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 2.

29. HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 35–36.

30. ASKARI ET AL., *supra* note 4, at 31 (“People who study economic sanctions have become comfortable with dividing sanctions into two basic categories: unilateral and multilateral. The distinction is made according to the number of entities participating in the sanction. When only one entity . . . is imposing an economic sanction, it is labeled unilateral; all others are multilateral.”).

31. See *supra* note 6 and accompanying text; see also PREGG, *supra* note 28, at 7–10.

32. HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 95; see also Daniel Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?*, 54 INT’L ORG. 73, 73 (2000) (arguing that there is no correlation, or even a negative correlation, between multilateral sanctions and their success).

unilateral sanctions.³³ This apparent controversy over the efficacy of multilateral sanctions can be attributed to our common sense conclusions, which mislead us into thinking that multilateral sanctions, by garnering greater participation and wider international support, ought to be more successful than their unilateral counterparts.

It is natural to expect multilateral sanctions to succeed where unilateral sanctions have failed, since, by definition, they involve many nations ganging up to impose their will on a target country. Nevertheless, economic interdependence between nations, brought about by globalization and technological advancement, may have rendered multilateral sanctions more symbolic than effective. When determining the efficacy of a particular sanctions episode, the critical question is not the total number of senders, but the identities of the senders and the non-senders and their respective present and future economic relationships with the target. This Article is concerned with the efficacy of unilateral sanctions and, as such, leaves the multilateral sanctions debate to others.

B. Unilateral Sanctions As a Tool for Foreign Policy

The United States has employed unilateral sanctions frequently since the end of the Cold War.³⁴ The attractiveness of unilateral sanctions, despite their divided reputation for effectiveness, can be traced to a number of factors. First, unilateral sanctions, and economic sanctions in general, represent a substitute for war.³⁵ Despite the benefits accrued from the avoidance of a military conflict, however, the civilian population of the target state still suffers the consequences of sanctions, which can create a humanitarian backlash in or against the sender country.³⁶ Second, unilateral sanctions provide the sender with a means to express concern and moral outrage against unacceptable behavior of foreign

33. See DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S* 204–08 (2000) (arguing that multilateral sanctions are the primary means by which the United Nations and its member countries can respond to a breach of the UN Charter obligations and that there are successful outcomes among the supposed failures that are widely publicized); see also PREEG, *supra* note 28, at 8 (asserting that multilateral sanctions inflict a greater economic hardship on the target country than unilateral sanctions).

34. See *supra* note 4 and accompanying text.

35. See *supra* note 18 and accompanying text.

36. Joseph J. Collins & Gabrielle D. Bowdoin, *Beyond Unilateral Economic Sanctions: Better Alternatives for U.S. Foreign Policy*, CSIS REP. 1, 8 (Mar. 1999) (discussing the resulting political costs in the United States as well as in the coalition countries stemming from the detailed accounts given by Denis Halliday, coordinator of the UN oil-for-food program in Iraq, who attributes the terrible toll exacted on the Iraqi civilian population to the U.S.-led sanctions).

governments.³⁷ Likewise, unilateral sanctions allow politicians to respond to domestic pressures from advocacy groups without the risk of incurring political costs in the future. Last, imposition of unilateral sanctions is not “constrained by the need to reach prior international agreement, as is the case for multilateral sanctions.”³⁸

1. The Logic Behind Unilateral Sanctions Policy

The imposition of economic sanctions is designed to compel a behavior or policy change in a target country by inducing economic losses. The causal theory behind economic sanctions is rather straightforward. Restrictions on normal trade relations, foreign direct investment, and development assistance are intended to inflict economic loss on a target country.³⁹ In turn, severe hardship brought about by these economic losses will then foster political discontent among the population in the target country.⁴⁰ One desired outcome is that the civilian population in the target country will rise up against its leaders to demand change, forcing the target government to reverse its objectionable behavior and policies.⁴¹ Alternatively, the leaders in the target country, after realizing the error of their ways, will acquiesce to the outside demands and change their behavior and policies.⁴²

However, the causal relationship between economic loss and political change is subject to a number of potential derailments. First, it is not clear how sanctions would work if the civilian population in a target country does not have the capacity to rise up against the government. For example, the target population’s ability to effect change will be much different in a repressive dictatorship than in a democracy. A population that lives in fear under a military dictatorship is less likely to rise up and demand political change. Second, often little thought is given to the alternatives available when a particular target government is not accountable to its citizens, does not take into consideration the welfare of all or a majority of its people, or “bunkers down” in the name of national security. The assumption that every leader in every target country is accountable to its constituents is little more than wishful thinking in a totalitarian state. Last, the link

37. *Id.* at 9.

38. *See* PREEG, *supra* note 28, at 1.

39. *See* ASKARI ET AL., *supra* note 4, at 68–69.

40. *Id.* at 69.

41. *Id.*; *see also* Joy Fausey, *Does the United Nations’ Use of Collective Sanctions to Protect Human Rights Violate Its Own Human Rights Standards?*, 10 CONN. J. INT’L L. 193, 197–99 (1994).

42. Fausey, *supra* note 41, at 199.

between economic loss and political change is closely coupled with democratic ideals, which are absent in the politics of a dictatorial regime.

2. Foreign Policy Goals and Motivations Behind the Sanctions

The United States has often imposed unilateral sanctions, or participated in multilateral sanctions, to promote a range of foreign policy objectives, including the disruption of military adventures,⁴³ the impairment of military potential,⁴⁴ and the destabilization of foreign governments.⁴⁵ In addition, sanctions have been employed to stop nuclear proliferation, promote democracy, protect human rights, combat international terrorism, battle drug trafficking, and settle expropriation claims.⁴⁶ Similarly, the motivations behind each sanctions episode range from punishment to deterrence to symbolic demonstrations of moral outrage.⁴⁷ For purposes of this Article, I limit my analysis to the use of comprehensive unilateral sanctions by the United States to promote democracy and protect human rights in Myanmar.

43. See HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 5–6, for a general description of the use of economic sanctions to discourage military adventures. *See also id.* at 163 (Case 80-1: U.S. v. USSR—the grain embargo and the boycott of the 1980 Moscow Olympics did not discourage Soviet occupation of Afghanistan, highlighting the inability of one major power to deter the military adventure of another major power); HUFBAUER ET AL., SUPPLEMENT, *supra* note 8, at 243 (Case 63-1: U.S. v. United Arab Republic—U.S. withholding of development and food aid caused Egypt to withdraw its troops from Yemen and the Congo).

44. See HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 6, for a general description of the use of economic sanctions to “impair the economic capability of the target country, thereby limiting its potential for military activity.” *Id.* at 125 (Case 48-5: U.S. and COCOM v. USSR and COMECON—U.S. instituted an embargo on the export of a wide range of strategic goods to the Soviet Union).

45. *Id.* at 6–7 (describing generally the use of economic sanctions to destabilize foreign governments, normally involving a major power against a small country); *see also* HUFBAUER ET AL., SUPPLEMENT, *supra* note 8, at 182 (Case 60-1: U.S. v. Dominican Republic—Trujillo); *id.* at 194 (Case 60-3: U.S. v. Cuba—Castro); *id.* at 220 (Case 62-1: U.S. v. Brazil—Goulart), and *id.* at 314 (Case 77-1: U.S. v. Chile—Allende), for a detailed analysis of U.S. involvement in destabilization cases against its neighbors in the Western Hemisphere).

46. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 7–8 (providing a general description of the use of economic sanctions to advance major and minor policy changes in target countries); *id.* at 192 (Case 82-1: U.S. v. Poland—sanctions to promote political liberalization in Poland); HUFBAUER ET AL., SUPPLEMENT, *supra* note 8, at 221 (Case 85-1: U.S. v. South Africa—sanctions to end the South African policy of apartheid); *see also id.* at 340 (Case 73-1: Arab League v. U.S. and Netherlands—Arab League boycott over the target countries’ support of Israel); *id.* at 625 (Case 89-1: India v. Nepal—India’s desire to reverse the brief pro-China line of the Nepalese government).

47. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 11 (“[T]he imposition of sanctions conveys a triple signal: to the target country it says the sender does not condone your actions; to allies it says that words will be supported with deeds; to domestic audiences it says the sender’s government will act to safeguard the nation’s vital interests.”).

C. U.S. Unilateral Sanctions Practice

The U.S. unilateral sanctions programs prohibit U.S. persons, and sometimes foreign entities controlled by U.S. firms, from conducting business and financial dealings with target countries, the governments of those countries, or entities controlled by those governments.⁴⁸ The prohibitions contained in the unilateral sanctions programs can be broadly categorized into two interconnected components: trade restrictions and financial restrictions. Trade restrictions consist of export controls, import controls, and denial of certain trade preferences.⁴⁹ Financial restrictions, on the other hand, include freezing the target country's foreign assets, banning foreign investment, and withdrawing foreign development and security assistance.⁵⁰ Most unilateral sanctions programs involve some combination of trade and financial restrictions. The sanctions are either partial or comprehensive, depending on the extent to which trade and financial relations with the target country are cut off.

Authority to impose unilateral sanctions is vested in the executive and legislative branches of the U.S. government. Under the executive powers, unilateral sanctions programs carried out by the United States are instituted pursuant to Presidential Executive Orders under several statutes.⁵¹ Prior to 1977, unilateral sanctions programs were exercised under the Trading with the Enemy Act of 1917, which now may be invoked only during a congressionally declared war.⁵² The current sanctions programs, however, derive their authority from the International

48. John L. Ellicott, Update on U.S. Foreign Trade Controls: Export Controls and Economic Sanctions, Outline for Remarks Before the Greater Cleveland International Lawyers Group 4 (Nov. 9, 2004) (on file with author).

49. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 36–37 (discussing the general preference for export controls over import controls); see The Export Administration Act (EAA), 50 U.S.C. app. §§ 2401–2420 (1988); see also Ellicott, *supra* note 48, at 2–3 (discussing the administration of export controls through the President's national emergency authority under the IEEPA even though the EAA has lapsed since 1994); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 43–46 (2001) (highlighting the role withdrawal of import preferences plays in promoting labor and human rights abroad).

50. See HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 37–38 (“Target countries are often hurt through the interruption of commercial and official finance The ultimate form of financial and trade control is a freeze of the target country's foreign assets, such as bank accounts held in the sender country.”); see also Cleveland, *supra* note 49, at 38–41 (citing specific cases in which bans on foreign investment and denials of development aid were imposed to promote human rights).

51. Ellicott, *supra* note 48, at 5. See Cleveland, *supra* note 49, at 31–37, for a detailed account of the statutory definitions and design of the federal statutes implicated in imposing unilateral sanctions.

52. Ellicott, *supra* note 48, at 5; see also Trading with the Enemy Act, 50 U.S.C. app. § 5(b) (1994).

Emergency Economic Powers Act of 1977 (IEEPA).⁵³ The IEEPA empowers the president to declare a national emergency and subsequently to impose broad economic sanctions if the President determines that “any unusual and extraordinary threat [exists] to the national security, foreign policy, or economy of the United States.”⁵⁴ Finally, unilateral sanctions can also be instituted pursuant to congressional enactment of special legislation authorizing or directing specific sanctions programs.⁵⁵

II. HUMAN RIGHTS, DEMOCRACY, AND MILITARY RULE IN MYANMAR

In order to properly frame the U.S. unilateral sanctions policy against the military government of Myanmar, it is critical to understand Myanmar’s domestic and international tensions, as well as the course of events that culminated in the imposition of comprehensive sanctions by the United States. At first glance, the Burmese sanctions seem to pit the democratic forces of change against a brutal regime unwilling to relinquish its grip on power. Another look, however, reveals an ill-considered attempt by the United States to force a democratic transition in Myanmar without a thorough assessment of Myanmar’s historical, political, economic, social, and cultural climate.⁵⁶ By unraveling this collision of opposing viewpoints, this Article attempts to better illuminate the historical and societal conditions that helped shape Myanmar’s political deadlock, provide structure to the sanctions analysis, and consider the prospects for a reconciliatory future. Most importantly, creative solutions to overcome the potentially tragic consequences facing the people of Myanmar, arising either from the continuation of sanctions or other factors, must begin with an attempt to understand the forces responsible for bringing Myanmar to its current predicament.

However, a detailed rendition of Myanmar history since its independence, though invaluable in providing insight into the historical and political situation in Myanmar, is beyond the scope of this Article.⁵⁷

53. International Emergency Economic Powers Act, Pub. L. No. 95-223, tit. II, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701–1707 (2000)) [hereinafter IEEPA]; *see also* Ellicott, *supra* note 48, at 5.

54. IEEPA, §§ 1701, 1702(b).

55. Ellicott, *supra* note 48, at 5. For example, the most recent set of comprehensive sanctions against Myanmar were founded on the Burmese Freedom and Democracy Act of 2003. *Id.*

56. PREEG, *supra* note 28, at 111–46.

57. *See supra* note 10 and accompanying text. For a brief overview of Myanmar history, see Robert H. Taylor, *Pathways to the Present*, in MYANMAR: BEYOND POLITICS TO SOCIETAL IMPERATIVES I (Kyaw Yin Hlaing, Robert H. Taylor, and Tin Maung Maung Than eds., 2005) [hereinafter Taylor, *Pathways*]. For a more detailed analysis of Myanmar history, see D.G.E. HALL,

Instead, the Article highlights the major events that have shaped Myanmar since its independence, the role of the military in Myanmar politics, and the prospects for a democratic future in Myanmar. This brief snapshot of the political events in Myanmar will help to facilitate an understanding of human rights in Myanmar during the pro-democracy uprisings of 1988 and its aftermath. Then the Article measures the U.S. response to human rights inadequacies in Myanmar against international, regional, and country-specific responses in an attempt to further determine their exact contours and effectiveness. Only then can we implement the most effective means to help the people of Myanmar “to make a transition from an isolated and highly repressive military regime toward the beginnings of a market-oriented democracy.”⁵⁸

A. *A Brief Perspective on Myanmar*

Two developments define modern Myanmar: (1) the inability to resolve political and economic challenges faced at the time of independence, and (2) the rise of the military (the Tatmadaw) from the civil chaos as a state-building institution that forcefully asserts the power of the central state. Robert Taylor, a Myanmar scholar, argues that Myanmar has tried tragically to fit a myriad of policy prescriptions, “encapsulated in the most popular ideology of the day” to tackle its many societal challenges.⁵⁹ Not only did these popularisms for change fail to

BURMA (1950); MAUNG HTIN AUNG, *THE STRICKEN PEACOCK: ANGLO-BURMESE RELATIONS 1752–1948* (1965); DONALD SMITH, *RELIGION AND POLITICS IN BURMA* (1965); JOHN F. CADY, *A HISTORY OF MODERN BURMA* (1958); JOSEF SILVERSTEIN, *BURMA: MILITARY RULE AND THE POLITICS OF STAGNATION* (1977); ROBERT H. TAYLOR, *THE STATE IN BURMA* (1987); THANT MYINT-U, *THE MAKING OF MODERN BURMA* (2001); and THANT MYINT-U, *THE RIVER OF LOST FOOTSTEPS* (2006).

58. PREGG, *supra* note 28, at 111. It is hard to predict with reasonable certainty the type of civilian rule Myanmar will enjoy in the future or when this change will begin. However, most international critics agree that a transition toward anything resembling a democratic civilian rule will take time because Myanmar must first address many complex and critical issues that have been neglected during the past sixty years. See Taylor, *Pathways*, *supra* note 57, at 1 (“The issues which today concern the citizens of Myanmar are rooted in the country’s complex and often contested institutions and history. Those who perceive their solutions as simple, and to be solved quickly by the mere introduction of democratically elected civilian rule, are in danger of deluding themselves. Without attempting to understand how Myanmar came to its current condition, simplistically proffered recipes for change, democratic or authoritarian, are as likely to result in failure as success.”).

59. Taylor, *Pathways*, *supra* note 57, at 1 (“Indeed, it can be argued that [Myanmar’s] condition now is the result of often well-meaning but ultimately foolhardy attempts to apply currently popular political solutions, encapsulated in the most popular ideology of the day, to Myanmar’s myriad societal imperatives. ‘Nationalism’, ‘socialism’, and ‘autarky’, just as ‘federalism’, ‘autonomy’, and ‘centralization’, have all had their day as policy prescriptions in post-colonial Myanmar Those that have come to be implemented have often persisted long after they demonstrated their inappropriateness.”).

resolve the critical issues of the past, but they also lingered beyond their usefulness and left a legacy of stasis and mismanagement that threatens to derail future prospects for change.⁶⁰ It is critical that new approaches to solve present day societal problems in Myanmar tackle, understand, and overcome political and economic challenges of the past.

Likewise, any solution leading to political and civil change in Myanmar must take into account the embedded role of the Tatmadaw in Myanmar politics. Mary Callahan argues that warfare and civil strife in postcolonial Myanmar created conditions under which the Tatmadaw secured its authority over nonmilitary affairs and consolidated its stranglehold over the power of the central state.⁶¹ The Tatmadaw's paternalistic attitude in managing the country was fueled by its distrust of foreign elements, reaction to threats against national security, and constant struggle for national unity. Conditioned by their education and experience to be "war fighters who are not adept at politics," the generals running the regime, unlike civilian politicians who are accountable to the public, will choose to defy international condemnation despite the costs involved.⁶²

Proper efficacy analysis of the U.S. unilateral sanctions must actively incorporate factors that have shaped Myanmar's current condition and political life. To this end, historical and political events giving rise to Myanmar's current situation are classified into three periods. Immediately following its independence from the British Empire, Myanmar's political landscape was marked by a brief experiment with participatory governance and democratic rule. This initial period was followed by twenty-six years of economic failure and self-imposed isolation under the direction of the Burma Socialist Program Party (BSPP). Most recently, the military junta in power today has been promising to make a transition to a market-oriented democracy since the crackdown of the pro-democracy movement nearly two decades ago.

60. *Id.* at 25 ("[Myanmar] is the only major country which appears nearly six decades after independence not to have yet resolved the consequences of its past in order to build a more prosperous and open society for its people. The legacy of civil war, separatism, ideological conflicts, socialism, underinvestment, inadequate infrastructure, and other consequences of an overemphasis on security have created a poverty stricken society in crisis in terms of health and educational provision.").

61. MARY P. CALLAHAN, MAKING ENEMIES: WAR AND STATE BUILDING IN BURMA, 2, 173 (1999) [hereinafter CALLAHAN, MAKING ENEMIES].

62. *Id.* at 2 ("[T]he tatmadaw is not a 'political movement in military garb.' Instead, the soldiers . . . as well as the generals running the regime over the last several decades, are war fighters who are not adept at politics. But they are war fighters, first and foremost . . . Unless seen in the light of its war-fighting focus, the Burmese tatmadaw looks like an incomparably efficient team of power-hungry, illiterate, shameless, vicious lunatics.").

1. 1948–1962: Nationalism and Roots of Democracy

Myanmar gained its independence from British colonial rule on January 4, 1948, and then began its initial experiment with parliamentary government. However, General Aung San, who was the unquestioned leader of the independence movement, an astute political strategist, and the father of both the Myanmar Tatmadaw and Daw Aung San Suu Kyi, was assassinated prior to Myanmar's independence.⁶³ Contemporary pro-democracy activists label this period from 1948 to 1962 (excluding the military caretaker government from 1958 to 1960) as Myanmar's "democratic era."⁶⁴ According to this view, the 1950s represented Myanmar's period of constitutionalism, civilian rule, contested elections, and parliamentary process.⁶⁵ Supporters of the authoritarian rule, on the other hand, insist that the 1950s was a period of internal instability, failed economic policies, corruption, and widespread anarchy.⁶⁶

The Anti-Fascist People's Freedom League (AFPFL) (the former wartime resistance organization turned political party led by Prime Minister U Nu), controlled the political arena and was victorious in the parliamentary elections of 1947, 1951, and 1956.⁶⁷ The collapse of the AFPFL produced a military caretaker government between 1958 and 1960, which culminated in U Nu's faction winning the 1960 elections over the military-supported faction.⁶⁸ More importantly, the military rose from the chaos of mutinies and defections, separatist movements by various ethnic groups, and the insurgency movement of the Burmese Communist Party (BCP) to become a dominant political force.⁶⁹ Blaming the elected

63. General Aung San, the leader of the famed "Thirty Comrades" and President of the Anti-Fascist People's Freedom League (AFPFL), is generally considered as the person who held together various nationalistic elements into a single state. He was assassinated during an executive council meeting on July 19, 1947, together with six other cabinet members and two bodyguards. For additional information on General Aung San, see MAUNG MAUNG, *AUNG SAN OF BURMA* (1962); AUNG SAN SUU KYI, *AUNG SAN OF BURMA: A BIOGRAPHICAL PORTRAIT BY HIS DAUGHTER* (2d ed. 1995).

64. For a detailed account of Burmese politics in the 1950s, see Mary P. Callahan, *On Time Warps and Warped Time: Lessons from Burma's "Democratic Era,"* in *BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE* 49 (Robert I. Rotberg ed., 1998) [hereinafter Callahan, *Time Warps*]; see also U NU, *TOWARDS PEACE AND DEMOCRACY* (1949) (selected translated speeches from the 1940s of then Burmese Prime Minister Hon'ble Thakin Nu); U NU, *FROM PEACE TO STABILITY* (1951); U NU, *BURMA LOOKS AHEAD* (1953); U NU, *FORWARD WITH THE PEOPLE* (1955).

65. Callahan, *Time Warps*, *supra* note 64, at 57–58.

66. *Id.* at 58.

67. *Id.* at 51; see HUGH TINKER, *THE UNION OF BURMA: A STUDY OF THE FIRST YEARS OF INDEPENDENCE* 18, 62 (1967); see also U SAN NYEIN & MYINT KYI, *MYANMAR POLITICS FROM 1958–1962* (1991) (in Burmese).

68. See PREEG, *supra* note 28, at 112; see also Callahan, *Time Warps*, *supra* note 64, at 51.

69. Callahan, *Time Warps*, *supra* note 64, at 59–60; see also Callahan, *Making Enemies*, *supra*

government's inability to deal with internal security threats, the Revolutionary Council headed by General Ne Win usurped power on March 2, 1962, and established the Socialist Republic of the Union of Myanmar.⁷⁰

2. 1962–1988: *The Burmese Way of Socialism*

With the goal of creating a unified and strong Myanmar, U Ne Win's brand of socialism was perpetuated through a one party system—the BSPP.⁷¹ Like many other newly independent nations that discarded their neo-colonial underpinnings of Western capitalism, Myanmar, under the control of the BSPP, incorporated socialist ideas and values into its political ideology, though cloaked in the language of Buddhism and references to its pre-colonial heritage.⁷² The BSPP argued that ending disunity among various ethnic groups and developing a national culture based on traditional Burmese values and ideals would lead to the creation of a unified and strong Myanmar.⁷³ The BSPP further insisted that only a unified and strong Myanmar would be able to resist alien ideas and values from abroad, which were destroying the fabric of the Burmese culture.⁷⁴ To this end, Myanmar isolated itself from the international community for twenty-six years.

The Burmese way of socialism was a tragic failure. Although considerable success was achieved in suppressing the insurgency by ethnic minorities and the BCP, the shortcomings far outweighed these triumphs.⁷⁵ The self-imposed isolation from the world community had cut off international trade as well as other social contacts with the outside world.⁷⁶

note 61, at 114–71.

70. Taylor, *Pathways*, *supra* note 57, at 16–21.

71. *Id.*

72. For an account of Burmese political culture, see Josef Silverstein, *The Evolution and Salience of Myanmar's National Political Culture*, in BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE 11 (Robert I. Rothberg ed., 1998) [hereinafter Silverstein, *Evolution*]. For a discussion of the incorporation of Buddhism into the Burmese version of socialism and a retracing of the roots of the political conflict in Myanmar, see R. H. Taylor, *Political Values and Political Conflict in Myanmar*, in BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE 33 (Robert I. Rothberg ed., 1998) [hereinafter Taylor, *Political Values*].

73. For the basis of these ideas, see the basic ideological text of the BURMA SOCIALIST PROGRAM PARTY (BSPP), *THE SYSTEM OF THE CORRELATION OF MAN AND HIS ENVIRONMENT: THE PHILOSOPHY OF THE BURMA SOCIALIST PROGRAMME PARTY* (1963), available at <http://www.burmalibrary.org/docs/System-of-correlation.htm>.

74. *Id.*

75. See PREEG, *supra* note 28, at 113.

76. Other detrimental aspects of the BSPP's isolationist policies include the exodus of educated Burmese from the country and the stoppage of the flow of ideas that accompany trade. For additional

Incompetent officials ran the newly created state enterprises to the ground, while economic mismanagement, inflation, and demonetization left the country's economy in ruins.⁷⁷ Even more, corruption and cronyism had slowly chipped away at the Burmese spirit and character. By 1987, Myanmar was declared a least-developed country by the United Nations at its own request.⁷⁸ The decreased standard of living and the government's failure to provide necessary infrastructure, goods, and social services compelled the normally docile population to stage peaceful demonstrations during the long summer of 1988.

3. 1988–Present: Clash of Ideologies and Political Impasse

The events that occurred between March and September of 1988 refocused the world's attention on Myanmar. On August 8, 1988, students, monks, government employees, and civilians from all walks of life took to the streets and peacefully marched for change. They were gunned down. As many as three thousand people were killed on the streets; many more would later die in prisons and at the border regions from malaria.⁷⁹ During the pro-democracy demonstrations of 1988, Daw Aung San Suu Kyi, the daughter of General Aung San, emerged as the figurehead and voice of the democratic movement. However, on September 18, 1988, the Myanmar Tatmadaw, later named the State Law and Order Restoration Council (SLORC),⁸⁰ violently suppressed the pro-democracy movement, put Daw Aung San Suu Kyi under house arrest, imposed martial law, and assumed command.⁸¹

Faced with both domestic and world-wide criticism of its violent usurpation of power, SLORC promised to hold national elections to reconstitute the general assembly as the first step in restoring democracy.⁸²

information on the linkage between flow of trade and exchange of ideas, see DANI RODRIK, *THE NEW GLOBAL ECONOMY AND THE DEVELOPING COUNTRIES: MAKING OPENNESS WORK* (1999).

77. PREGG, *supra* note 28, at 113.

78. John B. Haseman, *Burma in 1987: Change in the Air?*, 28 *ASIAN SURVEY* 223, 223–28 (1988).

79. It is almost impossible to correctly determine the true extent of the crackdown and estimates vary depending on the political viewpoint one is attempting to advance.

80. At the time when it installed itself in power, the military junta was known as the SLORC. In December 1997, the SLORC was dissolved and the State Peace and the Development Council (SPDC) was created, composed of many of the same generals. I will use SLORC and SPDC interchangeably in the Article because they are one and the same.

81. Recycling the justifications of the 1962 coup, the military junta declared that the nation was confronted with political disunity, threats to national sovereignty, and the dissolution of the state. For a more detailed account, see Taylor, *Pathways*, *supra* note 57, at 21–25.

82. *Id.* at 22.

However, SLORC nullified the results of the 1990 national election, in which Daw Aung San Suu Kyi's opposition party, the National League for Democracy (NLD), overwhelmingly defeated the military-backed National Unity Party (NUP) by winning over sixty percent of the vote and 392 of the 485 assembly seats, compared to ten for the NUP.⁸³

The political impasse between the NLD and SLORC stems from a clash of deeply rooted values—modern political ideology versus traditional values of the Burmese society. Daw Aung San Suu Kyi and the NLD called for democracy, freedom, and a government of law.⁸⁴ The military leaders, however, have been “conditioned by education and career experience to reject such values as not only foreign, but actually subversive of the nation they have pledged to defend.”⁸⁵

The enduring military dominance in Myanmar politics has resulted in a dual system of governance in Myanmar; “[o]ne limp structure of governance lay in the civilian realm, the other more robust structure lay in the military bureaucracy.”⁸⁶ Those who are affiliated with the military enjoy a different set of privileges than those who are not.⁸⁷ Daw Aung San Suu Kyi has been placed under house arrest numerous times and has remained in captivity since May 2003.⁸⁸ Many other pro-democracy advocates associated with the NLD have been detained as well.⁸⁹ There have also been reports of the military junta's widespread use of forced labor (most notoriously during the Yadana Natural Gas Pipeline Project), religious persecutions against persons of Islamic faith, and forcible relocation of civilians to accommodate various construction projects.⁹⁰

83. See PREEG, *supra* note 28, at 114; see also Silverstein, *Evolution*, *supra* note 72, at 25–26.

84. Taylor, *Pathways*, *supra* note 57, at 22.

85. Taylor, *Political Values*, *supra* note 72, at 39.

86. Callahan, *Making Enemies*, *supra* note 61, at 11.

87. While living in Myanmar, the author observed how wealth has become concentrated tightly in the hands of the ruling military regime, whose members monopolize the benefits accrued from foreign trade and investment. In addition, the public education system is neglected and frequent closures of universities deprive the younger generation of much needed higher education; in contrast, the military colleges remain open throughout this time. Lastly, government spending is exclusively concentrated on strengthening military infrastructure rather than on other public programs.

88. Daw Aung San Suu Kyi has been placed under house arrest on three separate occasions: from September 1989 to July 1995, from September 2000 to May 2002, and most recently since September 2003. See Daw Aung San Suu Kyi's Pages, *Daw Aung San Suu Kyi: Biography*, http://www.dassk.com/categories.php?category_no=5 (click on hyperlinks for Parts 1–3, 6, 9).

89. For the latest reports on detainees in Myanmar, see HUMAN RIGHTS WATCH, CRACKDOWN: REPRESSION OF THE 2007 POPULAR PROTESTS IN BURMA (2007), available at <http://hrw.org/reports/2007/burma1207/burma1207web.pdf> (last visited June 21, 2008).

90. Cleveland, *supra* note 49, at 8–9.

B. Responses to Human Rights Conditions in Myanmar

The crackdown on the 1988 pro-democracy uprisings, the refusal to hand over power after the 1990 national elections, the continuing political impasse, and reports of the government's participation in widespread human rights abuses have all garnered international condemnation of the military regime in Myanmar. Mistakenly hailed as the "South Africa of the 1990s," the transnational campaign to improve human rights conditions in Myanmar has come from international institutions, regional trade associations, non-governmental organizations, and individual nations.⁹¹ These transnational responses range from denunciations by various United Nations bodies to complete trade withdrawals and consumer boycotts under the U.S. unilateral sanctions policies.⁹²

1. International Institutional Responses

International institutional responses against the military junta in Myanmar have come in the form of denunciations by United Nations bodies, frequent publicity for the opposition's efforts and achievements, suspension of economic aid and financial support, and, in some cases, outright expulsion from international organizations.⁹³ The U.N. General Assembly and the Human Rights Commission have repeatedly adopted annual resolutions condemning Myanmar's human rights practices, with the Human Rights Commission having a special rapporteur appointed to Myanmar since 1992.⁹⁴ In 1991, Daw Aung San Suu Kyi was awarded the Nobel Peace Prize, which galvanized public support for her struggle for democracy and brought substantial international attention to the Myanmar crisis.⁹⁵ The World Bank has suspended economic aid to Myanmar since

91. For a brief explanation of why hailing Myanmar as the "South Africa of the 1990s" is misleading, see *infra* note 151 and accompanying text. For a detailed discussion on the South Africa comparison, see INT'L CRISIS GROUP (ICG), MYANMAR: SANCTIONS, ENGAGEMENT OR ANOTHER WAY FORWARD?, ICG ASIA REPORT NO. 78, 20–21 (2004), available at <http://www.crisisgroup.org/home/index.cfm?id=2677> (last visited May 3, 2008) [hereinafter ICG, SANCTIONS].

92. See *infra* notes 94–112 and accompanying text.

93. See *infra* notes 94–97 and accompanying text.

94. See, e.g., Situation of Human Rights in Myanmar, G.A. Res. 56/231, U.N. GAOR, 56th Sess., 92d mtg., U.N. Doc. A/RES/56/231 (Feb. 28, 2002); see also Situation of Human Rights in Myanmar, Comm'n on Human Rights Res. 2003/12, U.N. ESCOR, 51st mtg., U.N. Doc. E/CN.4/RES/2003/12 (Apr. 16, 2003). The U.N. documents relating to Myanmar's human rights conditions are available online at <http://www.unhchr.ch/html/menu2/7/a/mmya.htm>.

95. A list of Nobel Peace Prize laureates and a brief biography of Daw Aung San Suu Kyi is available at http://nobelprize.org/nobel_prizes/peace/laureates/ (for Daw Aung San Suu Kyi's biography, follow "Daw Aung San Suu Kyi" hyperlink; then follow "Biography" hyperlink) (last visited June 2, 2008).

the crackdown on the democratic uprisings and has used incremental restoration of aid as leverage to improve political and human rights conditions in Myanmar.⁹⁶ Additionally, the International Labour Organization (ILO), after investigating the country's forced labor practices and after the regime's failure to comply with the ILO's recommendations, effectively expelled Myanmar from the organization.⁹⁷

2. Regional Responses

Collective responses from regional trade associations vary greatly between Western democracies and Myanmar's Asian neighbors. Following the U.S. lead, the European Union has taken extensive diplomatic and economic action against Myanmar, though not nearly as comprehensive as the U.S. unilateral practice.⁹⁸ The EU has imposed an arms embargo, suspended bilateral aid other than humanitarian aid, publicized the opposition's efforts, voiced its own human rights concerns, declined entry visas to Burmese government officials, and suspended Generalized System of Preferences (GSP) benefits for Burmese industrial and agricultural exports to the European Union.⁹⁹

In stark contrast, the Association of Southeast Asian Nations (ASEAN) has pursued a policy of constructive engagement with the military regime "in support of a gradual process of democratization, but with greater emphasis on economic reforms that over time will presumably foster

96. See PREEG, *supra* note 28, at 117 ("[T]he cutoff of almost all economic aid and financial support from the World Bank, the Asian Development Bank, and bilateral aid donors . . . deprives [Myanmar] of up to a billion dollars per year in project assistance."); see also Cleveland, *supra* note 49, at 13. Additional information relating to the World Bank's assessment of Myanmar and its involvement in the country is available online at <http://www.worldbank.org/mm>.

97. See, e.g., Int'l Labour Org. [ILO], *Resolution on the Widespread Use of Forced Labour in Myanmar*, 87th Sess. (June 1999), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-myan.htm>; see also Press Release, Int'l Labour Org. [ILO], ILO Governing Body Opens the Way for Unprecedented Action Against Forced Labour in Myanmar, ILO/00/44 (Nov. 17, 2000), available at http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_007818/index.htm (last visited May 3, 2008). In November of 2000, the ILO urged its 175 member countries to impose sanctions against Myanmar for its poor track record on forced labor. In response, the military junta allowed the ILO to open an office in Yangon in 2002. A year later, the ILO withdrew its threat after agreeing on a plan of action with the government aimed towards complete elimination of forced labor in Myanmar. *Id.* Press Release, Int'l Labour Org. [ILO], ILO, Myanmar Agree on Facilitator to Help End Forced Labour, ILO/03/21 (May 14, 2003), available at http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang-en/WCMS_005271/index.htm (last visited May 3, 2008).

98. Cleveland, *supra* note 49, at 14–15 (detailing the European Union's response to human rights conditions in Myanmar).

99. See The European Union, *The EU's Relations with Myanmar (Burma)*, available at http://ec.europa.eu/external_relations/myanmar/intro/index.htm (last visited May 3, 2008).

democratic political change as well.”¹⁰⁰ While safeguarding its own economic interests in Myanmar from the growing Chinese influence, ASEAN argued that the U.S. unilateral sanctions against Myanmar could precipitate economic collapse and political violence in Myanmar, leaving ASEAN to pick up the pieces.¹⁰¹ In 1997, ASEAN admitted Myanmar as a member in the face of vehement criticism from the United States and European Union.¹⁰²

China has become Myanmar’s most important trading partner, foreign investor, and arms supplier since the early 1990s.¹⁰³ The uncontrolled flow of Chinese nationals and goods into northern Myanmar is unmistakable in the recent transformation of Mandalay, the second largest city and capital of middle Myanmar. China’s desire to expand its economic and strategic influence into Myanmar is linked to its policy of promoting economic growth in its southwestern provinces, which have lagged behind the booming coastal provinces.¹⁰⁴ In addition, China’s interaction with the military junta includes official state visits, military cooperation between the two nations, sale of armaments, and bilateral agreements to build roads, bridges, airports, and other infrastructure developments—all at “friendship prices.”¹⁰⁵

3. *The U.S. Response*

The United States has played a leading role in focusing international attention on Myanmar and garnering transnational condemnation against the human rights conditions there. However, the United States’ blind

100. PREEG, *supra* note 28, at 117; *see also* Cleveland, *supra* note 49, at 15 (detailing the ASEAN’s response to human rights conditions in Myanmar).

101. PREEG, *supra* note 28, at 118.

102. For an overview of Myanmar’s foreign relations with ASEAN, see N. Ganesan, *Myanmar’s Foreign Relations: Reaching Out to the World*, in MYANMAR: BEYOND POLITICS TO SOCIETAL IMPERATIVES 30, 44–47 (Kyaw Yin Hlaing, Robert H. Taylor, & Tin Maung Maung Than eds., 2005) [hereinafter Ganesan, *Foreign Relations*].

103. *Id.* at 35–38.

104. Two objectives stand out when analyzing Myanmar’s strategic importance to China: first, penetration into Myanmar would allow China to link up its underdeveloped southwestern provinces with the fast growing economies of Southeast and South Asia; second, an overland route to a deep sea port in Myanmar would open an Indian Ocean trade route and allow China to export cheap consumer goods to surrounding countries. For a detailed account of Myanmar’s strategic role in regional security, see J. Mohan Malik, *Myanmar’s Role in Regional Security—Pawn or Pivot?*, in BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE 109 (Robert I. Rotberg ed., 1998).

105. PREEG, *supra* note 28, at 118–19; *see also* Cleveland, *supra* note 49, at 17–18 (predicting “China’s energetic pursuit of trade and investment in Myanmar may be the single most significant impediment to the success of the transnational sanctions efforts”) (citing HUMAN RIGHTS WATCH, WORLD REPORT 1995, 135; HUMAN RIGHTS WATCH, WORLD REPORT 1996, 133).

resolve to use only comprehensive sanctions against the military junta might delay the democratization process in the long run and cause needless suffering among the Burmese people in the meantime. Prior to 1996, the United States suspended anti-narcotics assistance and economic aid to Myanmar, indefinitely discontinued Myanmar's preferred trading status, imposed an arms embargo, limited diplomatic relations with Myanmar by declining to appoint an ambassador, and encouraged other nations to do the same.¹⁰⁶ In addition, several state and local governments—most notably Massachusetts—adopted selective purchasing laws against Myanmar, which prohibit them from entering into procurement contracts with any company that is currently doing business with Myanmar.¹⁰⁷

In 1996, Congress enacted the Federal Burma Statute, which imposed a variety of mandatory sanctions against Myanmar for human rights violations and authorized the president to bar new investment in Myanmar by U.S. nationals if the president found either specified acts against the person of Daw Aung San Suu Kyi or “large-scale repression of or violence against the democratic opposition.”¹⁰⁸ In May 1997, President Clinton declared a national emergency, as required by the IEEPA, and invoked sanctions.¹⁰⁹ The most recent U.S. sanctions against Myanmar, however, are based on the Burmese Freedom and Democracy Act of 2003, enacted in response to the alleged SPDC-instigated attack on Daw Aung San Suu Kyi and her supporters in May of 2003.¹¹⁰ The President may lift the

106. For a detailed description of the U.S. measures taken against Myanmar between 1988 and 1996, see Cleveland, *supra* note 49, at 9–11 (citing several reports from the Human Rights Watch, available at http://hrw.org/doc/?t=asia_pub&c=burma (last visited Apr. 3, 2008)).

107. See, e.g., Mass. Gen. Laws Ann. ch. 7, § 22 H(a), J(a) (West 2000) (“A state agency, a state authority, the house of representatives or the state senate may not procure goods or services from . . . any persons currently doing business with Myanmar.”). *But see* Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) (invalidating the Massachusetts Burma Statute by upholding the First Circuit’s determination that the Massachusetts law was unconstitutional because it was preempted by the Federal Myanmar sanctions and thus was in violation of the Supremacy Clause. However, the Court did not reach a decision on whether the Massachusetts law infringed on the Federal Government’s authority to conduct foreign affairs, or whether it violated the dormant Foreign Commerce Clause, thus leaving unanswered the question of whether local and state sanctions laws could be held constitutional in the absence of federal legislation preempting.).

108. 1997 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 (1996).

109. Exec. Order No. 13,047, 3 C.F.R. 202 (1998), *reprinted in* 50 U.S.C. § 1701 (2000). It is not clear whether President Clinton derived his authority to impose sanctions from the Federal Burma Statute or the IEEPA because the former did not provide specific authority for the President to implement sanctions. For a detailed account of the events leading to the enactment of the Federal Burma Statute and eventual imposition of sanctions by President Clinton, see PREEG, *supra* note 28, at 119–26.

110. Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, § 2(4), 117 Stat. 864,

sanctions only upon a finding that the SPDC has made measurable progress toward implementing a democratic government, including releasing all political prisoners, allowing freedom of speech and the press, allowing freedom of association, and permitting the peaceful exercise of religion.¹¹¹ Lastly, President Bush further tightened U.S. unilateral sanctions in the immediate aftermath of the brutal crackdown of the protests in September of 2007.¹¹²

III. POLITICAL, ECONOMIC, AND SOCIAL ASSESSMENT OF THE EFFECTIVENESS OF THE U.S. UNILATERAL SANCTIONS AGAINST MYANMAR

A blanket statement that unilateral sanctions are ineffective tools of foreign policy is overly simplistic and often misleading. Such a statement fails to appreciate specific characteristics of a particular sanctions episode, such as when and how the sanctions are imposed, to what ends, what the unexpected successes and the unintended consequences are, and what the reasonable expectations should be.¹¹³ Furthermore, unilateral sanctions are not ineffective per se; there is nothing intrinsically suggestive of their inefficacy. Unilateral sanctions are often effective vehicles for change; whether the change effected is that which is desired is a different matter, however. The evaluation of efficacy is necessary only when unilateral sanctions are used as the chosen means, out of many available, to achieve some specified policy end.¹¹⁴

Closely related to the question of efficacy is the clear identification of the desired ends. Because efficacy is an assessment of the causal relationship between the means and the ends, a different set of ends gives rise to a different set of criteria by which the means are judged, which in turn affects the overall evaluation of efficacy. However, the malleable nature of the political goals as well as the ambiguity in identifying them

864 (2003) (codified at 50 U.S.C. § 1701 (2000)).

111. *Id.* § 3(3)(B), 117 Stat. at 864.

112. *See* Exec. Order No. 13,448, 72 Fed. Reg. 60,223 (Oct. 23, 2007) (granting the Treasury Department discretion to block property and prohibit certain transactions of the supporters of the Myanmar military regime); *see also* Exe. Order No. 13,464, 73 Fed. Reg. 24,491 (May 2, 2008).

113. There is no magic formula to accurately predict the exact outcome of a particular sanctions episode. Even the general theories extrapolated from empirical data of previous sanctions episodes serve only as general guideposts. Because no two sanctions episodes are exactly alike, each episode must be analyzed on a case by case basis and in a country-specific manner. *See* HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 92 (“Idiosyncratic influences are often at play. Human personalities and plain luck may well determine the outcome of a sanctions episode.”).

114. An alternative question to ask, for foreign policy purposes, is whether unilateral sanctions are the most effective means to promote certain foreign policy ends.

correctly add an additional layer of complexity to the debate.¹¹⁵ Thus, it is difficult to assess the efficacy of unilateral sanctions if the goals are not well defined, or if they change depending on the circumstances. For example, the foreign policy goals of any unilateral sanctions episode can be categorized either broadly or narrowly, and the resulting ends could range from promotion of transcendent goals, such as human rights and democracy, to promotion of specific goals, such as freedom of press.¹¹⁶ It is also important to differentiate between the stated and unstated goals and to determine which goals hold more sway.¹¹⁷ Accounting for the role that partial achievements of certain objectives play in the overall assessment of the effectiveness of the whole sanctions episode is also important, though difficult.

In this Part, I assess the efficacy of the U.S. comprehensive sanctions against Myanmar along political and economic lines. I start with the political and economic framework developed in the Hufbauer empirical study.¹¹⁸ I then incorporate the social and religious aspects of the Burmese culture and apply the conclusions drawn in the Hufbauer study to the Burmese context.

The U.S. unilateral sanctions against Myanmar will not succeed because they were ill-conceived, and their foreign policy goals are unclear and too lofty. Although promotion of human rights and democracy is needed in Myanmar, trying to accomplish this task through unilateral sanctions is overly ambitious, especially without a thorough consideration and understanding of the internal historical, political, and social landscape of Myanmar.

Second, our Western allies are reluctant to follow the U.S. lead in implementing a policy for Myanmar, especially given the comprehensive nature of U.S. unilateral sanctions. Likewise, the unilateral sanctions have alienated U.S. allies in the region and strengthened China's hand. Third, Myanmar's Asian neighbors undermine the effectiveness of the U.S.

115. The political, economic, legal, social, and cultural variables used in the determination of the efficacy of sanctions could have different importance and weight depending on the nature of the ends identified and chosen.

116. A possible subdivision of goals in the above example is limited to a sanctions episode involving a major policy change. Professor Hufbauer and colleagues employ a broader classification of foreign policy goals: to dissuade military adventures, impair military potential, destabilize foreign governments, and pursue both modest as well as major policy changes in target countries. *See supra* notes 3, 40–43 and accompanying text.

117. For example, a sanctions episode with a stated goal of promoting human rights and democracy in a target country might put more emphasis on an unstated goal of pleasing human rights activists in the sender country.

118. *See supra* note 13 and accompanying text.

unilateral sanctions through their continued—and in some cases increased—trade with the military regime. Fourth, the unilateral sanctions harm the United States' commercial and geopolitical interests. Last and perhaps most important, the U.S. sanctions deprive Myanmar's people of influential Western political ideas such as freedom, democracy, and human rights that normally accompany trade with the United States.

A. Political and Social Variables Implicated in the Determination of the Efficacy of the Unilateral Sanctions

Political and social variables, both domestic and international, influence the outcome of a given sanctions episode in a sanctions-specific manner. As such, a careful analysis of these factors is critical before taking the bold step of imposing sanctions.¹¹⁹ Political variables that are traditionally implicated when assessing the effectiveness of unilateral sanctions include the foreign policy objective(s) sought by the sanctions, political support for the policy, duration of the sanctions, extent of international cooperation in imposing sanctions, presence of international assistance to the target country, political stability and economic health of a target country, and prior relations between sender and target.¹²⁰

1. The U.S. Comprehensive Sanctions Against Myanmar Will Not Succeed Because Policy Objectives Are Unclear and Promotion of Human Rights and Democracy in Myanmar Will Ultimately Require the Military Junta to Relinquish Power

Success or failure of a particular sanctions episode depends on the nature of the foreign policy goal sought—the loftier the foreign policy goal, the less likely the sanctions will succeed.¹²¹ The Hufbauer study also stresses that sanctions are not particularly effective in bringing about major policy changes in the target country, and that sender countries need a near monopoly over trading relations with the target country to have a

119. Not only is it important to carefully analyze the political, economic, and social variables that are traditionally implicated in the efficacy assessment at the outset of each sanctions episode, but it is also critical to reanalyze these factors while the sanctions are in place, when the sanctions are clearly ineffective, or when the sanctions are up for renewal.

120. HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 40.

121. *Id.* at 93 (“[T]he success rate importantly depends on the type of policy or governmental change sought. Episodes involving destabilization succeeded in half the cases, usually against target countries that were small and shaky. Cases involving modest goals and attempts to disrupt minor military adventures were successful about a third of the time. Efforts to impair a foreign adversary’s military potential, or otherwise to change its policies in a major way, succeeded only infrequently.”).

remote chance of the sanctions succeeding.¹²² Furthermore, sanctions that are imposed primarily in response to domestic political pressures and to demonstrate moral outrage—without any intention of promoting real change in the target country’s behavior—are sanctions in appearance only and have no real positive effect.

The goals expressed in the Burmese Freedom and Democracy Act of 2003, which form the basis for the current U.S. comprehensive sanctions against Myanmar, are ubiquitous and, in some cases, conflicting. As a result, it is difficult to pinpoint the primary purpose behind the sanctions.¹²³ The Preamble of the Burmese Freedom and Democracy Act of 2003 lists a number of overarching goals: “[t]o sanction the ruling Burmese military junta [the SPDC], to strengthen Myanmar’s democratic forces and support and recognize the National League [for] Democracy [NLD] as the legitimate representative of the Myanmar people.”¹²⁴ The goals expressed in the Preamble are supplemented by additional conditions that must be met before the sanctions are disengaged: that the SPDC make “substantial and measurable progress to end violations of internationally recognized human rights . . . [and implement] a democratic government [by] releasing all political prisoners; allowing freedom of speech and the press; allowing freedom of association; permitting the peaceful exercise of religion; and [agreeing] . . . on the transfer of power to a civilian government”¹²⁵

It is unlikely that the U.S. comprehensive sanctions against Myanmar will succeed in achieving the goals articulated in the Burmese Freedom and Democracy Act of 2003. First, the “substantial and measurable progress” standard required for lifting the sanctions is vague, inflexible in its application, and unlikely to be attained given the political situation in Myanmar. Second, by publicly recognizing the NLD as the legitimate representative of the Myanmar people, the U.S. government has alienated the moderate faction within the military junta and further strengthened the position of the hardliners. Third, the often repeated rhetoric of promoting democracy and protecting human rights in Myanmar was intended only to

122. *Id.* at 94–95.

123. The goals sought by the U.S. comprehensive sanctions against Myanmar could be a combination of any of the following: to change the military regime’s policies on human rights and democracy, to inflict economic hardship on Myanmar, to punish the leaders of the military regime, to induce a regime change, to legitimize Daw Aung San Suu Kyi and the NLD, to rally support for democratic forces in Myanmar, or to make human rights activists in the United States feel good.

124. Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, pmbll., 117 Stat. 864, 964 (2003) (codified at 50 U.S.C. § 1701 (2000)).

125. *Id.* § 3(3)(A)-(B), 117 Stat. at 866.

appease domestic pressures to take action. Last, the loftiness of the goals expressed in the Burmese Freedom and Democracy Act of 2003 boil down to a call for a regime change in Myanmar.¹²⁶ In response, the SPDC placed Daw Aung San Suu Kyi under house-arrest,¹²⁷ forced the NLD to exclude itself from the ongoing national conventions,¹²⁸ and ousted a moderate member of the junta (Prime Minister Khin Nyunt) in favor of an SPDC hardliner.¹²⁹

2. *Two Decades of Economic Coercion in Myanmar Without Significant Improvements in Human Rights Conditions Suggests Diminishing Prospects for Success*

Success in a particular sanctions episode is inversely proportional to the duration of the sanctions—the longer the sanctions remain in place, the less likely they are going to be successful.¹³⁰ The U.S. unilateral sanctions were imposed against Myanmar in three stages: the strategic “turning of the screws” (1) commenced with the suspension of economic aid immediately after the pro-democracy crackdown in 1988, (2) continued with the prohibition of new investment under the Federal Burma Statute in 1997, and (3) culminated in the imposition of comprehensive sanctions under the Burmese Freedom and Democracy Act of 2003.¹³¹ Two decades of economic pressure without meaningful improvements in Burmese human rights conditions suggest diminishing prospects for success since

126. It is highly unlikely that the military junta, which has never been accountable to the Myanmar people and has so far ruled Myanmar by force and through fear, would suddenly decide to step down in favor of a civilian government without any joint action from the international community.

127. For the most recent report on Daw Aung San Suu Kyi's continued detention, see *Burma Extends Suu Kyi's Detention*, BBC NEWS, May 25, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6691935.stm> (last visited May 3, 2008) (reporting the extension of Daw Aung San Suu Kyi's house arrest by one year).

128. For a criticism of the NLD's boycott of the national convention, see Yin Yin Myint, Editorial, *Wrong Vision for Myanmar*, WASH. POST, June 28, 2005, at A14.

129. For more information on the internal coup that removed Prime Minister Khin Nyunt, see Ellen Nakashima, *Burmese Military Rulers Force Out Prime Minister*, WASH. POST, Oct. 20, 2004, at A16. In an apparent bid by General Than Shwe to consolidate power, General Khin Nyunt was removed from power and replaced with Lt. General Soe Win, who is rumored to have instigated the attack on Daw Aung San Suu Kyi in May of 2003. *Id.* See also *Promulgation of Law Repealing National Intelligence Bureau Law and Dissolution of the National Intelligence Bureau*, THE NEW LIGHT OF MYANMAR, Oct. 23, 2004 [hereinafter NEW LIGHT OF MYANMAR, *Dissolution*], available at http://www.myanmar.gov.mm/NLM-2004/Oct04/enlm/Oct23_h1.html (reporting the abolishment of the National Intelligence Bureau, the source of General Khin Nyunt's power).

130. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 100–01.

131. See *supra* notes 106–10 and accompanying text.

“[a] heavy, slow hand invites both evasion and the mobilization of [anti-American] domestic opinion.”¹³²

The lengthy duration and incremental nature of the U.S. sanctions present the Myanmar government with a number of public relations opportunities. First, the Myanmar government has been able to shift the blame for its economic failures to the continuance of the U.S. sanctions. This deflection of criticism to the United States, coupled with a very public withdrawal of U.S. economic interests from Myanmar, is used by the Myanmar government to inspire anti-American nationalism.¹³³ Second, the prolonged duration of the sanctions has allowed the Myanmar government to carefully craft and implement mechanisms for evasion, aided especially by third-party commercial interests, which benefit from the exclusion of American companies.¹³⁴ Lastly, even though popular opinion in the United States welcomed the Burmese sanctions at the outset, public support for the sanctions has and will continue to dissipate in both countries the longer sanctions remain in place.

3. *Although the United States Is Able to Rally Its Western Allies to Join Its Unilateral Sanctions Efforts, It Is Unable to Persuade Myanmar’s Asian Trading Partners to Impose Economic Sanctions Against Myanmar*

Although much emphasis has been placed on achieving international cooperation, “[m]ore [i]s [n]ot [n]ecessarily [m]errier.”¹³⁵ Despite its many symbolic benefits,¹³⁶ international cooperation is often difficult to achieve and usually requires a compromise on sanction-related demands. Recent economic interdependence between nations, induced by globalization and technological advancement, has made coalition-forming for the sake of constructing trade barriers less desirable. In assessing the U.S. unilateral

132. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 100.

133. Prior to the imposition of import controls under the Burmese Freedom and Democracy Act of 2003, the U.S. textile companies formerly exempt under the Federal Burma Statute had already left Myanmar for Cambodia and other Southeast Asian countries because of power shortages. Nevertheless, the Myanmar government blamed the closing of these textile factories on the sanctions, diverting potential criticism against the government’s inability to provide electricity in most parts of the country. Confidential Interviews with Various Textile Manufacturers, in Myan. (on file with author).

134. See *supra* notes 104–05 and accompanying text.

135. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 95.

136. *Id.* at 96 (“[I]nternational cooperation may serve three useful functions: to increase the moral suasion of the sanction, to help isolate the target country from the global community psychologically as well as economically, and to preempt foreign backlash, thus minimizing corrosive friction within the alliance.”).

sanctions against Myanmar, the critical question is not the number of senders, but the identities of the senders and the non-senders and their respective present and future economic relationships with Myanmar.

The United States' inability to persuade many of Myanmar's key trading partners to help isolate Myanmar economically and psychologically from the global community limits the likelihood of success. To this day, the United States remains the only nation to impose comprehensive sanctions against Myanmar.¹³⁷ Although the European Union has partially joined the U.S. efforts,¹³⁸ Myanmar's Asian neighbors have continued their previous trading relationships with the military junta.¹³⁹ Unless China, Singapore, and Thailand—Myanmar's three largest trading partners—join the sanctions efforts, the U.S. comprehensive sanctions will serve only a symbolic role. Even more, by attempting to promote human rights and democracy in Myanmar through the imposition of unilateral sanctions, the United States has alienated its allies in the ASEAN and may have ultimately damaged its geopolitical interests in Asia.¹⁴⁰

4. *The Impact of the U.S. Comprehensive Sanctions Is Offset by Myanmar's Increased Trade with China, India, Thailand, and Its Other ASEAN Neighbors*

In contrast to the difficulties associated with obtaining international cooperation, international assistance the target country receives from its allies and neighbors often reduces the burden imposed by the sanctions.¹⁴¹ However, unlike the Cold War cases, in which assistance was provided to make a symbolic stand against the policy excesses of a rival power, today's version of assistance is fueled by geopolitical concerns, the economic need to fill the void left by the sanctions, and competition to gain market shares in the target country. International assistance to the military junta in Myanmar comes from its Asian neighbors as they compete to fill the void left by withdrawal of U.S. and European firms and is sustained by the geopolitical checks and balances between China, India, and the ASEAN member nations.

137. See *supra* notes 110–12 and accompanying text.

138. See *supra* notes 98–99 and accompanying text.

139. See *supra* notes 100–05 and accompanying text.

140. See Leon T. Hadar, *U.S. Sanctions Against Burma: A Failure on All Fronts*, 1 TRADE POLICY ANALYSIS 1, 6–8 (1998), available at <http://www.freetrade.org/node/62> (last visited May 3, 2008); see also PREEG, *supra* note 28, at 136.

141. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 45.

The impact of the U.S. comprehensive sanctions against Myanmar is reduced because Myanmar is able to rely on China, India, and its ASEAN neighbors to keep open alternative markets and financing sources. First, Myanmar's economic and political relationship with China has grown exponentially since the early 1990s; cross-border migration and increasing control of the economy by well financed Chinese traders is evident in and around Mandalay.¹⁴²

Second, in order to counterbalance the growing Chinese influence in the region, ASEAN has pursued a policy of constructive engagement with the Burmese regime against U.S. wishes.¹⁴³ As a result, China, Singapore, Thailand, and the rest of Myanmar's Asian neighbors account for more than ninety percent of Myanmar's imports.¹⁴⁴ Likewise, Thailand, India, and China have represented main destinations for Burmese goods since the imposition of U.S. import controls.¹⁴⁵

Third, market shares controlled by Myanmar's trading partners may be even greater than reported because a large percentage of Myanmar's cross-border trade with India, China, and Thailand is conducted outside the purview of official records. Unrecorded black-market trade in timber, gems, and goods between Myanmar and its neighbors is estimated to be in the billions.¹⁴⁶

Last, Myanmar may have developed new strategies to counteract the threat of more severe sanctions from the United States. Myanmar's exports to Thailand doubled between 2003 and 2004, despite a reduction in natural gas exports from Myanmar, possibly making up for the loss of textile exports to the U.S. market.¹⁴⁷ The reality of the situation is this: although the U.S. sanctions exact some costs on Myanmar's military regime,¹⁴⁸ the

142. See *supra* notes 104–05 and accompanying text.

143. PREEG, *supra* note 28, at 117–18; see *supra* note 101 and accompanying text; see also Malik, *supra* note 104, at 110–23.

144. Economic Intelligence Unit, Country Report Myanmar: February 2005 (Feb. 2005) at 49, available at <http://www.eiu.com> (available for a fee, also on file with author) (listing China (28.9%), Singapore (20.7%), Thailand (14%), Malaysia (9.2%), and South Korea (5.5%) as Myanmar's five largest official importers for 2003).

145. *Id.* After excluding the United States (9.7%), Thailand (30.2%), India (9%), China (5.6%), and Japan (4.5%) represent the main destinations for exports in 2003. *Id.*

146. See Hadar, *supra* note 140, at 6; see also Nelson Rand, *Myanmar: The Case Against Sanctions*, ASIA TIMES, June 20, 2003, available at http://www.atimes.com/atimes/Southeast_Asia/EF20Ae02.html (last visited May 3, 2008).

147. See Economic Intelligence Unit, *supra* note 144, at 49 (stating that according to data from the Bank of Thailand, Myanmar's exports to Thailand rose by 42.4% in the first 11 months of 2004—from \$827 million in 2003 to \$1,177.5 million in 2004); see also Rand, *supra* note 146.

148. See Rand, *supra* note 146. The U.S. unilateral sanctions against the military junta in Myanmar deprive the ruling generals of any semblance of legitimacy. Furthermore, the cost of doing business is higher since the Burmese government must find alternative markets.

Burmese generals have never been cut off from alternative markets and financing sources.

5. *It Is Extremely Difficult for the Predominantly Buddhist and Agrarian Population of Myanmar to Rise up and Demand Change Because the U.S. Unilateral Sanctions Have Further Deepened the Existing Political and Economic Inequalities Between the Military and Civilian Population*

The outcome of a sanctions episode is strongly correlated to the political and economic health of the target country, as countries that are under severe political and economic strain are more likely to yield to external pressures for change.¹⁴⁹ A successful outcome is, however, not guaranteed even in the face of political and economic distress; additional factors, such as the target government's hold on power, its willingness to enter into pragmatic negotiations, and its accountability to the constituents often come into play. In Myanmar, unintended consequences of the U.S. sanctions arguably may have undermined their impact. In addition to imposing political and economic strain on the military elite as well as the civilian population, the U.S. unilateral sanctions have further entrenched the military government, deprived the civilian population of the ability to hold the government accountable, and weakened the democratic opposition.¹⁵⁰

Proponents of the sanctions often cite sanctions against the apartheid government in South Africa as evidence that economic pressure can be an effective weapon for political change. However, the analogy that Myanmar is the "South Africa of the 1990s" is misleading.¹⁵¹ Unlike South Africa, Myanmar's economy and public infrastructure were already in ruins before the sanctions because of mismanagement, corruption, and self-imposed isolation from the global community. In addition, Myanmar's economy had very little connection to the global economy

149. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 46 ("An analogy with rainmaking is appropriate. If storm clouds are overhead, rain may fall without anyone's help. If moisture-laden clouds are in the sky, chemical seeding may bring forth rain. But if the skies are clear and dry, no amount of human assistance will produce rain. Similarly, sanctions may be redundant, productive, or useless in pursuing foreign policy goals, depending on the economic health and political stability of the target country.")

150. *See supra* note 104 and accompanying text.

151. There is no denying the similarity between Nelson Mandela and Daw Aung San Suu Kyi, both charismatic and selfless leaders of their respective causes who unfortunately face similar trials and tribulations in their struggles. For a detailed South Africa comparison, see also ICG, SANCTIONS, *supra* note 91, at 20–21.

before sanctions, owing to more than a quarter century of isolation. Finally, internal and external pressure against apartheid in South Africa centered on a universally identifiable norm transgression—racial discrimination—whereas the human rights violations alleged against the Burmese generals are only tenuously linked to norm transgressions and are less recognizable according to international law.

Instead of promoting positive political change, the U.S. unilateral sanctions have made the military government stronger relative to the civilian population, further entrenching its role as a state-building institution. Rather than impacting the sectors of the Burmese economy under total state control, the U.S. unilateral sanctions exact their toll on parts that are controlled by the private sector.¹⁵² As a result, the military government is able to gain greater control of Myanmar's economy. This enables the military government to shift the resources of the country to sectors that support the regime. Consequently, governmental institutions needed for the establishment of democracy are neglected while benefits from foreign trade are invested in the military infrastructure and for the benefit of a selected few.¹⁵³

Despite widespread international condemnation and internal dissent, the Tatmadaw remains a powerful and well organized institution inside Myanmar and continues unchanged with its primary objective of maintaining national sovereignty and unity. The SPDC, even after one name change, has been in power for the nearly twenty years since its bloody crackdown on the democracy uprisings. The military controls every aspect of Burmese political life and maintains its rule through violence and fear.¹⁵⁴ Removal of General Khin Nyunt and his moderate faction from power further signifies consolidation of power in the hands of

152. It is this author's opinion that Myanmar's current political and economic predicament would be different if the United States had pursued trade expansion instead of sanctions in the mid-1990s. The military government at that time did not have the logistical capability to manage and control increased trade flows into Myanmar, which in turn would allow the private sector to fill the void. Instead, the U.S. sanctions and disinvestment campaigns decreased the trade flow, especially from the West, which allowed the military government to catch up and consolidate its grip on trade.

153. See *supra* note 87 and accompanying text.

154. As a result of the military's constant crackdown on the democratic forces, the majority of the Burmese people live under a shroud of fear, even if they are discontent with the junta's policies. Likewise, a strong totalitarian rule during the past five decades has destroyed any hope for a civil society to take root in Myanmar. In addition, years of economic downturn have deprived Myanmar of a politically affluent middle-class. Furthermore, Myanmar remains an agrarian society with greater than seventy percent of the population living in the rural areas. Until Burmese from the rural areas express their political will and join the urban democratic forces, the military's grip on power will likely continue. For a brief description of Myanmar's social complexity and ethnic diversity, see Taylor, *Pathways*, *supra* note 57, at 2–3.

the hardliners as they continue to defy international calls for rapid political change.¹⁵⁵

More alarmingly, the Tatmadaw's embedded role in Myanmar politics, and its stranglehold on power, has created a dual structure of governance and deprived the civilian population of previously existing forms of accountability. The question has never been whether the people of Myanmar can rise up to demand change. The moral courage of the Buddhist monks and students during the most recent demonstrations suggested as much. The critical question has always been: what happens after the people rise up? Sadly, in a country where the leaders are not accountable to their constituents, the answer so far has been: nothing much. Moreover, nearly a half century of economic stagnation and isolation has conditioned the Myanmar people to plod through their lives and adapt as best they can to any new economic challenges.

The U.S. unilateral sanctions have also weakened the democratic opposition within the country. The military junta continues to impose tight restrictions on the NLD, and has recently extended the detention period to keep Daw Aung San Suu Kyi under house arrest.¹⁵⁶ Barring a split within the ruling hardliners, the SPDC will most likely proceed with its own version of political reforms under its "road map to democracy," irrespective of its legitimacy.¹⁵⁷ Towards this end, the SPDC recently reconvened and completed a critical round of the National Convention, which has the task of drafting the guidelines for a new constitution, despite

155. See Nakashima, *supra* note 129, at A16; see also NEW LIGHT OF MYANMAR, *Dissolution*, *supra* note 129.

156. See *supra* note 127 and accompanying text.

157. David Arnott, Burma/Myanmar: How to Read the Generals' "Roadmap"—A Brief Guide with Links to the Literature (Aug. 27, 2003), <http://www.ibiblio.org/obl/docs/how9.html>. The Seven-Step Road Map to Principled Democracy laid out by then-Prime Minister Khin Nyunt during his State of the Union address includes:

- 1) reconvening of the National Convention that has been adjourned since 1996;
- 2) after the successful holding of the National Convention, step by step implementation of the process necessary for the emergence of a genuine and disciplined democratic system;
- 3) drafting of a new constitution in accordance with basic principles and detailed basic principles laid down by the National Convention;
- 4) adoption of the constitution through national referendum;
- 5) holding of free and fair elections for Pyithu Hluttaws (legislative bodies) according to the new constitution;
- 6) convening of Hluttaws attended by Hluttaw members in accordance with the new constitution; and
- 7) building a modern, developed and democratic nation by the state leaders elected by Hluttaw, and the government and other central organs formed by the Hluttaw.

Id.

boycotts from the NLD and other ethnic groups and in the face of questions concerning the National Convention's legitimacy.¹⁵⁸

6. *The Sanctions Have Further Deteriorated the Already Minimal Political and Economic Relationship Between the United States and Myanmar*

The intensity of prior relations between the sender and the target is often reflected in their trade linkage. As such, unilateral sanctions imposed against allies and close trading partners are more likely to succeed, while sanctions against adversaries and targets with very little trade linkage are less successful.¹⁵⁹ However, the efficacy of unilateral sanctions against neutral targets may depend primarily on the trade linkage between the countries involved. During the Cold War, Myanmar was one of the nonaligned countries that benefited from the rivalry between the United States and Soviet Union, even though it had very little economic contact with the outside world.¹⁶⁰ Nevertheless, the U.S. unilateral sanctions against Myanmar will most likely be ineffective because successive rounds of sanctions and consumer boycotts in recent years have further decimated the already minimal trading relationship between the two countries.¹⁶¹

B. *Economic Variables Involved in the Assessment of the Effectiveness of the Burmese Sanctions*

Similar to the political and social variables analyzed above, economic factors also influence the outcome of a sanctions episode. Although the underlying factors that influence the outcome of a sanctions episode are

158. Seven-Step Road Map Agenda Was Laid Down Only by Government—National Convention, First Step of Road Map, Is Most Important, Will Continue Without Fail—Change of Prime Minister Does Not Change Government's Road Map Agenda, THE NEW LIGHT OF MYANMAR, Oct. 23, 2004, available at http://www.myanmar.gov.mm/NLM-2004/Oct04/enlm/Oct23_h2.html (reporting that the ouster of General Khin Nyunt, who had spearheaded the National Convention, will not derail the process).

159. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 100 (“The higher compliance with sanctions by allies and trading partners reflects their willingness to bend on specific issues in deference to an overall relationship with the sender country. Such considerations may not be decisive in the calculus of an antagonistic target country, or a target country that has little economic contact with the sender.”).

160. PREEG, *supra* note 28, at 116 (reporting that the BSSP, under U Ne Win, was sustained to a large extent by foreign economic aid from the U.S., Soviet Union, Japan, and multilateral development banks).

161. See *infra* notes 167–71 and accompanying text.

artificially grouped into political, social, and economic clusters, they do not exist in a vacuum and the interplay between them is critical. Economic variables that are traditionally analyzed in determining the efficacy of unilateral sanctions include the relative economic size difference and trade linkage between the sender and the target, the costs imposed on the target country, and the costs imposed on the sender country.¹⁶²

1. Limited Trade Linkage Between the United States and Myanmar Suggests That the U.S. Comprehensive Sanctions Against Myanmar Will Not Be Successful

Since economic sanctions are historically employed by powerful countries against weaker nations, the economy of the sender is usually much larger than that of the target.¹⁶³ However, it is not reasonable to predict the efficacy of a sanctions episode based solely on the relative economic size difference between the sender and the target. Additional factors come into play, such as the availability of alternative markets or financing sources and any trade linkage between the sender and the target. Although economic interdependence between various states has made them more sensitive to coercion from foreigners, the availability of alternative suppliers and markets allows countries to diversify their economic contacts, making them less susceptible to unilateral sanctions.¹⁶⁴ Although U.S. GNP is more than one hundred times greater than that of Myanmar,¹⁶⁵ the lack of significant trade linkage between the countries, and the availability of alternative suppliers and markets for Myanmar's trade needs, undermine the effectiveness of sanctions.¹⁶⁶

Likewise, the United States has very little leverage over Myanmar because its economic stake in the country is limited. Owing to successive rounds of economic sanctions, the United States was not able to establish a significant trading relationship with Myanmar when Myanmar opened its doors to the global community. Instead, the already minimal trade linkage between Myanmar and the United States has decreased significantly

162. HUFBAUER ET AL., SANCTIONS RECONSIDERED, *supra* note 3, at 40.

163. *Id.* at 63 ("In most cases, the sender's GNP is over 10 times greater than the target's GNP, and in over half the ratio is greater than 50.")

164. Chan & Drury, *supra* note 18, at 4 ("Economic interdependence implies less trade asymmetry and more partner diversification so that it becomes more difficult for unilateral coercion to succeed.")

165. The Hufbauer study uses a GNP ratio to approximate the relative economic size between the sender and the target. *Id.* at 63–64. As of 2002, U.S. GNP (\$10,402 billion) is over 100 times greater than Myanmar's GNP (\$92.9 billion). *Id.*

166. See *supra* notes 100–06 and accompanying text for the availability of alternative markets and financing sources for the Burmese generals.

during the past decade and a half. From 1989 to 1996, the United States was a leading investor in Myanmar's oil and natural gas development, mining, and apparel manufacturing.¹⁶⁷ However, the banning of new investment under the Federal Burma Statute¹⁶⁸ and ensuing consumer boycotts caused many U.S. firms to shut down their operations in Myanmar.¹⁶⁹ The void left by the departure of the U.S. firms was readily filled by Asian and European companies. However, Myanmar's textile and apparel exports to the United States continued to grow, from \$60 million in 1994 to \$408 million in 2001 before falling to \$297 million in 2002.¹⁷⁰ Still, Myanmar's exports to the United States only made up about 9.4% of the country's total exports in 2003.¹⁷¹

2. *The U.S. Unilateral Sanctions Inflict Economic Hardship on the Myanmar People and Deprive Them of Western Political Ideas About Freedom, Democracy, and Human Rights That Normally Accompany Trade*

Economic sanctions are intended to inflict sufficient economic hardship in the target country that the targeted regime is compelled to change its behavior and policies. The situation in Myanmar, however, may represent an exception to the causal relationship between economic loss and political change. Rather than impacting the ruling elite, the burden of the U.S. unilateral sanctions falls mainly on the Myanmar people who do not have any means to hold the ruling junta accountable. At the same time, revolutionary fervor to rise up and demand change is tempered by reminders of the brutal crackdown in 1988, and most recently in 2007. The complexities of the political and social climate in Myanmar will require

167. See Hadar, *supra* note 140, at 6 (indicating that the United States was only the fifth largest foreign investor in Myanmar by 1995); see also PREEG, *supra* note 28, at 130 ("Total foreign direct investment into Myanmar from 1990 to 1995 was \$1.2 billion . . . [T]he United States was the largest source of this investment, with \$281 million, or 23 percent of the total, but this amount was concentrated in 1990–1992 and has since dropped off.")

168. See 1997 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 (1996).

169. PREEG, *supra* note 28, at 129 ("Under pressure from the various U.S. sanction activities, name-brand U.S. companies—such as Liz Claiborne, Eddie Bauer, and Levi Strauss—terminated contracts with Myanmar producers, and some of the approximately 30 apparel operations reduced production or shut down.")

170. See SENATE COMM. ON FINANCE, APPROVING THE RENEWAL OF IMPORT RESTRICTIONS CONTAINED IN THE BURMESE FREEDOM AND DEMOCRACY ACT OF 2003, S. REP. NO. 108-281, at 1 (2003) (reporting that total imports from Myanmar in 2002 were \$356 million); see also Rand, *supra* note 146 (reporting that Myanmar's natural gas exports to Thailand in 2002 alone were more than double that figure, bringing in \$846 million to the cash-starved junta).

171. See Economic Intelligence Unit, *supra* note 144, at 49.

more creative solutions than doggedly maintaining the belief that economic hardship on the Myanmar people will eventually bring about political change in Myanmar.

Myanmar's economy and public infrastructure were already in ruins prior to the imposition of sanctions, due to government mismanagement, corruption, and self-imposed isolation from the global community. As a result, other than worsening an already bad situation, the U.S. unilateral sanctions have not effected a drastic downturn in Myanmar's economy. Moreover, new economic challenges associated with the sanctions are absorbed by the Myanmar people, as half a century of economic deterioration has conditioned them to accept and adapt to new forms of economic hardships.¹⁷² Further, the military junta controls every aspect of Burmese political life, rules the country through fear, and is not accountable to the civilian population. The docile nature of the Burmese people—shaped in part by religion, culture, and fear—further decreases their capacity to rise up against the military dictatorship.¹⁷³

In addition, the foreign aid cutoff and the U.S. unilateral sanctions further deepen the preexisting inequalities between those affiliated with the military and those who are not. The military junta continues to spend a significant amount of money on military infrastructure while many of the public programs, such as health care and education, are woefully neglected.¹⁷⁴

The overall adverse effects of the U.S. unilateral sanctions on the already deteriorating Burmese economy are negligible because of limited leverage, timing, and sequential imposition of the sanctions. The ban on new investment under the Federal Burma Statute, consumer boycotts of U.S. firms doing business in Myanmar, and internet advocacy contributed to the withdrawal of U.S. firms from Myanmar and their subsequent replacement by Asian and European companies.¹⁷⁵

Likewise, the most recent import controls instituted under the Burmese Freedom and Democracy Act, banning \$356 million of mostly textile

172. See *supra* notes 149–58 and accompanying text.

173. This is not to discredit the brave men and women who risk their lives each day in Myanmar to bring about a better future. Nor is it a criticism of those who must maintain their silence as a consequence of potential violence.

174. See *supra* note 104 and accompanying text; see also INT'L CRISIS GROUP (ICG), MYANMAR: THE HIV/AIDS CRISIS, ICG ASIA BRIEFING PAPER, (2002) at 3, available at <http://www.crisisgroup.org/home/index.cfm?id=1799&1=1> (last visited May 4, 2008) [hereinafter ICG, HIV/AIDS CRISIS] (discussing the difference between the Joint Programme's estimates and the government's estimates).

175. See *supra* notes 143–46 and accompanying text; see also PREEG, *supra* note 28, at 128–29 (detailing additional examples of European and Asian firms replacing U.S. commercial interests in Myanmar).

imports from Myanmar, constituted only a fraction of Myanmar's total imports.¹⁷⁶ A tragic consequence of the most recent import controls is that the burden will fall on the estimated 350,000 textile workers in Myanmar and not on the generals.¹⁷⁷

Finally, the U.S. unilateral sanctions deprive the Burmese civilian population of Western political ideas about freedom, human rights, democracy, and the rule of law that normally accompany trade with the United States and other Western countries. It is critical that these political ideas are internalized by the Burmese people so that they may one day, with the help of the international community, promote positive change and transition to principled democracy and human rights in Myanmar. However, instead of relying on U.S. businesses to promote these ideas in Myanmar, or regulating the business conduct of U.S. firms in Myanmar, the U.S. unilateral sanctions bluntly halt any meaningful participation by the United States in this process.

3. Although the Immediate Costs of the Sanctions Are Miniscule, the Long-Term Costs on U.S. Commercial Interests Are Staggering

The U.S. unilateral sanctions policy against Myanmar is detrimental to U.S. political and strategic interests in the region. Significantly, the sanctions alienate ASEAN countries and other allies. A familiar pattern emerges from a survey of recent U.S. unilateral sanctions practices: the United States adopts unilateral sanctions to force rogue regimes to change their behavior; when that does not work, the United States tries to convince its trading partners and diplomatic allies to join in the sanctions crusade; finally, when its allies refuse to join in, the United States adopts secondary boycott measures against its reluctant allies.¹⁷⁸ Myanmar's recent admission into the ASEAN and the organization's constant refusal to interfere with Myanmar's domestic politics could potentially result in a long-term confrontation between the United States and its ASEAN allies.¹⁷⁹ In addition to weakening its strategic interests in the region, the

176. See *supra* notes 170–71 and accompanying text.

177. See Rand, *supra* note 146, at 1 (referring to the retired World Bank economist Bradley Babson's interview for the Far Eastern Economic Review on the prospects of the latest round of sanctions); see also Nicholas D. Kristof, *Our Man in Havana*, N.Y. TIMES, Nov. 8, 2003, at A15 (reporting that many of the four hundred thousand textile workers in Myanmar, mainly women, stand to lose their jobs as a direct consequence of the sanctions).

178. See Hadar, *supra* note 140, at 7; see also Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (also referred to as the Helms-Burton Act).

179. See *supra* notes 113–14 and accompanying text.

U.S. policy of isolating Myanmar could have the unwanted effect of strengthening China's political and economic influence in Myanmar and the surrounding areas—a more troubling national security concern.

Furthermore, the U.S. unilateral sanctions policy against Myanmar inflicts both short- and long-term commercial costs on American firms. Short-term effects on the U.S. firms are minimal: recent import controls under the Burmese Freedom and Democracy Act merely inconvenience the U.S. importers of Burmese textile goods. Because Myanmar is not alone in producing these goods, the U.S. companies can turn to producers from similar countries, such as Thailand and Bangladesh. The long-term effects on the U.S. firms, however, are potentially significant. The U.S. unilateral sanctions provide a competitive advantage to Japanese, ASEAN, and Chinese companies because the sanctions deny American companies the chance to compete for trade and investment opportunities in Myanmar. Additionally, lost opportunities for American companies in oil and natural gas exploration and other infrastructure building projects could have strategic consequences. Even if the sanctions are lifted in the future, the delayed market entry of U.S. firms could have a permanent deleterious effect on U.S. commercial interests.

IV. LEGAL AND HUMANITARIAN ASSESSMENT OF THE EFFICACY OF THE U.S. UNILATERAL SANCTIONS AGAINST MYANMAR

The efficacy of unilateral economic sanctions is traditionally assessed along political and economic grounds. However, confining the analysis solely to political and economic variables is woefully inadequate. In deciding whether to impose unilateral sanctions, policymakers should also consider the validity of the sanctions under the international legal system; the social, cultural, and humanitarian context of a particular sanctions episode; and the availability of alternative mechanisms to promote the ends sought by the sanctions.¹⁸⁰

First, it is important to determine whether the U.S. comprehensive sanctions against Myanmar conflict with international law principles regarding state sovereignty, free trade, and human rights. Second, social and cultural influences on the capacity of the Myanmar people to promote change and the likelihood of a humanitarian crisis must be considered. Last, alternative mechanisms to promote human rights and democracy,

180. *See supra* notes 6–8 and accompanying text.

such as humanitarian engagement and targeted sanctions, must be explored before resorting to unilateral sanctions.

A. Legitimacy of the U.S. Unilateral Sanctions Under International Law

The legitimacy of promoting human rights and democracy in Myanmar through the use of unilateral sanctions depends on the validity of these sanctions under international law. As such, unilateral sanctions should be employed with great care, after close scrutiny, and only as a last resort. Unilateral sanctions have frequently been criticized for coming into conflict with several international law principles. Critics of unilateral sanctions contend that such sanctions violate the customary international law principle of state sovereignty, which is enshrined in the United Nations Charter.¹⁸¹ Likewise, free trade advocates argue that general human rights sanctions against a member nation run counter to the General Agreement on Tariffs and Trade (GATT)/WTO agreement.¹⁸² Also, activists within the human rights community question the promotion of civil and political rights to the detriment of economic, social, and cultural rights.¹⁸³

1. Unless Accompanied by Forcible Measures, the U.S. Unilateral Sanctions to Promote Human Rights Norms Do Not Violate the State Sovereignty Principle

The primary question arising from the interaction between unilateral sanctions and international law is this: Do the unilateral sanctions violate the state sovereignty principle protected under the United Nations Charter and customary international law? The state sovereignty principle is one of nonintervention, which recognizes the right of states to be free from foreign interference in matters of purely domestic concern.¹⁸⁴ In the

181. See Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L L. 19 (2000). *Contra* Cleveland, *supra* note 49, at 49–56.

182. Carlos Manuel Vázquez, *Trade Sanctions and Human Rights—Past, Present, and Future*, 6 J. INT'L ECON. L. 797, 822–30 (2003) (analyzing the relationship between the GATT/WTO agreement and the international law of human rights by focusing on the permissibility of imposing trade sanctions against nations that commit violations of international human rights).

183. Amy Howlett, *Getting “Smart”: Crafting Economic Sanctions That Respect All Human Rights*, 73 FORDHAM L. REV. 1199, 1216–22 (2004) (presenting the controversy within the human rights community regarding the role that economic sanctions play in jeopardizing and strengthening international human rights law).

184. U.N. Charter art. 2, para. 7 (providing “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 . . .”).

Burmese sanctions context, the critical question is: Do the U.S. comprehensive sanctions, by attempting to coerce political change in Myanmar, constitute unlawful intervention into Myanmar's domestic affairs? The answer is most likely "no."

Critics of the U.S. sanctions against Myanmar contend that interfering with the Myanmar economy to bring about a major behavioral change within the government amounts to unlawful intervention into Burmese domestic politics.¹⁸⁵ In order to protect state sovereignty, customary international law has historically prohibited forcible or dictatorial intervention by a state in the domestic affairs of another state.¹⁸⁶ However, due to the increased economic interdependence between nations, non-forcible economic coercion achieves the same objectives as forcible or dictatorial interference and ultimately results in a powerful state dictating the domestic policies of a weaker state.¹⁸⁷ As such, economic pressure applied by the sender country to induce policy and behavioral changes within the target country and its government amounts to intervention whether or not force is used.

Proponents of the Burmese sanctions, on the other hand, could raise a number of arguments. First, the U.S. sanctions against Myanmar are consistent with the United Nations Charter.¹⁸⁸ It is not disputed that the United Nations Charter recognizes the principle of state sovereignty; however, Article 2(7) is limited to actions by the United Nations—not by its individual member states.¹⁸⁹ Likewise, Article 2(4) bars the unilateral "threat or use of force," not the unilateral imposition of non-forcible economic sanctions.¹⁹⁰ Furthermore, the United Nations Charter authorizes

185. The meaning and nature of 'intervention' is significantly broadened under this argument; 'intervention' encompasses both forcible and nonforcible interference into the domestic affairs of a foreign sovereign state. However, economic sanctions, unless accompanied by military measures, do not fit into the traditional mold of forcible interference.

186. Cleveland, *supra* note 49, at 53 ("Customary international law prohibits 'intervention' in the form of 'forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state.'" (quoting Oppenheim, *INTERNATIONAL LAW* § 1, § 129 (9th ed. 1992))).

187. Positioned somewhere between diplomacy and warfare, economic sanctions were frequently utilized in place of military engagement. Although the promotion of human rights through economic sanctions might warrant an exception to the state sovereignty principle, there is no such exception in international law; economic sanctions constitute interference into the domestic affairs of another state.

188. Cleveland, *supra* note 49, at 50–52 (arguing that unilateral sanctions may be adopted consistent with the United Nations Charter).

189. U.N. Charter, art. 2, para. 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 . . .") (emphasis added).

190. *Id.* art. 2, para. 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

the Security Council to impose multilateral economic sanctions in order to preserve the peace and security of the international system.¹⁹¹

Second, customary international law does not bar the United States from using economic coercion to promote human rights in Myanmar.¹⁹² A long history of economic statecraft in international relations, coupled with frequent U.S. use of unilateral sanctions for a variety of purposes, suggest that there is no customary international law norm against the use of unilateral sanctions.¹⁹³ Likewise, customary international law does not place any restrictions on a state's right to trade with another state.¹⁹⁴ Moreover, the customary international law principle of nonintervention does not apply because economic coercion falls short of the forcible or dictatorial standard.¹⁹⁵

Finally, protection of human rights is a matter of international concern and not limited to domestic discretion; the United Nations Charter creates a legal obligation on member states not to commit human rights violations.¹⁹⁶

manner inconsistent with the Purposes of the United Nations.”) (emphasis added).

191. *Id.* art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include *complete or partial interruption of economic relations* and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”) (emphasis added); *see also id.* art. 39 (“The Security Council shall determine the existence of any threat to peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 43 to maintain or restore international peace and security.”).

192. Cleveland, *supra* note 49, at 52–56 (documenting arguments that unilateral sanctions are consistent with customary international law).

193. *See supra* note 4 and accompanying text.

194. Cleveland, *supra* note 49, at 53 (“[E]very nation has a right to choose whether she will or will not trade with another, and on what conditions she is willing to do it; if one nation has for a time permitted another to come and trade in the country, she is at liberty, whenever she thinks proper, to prohibit that commerce—to restrain it—to subject it to certain regulations; and the people who before carried it on cannot complain of injustice.” (citing EMER DE VATEL, *THE LAW OF NATIONS*, bk. I, ch. VIII, § 94 (Chitty ed., 1866) (1758)).

195. Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT’L L. 405, 413 (1985) (arguing that economic coercion constitutes forcible and dictatorial interference only when “the *objective* of the coercion is to liquidate an existing state or to reduce that state to the position of a satellite”) (emphasis in original).

196. U.N. Charter, art. 55 (“[T]he United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; [and] (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”); *id.* art. 56 (“All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”); *see* Cleveland, *supra* note 49, at 52 (“Even if [economic sanctions imposed for human rights purposes] were to violate the nonintervention norm, they may still constitute an acceptable use of nonforcible countermeasures to retaliate against violations of international human rights.”); *see also* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*,

2. *The U.S. Comprehensive Sanctions Against Myanmar Are Most Likely Consistent with the GATT/WTO System*

The U.S. unilateral economic sanctions to promote human rights norms in Myanmar raise additional questions concerning compliance with the GATT/WTO system. The recent trend to promote fundamental human rights through trade restrictions has been challenged by developing countries and trade advocates for impinging on the comparative advantage of developing states and their establishment of disguised protectionist measures that conflict with the basic principles of the GATT/WTO system.¹⁹⁷ More importantly, compliance of human rights-related trade restrictions with the international trade system has profound consequences on the enforcement of international human rights: if the GATT/WTO system prohibits imposition of economic sanctions in response to human rights violations, then the international human rights community would most likely be deprived of its most frequently used, long-standing, and highly regarded mechanism of enforcement for human rights abuses.

The GATT/WTO provisions that are relevant to the human rights situation in Myanmar include the prohibitions provided in Articles I, III, and XI of the GATT/WTO Agreement and the corresponding exceptions set forth in Articles XX and XXI.¹⁹⁸ Article I's "most favored nations" clause is a rule of non-discrimination requiring any beneficial treatment given to the products of one country—whether a WTO member or not—to be given to the like products of all WTO members.¹⁹⁹ Similarly, Article III's "national treatment" provision prohibits discrimination between domestic and imported products.²⁰⁰ Article XI prohibits any quota or any

83 AM. J. INT'L L. 1, 31–34 (1989) (arguing that economic intervention in foreign states for human rights purposes does not violate the nonintervention norm).

197. See Vázquez, *supra* note 182, for a more detailed analysis of the relationship between the international law of trade and the international law of human rights.

198. See *infra* notes 199–211 and accompanying text.

199. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947] (as amended and incorporated by reference into General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1A, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter GATT 1994]) (Article I, paragraph 1, provides: "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.").

200. *Id.* art. III(2) ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.").

quantitative restrictions on imports or exports.²⁰¹ Conversely, Article XX enumerates exceptions to the general obligations and permits some otherwise prohibited measures so long as “such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”²⁰² Last, Article XXI provides a national security exception, which seems to contemplate an unspoken judicial deference of sorts.²⁰³

Although the legality of human rights-based trade restrictions has not been adjudicated in the GATT/WTO dispute resolution system, the U.S. unilateral sanctions against Myanmar would most likely be found to comply with the guidelines of the GATT/WTO system. Surprisingly enough, Myanmar is one of the original twenty-three contracting members to GATT '47.²⁰⁴ Likewise, the weight of authority supports the conclusion that the U.S. unilateral economic sanctions banning trade with Myanmar violate Articles I, III, and XI. However, the U.S. trade restriction against Myanmar is most likely to be valid under the GATT/WTO system if it falls within one of the enumerated exceptions in Article XX, or is authorized under Article XXI's national security exception. In addition, supporters of the U.S. sanctions could argue that nothing in the text or the negotiating history of GATT suggests an intention by the contracting parties to take away the ability of states to impose unilateral economic measures in response to human rights violations that are otherwise allowed under customary international law.²⁰⁵

Supporters of the U.S. sanctions argue that these measures fall within Article XX's exceptions for public morals and/or human life or health.²⁰⁶ In addition to overcoming the obvious extraterritoriality problems,²⁰⁷

201. *Id.* art. XI(1) (“No prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”).

202. *Id.* art. XX.

203. *Id.* art. XXI (“Nothing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations . . .”).

204. *Id.* pmb1.

205. Cleveland, *supra* note 49, at 65–69.

206. GATT 47, *supra* note 199, art. XX(1). These exceptions include measures that are “(a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health . . .”

Id.

207. To overcome the extraterritoriality concerns, one might argue that international human rights obligations are universal in nature and that they are independently binding on states. However, it

proponents of the U.S. sanctions must also satisfy the chapeau's requirement that the measures "not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."²⁰⁸ Professor Carlos Manuel Vázquez argues that the United States would have a hard time justifying that its sanctions apply equally to all countries with human rights violations, pointing out the divergent approaches to economic engagement towards China as compared to Cuba or Myanmar.²⁰⁹

Additionally, reliance on the Article XXI(b) exception for essential security interests may be permissible under extraordinary circumstances;²¹⁰ arguably, this includes the human rights situation in Myanmar. Nevertheless, the lack of judicial interpretation, coupled with the potential self-judging nature of the exception, raises concerns about the likelihood of abuse. Furthermore, it is unclear how the alleged human rights abuses in Myanmar relate to the essential national security interests of the United States.²¹¹

3. The U.S. Comprehensive Sanctions Against Myanmar Promote Civil and Political Rights to the Detriment of Economic, Social, and Cultural Rights

The controversy between the Burmese sanctions and the international human rights system²¹² concerns whether the U.S. comprehensive sanctions against Myanmar exclusively promote civil and political rights to the detriment of economic, social, and cultural rights. The international human rights doctrine is structured to protect two categories of rights: (1)

remains a point of contention whether GATT authorizes measures established to protect the morals and health of persons in the exporting states or elsewhere (i.e., target countries) or whether the exception is limited to measures that protect those within the importing states (i.e., sender countries). See Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689, 695 (distinguishing between the "inwardly-directed" measures designed to protect the morals or health of people within the implementing state and "outwardly-directed" measures designed to protect the morals or health of people outside the implementing state).

208. GATT 47, *supra* note 199, art. XX.

209. Vázquez, *supra* note 182, at 823.

210. GATT 47, *supra* note 199, art. XXI(b).

211. China's recent economic and political takeover of Myanmar seems more of a threat to U.S. national security interests and to regional security.

212. The international law of human rights developed in reaction to the lack of human rights protection in the domestic laws of various countries. The international law of human rights is created primarily through (1) international treaties; (2) *jus cogens* norms and customary international law principles that have evolved through treaties, state practice, and efforts by nongovernmental actors; and is supplemented by (3) general principles that are common to and found in the major legal systems of the world.

civil and political rights, and (2) economic, social and cultural rights.²¹³ Civil and political rights are generally thought of as negative rights—freedom from governmental interference with individual autonomy beyond what is required in the exercise of government’s police power.²¹⁴ Economic, social, and cultural rights, on the other hand, are considered to be positive rights—individual entitlements which impose an obligation on the government, as a matter of right, to promote economic and social conditions that are deemed essential to human dignity and to make negative rights meaningful.²¹⁵

The principle human rights norms are enshrined in the International Bill of Rights: (1) the Universal Declaration of Human Rights; (2) the International Covenant on Civil and Political Rights (ICCPR); and (3) the International Covenant on Economic, Social, and Cultural Rights (ICESCR).²¹⁶ The Universal Declaration was adopted as a statement of principles, and hence lacks normative force.²¹⁷ The principle rights protected in the Universal Declaration, however, are codified into binding treaty law through two supporting covenants: the ICCPR²¹⁸ and the

213. See *infra* notes 214–20 and accompanying text.

214. Civil and political rights expressed in human rights documents are natural rights—rights of every individual in the state of nature—that are retained by each individual to some extent after instituting a government to secure these rights in a liberal state. For example, they include the rights to life, liberty, property, and autonomy.

215. Economic, social, and cultural rights expressed in human rights documents are individual entitlements, closely identified with the welfare state ideology which obligates the government to promote and secure the welfare of the individual. For example, they include the right to education, the right to work, the right to social security, and the right to a standard of living adequate for the health and well-being of the individual.

216. The International Bill of Rights consists of (1) the Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc. A/10 (Dec. 12, 1948) [hereinafter Universal Declaration]; (2) the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; and (3) the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

217. The question of whether the Universal Declaration is legally binding under international law remains somewhat controversial. Proponents argue that even if the Universal Declaration itself is not legally binding, at least some of the principles contained in it have attained the status of customary international law because (1) the Universal Declaration is an authoritative interpretation of the human rights provisions in the U.N. Charter, and (2) some of its principles were already legally binding through other international agreements. See, e.g., MICHAEL G. SCHECHTER, UNITED NATIONS GLOBAL CONFERENCES 20 (2005).

218. The ICCPR requires member states to refrain from actions that would violate the civil and political rights of individuals—freedoms and immunities which a member state can respect by leaving the individual alone. See ICCPR, *supra* note 216, art. 2(1) (“Each state party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized . . . without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”); see also *supra* note 208 and accompanying text (describing negative rights).

ICESCR;²¹⁹ the former protecting civil and political rights and the latter promoting economic, social, and cultural rights. Although the United States has ratified the ICCPR with reservations, it has not ratified the ICESCR. Consequently, U.S. conviction for promoting economic, social, and cultural rights is lacking when compared to its promotion of civil and political rights.²²⁰

Proponents of the Burmese sanctions argue that the sanctions promote the growth of international human rights norms.²²¹ International norms are defined and refined when the international community responds to alleged breaches of international law.²²² When the United States imposed comprehensive sanctions in response to political repression in Myanmar, it reinforced its commitment to international human rights norms by voicing its distaste for such behavior. If U.S. allies and the international community joined in the effort, the sanctions would serve to further refine the international human rights norms that Myanmar has allegedly violated. Furthermore, if the Burmese government relents to some of the sanctions' demands, it would begin the process of internalizing international human rights norms into its domestic law.²²³ Finally, the proponents of the Burmese sanctions argue that the sanctions brought about international

219. The ICESCR, on the other hand, requires member states to take affirmative action to advance economic, social, and cultural rights of individuals—entitlements that a member state is obligated to provide to individuals. *See* ICESCR, *supra* note 216, art. 2(1) (“Each state party . . . undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized . . . by all appropriate means, including particularly the adoption of legislative measures.”); *see also supra* note 209 and accompanying text (describing positive rights).

220. Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUMAN RIGHTS Q. 156, 158 (1987).

221. *See* Howlett, *supra* note 183, at 1220–22 (surveying the literature on the relationship between economic sanctions and the growth of international human rights norms); *see also* Cleveland, *supra* note 49, at 19 (stating that the international responses to human rights conditions in Myanmar “form part of a collective effort on the part of the international community to refine existing human rights norms and to promote improved human rights conditions and democratic governance in Burma”).

222. Myres S. McDougal & W. Michael Reisman, *The Prescribing Function: How International Law Is Made*, 6 YALE J. WORLD PUB. ORD. 249 (1980), *reprinted in* Myres S. McDougal & W. Michael Reisman, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY* 84 (1981).

223. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 295 (2002) (“[T]he United States government must promote democracy and human rights worldwide—including at home—both as ends in themselves and as critical means to a safer, healthier, more prosperous process of globalization. The United States should support the growing globalization of human freedom, not just as an end in itself, but also because more global freedom provides needed and humane solutions to modern global problems, such as environmental degradation, international crime and terrorism, transborder trafficking and refugee flows, and the spread of global AIDS.”).

attention, pressure, and condemnation against the Burmese military junta.²²⁴

Opponents of the Burmese sanctions do not dispute the benefits conferred by the U.S. unilateral sanctions in promoting civil and political rights. Instead, those who oppose the sanctions contend that hardships imposed on Burmese civilians through the unilateral sanctions rise to violations of their economic, social, and cultural rights.²²⁵ Mass layoffs of the textile workers in Myanmar interfere with their right to work. Likewise, reductions in government spending and foreign development assistance reduce the resources available for education and healthcare, further depriving the Burmese civilians of their rights to education and healthcare.²²⁶ Moreover, promotion of civil and political rights to the detriment of economic, social, and cultural rights undermines the importance of the latter category of rights in the international human rights system. The frequent U.S. practice to exclusively promote civil and political rights fosters the international norm that it is acceptable to violate the economic, social, and cultural rights of the target country's civilians so long as civil and political goals are achieved.²²⁷

B. Humanitarian Assessment of the Efficacy of the U.S. Sanctions Against Myanmar

It is often assumed and accepted that economic hardship will befall the people of the target country when economic sanctions are imposed.²²⁸ Few

224. Cleveland, *supra* note 49, at 19.

225. In Myanmar, the impact of the U.S. sanctions is reflected in loss of employment among the general population, reduction in foreign economic aid, and an excuse to reduce already minimal government spending. *See supra* Part III. However, the causal relationship between the U.S. sanctions and the Burmese government's inability to promote economic, social, and cultural rights is difficult to trace and indirect at best. Nevertheless, unlike the protection of civil and political rights, promotion of economic, social, and cultural rights requires the Burmese government to work in concert with the international community.

226. *See, e.g.*, ICESCR, *supra* note 216, art. 6 ("The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."); *id.* art. 12 ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."); *id.* art. 13 ("The States Parties to the present Covenant recognize the right of everyone to education.").

227. Howlett, *supra* note 183, at 1228 ("Because economic sanctions are a form of state practice, when the United States imposes economic sanctions and fails to take into account or even try to prevent dire civilian consequences that implicate [economic, social, and cultural] rights, it is weakening these rights. Such actions foster the growth of the idea that [economic, social, and cultural] rights are irrelevant, and that jeopardizing [economic, social, and cultural] rights for civil and political goals is perfectly acceptable.").

228. Because of diminished trade, target industries might suffer, leading to job loss, down-turn in

have addressed, however, what should be done when economic hardship morphs into a humanitarian crisis or when the imposition of sanctions makes worse a burgeoning humanitarian crisis. The critical question in assessing the efficacy of unilateral sanctions along humanitarian lines is this: if one could predict that the sanctions would result in a humanitarian crisis, would the sanctions still be appropriate? This may be especially relevant in target countries where the respective governments are not accountable to their civilian populations, such that economic hardship quickly spirals into humanitarian catastrophe.²²⁹ I argue that unilateral sanctions employed in the face of a humanitarian crisis run counter to the very goal of the sanctions—to help the citizens of the target country who cannot help themselves.

The U.S.-led sanctions against pre-invasion Iraq, for example, have been widely criticized for their disparate impact on the Iraqi civilian population.²³⁰ Iraq, prior to sanctions, was a nation with immense natural resources, a strong middle class, and excellent health care and education systems.²³¹ At the same time though, the people of Iraq lived under the tyranny of Saddam Hussein, who terrorized his people with mass killings and brutal policing.²³² The Iraqi population shouldered the impact of the sanctions. Economic hardship turned into a humanitarian crisis as the struggles of the Iraqi civilians were compounded further by the choices that Saddam Hussein made and the mismanagement of the oil-for-food program. Essential infrastructure was destroyed, and food and health care became scarce for a large portion of the population.²³³ Nevertheless, Saddam Hussein's regime remained in power; it took a full-scale military invasion by the United States and its coalition to topple Saddam Hussein's regime.

Economic hardships induced by sanctions invariably result in the deterioration of the public infrastructure, which makes the target country

local economies, and even a drop in the standard of living; *see also supra* notes 39–42 and accompanying text.

229. This leads to a paradox: the sanctions are employed mainly because a majority of the governments of target countries are not accountable to their constituencies.

230. *See supra* note 36 and accompanying text; *see also supra* notes 227–29 and accompanying text.

231. Eric Hoskins, *The Humanitarian Impacts of Economic Sanctions and War in Iraq*, in *POLITICAL GAIN AND CIVILIAN PAIN* 91 (Thomas G. Weiss et al. eds., 1997).

232. Human Rights Watch, *Whatever Happened to the Iraqi Kurds?* (1991), available at <http://www.hrw.org/reports/1991/iraq> (last visited May 4, 2008) (reporting Saddam Hussein's gassing of Kurdish civilians at Halabja, where tens of thousands of civilians were estimated to have been killed).

233. Hoskins, *supra* note 231, at 106–08, 113–16.

more susceptible to a humanitarian crisis. Additionally, imposition of sanctions worsens an already escalating humanitarian problem within a target country. While it is sometimes difficult to distinguish between economic hardship and a humanitarian crisis, other times the distinction is clear; this is especially true in the example of the HIV/AIDS epidemic.²³⁴ Myanmar, like many other developing countries outside of Africa, is beginning to battle such an epidemic.²³⁵ In addition to exacting economic hardship on the Burmese people at large, the U.S. comprehensive sanctions further fuel the HIV/AIDS epidemic in Myanmar by preventing necessary intervention programs and funds from reaching the people.²³⁶

Experts in the public health community have predicted that the infection rate of HIV in Myanmar has reached a tipping point; without intervention, the rates will increase exponentially from this point forward.²³⁷ This fact has alarmed the world health community; in 2002, the Center for Disease Control (CDC) developed a joint program between the

234. Jenni Fredriksson-Bass & Annabel Kanabus, *HIV & AIDS in Botswana*, available at <http://www.avert.org/aidsbotswana.htm> (last visited May 4, 2008) (reporting that the HIV/AIDS epidemic in Botswana has surpassed crisis levels with nearly 25% of the population infected with HIV and only limited treatment options available). The average life expectancy has fallen from 65 to less than 40 and 120,000 children have lost at least one parent to the epidemic. *Id.* In his 2001 address to the UN, the President of Botswana, Festus Mogae, said “we are threatened with extinction . . .” *Id.* What makes the HIV/AIDS crisis in Botswana even more tragic is that it could have been at least partially mitigated with earlier intervention. The first case of HIV in Botswana was recorded in 1985, but it was not until 1997 that a multi-tiered approach was implemented, which finally began to make an impact on the spread of HIV. *Id.*

235. Joint Programme for HIV/AIDS in Myanmar 2003–2005, *Joint Programme for HIV/AIDS: Revised with Monitoring and Evaluation Plan*, Mar. 31, 2004, at 5 (on file with author) [hereinafter Joint Programme] (“New estimates from the Ministry of Health show 180,000 people infected with HIV, compared to estimates of 20,000 in 2003, while UNAIDS estimates a range of 170,000 to 420,000. Trends in official surveillance data from 2001 show increasing rates of HIV infection among key sentinel groups: sexually transmitted infection (STI) patients (20.5%), commercial sex workers (CSW) (33.5%), blood donors (1.1%), new military recruits (2.2%), and pregnant women (2.2%), with considerable in-country regional variation.”); see Jon Cohen, *The Politics of Prevalence*, SCIENCE, Sept. 19, 2003, at 1652 [hereinafter Cohen, *Prevalence*] (discussing the discrepancies when analyzing the HIV prevalence in Myanmar); see also ICG, HIV/AIDS CRISIS, *supra* note 174, at 2.

236. Putting aside the disagreements in analyzing the prevalence of HIV infections, the HIV/AIDS problem in Myanmar could threaten national security, devastate the economy and undermine the already weak capacity of the government to provide adequate health care. When the so far silent epidemic finally shows its face, the devastation will be immense: households will be deprived of breadwinners and children will lose their parents. An even more damaging consequence will be the effect on the morale of the population, as the hardest hit communities will invariably lose hope. For a detailed discussion of political threats to humanitarian aid delivery in Myanmar, see INT’L CRISIS GROUP (ICG), MYANMAR: NEW THREATS TO HUMANITARIAN AID, ASIA BRIEFING NO. 58, Dec. 8, 2006, available at <http://crisisgroup.org/home/index.cfm?id=4565&l=1> [hereinafter ICG, THREATS].

237. The Government’s estimate of 180,000 people living with HIV is significantly lower than that of the UNAIDS’ estimate, which ranges from over 170,000–420,000. Either way, these numbers will multiply rapidly if appropriate provisions are not implemented immediately. See ICG, HIV/AIDS CRISIS, *supra* note 174, at 1.

United States, international non-governmental organizations, and the Burmese government for the purpose of fighting HIV/AIDS in Myanmar.²³⁸ Despite rhetoric stating that humanitarian aid is independent of the economic sanctions, however, the greatest obstacle to fighting HIV/AIDS in Myanmar is politics. The United States cancelled the program before it began as a form of protest to the latest detainment of Daw Aung San Suu Kyi.²³⁹

Similarly, the Global Fund to Fight AIDS, Tuberculosis, and Malaria (Global Fund)—the single biggest aid initiative in Myanmar in twenty years—has also recently pulled out of Myanmar because it came under intense pressure from the U.S. Congress and U.S.-based advocacy groups.²⁴⁰ Although the Global Fund maintains that its August 2005 withdrawal was motivated by technical considerations only,²⁴¹ the U.S. Congress exerted pressure on the Global Fund in stages. First came a letter from Senators Judd Greg, Mitch McConnell, and Sam Brownback to the executive director of the Global Fund criticizing the Global Fund and the UNDP, and requesting to “withhold the disbursement of additional funds to [Myanmar].”²⁴² Then when the Global Fund refused, Congress threatened to withdraw about \$50 million of U.S. core funding for the UNDP through an amendment introduced by Senator McConnell to the 2006–2007 Foreign Appropriations Bill.²⁴³ At the same time, U.S.-based

238. Jon Cohen, *The Collaboration That Almost Was*, SCIENCE, Sept. 19, 2003, at 1654 (discussing the cancellation of a collaboration between U.S. Centers for Disease Control and Prevention (CDC), NGOs, and the Myanmar government).

239. *Id.* at 1654.

240. For a detailed account of the politics behind the Global Fund withdrawal, see ICG, THREATS, *supra* note 236, at 12–14.

241. The Global Fund to Fight AIDS, Tuberculosis, and Malaria, *Termination of Grants to Myanmar*, 1 (Aug. 18, 2005), available at http://www.theglobalfund.org/en/media_center/press/pr_050819_factsheet.pdf (last visited May 4, 2008) (citing government interference as a major factor in the decision to terminate a five year, \$98.4 million funding project to Myanmar).

242. ICG, THREATS, *supra* note 236, at 12 (citing a letter to the Executive Director of the Global Fund, dated on September 28, 2004, and signed by Judd Greg, Chairman, U.S. Senate Committee on Health, Education, Labor and Pensions; Mitch McConnell, Chairman, U.S. Senate Subcommittee on Foreign Operations; and Sam Brownback, Chairman, U.S. Senate Subcommittee on East Asia and Pacific Affairs).

243. *Id.* at 12.

In early 2005, Senator Mitch McConnell introduced an amendment to the 2006–2007 Foreign Appropriations Bill, which threatened to withdraw about \$50 million—roughly half—of U.S. core funding for the agency if it failed to certify that all its programs in Myanmar, including those it administered for others such as the Global Fund, provided “no financial, political, or military benefit, including the provision of goods, services, or per diems, to the SPDC or any agency or entity of, or affiliated with, the SPDC.” Although the bill did not specifically mention the Global Fund, it was a thinly veiled attempt to force UNDP to withdraw as the principal recipient of its money, a step which likely would have led to termination of the programs.

advocacy groups led by the Open Society Institute put pressure on the Global Fund to introduce “tighter restrictions on the use of funds,” to a point that compromised program effectiveness and seemed in breach of its own regulations.²⁴⁴ Thus, the Burmese people face rising HIV infection rates without much help from the international community; and because antiretroviral drugs are not widely available in Myanmar, every case is fatal.²⁴⁵

In relating the HIV/AIDS crisis back to sanctions, discussion of the appropriateness of using the suffering of the people of a target country as a vehicle for change is important. If one could predict that a humanitarian crisis brought on by sanctions would in fact be minimal and bring about political changes in the target country, such sanctions might be justifiable.²⁴⁶ In Myanmar, however, it is likely that sanctions have decreased the standard of living and it is possible that this has increased unrest in the country. At the same time, are the U.S. comprehensive sanctions fueling the HIV/AIDS epidemic in Myanmar and putting the civilians at risk for “extinction,” like in Botswana?²⁴⁷ If so, will the deaths of a large number of Burmese people and the orphaning of hundreds of thousands of Burmese children help strengthen the resistance movement in a country like Myanmar?

Predictions of the possible humanitarian effects of sanctions—both positive and negative—should be considered if the sanctions are to have any hope of succeeding. In Myanmar, such effects, and especially a humanitarian crisis, can weaken the ability of the Burmese people to rise up against the military junta. Likewise, an HIV/AIDS epidemic can generate political backlash in the United States when the military government in Myanmar shifts the blame for the epidemic to the sanctions. Even more, continuation of sanctions may provide opportunities for repressive governments to tighten their grip on an even more vulnerable population. Lastly, holding humanitarian aid hostage to further

Id.

244. *Id.* at 12–13 (citing a memorandum dated September 24, 2004, from Aryeh Neier (President of the Open Society Institute) to Brad Herbert (Chief of Operations of the Global Fund) insisting that “none of [Global Fund] programs should be conducted by or with financial assistance to the ruling military junta or government-organized NGOs”).

245. See UNAIDS, *Fund for HIV/AIDS in Myanmar: Annual Progress Report 2006* (2007), available at http://data.unaids.org/pub/Report/2007/fham_report_en.pdf (last visited May 28, 2008).

246. In South Africa, for example, economic hardship caused by sanctions may in fact have helped to destabilize the political system, leading to the dramatic dissolution of the white minority government and national democratic elections.

247. See *supra* note 234 and accompanying text.

a political goal, especially in face of humanitarian crisis, is unconscionable.

CONCLUSION

The contemporary debate over U.S. unilateral sanctions practice is a dispute about the means—whether unilateral sanctions are the most effective means to coerce foreign governments to modify their unsavory policies. Those in favor of unilateral sanctions argue that they are low-cost remedies for the unacceptable behavior of foreign governments, and that they offer an immediate response to domestic demands for action.²⁴⁸ Opponents of unilateral sanctions, on the other hand, contend that their costs outweigh their effectiveness and that they can lead to counterproductive outcomes.²⁴⁹ The consensus of the literature on the efficacy of unilateral sanctions is that they are not an effective tool of foreign policy.²⁵⁰ Yet, since the end of the Cold War, we have witnessed a renaissance in the use of unilateral sanctions, giving rise to an apparent paradox.

In this Article, I analyzed the efficacy of unilateral sanctions in the context of the U.S. unilateral sanctions against the military government of Myanmar. Starting with Professor Hufbauer's framework of political and economic factors as a guidepost, I introduced the additional lenses needed to view each episode in a sanctions-specific manner, in order to develop a

248. See ASKARI ET AL., *supra* note 4, at 65–66 (citing Jesse Helms, *What Sanctions Epidemic?*, 78 FOREIGN AFF. 2 (1999)). Advocates of the unilateral sanctions argue the following: sanctions allow the sender country to signal disapproval of the target country's policies without resorting to military action, the threat of sanctions can be a powerful tool in trade negotiations, export controls block transfer of sensitive technologies to dangerous countries, sanctions serve as an expression of moral outrage and reassure the world that the United States will stand by its international commitments, and economic hardship in the target country will lead to a subsequent political and behavioral change.

249. *Id.* Opponents of the unilateral sanctions argue the following: sanctions hurt the innocent citizens of the target country and further solidify the power of the authoritarian leaders, sanctions can be bypassed through reexport from third countries, loss of exports to target countries imposes significant economic costs on the senders' citizens through lost output and jobs, loss of imports from target countries imposes higher costs on businesses in the sender country and affords fewer choices to consumers, and sanctions rarely cause the target country to modify its policies. *Id.* at 66 (citing Gary Clyde Hufbauer & Reginald Jones, *Sanctions-Happy USA*, WASH. POST, July 12, 1998, at C1).

250. See *supra* note 6 and accompanying text. See also HUFBAUER ET AL., *SANCTIONS RECONSIDERED*, *supra* note 3, at 95 (reporting that only thirty-four percent of the sanctions in their study are deemed successful); ASKARI ET AL., *supra* note 4, at 67 (“No matter how well intentioned and no matter how just the cause, U.S. unilateral economic sanctions are an ineffective policy approach for bringing about policy changes in other countries and have poor prospects for success.”); PREEG, *supra* note 28, at 2–3 (“[B]roadly based unilateral sanctions during the 1990s . . . have been almost entirely ineffective in achieving their intended foreign policy objectives while having a substantial adverse impact on other U.S. foreign policy and commercial interests.”).

better understanding of how each of these parts—economic, political, social, legal, and humanitarian—fit together in any given sanctions experience, and to use that new framework to analyze the Burmese sanctions. On paper, promotion of democracy and human rights in Myanmar seems like the right thing to do. The United States, as a world leader, ought to fight for the rights of the oppressed in Myanmar and elsewhere. In practice, however, it is becoming apparent that the U.S. sanctions in Myanmar do more harm than good while attempting to achieve their desired goals. Our duty, then, is to stop and ask what other means are available to help the Burmese help themselves.

The U.S. unilateral sanctions against Myanmar will most likely fail in achieving their foreign policy goals. First, the sanctions were never intended to succeed; rather, they were imposed primarily to satisfy the demands of the domestic human rights activists and to further perpetuate U.S. moral convictions on the global stage—all without really having to jeopardize U.S. national interests. Those who favor the sanctions have determined by themselves that the suffering imposed on Burmese civilians is an acceptable sacrifice in the name of democracy and human rights.

Second, the lofty goals sought by the Burmese sanctions make success improbable. The sanctions are too inflexible, requiring the ruling military junta to give up power, elevate its political nemesis into power, and fade away into the background. To be successful, we must promote democracy and human rights in Myanmar—a country with a deep political divide and very little democratic infrastructure—gradually and through compromise.

Third, the comprehensive nature of the Burmese sanctions has kept the United States' western allies from joining, thus depriving the cause of much needed multilateral support. Even worse, the Burmese sanctions have alienated U.S. allies in the region and strengthened China's hand in Myanmar. The ASEAN has continually argued that the sanctions may precipitate economic collapse and political violence in Myanmar, destabilizing the regional economy and security.

Fourth, Myanmar's Asian neighbors undermine the effectiveness of the U.S. unilateral sanctions through their continued, and in some cases increased, trade with the military regime. China has become Myanmar's most important trading partner, filling the void left by the withdrawal of U.S. commercial interests. The ASEAN member countries continue to pursue a policy of constructive engagement in order to counterbalance the growing Chinese influence in Myanmar. Meanwhile, the sanctions hurt the short- and long-term commercial interests of the United States in Myanmar.

Fifth, the prolonged duration of the Burmese sanctions, without any significant improvement in human rights conditions, calls for a reassessment of the current sanctions policy. The military junta, in addition to blaming its own internal economic failures on the sanctions, has developed mechanisms for evasion. The time has come for the United States to reassess its unilateral sanctions practice towards Myanmar by designing and implementing creative solutions.

Sixth, the costs of the sanctions are shouldered by the Burmese civilian population. The sanctions deepen the preexisting inequalities in Myanmar between those who are affiliated with the military and those who are not. More importantly, the sanctions deprive the Burmese people of important Western political ideas about freedom, democracy, and human rights, which normally accompany trade with the United States.

Last, the impending threat of an HIV/AIDS epidemic in Myanmar, coupled with the detrimental effects of the economic sanctions on humanitarian aid delivery, cautions against the continuation of the sanctions. Instead, increased humanitarian aid from the international community—without any benchmark preconditions—for the Burmese people, especially in the wake of Cyclone Nargis, could serve as a vehicle to reopen dialogue with the military government and bring about social change through humanitarian engagement.

The impact of the sanctions, once imposed, is long lasting because of the stigma attached to them. In the case of Myanmar, it is hard to remove because the positions on both sides have become so entrenched and inflexible. The U.S. sanctions have shut the door on Myanmar at a time when increased international cooperation and diplomacy, rather than external pressure, was needed to finally open up once-isolated society. Likewise, the U.S. sanctions have frozen in place a political deadlock that cannot resolve itself. The bottom line is this: the U.S. sanctions may provide moral support for the pro-democracy movement and make us feel good about having done something, but they do not do any good at all for Myanmar and the people of Myanmar.

A more flexible diplomacy is needed for Myanmar to move forward and the U.S. must start by reassessing its current unilateral sanctions policy against the military government of Myanmar. To do so effectively, the United States must lead the international community in reformulating practical benchmarks that can realistically be achieved by the military government of Myanmar. Likewise, the United States must be flexible enough to gradually withdraw its sanctions policies upon the Myanmar government's demonstrated progress on political and economic reforms.

Regardless of whether the Myanmar government is able to institute suitable political and economic reforms geared towards gradual removal of sanctions, the United States must provide sustained leadership and mobilize international support to alleviate economic, social, and humanitarian conditions that inhibit progress in Myanmar. The United States must lead the international community to collectively engage Myanmar—this time through “humanitarian engagement for change.”²⁵¹ The United States has an opportunity to mobilize international and regional cooperation to engage the Myanmar government at a humanitarian level, especially in the aftermath of the September 2007 protests and the Cyclone Nargis disaster. By engaging at a humanitarian level, we reaffirm our commitment to help and restore hope to the people of Myanmar. In restoring hope, we help plant the seeds of empowerment and change. Likewise, the international funding institutions must reopen channels of funding as a first step in furtherance of this goal. It is critical that the Burmese people receive increased international aid, at least comparable to that of their neighbors, so that the Burmese people can start to rebuild the public sectors gutted by years of conflict and neglect.

251. The goal of humanitarian engagement for change should be to alleviate economic, social, and humanitarian conditions that inhibit progress in Myanmar through longer-term initiatives aimed at building the capacity of the state, fostering the emergence of a broader civil society and more inclusive political process, and promoting respect for essential individual and communal rights when addressing Myanmar’s development challenges.

ADDENDUM

Neither a policy grounded in diplomatic isolation and punitive economic sanctions, as advocated by the West, nor an approach based on noninterference and constructive engagement, as championed by Myanmar's neighbors, have brought about an end to the political deadlock in Myanmar. Instead, this uncoordinated and contradictory assortment of international responses to the need for political and economic change in Myanmar has helped perpetuate a crisis that requires a coordinated intervention and meaningful support from the international community. The people of Myanmar, who have suffered greatly during this time, deserve a better life, and their dream of a better future ought to compel all stakeholders to have the courage and energy to move away from their entrenched positions in favor of a more pragmatic approach.

The time for action is now. Amidst the monsoon rains of August and September of 2007, what started out as sporadic protests against the increase in fuel prices in Myanmar gained momentum and transformed into a countrywide, antigovernment movement. Spearheaded by the Buddhist *Sangha*—the moral center and the only functioning institution outside the Tatmadaw—peaceful demonstrators have called for national reconciliation; inclusive political processes; and improvements in social, political, and economic conditions.²⁵² The United States should seize this rare opportunity to empower the people of Myanmar and promote meaningful political change.

Yet, in the face of the Burmese people's heroic stand for freedom, President Bush offered before the United Nations General Assembly only more sanctions, intensifying the already existing visa bans and financial restrictions against the generals.²⁵³ Although this symbolic show of support may have fulfilled the Bush administration's emotional need to do something, it may not do any good for the people of Myanmar. Such unilateral action stunts the diplomatic process needed to untangle a complicated and delicate political deadlock in Myanmar and further alienates a regime that has maintained its grip on power through isolation.

The democratic forces for change inside Myanmar need assistance from the international community to succeed. However, international

252. For a detailed account of the protests and the subsequent crackdown, see Paulo Sérgio Pinheiro, U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Advance Edited Version*, U.N. Doc. A/HRC/6/14 (Dec. 7, 2007).

253. Fareed Zakaria, *Sleepwalking to Sanctions, Again*, NEWSWEEK, Oct. 15, 2007, at 34; George W. Bush, Remarks by the President to the United Nations General Assembly (Sept. 25, 2007).

pressure must come in its most effective form: collective action. The United States can do more to bring about a peaceful solution to this standoff, sustain the momentum for change, and promote democracy in Myanmar. While our emotional need to do something shapes our response to this recent crisis, we must be mindful of what is good for the Burmese people.

Instead of acting alone, the United States should build an international coalition to formulate a collective response that condemns the regime's violent repression of dissent and presses the regime for lasting political and economic reforms. Likewise, gathering support from other U.S. and EU allies on a common position may be more effective when trying to convince Myanmar's neighbors to act. Furthermore, the United Nations Security Council may not be the most appropriate forum in which to take action, given that the last attempt to formulate a resolution there met a rare Sino-Russian double veto.²⁵⁴ Instead, the United States should put its full support behind the "good offices" of the United Nations Secretary-General to build a consensus among China, India, and ASEAN member countries to use their political and economic influence to encourage the military government in Myanmar to stem the tide of violence, foster a peaceful dialogue, and begin the process of national reconciliation.

Myanmar's neighbors should act immediately. Unexpected escalation of sporadic protests over fuel prices into a countrywide antigovernment movement may have come as a surprise to the ruling generals. Though the Burmese government acted violently and inexcusably in repressing the demonstrations, the level of relative restraint shown—compared with their violent response in 1988—and the decision to allow the United Nations special envoy to enter the country suggest that the regime may be open to dialogue under the right circumstances. Moreover, the need to generate political support for the recently completed national constitutional convention may motivate the military regime to listen. Coupled with the pressure exerted by the Myanmar people themselves, a common position from China, India, and ASEAN could encourage the military regime to implement lasting reforms.

Although the United States has minimal political and economic leverage over the military regime, it is in a unique position to encourage Myanmar's neighbors. First, it has significant influence over China, India,

254. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Myanmar, Owing to Negative Votes by China, Russian Federation, U.N. Doc. SC/8939 (Jan. 12, 2007). For a summary record of the meeting, see U.N. SCOR, 62d Sess., 5619th mtg., U.N. Doc. S/PV.5619 (Jan. 12, 2007).

and ASEAN—the countries that can most effectively influence the military regime in Myanmar. Second, the best interest of these countries is served by a peaceful and prosperous Myanmar that contributes to regional stability. Most importantly, the United States' moral commitment to freedom resonates in Asia, especially among the people of Myanmar. In the long-term, we must again become an important player in the Burmese people's struggle for freedom.

That said, a number of foreign policy decisions may come back to haunt us. First, the United States must rely on Myanmar's neighbors to effect change—the same neighbors that have supported the military regime in the past. Ten years of U.S. unilateral sanctions have depleted our already minimal political and economic leverage over the regime and alienated some of our allies in the region. Myanmar's neighbors have refused to join the sanctions in the past, and we may not be prepared to employ the leverage necessary for them to act on our behalf now. The idea that political stability in Myanmar will lead to better economic opportunities may not be incentive enough for Myanmar's neighbors to encourage change.

Second, it will be difficult to create a common position among Myanmar's neighbors because their interaction with the Myanmar military regime is shaped by their specific economic and geopolitical interests. To create a common position among such diversity will require us to frame properly how we want them to use their influence. For example, it is highly unlikely that a common position grounded on regime change and promotion of democracy will ever be adopted by Myanmar's neighbors. However, a common plea to stem the violence and begin a dialogue as a first step may be more palatable.

While the spirit of the Burmese people to rise up against tyranny has never wavered, the exact events that would follow a revolution have become a crucial issue. Before the next opportunity arises, the United States must work together with regional powers as well as stakeholders inside and outside the country to develop a vision of a free and prosperous Myanmar and pave the way for future political and economic reforms. The United States should be further prepared to reassess its failed sanctions-only policy in light of recent events. A policy grounded in diplomacy and dialogue is much more likely to bring about a positive change in Myanmar.

Daw Aung San Suu Kyi once urged the world to “use your liberty to promote ours.”²⁵⁵ At a critical moment when Burmese monks and students were willing to risk everything, we ought to have done more to answer her plea. By not doing enough, we have undermined ourselves and devalued the sacrifices of the monks and students who put their lives on the line to be free. Instead, the United States must lead the international community in empowering the Burmese people so that they may one day voice their convictions in unison, build a modern nation, and change their country for the better.

255. Daw Aung San Suu Kyi, *Please Use Your Liberty to Promote Ours*, INT’L HERALD TRIB., Feb. 4, 1997, at 8 (adapted by the International Herald Tribune from a commencement address by Daw Aung San Suu Kyi to the American University in Washington, D.C., delivered on her behalf by her husband).