Articles

Norm Internalization and U.S. Economic Sanctions

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I. INTRODUCTION

The fifty years since the adoption of the Universal Declaration of Human Rights have seen a revolution in the promulgation and universalization of human and labor rights. Human rights conventions have proliferated in the areas of civil and political rights, social and economic rights, and the rights of women, children, minorities, and refugees. Many of these conventions have been ratified by a majority of the nations of the world. International monitoring of human and labor rights compliance is conducted by international institutions such as the U.N. Human Rights Commission and the International Labour Organization (ILO), by regional entities such as the Inter-American Commission on Human Rights, by non-governmental organizations (NGOs) such as Human Rights Watch and Amnesty International, and by national governments. Since the end of the Cold War, significant steps toward international judicial enforcement have been made through the development of regional courts such as the European and Inter-American Courts of Human Rights, through the creation of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), and through the 1998 agreement to establish a Permanent International Criminal Court. Peacekeeping efforts such as that of the United Nations in East Timor and the military intervention of the North Atlantic Treaty

Organization (NATO) in Kosovo also have been motivated substantially by human rights concerns. The ICTY's indictment last year of Slobodan Milosevic, a sitting head of state, was a striking pronouncement of the extent to which international human rights enforcement mechanisms have developed.

Despite significant progress in the identification, definition, and promulgation of human and labor rights norms, however, international mechanisms for their enforcement remain underdeveloped. International monitoring bodies lack enforcement authority and rely substantially on the "mobilization of shame" to encourage governments to comply with international norms. The International Court of Justice (ICJ) remains limited in its effectiveness, and the restricted jurisdiction of the Rwanda and Yugoslavia war crimes tribunals, and the United States' refusal to join the International Criminal Court, indicate that effective international judicial enforcement for even the most fundamental human rights violations such as genocide, torture, and crimes against humanity may be years away. There is, to date, no international institution capable of holding individuals such as the late Pol Pot, General Pinochet, and "Baby Doc" Duvalier accountable for even the most basic human rights violations. Nor do any international enforcement mechanisms exist to reach nations and private corporations that utilize forced labor, murder labor organizers, or engage in other fundamental violations of international labor rights.

The General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) have consolidated an international free trade regime, but multilateral efforts to use international trade to encourage compliance with labor and human rights norms have been consistently rejected by developing countries, which criticize such efforts as protectionist and imperialist. Regional trade regimes such as the North American Free Trade Agreement (NAFTA) and the European Union (EU) have proven more receptive to incorporating labor and environmental concerns into their trading systems. With the notable exception of the EU, however, enforcement mechanisms in regional trade regimes also remain weak.

In light of the limited possibilities for multilateral enforcement of international norms, domestic law mechanisms for this purpose have become increasingly important. The past several decades have seen significant progress in the internalization of fundamental human rights into the domestic law and practices of states.[1] The 1999 arrest of Pinochet in the United Kingdom on a Spanish extradition request may be the most striking recent example, but it is by no means the only case in which domestic legal structures have been mobilized to redress fundamental rights violations committed in foreign jurisdictions.[2] In the United States, victims of human

1. *See generally* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (Benedetto Conforti & Francesco Francioni eds., 1997) (discussing the domestic application of international human rights law in various countries' courts).

2. Recent domestic efforts to hold government officials accountable for international human rights violations committed abroad include Senegal's prosecution of former President Hissen Habre of Chad on torture charges, *More "Pinochet Style" Prosecutions Urged Rights Watch*, AFRICA NEWS SERVICE, Mar. 6, 2000, 2000 WL 15974406, Belgium's recent indictment of Congolese foreign minister

rights atrocities abroad have filed civil suits under the Alien Tort Claims Act for violations of the law of nations by former government officials and private corporations.[3] Congress's 1996 repeal of foreign sovereign immunity for designated state sponsors of terrorism has exposed certain states to civil liability for, *inter alia*, core international law violations.[4] Sub-national and private efforts such as consumer boycotts, labeling schemes that enable consumers to identify products made using socially responsible methods, and the development of voluntary corporate codes of conduct have sought to harness consumer market power to encourage compliance by private industry with human and labor rights. All of these efforts contribute to the development of a multi-tiered enforcement structure for the global human rights regime.

"Unilateral" economic sanctions, or sanctions imposed without express regional or multilateral authorization,[5] have become one common domestic enforcement mechanism to encourage foreign states to comply with international norms. Western states traditionally have resorted to restrictions on foreign assistance and trade benefits to promote a range of social goals, although the United States has been by far the most active player in this area.[6] Unilateral sanctions by the United States have taken a variety of forms, from general statutes conditioning foreign assistance and trade preferences on compliance with certain human and labor rights standards, to statutes that

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Abdoulaye Yerodia Ndomasi for crimes against humanity and war crimes, *Human Rights Watch Endorses Belgian Warrant Against DRC Minister*, AFRICA NEWS SERVICE, Nov. 17, 2000, 2000 WL 29192967, and the Netherlands' investigation of Desi Bouterse, former military dictator of Suriname, for crimes against humanity, Marlise Simons, *Dutch Court Orders an Investigation of '82 Killings in Suriname*, N.Y. TIMES, Nov. 26, 2000, § 1, at 12.

3. Sarah Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1561-66 (1998) (discussing litigation under the ATCA).

4. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214 (1997) (codified at 28 U.S.C. § 1605(a)(7) (2000)), waived the foreign sovereign immunity of countries designated as sponsors of terrorism for damage claims based on acts of torture, extrajudicial killing, aircraft sabotage, and hostage taking. The waiver was limited in 1997 to claims by U.S. nationals. Pub. L. No. 105-11, 111 Stat. 22 (1997). States currently subject to the waiver are Iran, Iraq, Libya, Cuba, Sudan, Syria, and North Korea. *See generally* Joseph W. Glannon & Jeffrey Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L.J. 675 (1999) (discussing the effects of the Foreign Sovereign Immunities Act waiver on litigation).

5. For the purposes of this Article, the term "unilateral" refers to action by individual states which is not taken pursuant to the mandate of a regional or international organization. The term does not preclude the possibility that other states may also act unilaterally to support the same goals, as in the case of sanctions against Burma, described *infra* Part II. "Regional" action refers to measures taken by states pursuant to the authorization of a regional entity such as the Organization of American States (OAS), the European Union, the Association of South East Asian Nations (ASEAN), or NATO. "Multilateral" measures refer to those adopted or authorized by the United Nations, the World Bank, or other authoritative multilateral bodies.

6. A study of sanctions imposed in the post-World War II era indicated that of 119 cases studied between World War II and 1990, thirty-nine involved only foreign states, seventeen involved the United States and other states or international actors, and sixty-three involved sanctions imposed only by the United States. GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 16-27 (2d ed. 1990).

target specific countries deemed to be rights abusers. Recent U.S. legislation such as the Helms-Burton Act regarding Cuba controversially extends U.S. sanctions to third parties doing business with the target state. States and municipalities also have adopted selective purchasing laws to promote fundamental rights, such as the Massachusetts statute targeting Burma.

Unilateral economic sanctions serve a range of purposes, including punishing a regime for past wrongdoing and improving future compliance. Governments may use sanctions to publicly distance themselves and their private enterprises from noncompliant states and to encourage other states to respect the normative principles of the international community. In the context of international trade, labor rights sanctions may also constitute valid retaliation for unfair trade practices. Trade sanctions targeting goods produced with forced or prison labor, for example, are intended both to punish human rights violations and to prevent companies from gaining an improper competitive advantage in international markets through violations of fundamental rights.[7]

Economic sanctions are an important weapon in transnational efforts to promote respect for fundamental rights and can have substantial behavior-modifying potential. Gary Hufbauer and Jeffrey Schott's comprehensive study of sanctions in the post-World War II era found U.S. sanctions to be effective in promoting human rights in Brazil between 1977 and 1984,[8] in Idi Amin's Uganda,[9] and in Somoza's Nicaragua.[10] Sanctions are acknowledged to have played a role in dismantling the apartheid regime in South Africa.[11] In more recent examples, the U.S. Congress' consideration of economic sanctions against Burma in 1995 partially prompted that government's release of pro-democracy leader Aung San Suu Kyi from her six-year house arrest.[12] In 1998, Colombia disbanded its notorious Twentieth Intelligence Brigade in response to political pressure and aid restrictions from the United States.[13] And the threat of sanctions from Western trading partners may have

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7. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE 11-12 (1996) [hereinafter OECD STUDY].

8. GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED: SUPPLEMENTAL CASE HISTORIES 463-66 (2d ed. 1990). Applying a fairly stringent interpretation of sanctions' effectiveness, the authors concluded that unilateral sanctions imposed since World War II had had a success rate of about thirty-six percent. HUFBAUER ET AL, *supra* note 6, at 91. In his study of U.S. sanctions, Barry Carter concludes that sanctions for human rights purposes have a success rate of forty percent. BARRY E. CARTER, INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. LEGAL REGIME 233 (1988).

9. HUFBAUER ET AL., SUPPLEMENTAL CASE HISTORIES, *supra* note 8, at 330-33.

10. *Id.* at 552-56.

11. *See generally* HOW SANCTIONS WORK: LESSONS FROM SOUTH AFRICA 264 (Neta C. Crawford & Audie Klotz eds., 1999) (concluding that economic sanctions undermined the apartheid regime, while also having some counterproductive effects); HUFBAUER ET AL., *supra* note 6, at 248 (concluding that U.S. sanctions contributed modestly to the 1990 reforms adopted by Prime Minister F. W. de Klerk).

12. *Moving Myanmar*, ECONOMIST, July 22, 1995, at 17.

13. Arturo Carrillo-Suarez, Hors de Logique: *Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT'L L. REV. 1, 133 (1999).

encouraged Chile's right-wing elite to tolerate, however unhappily, the current criminal proceedings against members of the Pinochet regime.[14]

The use of restrictions on economic assistance and trade to promote international human and labor rights, however, may conflict with other fundamental values of the global community. Critics of unilateral sanctions have argued that economic intervention in the affairs of foreign states—and particularly extraterritorial measures that target third parties—violate public international law principles of nonintervention and territorial jurisdiction. Unilateral trade restrictions may also conflict with GATT trade liberalization principles, a view that finds support in recent WTO rulings. Selective unilateral action—particularly by the United States—also has been criticized as hypocritical conduct that undermines, rather than promotes, efforts to develop the international human rights regime. Finally, critics who focus narrowly on the ability of sanctions to alter a foreign state's behavior condemn sanctions as ineffective measures which merely entrench foreign leaders and cripple U.S. industry in the global marketplace.

Economic sanctions, however, play a broader role in the development of the international system than merely seeking to alter a specific state's behavior. In his writings on transnational legal process, Harold Koh has argued that norm internalization—the process by which nations incorporate international law concepts into their domestic practice—is a critical element in determining why nations obey international law. According to Koh, this process occurs through repeated interactions between states and a variety of domestic and transnational actors, which produce interpretations of applicable global norms and ultimately the internalization of those norms into states' domestic values and processes.[15] Rather than focusing narrowly on punitive interactions between states, Koh sees "repeated participation in transnational legal process" as the key factor in the move "from one-time grudging compliance" with international norms "to habitual internalized obedience."[16] Repeated interactions between states and a wide range of transnational actors accordingly become the process by which norms created by international society are clarified and become enmeshed into domestic society.[17] "To the extent that those norms are successfully internalized, they become future determinants of why nations obey."[18]

This Article argues that economic sanctions have an importance beyond their classical role in seeking to punish and alter a foreign state's behavior—that of assisting in the international definition, promulgation, recognition, and domestic internalization of human rights norms. If, as Professors Myres

14. Tina Rosenberg, *The Precarious Nature of Latin Democracies*, N.Y. TIMES, Feb. 27, 2000, § 4, at 16.

15. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997).

16. *Id.* at 2655.

17. *Id.* at 2651.

18. *Id.*

McDougal and W. Michael Reisman contend, the creation and existence of an international norm can be discerned through the responses of various actors in the international community to an alleged breach,[19] the imposition of unilateral sanctions by states contributes to the development and identification of international rules. Economic sanctions also contribute to the process of norm definition and internalization on various levels. Santions contribute to *domestic* internalization by incorporating attention to human rights concerns into the political processes of the sanctioning state. They also contribute to *transnational* internalization by the broader international community by attracting foreign attention to human rights concerns and generating multilateral pressure on the target state. Unilateral action thus can contribute importantly to the definition and incorporation of rights into the international system. In order to promote norm internalization, however, economic sanctions must also be consistent with broader principles of the international community, such as principles of international jurisdiction, nonintervention, and free trade, and must positively contribute to the development of the global human rights system, rather than compete with or undermine the development of this system.

This Article examines the role of U.S. unilateral sanctions in promoting norm definition and internalization and advancing respect for the international human rights system. Part II examines the case of Burma to place U.S. unilateralism in the context of transnational efforts to compel compliance with fundamental human rights norms. Part III identifies the core human and labor rights implicated by U.S. sanctions, while Part IV considers the major statutory and regulatory programs in the United States that link economic sanctions to human rights. Part V considers the major international law concerns raised by U.S. unilateralism, Part VI discusses the process of norm internalization spurred by unilateral sanctions, and Part VII concludes by examining the contribution of U.S. practice to human rights development. The Article argues that while some U.S. unilateral measures are problematic and subject to abuse, those that are consistent with international law and that promote recognized human rights standards play an important and legitimate part in transnational legal process and the promulgation and internalization of fundamental human rights.

II. TRANSNATIONAL COMPLEMENTARITY: THE CASE OF BURMA

Sanctions by the United States are unilateral in the sense that they are not imposed at the request of a regional or international institution. But the United States does not act alone in employing aid and trade restrictions to

19. Arthur M. Weisburd, *The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights*, 25 GA. J. INT'L & COMP. L. 99, 100 (1995-96) ("If violation of a putative rule is met with coercion from such persons, it is at least possible that the putative rule is in fact a rule of the system. Conversely, if the system's authorities do not react to violations of a putative rule, its status as a rule is doubtful.").

promote international rights. Instead, U.S. sanctions practices form part of a broad network of decentralized but concerted transnational efforts to define, transfer, and implement international human and labor rights.[20] These efforts are conducted by a range of transnational actors, including U.N. bodies, international organizations, regional regimes, national and sub-national governments, private corporations, unions, religious groups, journalists, consumer advocates, and NGOs. These transnational actors utilize a range of instruments, including review in international, regional and domestic courts; monitoring, site visits and oversight; granting and withholding of diplomatic relations and membership in regional associations; economic assistance, trade benefits and sanctions, national and international prizes; corporate codes of conduct; and consumer boycotts. While apparently *ad hoc* when viewed in isolation, these dynamic and complementary activities coalesce into an evolving web of international efforts to promote universal rights compliance. This Section examines sanctions against Burma (Myanmar) as the most distinctive contemporary example of this transnational enforcement effort.

Burma became the object of international condemnation in 1988 when its military government, the State Law and Order Restoration Council (SLORC),[21] violently suppressed pro-democracy efforts and later nullified the results of the 1990 national election. Over the past decade, the governing military junta has severely suppressed political protest in the country, placing pro-democracy leader Aung San Suu Kyi under a six-year house arrest and continuing to restrict her right to travel, detaining or deporting pro-democracy advocates, closing public universities, and barring Internet access. The government has made widespread use of forced labor for military porters and building infrastructure projects, has forcibly relocated thousands of civilians, and has committed other gross human rights abuses in its violent suppression of the country's various ethnic groups. Approximately 260,000 Muslim refugees fled to Bangladesh to escape religious persecution in Burma in 1991-92, and over 100,000 refugees similarly have fled to Thailand to escape political oppression and violence against ethnic insurgents. Wages for ordinary laborers average around fifty cents per day, child labor is rampant,

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20. As McDougal and Reisman have observed, international law is created through a "staggering[ly]" diverse process of communication within the global community:

> The peoples of the world communicate to each other expectations about policy, authority, and control, not merely through state or intergovernmental organs, but through reciprocal claims and mutual tolerances in all their interactions. The participants in the relevant processes of communication, . . . include not merely the officials of states and intergovernmental organizations but also the representatives of political parties, pressure groups, private associations, and the individual human being *qua* individual with all his or her identifications.

Myres S. McDougal & W. Michael Reisman, *The Prescribing Function: How International Law Is Made*, 6 YALE STUD. 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).

21. The military government recently changed its name from SLORC to the State Peace and Development Council (SPDC).

and the government has made no effort to stem the sale of women into the Thai sex trades. Thus, in addition to deposing a democratically elected government, the state has violated fundamental norms regarding torture, summary execution, arbitrary detention, religious discrimination, and forced and child labor. Burma, nevertheless, is party to a number of major human rights instruments, including the Genocide Convention, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the ILO's Forced Labour Convention and Convention on the Freedom of Association and Protection of the Right to Organize.[22]

Prior to 1988, Burma had pursued a thirty-year long policy of economic isolation, and few Western states at that time had substantial economic interests in the country. The country is extremely rich in natural resources, particularly gems, teak wood, and oil. Burma also has an active illegal drug trade and is reportedly the world's second largest producer of opium and heroin, after Afghanistan.[23] The events of 1988 to 1990, and the government's continuing participation in widespread human rights abuses, however, have focused a range of international, regional, state, municipal, and non-governmental efforts on condemning the actions of the Burmese military regime. The United States has been a leader in this area, and unilateral measures adopted by the United States have helped marshal the transnational response. Sanctions and other measures by the United States have played an important role in focusing international attention on human rights violations in Burma and in garnering support for a wide range of transnational measures condemning these actions.

A. *The U.S. Response*

Following the SLORC's violent actions against pro-democracy groups in 1988, the United States suspended anti-narcotics assistance to Burma and minimized high level diplomatic contacts with the government. The United States also imposed a *de facto* embargo on arms sales and attempted to discourage other states from selling weapons to Burma.[24] In 1989, the United States suspended twelve million dollars in aid[25] and encouraged other countries (especially Japan, Burma's largest donor) to suspend aid as well.[26] In addition, the United States indefinitely suspended Burma's preferred trading status in 1989 due to the country's labor rights violations.[27] In 1990, the United States adopted legislation requiring the President to "impose such

22. For a discussion of these Conventions, see *infra*, Section III.A.

23. *Growing Threat from Burma*, INT'L HERALD-TRIB., Mar. 17, 2000, at 6.

24. HUMAN RIGHTS WATCH, WORLD REPORT 1990, at 262 (1989) [hereinafter HRW WORLD REPORT 1990]; *see also* 22 C.F.R. § 126.1(a) (2000) (prohibiting arms sales to Burma).

25. Steven Erlanger, *Burma Becomes a Test Case in Human Rights Politics*, N.Y. TIMES, Jan. 15, 1989, § 4, at 5.

26. HRW WORLD REPORT 1990, *supra* note 24, at 262.

27. Proclamation No. 6245, 3 C.F.R. 7, 7-9 (1992), *reprinted in* 105 Stat. 2484, 2484-86 (1991); Proclamation No. 5955, 3 C.F.R. 29, 29-31 (1990), *reprinted in* 103 Stat. 3010, 3011-13 (1989).

economic sanctions upon Burma as the President determines to be appropriate" if Burma's rulers failed to transfer the government to civilian authority and to take other democratizing measures.[28] The Act also requested the President to "confer with other industrialized democracies in order to reach cooperative agreements to impose sanctions against Burma."[29] The United States declined to appoint a new ambassador to Burma in 1990 and since then has limited diplomatic relations with the country to a *charge d'affaires*.[30] Pursuant to the sanctions legislation, the United States decided in 1991 not to renew a lapsed bilateral textile agreement with Burma.[31] In 1993, the United States reduced a $40 million grant to $18 million,[32] and the United States prohibited use of its $7 million contribution to the U.N. Development Program (UNDP) for projects that would benefit the SLORC.[33] In 1995, however, the Clinton administration renewed anti-narcotics assistance to Burma and agreed to provide in-country training for SLORC anti-narcotics agencies—contradicting earlier statements that U.S. assistance would not increase until greater improvements in human rights conditions were made.[34]

Throughout the early and mid-1990s, the United States worked to encourage international opposition to the Burmese regime. The United States actively supported a U.N. Human Rights Commission resolution regarding human rights conditions in Burma,[35] endorsed ongoing U.N. diplomatic efforts, and pressed for appointment of a U.N. special envoy to Burma.[36] Efforts to encourage individual states to adopt restrictions on foreign assistance and arms sales and to limit diplomatic relations and Burma's participation in ASEAN, however, were hindered in part by Western industrial states' low levels of trade and assistance to the country, by the willingness of certain Asian nations to trade with Burma, and by U.S. reluctance to confront China on the issue. In 1996, increased repression of democracy leaders and pending sanctions legislation in Congress spurred a mission of U.S. envoys to Asian states, producing an agreement by Japan to coordinate future policy towards Burma with the United States.[37]

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28. Customs and Trade Act of 1990, Pub. L. No. 101-382, § 138, 104 Stat. 629, 653 (1990).
29. *Id.* § 138(a)(2).
30. HRW WORLD REPORT 1990, *supra* note 24, at 263.
31. HUMAN RIGHTS WATCH, WORLD REPORT 1992, at 351 (1991).
32. Steven A. Holmes, *U.S. is Criticized on Burmese Policy*, N.Y. TIMES, June 21, 1993, at A11.
33. HUMAN RIGHTS WATCH, WORLD REPORT 1994, at 148 (1993); *see also* 22 U.S.C. § 2227(a) (1994) (barring the use of U.S. aid to international organizations for programs in Burma).
34. HUMAN RIGHTS WATCH, WORLD REPORT 1996, 134 (1995) [hereinafter HRW WORLD REPORT 1996].
35. HUMAN RIGHTS WATCH, WORLD REPORT 1993, at 155-56 (1992) [hereinafter HRW WORLD REPORT 1993].
36. HUMAN RIGHTS WATCH, WORLD REPORT 1995, 135 (1994) [hereinafter HRW WORLD REPORT 1995].
37. HUMAN RIGHTS WATCH, WORLD REPORT 1997, 143 (1996) [hereinafter HRW WORLD REPORT 1997].

In 1996, Congress imposed a variety of mandatory sanctions against Burma for human rights violations, including prohibiting foreign aid other than humanitarian and anti-drug trafficking aid, denying U.S. entry visas to Burmese officials and directing U.S. representatives to oppose financial assistance to Burma in international financial institutions such as the World Bank.[38] The Act further authorized the President to bar new investment in Burma by U.S. nationals if the President found that Burma had acted against Aung San Suu Kyi, or had committed "large-scale repression" or violence against the democratic opposition. The President could terminate the sanctions upon finding that "Burma has made measurable and substantial progress in improving human rights practices and implementing democratic government"[39] and could waive the Act's provisions upon a finding that sanctions "would be contrary to the national security interests of the United States."[40] The Act finally required the President to develop "a comprehensive multilateral strategy" to improve human rights practices in Burma, and to report to Congress twice a year on Burma's progress toward democracy and human rights.[41]

The visa restrictions went into effect immediately,[42] and in 1997 President Clinton exercised his authority under the Burma statute to prohibit new U.S. investment in Burma by U.S. nationals.[43] Clinton noted that the United States would be carefully watching the conclusions of the U.N. Special Rapporteur and the U.N. Secretary General regarding Burma, and called on the regime "to cooperate fully with those two important U.N. initiatives."[44] Although in early 1998 the U.S. gave $3 million toward a U.N. crop substitution program in the Shan State, the U.S. later decertified Burma from anti-narcotics assistance.[45] In 1998, at the direction of Congress, the U.S. Department of Labor issued a lengthy report on forced labor practices in Burma.[46] President Clinton has continued the sanctions against Burma to the present date.[47]

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38. 1997 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 (1996). The statute is referred to in the text as the Federal Burma Statute.

39. *Id.* § 570(a).

40. *Id.* § 570(e).

41. *Id.* § 570(c) and (d).

42. Proclamation No. 6925, 3 C.F.R. 74 (1997) (suspending visas).

43. Exec. Order No. 13,047, 3 C.F.R. 202 (1998), *reprinted in* 50 U.S.C. § 1701 (2000); *see also* Steven Erlanger, *Clinton Approves New U.S. Sanctions Against Burmese*, N.Y. TIMES, Apr. 22, 1997, at A1.

44. Letter from President Clinton to Congress Transmitting Exec. Order No. 13,047, *at* http://infoserve2.ita.doc.gov/apweb.nsf (May 20, 1997) (on file with The Yale Journal of International Law).

45. HUMAN RIGHTS WATCH, WORLD REPORT 1999, at 169 (1998), *available at* http://www.hrw.org/hrw/worldreport (last visited Mar. 7, 2000) [hereinafter HRW WORLD REPORT 1999].

46. U.S. Dep't. of Labor, Bureau of Int'l Labor Affairs, Report on Labor Practices in Burma, *at* http://www.dol.gov/dol/ilib/public/media/report/ofr/burma/main.htm (Sept. 1998) (on file with The Yale Journal of International Law).

47. Notice of the President, 65 Fed. Reg. 32,005 (May 18, 2000); Notice of the President, 64 Fed. Reg. 27,443 (May 18, 1999); Notice of the President, 63 Fed. Reg. 27,661 (May 18, 1998).

Burma has also been the country most targeted by U.S. state and local government procurement laws. In 1996, prior to the adoption of the Federal Burma Statute, Massachusetts adopted a law prohibiting state and local governments from entering into procurement contracts or otherwise doing business with Burma.[48] Similar selective purchasing laws against Burma have been adopted by more than two dozen states and localities, including Vermont, Los Angeles, San Francisco, and New York City.[49] Most reflect a desire, as set forth in the measure adopted by the City of Berkeley, California, "to promote universal respect for human rights and fundamental freedoms, [and to] recognize the responsibility of local communities to take positive steps to support the rule of law and to help end injustices and egregious violations of human rights wherever they may occur."[50] The measures have had an effect on corporate practices: Motorola closed its office in Burma partially due to a San Francisco ordinance,[51] and Apple Computer withdrew its Burma operations in response to the Massachusetts statute.[52]

B. *International Responses*

Encouraged in part by U.S. measures, the international community has responded to Burma's human rights abuses with widespread denunciations. Both the U.N. General Assembly and the Human Rights Commission repeatedly have adopted annual resolutions condemning Burma's human rights practices.[53] The Human Rights Commission appointed a special

48. 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 Burma (Myanmar)."). The law is referred to in the text as the Massachusetts Burma Statute. It has since been invalidated by the U.S. Supreme Court. See the discussion *infra* note 363 and accompanying text.

49. The Organization for International Investment, a business group which lobbies against trade sanctions, maintains a website cataloguing current local selective purchasing measures. ORGANIZATION FOR INTERNATIONAL INVESTMENT, STATE AND MUNICIPAL SANCTIONS REPORT, *at* http://www.ofii.org/issues/sanction.asp (visited Oct. 2, 2000) [hereinafter OFII Report] (on file with The Yale Journal of International Law).

50. The City of Berkeley, California, was the first municipality to enact a Burma selective purchasing law. The Berkeley Resolution bars contracts for services or commodities with companies doing business with Burma "until the City Council determines that the people of Burma have become self-governing." Berkeley, Cal. Resolution No. 57,881-N.S., IIIB and IVB (Feb. 28, 1995), *cited in* David Schmahmann & James Finch, *The Unconstitutionality of State and Local Enactments in the United States Restricting Business Ties with Burma*, 30 VAND. J. TRANSNAT'L L. 175, 180 n.13 (1997).

51. Leslie Goldberg, *Motorola Gets Out of Burma, Into City: Firm's Closing of Office Likely To Net It $40 million S.F. Radio Contract*," S.F. EXAMINER, Dec. 6, 1996, at A1.

52. Frank Phillips, *Apple Cites Mass. Law in Burma Decision*, BOSTON GLOBE, Oct. 4, 1996, at B6 (indicating that Apple was discontinuing computer sales to Burma in response to the Massachusetts law).

53. *E.g.*, *Situation of Human Rights in Myanmar*, G.A. Res. 53/162, U.N. GAOR, 53d Sess., 85 mtg., Supp. No. 49, U.N. Doc. A/RES/53/162 (1998); *see also Situation of Human Rights in Myanmar*, Commission on Human Rights Res. 1999/17, U.N. ESCOR, 52d mtg., U.N. Doc. E/CN.4/RES/1999/17 (1999), *available at* http://www.unhchr.ch/Huridocda (last visited Nov. 27, 2000).

rapporteur to Burma in 1992[54] and has extended the rapporteur's mandate through 2000.[55] In 1992, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) awarded Aung San Suu Kyi the Simon Bolivar Prize for contributing to "freedom, independence and dignity of peoples and to the strengthening of a new international, economic, social, and cultural order."[56] The U.N. High Commissioner for Refugees has been involved in monitoring refugee conditions on both the Thai and Bangladesh borders, and in 1998, the International Red Cross closed its office in Burma due to lack of access to Burma's prisons.

The ILO repeatedly has expressed concern regarding labor abuses in Burma and in 1997 appointed a commission of inquiry to investigate Burma's forced labor practices, an extraordinary step that the ILO previously had taken against only nine countries.[57] The Commission's 1998 report found pervasive use of forced labor in Burma, often accompanied by beatings, torture, rape, and murder and particularly targeting ethnic minorities.[58] The ILO report requested that the Burmese government adopt certain reforms if it wished to remain an ILO member in good standing, and when Burma failed to comply, the ILO effectively expelled the country from the organization, prohibiting any further participation in ILO activities and barring ILO technical assistance.[59] The ILO has indicated that the ban will continue until Burma ceases using forced labor and implements the ILO recommendations.

In 1998, the World Bank suspended international assistance to Burma following the crackdown on democracy. That policy remained in place through 1999, when the U.N. and the World Bank pursued discussions with Burma regarding the possible incremental restoration of aid to the country in exchange for improved human rights conditions and democratization.[60]

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54. *Situation of Human Rights in Myanmar*, Commission on Human Rights Res. 1992/58, 48th Sess., 52d mtg., Supp. No. 2, at 136, U.N. Doc. E/1992/22, ch. II, § A (1992).

55. *Situation of Human Rights in Myanmar*, Commission on Human Rights Res. 1999/17, *supra* note 53, § 8(a). In recent years, the government of Myanmar has persistently refused to permit the Special Rapporteur to visit the country.

56. *See* International Simon Bolivar Prize-Winners, *at* http://www.unesco.org/culture/simon_bolivar/html_eng/winners.htm (last visited Nov. 18, 2000) (on file with The Yale Journal International Law).

57. HUMAN RIGHTS WATCH, WORLD REPORT 1998, at 161 (1997), *available at* http://www.hrw.org/hrw/worldreport [hereinafter HRW WORLD REPORT 1998].

58. *Forced Labour in Myanmar (Burma)*, Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), *at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm (last visited Nov. 27, 2000) (on file with The Yale Journal of International Law).

59. Resolution on the Widespread Use of Forced Labour in Myanmar, International Labour Organization, 87th Sess., *at* http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-myan.htm (June 1999). In November 2000, the ILO Governing Body reaffirmed the resolution and called upon ILO members to ensure that their relations with the Burmese government "do not perpetuate or extend the system of forced or compulsory labour in that country." Press Release, International Labour Organization, ILO Governing Body Opens the Way for Unprecedented Action Against Forced Labour in Myanmar, *at* http://www.ilo.org/public/english/bureau/inf/pr/2000/44.htm (Nov. 17, 2000) (on file with The Yale Journal of International Law).

60. HUMAN RIGHTS WATCH, WORLD REPORT 2000, 172 (1999), *available at* http://www.hrw.org [hereinafter HRW World Report 2000].

Transnational NGOs such as Amnesty International and Human Rights Watch have conducted extensive monitoring and reporting on the human rights situation in Burma. The International Commission of Jurists in Geneva also has documented numerous human rights violations in the country, including the arbitrary arrest of opponents of the military regime, torture of detainees, media restrictions, forcible relocations and the use of forced labor. In a gesture that brought perhaps the most substantial international attention to the Burma crisis, in 1991, the Nobel Peace Prize was awarded to Aung San Suu Kyi.

C. *Regional Responses*

On the regional level, the European Union has taken extensive diplomatic and economic action against Burma. Since the early 1990s, the European Union has maintained an arms embargo and has suspended military cooperation and bilateral aid other than strictly humanitarian aid to Burma.[61] In 1991, the European Parliament awarded Aung San Suu Kyi the Sakharov Prize for freedom of thought. A Danish effort to impose Europe-wide economic sanctions against Burma was opposed by Britain, France, and Germany.[62] Nevertheless, Europe joined the United States in opposing Burma's membership in Association of Southeast Asian Nations (ASEAN),[63] and in late 1996, the EU started declining entry visas for senior members of the Burmese government, their families, and members of the Burmese security forces and suspended high-level government visits to Burma.[64] Following Burma's refusal to allow an EU investigation into its forced labor practices and in response to a complaint by European trade unions, in December 1996 the European Commission for the first time exercised the human rights clause of the European Generalized System of Preferences (GSP) program to terminate Burma's GSP trade benefits on industrial exports to the EU. The Commission attributed the decision to Burma's forced labor practices and indicated that the restriction would remain in place until the use of forced labor was abolished. In March 1997, the European Union suspended GSP benefits for Burmese agricultural products,[65] and in 1998, it extended its visa ban to include transit visas and visas for members of the Burmese tourism administration. In 2000, the EU further strengthened its sanctions policies by banning exports of technology that might be used for internal repression or

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61. EU/Burma-Myanmar Relations—An Overview, *at* http://www.europa.eu.int/comm/external_relations/myanmar/intro/index.htm (last visited Nov. 19, 2000) [hereinafter EU/Burma Relations] (on file with The Yale Journal of International Law).

62. HRW WORLD REPORT 1997, *supra* note 37, at 143. In October 1999, the EU voted to cancel aid for another six months; *see also* HRW WORLD REPORT 2000, *supra* note 60, at 173.

63. HRW WORLD REPORT 1996, *supra* note 34, at 134.

64. EU/Burma Relations, *supra* note 61.

65. HRW WORLD REPORT 1998, *supra* note 57, at 161.

terrorism and freezing European funds held by persons subject to the visa ban.[66]

International condemnation is not universal, and Asian nations have been significantly less critical of Burmese policies. In the early 1990s, members of ASEAN (then including Thailand, Malaysia, Singapore, Brunei, Indonesia, and the Philippines) rejected a U.S. proposal to impose multilateral economic sanctions on Burma, arguing that, in light of the country's prior decades of self-imposed isolation, further isolation would be counterproductive. Malaysia did, however, block Burma from attending the 1992 ASEAN conference, citing Burma's human rights record.[67] In 1997, ASEAN admitted Burma as its member in a move that was sharply criticized by the United States and Europe. Western criticism and sanctions, however, "seemed only to harden ASEAN resolve to accept Burma as a full member and defy what was projected as an example of western imperialism."[68] But ASEAN is not impervious to human rights concerns. Among ASEAN members, Thailand and the Philippines have been the most willing to criticize Burma's human rights practices.

Burma's membership in ASEAN has created tensions in EU-ASEAN relations. In 1997, the EU Council President announced that the EU would bar Burma from participating in the EC-ASEAN cooperation agreement.[69] The EU excluded Burma from the 1998 Asia-Europe meeting (ASEM) in London, and only agreed to participate in 1999 discussions with ASEAN after Burma's participation was limited to silent observer status.

D. *Individual State Responses*

Individual states also have imposed diplomatic, foreign assistance, and trade sanctions on Burma. Canada has prohibited military and non-humanitarian exports to Burma and has maintained limited diplomatic relations with the country since 1988.[70] In 1997, Canada withdrew General Preferential Tariff benefits from Burma and required all Canadian firms trading in Burma to obtain export permits. The government further urged Canadians to discontinue investing in Burma.[71]

Australia suspended military relations with Burma in 1991 for a three year period, and presently has suspended all foreign aid to the country. Australia also has attempted to use diplomatic contacts to promote political reform. In 1999, Australia's Human Rights Commissioner met with Burmese

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66. EU/Burma Relations, *supra* note 61.
67. HRW WORLD REPORT 1993, *supra* note 35, at 156.
68. HRW WORLD REPORT 1998, *supra* note 57, at 162.
69. *Id.*
70. HRW WORLD REPORT 2000, *supra* note 60, at 173. *Contra id.* (acknowledging that Canada has recently expressed "willingness to engage the SPDC on the prospect of cooperation in narcotics suppression").
71. HRW WORLD REPORT 1998, *supra* note 57, at 162.

government officials to try to encourage the regime to establish an independent human rights office.[72]

In 1995, the British Parliament under John Major considered and rejected imposing trade sanctions on Burma. In 1997, however, the British Labour government, which had campaigned on a pro-human rights platform, announced that it would actively discourage U.K. companies from investing in Burma, and would continue to suspend all government-sponsored trade tours to the country.[73] In 1998, the United Kingdom announced a policy to "actively discourage" tourism in Burma, the first time the U.K. has adopted such a policy toward any country.[74] West Germany suspended $10 million in aid in 1989,[75] and Denmark called for European economic sanctions against Burma in the mid-1990s.[76]

Japan has pursued a mixed policy of sanctions and engagement. Within six months of the violence of Burma's 1988 "democracy summer," Japan recognized SLORC as the legitimate government of Burma and continued gas, hydro, and power projects that had been commenced before the democratic uprising.[77] In October 1989, Japan and Burma entered a $15 million loan agreement for natural gas development,[78] and Japan provided limited foreign assistance and debt relief to Burma during the 1990s. Japan also, however, responded to the crackdown by suspending $300 million in aid,[79] and has continued to keep most Official Development Assistance suspended. In 1998, Japan terminated all high level meetings with Burmese officials pending a 1999 meeting to discuss improving human rights and democracy.[80] Japan supported Burma's entry into ASEAN in 1997, while warning that the move should not provide "cover for oppression."[81] The Japanese government has supported U.N. Human Rights Commission resolutions regarding Burma without formally voting for them. Tokyo resumed a $19.5 million business project to enlarge the Yangon airport in 1998, which it justified as "humanitarian aid." The decision was urged by Japanese business but strongly protested by the United States. While calling for improvements in the country's human rights practices, in March 1998, Japan gave Burma $16 million in debt relief and pledged $800,000 for drug crop substitution programs, without requiring effective mechanisms to monitor the funding's

72. HRW WORLD REPORT 2000, *supra* note 60, at 172.
73 HRW WORLD REPORT 1998, *supra* note 57, at 162.
74. HRW WORLD REPORT 1999, *supra* note 45, at 162.
75. HRW WORLD REPORT 1997, *supra* note 37, at 142.
76 *Id.* at 143.
77. EARTHRIGHTS INT'L & S.E. ASIAN INFO. NETWORK, TOTAL DENIAL: A REPORT ON THE YADANA PROJECT IN BURMA, app. A at 71 (1996), *at* www.earthrights.org/our_publication/Total_Denial/home.html (on file with The Yale Journal of International Law).
78. *Id.* at 72.
79. Erlanger, *supra* note 25, at 5.
80. HRW WORLD REPORT 2000, *supra* note 60, at 72.
81. HRW WORLD REPORT 1998, *supra* note 57, at 162.

use.[82] In 1999, Japan informed the Burmese government that no further substantial aid would be awarded "without substantial political and human rights reforms."[83]

Burma's persecution of its minority Muslim population alienated much of the Muslim world. Bangladesh terminated relations with Burma following the expulsion of the Muslim *Rohingya* refugees in the early 1990s, and Indonesia and Malaysia further reduced their limited support for the Burmese government. In 1995, the government of India awarded Aung San Suu Kyi, *in absentia*, the Jawaharlal Nehru Award for International Understanding. That year, India, however, also resumed trade with Burma for the first time since the 1962 military takeover, in response to Burma's increased trade with China.[84]

Thailand supported ASEAN's policy of constructive engagement with Burma in the early 1990s and pursued a variety of economic deals with the country.[85] However, Burma's relations with Thailand, which hosts approximately 100,000 refugees on the Thai-Burmese border, have become strained as the number of refugees has increased, and both the Burmese government and rebel forces have conducted bombing campaigns and attacks along the Thai border. Thailand terminated timber and mineral contracts in Burma in the early 1990s and closed all border crossings in 1995.[86] Thailand pursued the lucrative Yadana natural gas pipeline agreement with Burma throughout the 1990s, but in a major blow to the Burmese government, Thailand recently announced that it would not purchase the Yadana gas.

Both China and Singapore have energetically pursued trade and investment with the Burmese military regime. Singapore signed $465 million in trade and tourism agreements with Burma in 1993.[87] The Singapore government shipped a prefabricated small arms and ammunition factory to Burma in February 1998,[88] and Singapore's Tiger Beer took over Heineken's Burmese operations when the Dutch company withdrew. Western China uses Burma's capital as a deep water port, and so China has warmly embraced the Burmese government. China, both licitly and illicitly, is Burma's most important trading partner, foreign investor, and arms supplier. In the early 1990s, China awarded Burma millions in soft loans for roads, airports, and other infrastructure development.[89] In 1994, China sold over $400 million in armaments to Burma,[90] and trade between the two countries was estimated in the billions.[91] Chinese trade and investment in Burma has continued to grow throughout the 1990s. Indeed, China's energetic pursuit of trade and

82. HRW WORLD REPORT 1999, *supra* note 45, at 170.
83. HRW WORLD REPORT 2000, *supra* note 60, at 172.
84. HRW WORLD REPORT 1996, *supra* note 34, at 133.
85. HRW WORLD REPORT 1995, *supra* note 36, at 135.
86. HRW WORLD REPORT 1996, *supra* note 34, at 134.
87. HRW WORLD REPORT 1995, *supra* note 36, at 135.
88. HRW WORLD REPORT 1999, *supra* note 45, at 169.
89. HRW WORLD REPORT 1995, *supra* note 36, at 135.
90. HRW WORLD REPORT 1996, *supra* note 34, at 133.
91. HRW WORLD REPORT 1995, *supra* note 36, at 135.

investment in Burma may be the single most significant impediment to the success of the transnational sanctions efforts.

E. *Local Non-governmental Responses*

Finally, private corporate, NGO, and consumer efforts have contributed significantly to the international condemnation of Burma. In addition to the work of international NGOs discussed above, domestic nonprofits have emerged in a number of countries to promote public awareness and condemnation of Burma's human rights crisis.[92] Shareholder pressure on the University of Washington, for example, led the University to support stockholder resolutions demanding withdrawal from Burma by companies in which the University held stock.[93] Local consumer pressure has spurred U.S. retailers such as Macy's, Eddie Bauer, Liz Claiborne, Motorola, Apple Computer, and Levi Strauss to cease doing business in Burma[94] and to stop purchasing Burmese-made goods through their other Asian suppliers. Beverage companies Heineken,[95] Carlsberg, and Pepsi have also pulled out of joint ventures with the Burmese government in response to public pressure.

On the other hand, many Asian companies pursue business as usual in Burma. Singaporean, Japanese, and Chinese companies are the most substantial investors in Burma, and Japanese companies such as Nissan and Mitsubishi Motor Companies, Nippon Steel, and Sumitomo have aggressively pursued the Burmese market.[96] The oil industry uniformly has been impervious to international calls for divestment. Premier Oil of the United Kingdom, Nippon Oil of Japan, Unocal and Texaco of the United States, Total of France, and the Petroleum Authority of Thailand all pursued investments in energy exploration and development in Burma during the 1990s, totaling many billions of dollars. These investments, unlike the sale of retail commodities, do little to benefit the local populace and provide critical foreign currency to the Burmese government. Sanctions by the United States carefully preserved the existing U.S. oil investments in Burma, although the oil industry has not been immune to public pressure. Amoco Oil Company withdrew from Burma in 1994,[97] and American consumer and labor advocates have brought two lawsuits against Unocal in U.S. federal court to challenge its complicity in the use of forced labor in constructing the Yadana pipeline.[98]

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92. Some of these NGOs are the Karen Human Rights Project, the Committee for the Publicity of the People's Struggle in Monland, The Burma Relief Center (Japan), and the Free Burma Project.

93. *Causes: Bailing Out of Burma*, N.Y. TIMES, Apr. 2, 1995, § 6, at 18.

94. *Macy's No Longer Shops in Myanmar*, ECONOMIST, April 22, 1995, at 35.

95. Ted Bardacke, *Western Companies Encounter Protesters on the Road to Burma*, FIN. TIMES, July 12, 1996, at 3.

96. *Burma: Japan Sees Rich Pickings in Burma*, BUS. VIETNAM, Aug. 1, 1996, *at* 1996 WL 11680262.

97. HRW WORLD REPORT 1995, *supra* note 36, at 135.

98. Doe v. Unocal Corp., 110 F. Supp. 2d. 1294 (C.D. Cal. 2000) (denying liability by

F. *Impact of Sanctions*

The Burmese government has taken a number of modest but significant steps in response to international pressure. The government released Aung San Suu Kyi from her six-year house arrest the day the U.S. Congress began debating sanctions,[99] though her ability to travel and meet with members of the opposition remains severely curtailed. Burma acceded to the Convention to Eliminate All Forms of Discrimination Against Women in 1991 and to the 1949 Geneva Conventions in 1992. In 1997, it ratified the Convention on the Rights of the Child, a move which has given child advocacy personnel within the country increased leverage in local interactions with Burmese officials. The use of forced labor declined in central Burma in the late 1990s, as the Burmese government replaced manual labor with heavy machinery. After years of seeking access to Burma's prisons, in 1999, the International Committee of the Red Cross finally was granted inspection permission and re-opened its office in the capital of Yangon.[100] And in the summer of 2000, the government took steps toward opening the country's universities, which had been closed since 1996.

The response to the human rights crisis in Burma illustrates the complementary, transnational nature of these apparently isolated efforts. U.S. unilateral measures and diplomatic efforts to garner international support have played a catalytic role in broadening and deepening the global response. Condemnation by U.N. bodies, monitoring, reporting, and widely-publicized awards by international organizations and NGOs, withholding of diplomatic relations, denials of loans and foreign assistance, visa blacklists, domestic litigation, corporate withdrawals and consumer boycotts all have coalesced to bring substantial international attention, pressure, and condemnation to bear on the Burmese regime. The various mechanisms serve a number of functions, including denying the military government access to foreign goods and credit and denying them membership in the international community through travel restrictions and boycotts. All of these actions 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.

Burma is not strictly an example of transnational *judicial* process, in which international norms are enforced through domestic litigation,[101] but of a fluid system of transnational accountability, in which norms that have been defined through international and regional instruments and the customary behavior of states are further clarified, elaborated, and internalized through the

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defendant for participation in Burmese government's use of forced labor).

99. *Moving Myanmar*, *supra* note 12 ("[O]utside pressure was also crucial in securing Miss [sic] Suu Kyi's release, which came on the day that America's Congress started considering a bill that would impose swinging trade sanctions on Myanmar.").

100. HRW WORLD REPORT 2000, *supra* note 60, at 170.

101. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996) (discussing the process by which norms articulated in international fora are transferred and enforced through domestic courts).

communications and the practices of international, regional, national, and subnational systems, which loosely cooperate through individual action to promote transnational compliance with fundamental rights norms. In the Burmese example, norms that are articulated and defined through customary international law and widely-ratified international treaties are asserted through repeated interactions between the Burmese government and international, regional, national, sub-national, corporate and nonprofit efforts. Thus, the various responses to the Burmese crisis have helped define and clarify international norms prohibiting forced labor and promoting democracy and free speech. Indeed, Burma has figured prominently in the development of an evolving international norm against the overthrow of democratic governments. The effort has further promoted *domestic* norm internalization in the states and institutions that have acted in response to the situation in Burma, by incorporating into their systems an awareness of international human rights standards and Burma's noncompliance with those standards. The effort also has produced incremental *transnational* norm internalization by encouraging Burma to accept international treaty obligations and modestly alter its human rights conduct, and by heightening international awareness and placing pressure on other states and actors to participate in the norm internalization dialogue. The Burmese example thus demonstrates that unilateral measures can form important building blocks in the development of a transnational enforcement process.

III. DEFINING INTERNATIONAL HUMAN RIGHTS

Before discussing further the role of economic measures in promoting the human rights system, it is important to identify the core principles of that system. The international human rights regime is enunciated through a loose network of general treaties promulgated by the United Nations; rights-specific regimes which are promoted by intergovernmental entities and international organizations such as the International Labour Organization; regional regimes of conventions and oversight; and universal customary prohibitions that have evolved through treaties, the practices of states, and the efforts of nongovernmental and private actors. The resulting global system of rules is comprised of essentially two tiers of human rights: *jus cogens* norms, such as the prohibitions against torture and slavery, that preempt other obligations as a matter of customary international law; and treaty rights and customary obligations *erga omnes*, such as freedom of association and the prohibition against discrimination, to which states have nearly universally acceded. Together, these customary international law norms and treaty rights coalesce to form the global human rights regime. Violations of these principles are violations of obligations to all other states and offenses to the international system.[102]

102. Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 4, 32-34 (Feb. 5).

A. *The Treaty Regime*

The U.N. Charter, through Articles 55 and 56, establishes international human rights as matters of international concern and pledges member states to promote human rights.[103] The ICJ has recognized that the Charter obligates its members "to observe and respect . . . human rights and fundamental freedoms for all," and that denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.[104] The Charter itself leaves the content of human rights undefined, however, and the cornerstone document of the U.N. human rights regime is generally considered to be the Universal Declaration of Human Rights,[105] which pledges U.N. members to "promot[e] . . . universal respect for and observance of human rights and fundamental freedoms,"[106] and recognizes a broad range of civil, political, and economic rights. The Declaration is non-binding but is supported by two foundational conventions, the International Covenant on Civil and Political Rights (ICCPR)[107] and the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[108] which essentially codify the Declaration into binding treaty law. A number of additional instruments promulgated to address specific categories of rights have been widely ratified. These include the 1949 Geneva Conventions and the 1977 Additional Protocols,[109] the Genocide

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103. Article 55 of the Charter provides as follows:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the 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 international cultural and educational cooperation; and
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. CHARTER art. 55. Under Article 56, "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* art. 56.

104. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 57 (June 21) (holding that South Africa's imposition of legally-mandated apartheid in Namibia, an international territory, violated its obligations under the Charter); *see also* Stephen M. Schwebel, *The Treatment of Human Rights and of Aliens in the International Court of Justice, in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 327, 336 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (arguing that the court's holding is not limited to international territories and "'what is a flagrant violation'" of the Charter for Namibia "'is also such a violation when committed . . . in any sovereign Member State'").

105. Universal Declaration of Human Rights, G.A. Res. 217(AIII), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

106. *Id.*, pmbl.

107. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

108. 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].

109. *E.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

Convention,[110] the Torture Convention,[111] the Convention to Eliminate All Forms of Racial Discrimination,[112] the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW),[113] and the Convention on the Rights of the Child.[114] Regional agreements that substantially incorporate the principles of the Universal Declaration include the European Convention on Human Rights,[115] the American Convention on Human Rights,[116] the American Declaration of the Rights and Duties of Man,[117] and the African Charter on Human and People's Rights.[118]

Certain labor rights also have attained broad recognition as fundamental human rights. The U.N. Charter commits states to improved living standards, full employment, and freedom from discrimination based on race, gender, language or religion.[119] The International Labour Organization, which is the international body primarily responsible for defining and implementing international labor norms,[120] identifies eight of its conventions as setting forth "fundamental human rights" which must be respected by all nations under all circumstances.[121] These include conventions protecting the following:

a) freedom of association and the right to organize and bargain collectively,[122]

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110. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

111. Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Torture Convention].

112. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter Racial Discrimination Convention].

113. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

114. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

115. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

116. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention]. The twenty-five parties to the convention are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad & Tobago, Uruguay, and Venezuela.

117. American Declaration of the Rights and Duties of Man, OAS Res. XXX, International Conference of American States, 9th Conf., OAS Doc. OEA/Ser. L/V/I. 4 Rev. XX (1948), *reprinted in* ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS, OEA/Ser.L/V/II.23 doc.21 rev.5, at 15 (1978).

118. African Charter on Human and People's Rights, June 27, 1981, 1520 U.N.T.S. 217 (entered into force Oct. 21, 1986).

119. U.N. CHARTER art. 55.

120. ILO standards are developed and implemented on a tripartite basis, through cooperation among representatives of governments, labor, and employer organizations. The ILO has promulgated over 180 labor conventions.

121. INTERNATIONAL LABOUR ORGANIZATION, FUNDAMENTAL ILO CONVENTIONS, *at* http://www.ilo.org/public/english/standards/norm/whatare/fundam/index.htm (last visited Nov. 20, 2000) [hereinafter FUNDAMENTAL ILO CONVENTIONS] (on file with The Yale Journal of International Law).

122. Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87), July 9, 1948, 68 U.N.T.S. 16 (entered into force July 4, 1950); Convention Concerning the

b) the prohibition against slavery and forced labor,[123]
c) equal pay and the prohibition against discrimination in employment,[124] and
d) the prohibition against child labor.[125]

With the notable exception of the United States, which has ratified only Convention No. 105 regarding the abolition of forced labor and the Worst Forms of Child Labour Convention,[126] the core conventions are nearly universally embraced. The Child Labour Convention has proven controversial, but all of the other instruments have been formally ratified by at least 100 nations.[127] Moreover, in 1998, the ILO made significant progress toward the universalization of these norms by adopting its Declaration on Fundamental Principles and Rights at Work.[128] Article 2 of this ILO Declaration binds all ILO members to the core labor principles, regardless of whether the member has ratified the relevant conventions.[129] Thus, commitment to core ILO principles is now a condition of ILO membership.

The OECD similarly has identified the rights to freedom of association and to bargain collectively, and the prohibitions against employment

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Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98), July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951).

123. ILO Convention Concerning the Abolition of Forced Labour (No. 105), June 25, 1957, 320 U.N.T.S. 291 [hereinafter 1957 Forced Labour Convention]; ILO Convention Concerning Forced or Compulsory Labour (No. 29), June 28, 1930, 39 U.N.T.S. 55 [hereinafter 1930 Forced Labour Convention]. The prohibition against forced labor is closely related to the prohibition against slavery and likely has attained the status of customary international law. For more information, see the discussion in Cleveland, *supra* note 3, at 1569-73.

124. Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960); Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (No. 100), June 29, 1951, 165 U.N.T.S. 303 (entered into force May 23, 1953).

125. Convention Concerning Minimum Age for Admission to Employment (No. 138), June 26, 1973, 1015 U.N.T.S. 297 (entered into force July 19, 1976).

126. 1957 Forced Labour Convention, *supra* note 123, entered into force in the United States in 1992. The United States is also party to the 1926 Slavery Convention and the 1957 Supplementary Slavery Convention. Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 2191, 60 L.N.T.S. 253, 263 [hereinafter 1926 Slavery Convention]; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 [hereinafter 1957 Supplementary Slavery Convention].

127. Specifically, the ILO reports the following total ratifications for these Conventions:
Convention No. 29: 155 ratifications
Convention No. 87: 132 ratifications
Convention No. 98: 147 ratifications
Convention No. 100: 149 ratifications
Convention No. 105: 150 ratifications
Convention No. 111: 145 ratifications
Convention No. 138: 103 ratifications
Convention No. 182: 49 Ratifications
FUNDAMENTAL ILO CONVENTIONS, *supra* note 121.

128. ILO Declaration on Fundamental Principles and Rights at Work, art. 2 (June 18, 1998), 37 I.L.M. 1233 (1998), *available at* http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm [hereinafter *ILO Declaration*]. The Declaration immediately received approval from all but about twenty-five of the ILO's approximately 175 members, with the rest abstaining.

129. *Id.* The ILO Declaration notes that in joining the ILO, all members endorsed the principles set out in the ILO Constitution and undertook to promote the overall objectives of the Organization. Accordingly, the Declaration states that "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote, and to realize . . . the fundamental rights which are the subject of those Conventions." *Id.* at 2.

discrimination and forced and exploitative child labor, as core labor standards.[130] The basic labor rights have been incorporated into foundational international human rights instruments such as the Universal Declaration,[131] ICCPR,[132] ICESCR,[133] CEDAW,[134] and the Convention on the Rights of the Child.[135] All of these instruments have received near-universal acceptance.

The above international treaty obligations cover a wide range of human rights protections and create binding obligations between party states. A state, by acceding to these conventions, becomes obligated to every other state to uphold the promises of the treaty and "submit[s] its performance to scrutiny and to appropriate, peaceful reaction by other parties . . . ."[136]

B. *Customary International Law Norms:* Jus Cogens *and* Erga Omnes

In addition to the rights detailed in the formal instruments of the human rights regime, certain rights are generally considered to be universally accepted and binding on all sovereign states as either *jus cogens* or *erga omnes* principles of customary international law. *Jus cogens* norms constitute a small subset of the recognized international human rights, and number among the most fundamental duties of states. Human rights provisions that have achieved the universal status of *jus cogens* are peremptory norms that cannot be superceded. States may not persistently object to avoid obligations under such norms, and they prevail over all competing principles of treaty and customary international law.[137]

On the other hand, certain human rights obligations that have achieved the status of customary international law, but may not yet constitute peremptory norms, nevertheless enjoy status as obligations *erga omnes*, or

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130. OECD STUDY, *supra* note 7, at 26. The OECD describes these standards as expressing "well-established elements of international jurisprudence concerning human rights." *Id.* at 27. The 1995 World Summit for Development in Copenhagen also affirmed member states' commitment to promoting these core worker rights. Report of the World Summit for Social Development, U.N. Doc. A/Conf.166/9, at 12 (1996).

131. Universal Declaration, *supra* note 105, art. 4 (prohibition against slavery and servitude); art. 20 (freedom of association); art. 23(2) & (4) (rights to equal pay and to form and join trade unions).

132. ICCPR, *supra* note 107, art. 8 (prohibition against slavery, servitude and forced labor); art. 22 (freedom of association and to form and join trade unions); art. 26 (non-discrimination).

133. ICESCR, *supra* note 108, art. 7(a)(1) (equal pay); art. 8 (freedom of association, right to form and join trade unions and to strike).

134. CEDAW, *supra* note 113, art. 11 (prohibition against gender discrimination in employment).

135. Convention on the Rights of the Child, *supra* note 114, at art. 19 (obligating states to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse).

136. Louis Henkin, *Introduction* to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 1, 15 (Louis Henkin ed., 1981).

137. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 344, art. 53 (defining *jus cogens* norms as principles "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"); *see also id.*, art. 64, at 347 (stating that newly emerging *jus cogens* norms supercede existing treaties).

obligations owed by and to all. These obligations, as the ICJ has explained, constitute "obligations of a State toward the international community as a whole" and include the "basic rights of the human person."[138] The International Law Institute recognizes that the international obligation to respect human rights is an obligation *erga omnes*, binding on all states.[139] Unlike other obligations under customary international law, such human rights obligations are considered owed to all members of the international community. All bound parties have a general interest in ensuring their observance and may take action to secure their enforcement.[140] In short, obligations *erga omnes* share with *jus cogens* norms their universal character. *Erga omnes* norms are not, however, peremptory norms which prevail over all other rules of customary international law.

Identifying the international human rights principles that constitute *jus cogens* norms or obligations *erga omnes* is difficult and controversial. Nevertheless, a consensus has coalesced around certain core human rights principles. The *Restatement (Third) of the Foreign Relations Law of the United States*[141] considers *jus cogens* rights—which also are set forth in numerous human rights instruments—to include the following:

(a) genocide;[142]

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138. Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 4, 32 (Feb. 5); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 86 (Further Requests for the Indication of Provisional Measures of Sept. 13) (opinion of Judge Elihu Lauterpacht) ("The duty to 'prevent' genocide is a duty that rests upon all parties and is a duty owed by each party to every other."); Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21).

139. The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States, 63 INSTITUT DE DROIT INTERNATIONAL ANNUAIRE 338 (1989); *see also* Summary Records of the 38th Mtg., 1 Y.B. Int'l L. Comm'n 99, U.N. Doc. A/CN.4/Ser.A/1976 (1976); OPPENHEIM, INTERNATIONAL LAW § 1 (9th ed., 1992) [hereinafter OPPENHEIM].

140. OPPENHEIM, *supra* note 139, § 150. Judicial enforcement, however, may not be available. South West Africa Cases (Eth. v. S. Afr., Liber. v. S. Afr.) (Second Phase), 1996 I.C.J. 4, 47 (July 18) (holding that an *actio popularis*, or action on behalf of the general community, "is not known to international law as it stands at present").

141. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) [hereinafter RESTATEMENT].

142. Genocide is defined in Article 2 of the Genocide Convention as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Genocide Convention, *supra* note 110, art. 2. Case Concerning Application of the Convention on the Prevention of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)) I.C.J. Second Request, 1993 I.C.J. 325, 440 (discussing genocide as a peremptory human rights norm); *see also Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), in* Letter Dated 9 February 1993 from the Secretary-General addressed to the President of the Security Council, U.N. SCOR, 48th Sess, Ann., at 15, U.N. Doc. S/25274 (1993) (recognizing the "character" of genocide and other fundamental human rights "as peremptory norms of international law").

(b) slavery or slave trade;[143]
(c) summary execution[144] or causing the disappearance of individuals;[145]
(d) torture or other cruel, inhuman, or degrading treatment or punishment;[146]
(e) prolonged arbitrary detention;[147]
(f) systematic racial discrimination;[148] and

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143. Various forms of coerced labor are barred under international law. ICCPR, *supra* note 107, art. 8. "Slavery," in its strict sense, is defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." 1926 Slavery Convention, *supra* note 126, art. 1(1). Servitude or "slave-like" practices include debt bondage, serfdom, compulsory marital arrangements, and the sale of children into labor. 1957 Supplementary Slavery Convention, *supra* note 126, art. 1. Forced labor requires involuntariness and is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." 1930 Forced Labour Convention, *supra* note 123. For further discussion, see Cleveland, *supra* note 3, at 1569-73.

144. Deliberate state-sponsored killing violates international law unless it is imposed as punishment pursuant to a lawful judicial conviction or under other authority of international law. Torture Victim Protection Act of 1991 § 3(a), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1994)); *see also* RESTATEMENT, *supra* note 141, § 702, cmt. f.

145. Disappearance involves state-sponsored abduction of an individual, combined with "the persistent refusal of [state] authorities . . . to acknowledge that they hold such persons in their custody." U.N. Res. on Disappeared Persons, G.A. Res. 33/173, U.N. GAOR, Supp. No. 45, at 158, U.N. Doc. A/33/45 (1978). Disappearance frequently involves other violations of fundamental rights, such as summary execution and torture. G.A. Res. 47/133, U.N. GAOR, art. 1(2), U.N. Doc. A/Res/47/133 (1992); *see also* Velásquez Rodriguez Case, Inter-Am. Ct. H.R., Ser. 4, ¶¶ 155-58 (1988), *reprinted in* 9 HUM. RTS. L.J. 212, 238-39 (1988).

146. Torture has been defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Torture Convention, *supra* note 111, art. I. Cruel, inhuman or degrading treatment includes acts that inflict mental or physical suffering, anguish, humiliation, fear and debasement, but which lack the intent requirement of torture. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 167 (1978); Xuncax v. Gramajo, 886 F. Supp. 162, 189 (D. Mass. 1995). Professor Lillich has questioned whether the prohibition against cruel, inhuman, and degrading treatment has achieved the status of a customary international law or *jus cogens* norm. Richard B. Lillich, *Remarks*, 1985 AM. SOC'Y. INT'L L. PROC., 84, 84-86, *reprinted in* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 156 (2d ed. 1991).

147. International instruments generally recognize that detention is arbitrary if conducted without a warrant, probable cause, articulable suspicion, notice of charges, or trial. ICCPR, *supra* note 107, art. 9; European Convention, *supra* note 115, art. 5. The *Restatement* provides that detention may also be arbitrary if "it is incompatible with the principles of justice or with the dignity of the human person." RESTATEMENT, *supra* note 141, § 702 cmt. h (quoting *Statement of U.S. Delegation*, 13 GAOR, U.N. Doc. A/C.3/SR.863, at 137 (1958)).

148. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 57 (June 21) (holding that South Africa's imposition of legally-mandated apartheid in Namibia violated fundamental human rights under the U.N. Charter). The Racial Discrimination Convention defines racial discrimination as

> any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Racial Discrimination Convention, *supra* note 112, art. I. Racial discrimination violates customary law

(g) a consistent pattern or gross violations of internationally recognized human rights.[149]

The Restatement provides that "[t]he rules of this section are peremptory norms (*jus cogens*), . . . and an international agreement that would violate them would be void."[150] The international law prohibition against slavery reasonably may be read to include the prohibition against forced and bonded labor, including exploitative child labor, and other slave-like practices.[151] Crimes against humanity and war crimes, as first defined in the Nuremberg Charter and the Geneva Conventions,[152] and as elaborated more recently for the International War Crimes Tribunals and in the Statute of the Permanent International Criminal Court,[153] may also be included among the *jus cogens* norms of customary international law.[154]

The *Restatement* list does not purport to be exhaustive,[155] and some commentators have identified a more restrictive list.[156] In 1994, the U.N.

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when practiced systematically as a matter of state policy, as under apartheid in the former South Africa. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243. For further discussion of the modern international law status of the prohibition against apartheid, see Ronald C. Slye, *Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission*, 20 MICH. J. INT'L L. 267 (1999) (arguing that the practice of apartheid constitutes a crime against humanity).

149. According to the *Restatement*, a consistent pattern of any of the following human rights abuses would constitute a violation of customary international law:

> systematic harassment, invasions of the privacy of the home, arbitrary arrest and detention (even if not prolonged); denial of fair trial in criminal cases; grossly disproportionate punishment; denial of freedom to leave a country; denial of the right to return to one's country; mass uprooting of a country's population; denial of freedom of conscience and religion; denial of personality before the law; denial of basic privacy such as the right to marry and raise a family; and invidious racial or religious discrimination.

RESTATEMENT, *supra* note 141, § 702, cmt. m.

150. *Id.* § 702, cmt. n.

151. *Id.*

152. *E.g.*, Geneva Convention, *supra* note 109. For a discussion of the customary international law status of the Geneva Conventions, see *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., ¶ 35, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1163, 1170 (1993), *approved by* S.C. Res. 827, U.N. Doc. S/Res/827 (1993), *reprinted in* 32 I.L.M. 1203, 1204 (1993).

153. Crimes against humanity include widespread and systematic attacks knowingly directed against any civilian population. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), *available at* http://www.un.org/law/icc/statute/99_corr/cstatute.htm [hereinafter Rome Statute]. As originally set forth at Nuremberg, crimes against humanity included "murder, extermination, enslavement, deportation, and other inhumane acts . . . or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal . . . . " Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 279. The Rome Statute adds to this definition acts of torture; severe deprivation of physical liberty; rape; sexual slavery; enforced prostitution; forced pregnancy; forced sterilization or other forms of sexual violence; persecution based on national, ethnic, cultural or gender grounds; disappearance; and apartheid. Rome Statute, *supra*, art. 7; *see also* Kadic v. Karadzic, 70 F.3d 242, 243 (2d Cir. 1995) (recognizing rape, forced impregnation, and forced prostitution as war crimes under customary international law).

154. *Cf.* OPPENHEIM, *supra* note 139, § 2 (identifying *jus cogens* norms as including the prohibitions against the use of force, the slave trade, piracy, and genocide, and the observance of human rights, state equality, and self-determination).

155. The *Restatement* suggests that the right to property and the prohibitions against systematic religious discrimination and gender discrimination may be included as violations of customary international law. While not yet *jus cogens*, the *Restatement* recognizes these as potentially emergent

Human Rights Committee,[157] the authoritative body with responsibility for oversight of the International Covenant of Civil and Political Rights (ICCPR), elaborated on the *Restatement* list by identifying certain provisions of the ICCPR as reflecting customary international, if not *jus cogens*, norms. These included the prohibitions against slavery; torture; cruel, inhuman or degrading treatment or punishment; arbitrary deprivation of life; arbitrary arrest and detention; denial of freedom of thought, conscience and religion; and prohibitions against a presumption of guilt in criminal proceedings; against execution of children or pregnant women; and against advocacy of national, racial or religious hatred. They also included the right to marry; the right of minorities to their own culture, religion, and language; and the right to a fair trial.[158] The breadth of the list proved controversial, with the United States in particular criticizing the Committee's "cavalier" pronouncement of customary international law.[159] The Committee, however, is not alone in its recognition of expansive customary rights. In a 1994 Declaration addressing the customary international law status of the norms set forth in the Universal Declaration, the International Law Association Committee also ratified the *Restatement*'s catalogue of customary international human rights, and suggested a number of possible additions.[160]

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examples of obligations *erga omnes*. RESTATEMENT, *supra* note 141, § 702, cmts. a, j, k, l.

156. *Cf.* OPPENHEIM, *supra* note 139, § 2 (identifying *jus cogens* norms as including the prohibitions against the use of force, the slave trade, piracy, and genocide, and the observance of human rights, state equality, and self-determination).

157. General Comment 24(52) of 2 November 1994 on Issues Relating to Reservations Made upon or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, U.N. Human Rights Comm., 52d Sess., ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), *reprinted in* 15 HUM. RTS. L.J. 464, 465 (1994) [hereinafter General Comment 24]. The Committee is an authoritative body of experts from eighteen countries established to monitor compliance with the ICCPR.

158. The Committee also noted that reservations to the protection of the right of peoples to determine their own political status and to pursue their economic, social, and cultural development would violate the object and purpose of the treaty, as would a reservation to the prohibition against discrimination in the protection of rights, and the obligation to give domestic effect to the rights protected, and the obligation to provide domestic remedies. *Id.* ¶¶ 9, 11.

159. Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1. 21 n.101 (1995/1996) (quoting Observations on General Comment 24, Accompanying Letter from the Hon. Conrad K. Harper, Legal Advisor, Department of State, to the Hon. Francisco Jose Aguilar-Urbina, Chairman, Human Rights Committee (Mar. 28, 1995)):

> It cannot be established on the basis of practice or other authority . . . that the mere expression (albeit deplorable) of national, racial or religious hatred (unaccompanied by any overt action or preparation) is prohibited by customary international law . . . . Similarly, while many are opposed to the death penalty in general and the juvenile death penalty in particular, the practice of States demonstrates that there is currently no blanket prohibition in customary international law. Such a cavalier approach to international law [poses] serious concerns about the methodology of the Committee as well as its authority.

160. Comm. on the Enforcement of Human Rights Law, Int'l L. Ass'n., *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, *in* INT'L L. ASS'N, REPORT OF THE SIXTY-SIXTH CONFERENCE 525, 544-49 (1994), *reprinted in* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 166 (3d ed. 1995). The Committee questioned whether the prohibition against arbitrary detention must be limited to "prolonged" arbitrary detention. The Committee also suggested adding: the right to equal

It is difficult, if not impossible, to define precisely and comprehensively the rights that constitute core provisions of the global human rights regime. This is particularly true given the disagreement over priorities among Western industrial nations, which generally emphasize civil and political rights, and developing countries, which often place greater emphasis on economic development. Religious differences may also explain variations in countries' interpretations of fundamental human rights. Given these rifts, defining the precise content of core human rights norms poses a continuing challenge to the human rights system and difficulties unquestionably remain in applying these norms to specific contexts. Nevertheless, international instruments and state practice reveal a core of civil, political, and economic rights that enjoy near-universal recognition. The principles identified in the *Restatement*, together with war crimes, crimes against humanity, and the prohibition against forced labor, are broadly recognized as rights that no state officially claims the right to violate, and may be considered among the core *jus cogens* principles of the human rights system. Other emerging norms that are approaching, but may not have fully achieved, the status of customary obligations *erga omnes* may include freedom of religion, the prohibitions against gender discrimination and discrimination in fundamental human rights, the prohibition against the execution of juveniles (from which the United States is a notable dissenter), the right to a fair trial, the right to property, the right to freedom of association, the prohibition against employment discrimination, and a prohibition against the overthrow of democracy. These emerging norms are binding on the vast majority of states, as a result of their accession to foundational international and regional conventions and their membership in the ILO. For the remainder of this Article, references to core or fundamental human rights should be understood as referring to these provisions.

C. *U.S. Participation*

Because this Article focuses on unilateral U.S. enforcement of human and labor standards, it is appropriate to address briefly the United States' ambivalent relationship to the controlling instruments. The United States' participation in the international system is relevant to an examination of norm internalization since, as discussed in Part V, international law authorizes the United States to enforce against other states only those norms that either both

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treatment and non-discrimination with respect to guaranteed human rights, the right to a fair trial, the prohibition against forcible return of refugees (*nonrefoulement*), the right to a nationality, the right to freedom of marriage, the right to property (excluding international norms regarding state expropriation of property, which the committee recognized remained "controversial"), the right to free choice of employment, the right to form and join trade unions, the right to a free primary education, subject to a state's available resources, and the prohibition against sex discrimination in employment as customary international law norms.

The Committee concluded that the degree of *de facto* and *de jure* suppression of religious freedom in various countries made "problematic" the recognition of the freedom of thought, conscience, and religion as *jus cogens* norms. The Committee also found it difficult to conclude that the protection of freedom of opinion and expression had become customary international law, and noted that "many states have not accepted" the Declaration's promise of the right to democracy.

the United States and the violating state have ratified or those that are binding on all states as a matter of customary international law.

The United States played a primary role in the creation of the modern human rights system and was one of the leading forces behind the drafting of the Universal Declaration of Human Rights, the ICCPR, and the ICESCR in the immediate post-war period.[161] The United States aggressively pursued the development of the Nuremberg Charter, the United Nations Charter and system, and the Charter of the Organization of American States.[162] Despite its enthusiasm for drafting human rights provisions for others, however, the United States has been notoriously reluctant to ratify human rights conventions. The United States refused to ratify the Genocide Convention for four decades, and only recently ratified the ICCPR, the Convention to Eliminate All Forms of Racial Discrimination, and the Torture Convention.[163] When the United States finally did ratify these instruments, it entered substantial reservations, declarations, and understandings to qualify U.S. obligations under the conventions, and declined to fully implement them into domestic law.[164] By far the most important of these qualifications was the Senate's declaration that the instruments are not self-executing—i.e., that absent further legislation, they are not directly enforceable in U.S. courts.[165] United States courts also have declared human rights conventions to be non-self-executing, thus further reducing the possibility that the United States may be held internally accountable for human rights violations.[166] The United States presently numbers among only a handful of countries in the world that have not ratified the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child, and though a member of the Organization of American States (OAS) and party to the American Declaration, the United States has not ratified the

161. *See generally* NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION (1990) (discussing the U.S. role in drafting the foundational international human rights instruments).

162. Louis Henkin, *Human Rights and United States Foreign Policy, in* THE AGE OF RIGHTS 65 (1990).

163. The United States ratified the Genocide Convention in 1988, the ICCPR and the Racial Discrimination Convention in 1992, and the Torture Convention in 1994.

164. *See generally* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995) (discussing U.S. reluctance to ratify human rights treaties). The Torture Victim Protection Act of 1991, for example, creates domestic civil remedies only for acts of torture committed by foreign officials, and limits the definition of torture to acts committed against individuals "in the offender's custody or physical control." Torture Victim Protection Act of 1991 § 2(a) & 3(b)(1), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1994)). The statute also defines mental suffering more specifically than the convention. *Id.* § 3(b)(2). The Genocide Convention Implementation Act provides that the Act shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." 18 U.S.C. § 1092 (1994).

165. *But see* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L. L. 129, 165-69 (1999) (arguing that the non-self-executing declaration to the ICCPR may have been intended to avoid establishing a private right of action under the treaty without otherwise barring judicial enforcement).

166. *See generally* Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) (discussing the non-self-execution doctrine).

American Convention on Human Rights.[167] The United States' recent rejection of both the Land Mines Convention and the Permanent Criminal Court stand as further examples of U.S. hostility toward embracing international human rights obligations.

The United States' ratification record of ILO Conventions is equally checkered. The United States is a signatory to only eleven ILO conventions that are currently in force, many of which address seamen's rights, and only two of which involve core ILO protections. Historically a reluctant participant in the ILO, the United States withdrew from ILO membership between 1975 and 1980, due to the organization's perceived leftist sympathies.[168] Although the U.S. Senate remains hostile to ratifying new labor conventions, the United States' relationship with the ILO has warmed under the Clinton administration. President Clinton publicly urged the ILO to adopt the Convention on the Worst Forms of Child Labour, and the United States was one of the first states to ratify the new Convention.[169] Moreover, the core labor rights now are binding on the United States, as a result of its ratification of the ICCPR and its membership in the ILO. In sum, although substantial room for improvement remains, the United States has taken significant strides in the past decade toward embracing fundamental international obligations.

IV. UNILATERAL U.S. SANCTIONS PRACTICE

Foreign trade and economic assistance have long been viewed as an arm of U.S. foreign policy, and the United States has imposed economic sanctions for many years to promote a range of foreign policy objectives, including combating nuclear proliferation, drug and weapons trafficking and terrorism; promoting democracy and human rights; destabilizing hostile regimes; and punishing territorial aggression. For over a century, U.S. laws have authorized the imposition of trade sanctions for human or labor rights violations abroad. In 1890, Congress prohibited the importation of goods made with convict labor,[170] and since 1930, U.S. tariff laws have prohibited the importation of goods made with convict, forced, or indentured labor.[171] This trend has increased substantially in the post-World War II era. The following Section addresses the major economic mechanisms through which the United States promotes human rights compliance. These mechanisms promote both domestic and transnational norm internalization by conditioning a range of foreign development and security assistance, international and domestic investment support, import and export privileges, and government

167. American Convention, *supra* note 116.

168. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 995 (3d ed. 1995).

169. Elizabeth Olson, *U.N. Agency Adopts Treaty on Child Labor*, N.Y. TIMES, June 17, 1999, at A15; Jane Perlez, *Clinton Presses for Treaty to Ban the Worst Child Labor Practices*, N.Y. TIMES, June 17, 1999, at A13.

170. 26 Stat. 624 (1890).

171. Tariff Act of 1930, ch. 497, 46 Stat. 689 (1930) (current version at 19 U.S.C. § 1307 (2000)).

procurement rights on the compliance of foreign states with internationally recognized human rights norms.

A. *Federal Statutes Imposing Sanctions for Human Rights Violations*

In the period of intense scrutiny of U.S. foreign policy and executive practices that followed the Vietnam War and Watergate, the U.S. Congress adopted a series of statutes that formally incorporated the promotion of international human rights into U.S. foreign policy.[172] Accordingly, Section 502B of the Foreign Assistance Act of 1961, which was adopted in December 1974, provides as follows:

> The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principle goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.[173]

A number of the present statutes implementing this policy (which are further discussed in the chart attached as Appendix A), authorize the withholding of development and security assistance and trade benefits from countries that engage in a "consistent pattern of gross violations of internationally recognized human rights"[174] or that are not "taking steps to afford [their workers] internationally recognized worker rights."[175] Other laws direct the

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172. This legislative effort was driven largely by Representative Donald Fraser, Chairman of the House Committee on Foreign Affairs Subcommittee on International Organizations and Movements. Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 250-53 (1982). In 1973, Fraser held a series of hearings on U.S. foreign policy and human rights, resulting in the production of a lengthy report that criticized U.S. engagement with governments that committed fundamental human rights violations against their citizens and the disregard for human rights compliance in U.S. foreign policy. *International Protection of Human Rights, The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1974). For the report ensuing from the hearings, see Cohen, *supra*.

173. Foreign Assistance Act § 502(b), 22 U.S.C. § 2304(a)(1) (1994).

174. Foreign Assistance Act § 116, 22 U.S.C. § 2151n (1994) (development assistance); Foreign Assistance Act § 502(b), 22 U.S.C. § 2304(a)(1) (1994) (security assistance); 22 U.S.C. § 2420(a) (1994) (police training); 22 U.S.C. § 2347 (1994) (military education and training assistance); Pub. L. No. 104-208, 110 Stat. 3009-133 (1996) (prohibiting U.S. assistance to foreign security force units "if the Secretary of State has credible evidence to believe such unit has committed gross violations of human rights") [hereinafter Leahy Amendment]; Amendment No. 3406, S94621 (July 30, 1998) (applying Leahy Amendment to Department of Defense expenditures).

175. Generalized System of Preferences, 19 U.S.C. § 2462(c)(7) (2000); Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2702(c)(8) (1994) (conditioning tariff preferences on "whether or not such country has taken or is taking steps to afford workers in that country . . . internationally recognized worker rights"); Andean Trade Preference Act, 19 U.S.C. §§ 3201-3205 (1994) (applying GSP labor provisions to Bolivia, Ecuador, Colombia, and Peru); Trade and Development Act of 2000, Pub. L. No. 106-200 (2000), § 104 (a)(1)(F), 114 Stat. 251 (conditioning import benefits for Sub-Saharan Africa on compliance with internationally-recognized human and worker rights). The Caribbean Basin Initiative also was amended in 2000 to include consideration of the GSP labor provisions. 19

United States to oppose loans by international financial institutions (IFIs) to violating states,[176] withhold domestic investment assistance,[177] or target specific countries by restricting aid or trade.

1. *Statutory Definitions*

The rights targeted by U.S. measures vary from statute to statute, but roughly correspond to the core internationally recognized human rights. Thus, Section 116 of the Foreign Assistance Act,[178] one of the foundational measures barring development assistance to noncompliant foreign governments, defines internationally recognized human rights to include:

> torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person....[179]

U.S.C. § 2703(b)(5)(B)(iii) (2000); *see also* Trade Act of 1974 § 301(b), 19 U.S.C. § 2411(d) (1994) (authorizing the President to impose trade sanctions for "unreasonable" trade practices, including violation of the GSP worker rights). The labor rights amendment of Section 301 spurred much academic discussion of trade-labor linkage, but the provision has never been applied to promote worker rights. *E.g.*, AGGRESSIVE UNILATERALISM: AMERICA'S 301 TRADE POLICY AND THE WORLD TRADING SYSTEM (Jagdish Bhagwati & Hugh T. Patrick eds., 1990); Ian Charles Ballon, *The Implications of Making the Denial of Internationally Recognized Worker Rights Actionable Under Section 301 of the Trade Act of 1974*, 28 VA. J. INT'L L. 73 (1987).

176. The International Financial Institutions Act of 1977, 22 U.S.C. § 262d(a) (1994), directs the United States to use its "voice and vote" in the International Monetary Fund (IMF) and other international financial institutions to "advance the cause of human rights." The Act requires the United States to direct loans and other assistance away from countries whose governments engage in "a pattern of gross violations of internationally recognized human rights." 22 U.S.C. § 262d(a)(1). It covers U.S. participation in the International Monetary Fund, the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Inter-American Development Bank, the African Development Fund, the Asian Development Bank, the African Development Bank, and the European Bank for Reconstruction. *See also* Foreign Appropriations, Export Financing and Related Programs Appropriations Act, 22 U.S.C. § 262p-4p (1994) (requiring U.S. delegates to IFIs to use their "voice and vote" to press borrowing countries to guarantee internationally recognized worker rights as set forth in the GSP and relevant ILO conventions).

177. Since 1985, the Overseas Private Investment Corporation (OPIC), which provides U.S. government-secured financing, insurance, and other guarantees to U.S. investment projects in developing countries, has authorized denial of such protection for projects in countries that are not "taking steps to . . . extend internationally recognized worker rights." Overseas Private Investment Corporation Amendments Act of 1985, 22 U.S.C. §§ 2191a(a)(1) (1994) & 2199(i) (1982 & Supp. III 1985). The statute also requires OPIC to consider a country's "observance and respect for human rights and fundamental freedoms" and the impact of the intended project on those rights. The Multilateral Investment Guarantee Agency (MIGA) requires U.S. representatives to the agency to encourage labor rights protections as a condition for obtaining international investment insurance. 22 U.S.C. §§ 290(k)(1-11) (1994).

178. 22 U.S.C. § 2151n (1994).

179. 22 U.S.C. § 2151n(a) (1999). *Accord* International Financial Institutions Act, 22 U.S.C. § 262d(a)(1) (1994) (adopting the Section 116 definition of internationally recognized human rights but not expressly including the disappearance of persons); *see also* 22 U.S.C. § 2370(f) (Supp. III 1985) (providing that assistance to communist countries should consider whether the country was "giving evidence of fostering the establishment of a genuinely democratic system, with respect for internationally recognized human rights").

The Act has been amended to prohibit assistance to governments that fail "to protect children from exploitation, abuse or forced conscription into military or paramilitary services,"[180] and that have engaged in, or failed to combat, "severe violations of religious freedom."[181] The Section 116 list does not expressly include such broadly recognized *jus cogens* norms as genocide or crimes against humanity but also does not purport to be exclusive.

The Generalized System of Preferences (GSP),[182] which provides import tariff preferences to developing countries, defines "internationally recognized labor rights" as including freedom of association; the right to organize and bargain collectively; the prohibition against forced labor, child labor under a certain age, and the worst forms of child labor; and minimum acceptable employment conditions with respect to wages, hours of work, and occupational safety and health.[183] Although this list tracks most of the core ILO protections, it diverges from the ILO standards in several respects. The U.S. list fails to include expressly discrimination in employment, which the ILO recognizes as a core labor protection.[184] On the other hand, the U.S. list includes "minimum acceptable employment conditions," a principle that is not included among the ILO's core labor rights, that does not enjoy international consensus, and that the United States has not ratified. Some laws address specific norms such as coerced abortion or involuntary sterilization,[185] democracy,[186] religious freedom,[187] and forced, indentured or prison labor,

180. 22 U.S.C. § 2151n(b)(2) (1990).

181. 22 U.S.C. § 2151n(c) (1998).

182. 19 U.S.C. § 2462(c)(7) (2000). Labor rights provisions were added in 1984 as an amendment to the 1974 Trade Act. The House Report on the amendment noted that conditioning trade relations on compliance with these basic worker rights should not significantly alter U.S. policy, since it was long-established U.S. policy to promote political and human rights. Generalized System of Preferences Renewal Act of 1984, H.R. REP. NO. 98-1090, at 12 (1984) [hereinafter GSP House Report].

183. 19 U.S.C. §§ 2467(4), (6) (2000).

184. The legislative history of the worker rights amendment indicates that Congress intended these standards to be flexible and to take into account the level of development in a particular country in determining whether the country was "taking steps" to afford worker rights. Thus, the House Report to the 1984 statute notes that "[i]t is not the expectation of the Committee that developing countries come up to the prevailing labor standards of the U.S. and other highly-industrialized countries. It is recognized that acceptable minimum standards may vary from country to country." GSP House Report, *supra* note 182, at 12.

185. Foreign Assistance and Related Programs Act, Pub. L. No. 99-88, 99 Stat. 293 (1985) (Kemp-Kasten Amendment to the Foreign Assistance Act) (withholding U.S. foreign aid from organizations engaging in such practices).

186. *E.g.*, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (1996) (promoting democratization in Cuba) (This act is referred to in the text as the Helms-Burton Act); Customs and Trade Act of 1990 § 138, Pub. L. No. 101-382, 104 Stat. 653 (1990) (promoting democratization in Burma); 1997 Omnibus Consolidated Appropriations Act § 570, Pub. L. No. 104-208, 110 Stat. 3009-166 (1996) (same).

187. International Religious Freedom Act of 1998, 22 U.S.C. § 6441(b)(1) (2000) (authorizing imposition of a range of sanctions on states violating religious freedom). Examples of religious intolerance around the world, as set forth by then-Assistant Secretary of State for Democracy, Human Rights and Labor, John Shattuck, include religious suppression in the Sudan, Chinese repression of Tibetan Buddhists, Iranian discrimination against Bahá'í and evangelical Christians, Burma's oppression of the *Rohingya* Muslim minority, and other examples from Russia and Western Europe. T. Lynch,

including child labor.[188] Other statutes define the human rights contemplated with less specificity, or not at all. The statute of the Export-Import Bank, which provides credit assistance to import-export transactions, for example, provides that the Bank may deny applications where the President determines that the denial "would clearly and importantly advance U.S. policy" in promoting "human rights (including child labor)."[189] The granting of "most favored nation" (MFN) status to communist countries is conditioned on the state's recognition of the freedom to emigrate, though the law has been applied to consider overall protection for fundamental human rights.[190] Finally, various national security statutes, such as the International Emergency Economic Powers Act (IEEPA)[191] and the Export Administration Act of 1979 (EAA),[192] give the President broad powers to impose trade restrictions for foreign policy reasons, which may, at the President's discretion, include human rights concerns.

Legislative Focus: The International Religious Freedom Act of 1998, HUMAN RIGHTS BRIEF, 6 LEG. WATCH 2, *at* http://www.wcl.american.edu/pub/humright/brief/v6i2/lf.htm (last visited Oct. 31, 2000) (on file with The Yale Journal of International Law); *see also* Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 577, 111 Stat. 2386, 2433-34 (1997) (prohibiting foreign assistance to Russia if the country is found to discriminate against religious minorities).

188. U.S. Tariff Act § 307, 19 U.S.C. § 1307 (1997) (prohibiting entry into the United States of goods produced wholly or in part by such means); Treasury and Government Appropriations Act for 1998, Pub. L. No. 105-61, 111 Stat. 1272 (1997), enacting H.R. 2378 as cited in 143 Cong. Rec. D1103 (Oct. 20, 1997); *see also* Exec. Order 13,126, 64 Fed. Reg. 32,383 (1999) (prohibiting federal agencies from purchasing any products made with such labor from countries that are not members of NAFTA or parties to the WTO agreement on government procurement).

189. 12 U.S.C. § 635(b)(1)(B) (2000).

190. Jackson-Vanik Amendment of the Trade Act of 1974, 19 U.S.C. § 2432 (1994).

191. International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, tit. II, 91 Stat. 1626, 50 U.S.C. §§ 1701-1706 (2000). If the President determines that "any unusual and extraordinary threat [exists] . . . to the [U.S.] national security, foreign policy, or economy," the President may declare a national emergency under the National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601-1651 (1994)). The IEEPA authorizes the President to impose broad economic sanctions, including restricting currency and freezing foreign assets. International Emergency Economic Powers Act, §§ 1701, 1702(a); *see also* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding broad executive authority under IEEPA). On IEEPA sanctions generally, see Lee R. Marks & John C. Grabow, *The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence*, 68 CORNELL L. REV. 68 (1982). IEEPA was intended to be more restrictive than its predecessor statute, the Trading with the Enemy Act (TWEA), 50 U.S.C. App. § 5(b) (1994), under which Cold War economic sanctions were imposed against countries such as Cambodia, Vietnam, North Korea, and Cuba. The Cuban and North Korean sanctions remain in place.

192. The Export Administration Act, 50 U.S.C. App. §§ 2401-2420 (1988) (authorizing the President to restrict U.S. exports for reasons of foreign policy, national security, or short supply). The EAA export system is governed by the U.S. Department of Commerce's Bureau of Export Administration, which imposes licensing requirements on the export of certain commodities and exports to certain countries. The EAA has lapsed since 1994, and the President currently sustains EAA restrictions through his authority under IEEPA. Executive Order 12,924 (Aug. 18, 1994); *see also* Continuation of Emergency Regarding Export Control Regulations, 65 Fed. Reg. 48,347 (Aug. 3, 2000) (extending EAA restrictions).

2. *Statutory Design*

The U.S. sanctions measures also take a variety of forms. Some statutes, such as the Federal Burma Statute, mandate the imposition of certain sanctions on specific countries. Others delegate to the Executive responsibility to "certify" whether a violation has occurred, with the imposition of sanctions turning on that executive finding. The specificity of the executive finding that is required may vary significantly from statute to statute, from a general finding of a threat to national security under IEEPA, to a specific finding that action has been taken against the democratic leader under the Federal Burma Statute. All the statutes authorize the President to waive application of the sanctions based on a finding that certain circumstances exist, such as improved human rights conditions, "extraordinary circumstances," or simply a finding that waiver is in U.S. national security interests.[193]

Many of the statutes also impose reporting requirements on the Executive to keep Congress abreast of human rights developments. Thus, Section 116 of the Foreign Assistance Act directs the State Department to prepare annual reports for Congress regarding the status of internationally recognized human rights in every U.N. member country.[194] The State Department reports are required to examine country practices regarding the human rights set forth in Section 116,[195] as well as coercive population control,[196] child labor,[197] refugees,[198] and religious freedom.[199] The Federal

193. 19 U.S.C. §§ 2432(c)(2) (1994) (allowing executive to grant MFN status upon a finding that this will promote the purposes of the act or if the foreign government provides assurance that its emigration practices will improve); Foreign Assistance Act § 116, 22 U.S.C. § 2151n(a) (2000) (allowing foreign assistance if the Executive finds that the prohibited assistance "will directly benefit the needy people in such country"). Similar exceptions are authorized for financing assistance by the Overseas Private Investment Corporation (OPIC). CARTER, *supra* note 8, at 54; *see also* 22 U.S.C. § 262d(f) (the United States may support international financial assistance that will "serve the basic needs of the citizens of [a violating] country"); 22 U.S.C. §§ 2304(a)(2), (e) (2000) (authorizing waiver of Section 502B security assistance restrictions based on a finding of "extraordinary circumstances" or of "a significant improvement in [the country's] human rights record"); International Religious Freedom Act of 1998, 22 U.S.C. § 6407 (2000) (authorizing executive waiver of sanctions if this would further the purposes of the act or promote U.S. national security interests); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, §§ 6085(b), (c)(1)(B) (authorizing limited waiver based on finding that Cuba is democratizing); 1997 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 570(a) & (e), 110 Stat. 3009-166, 167 (1996) (authorizing waiver based on finding that Burma "has made measurable and substantial progress in improving human rights practices and implementing democratic government" or if the sanction is "contrary to the national security interests of the United States").

194. 22 U.S.C. § 2151n(d) (2000).

195. 22 U.S.C. § 2304(d)(1) (1994).

196. 22 U.S.C. § 2151n(d)(2) (2000).

197. 22 U.S.C. § 2151n(d)(3) (2000). This provision includes consideration of "whether such country has adopted policies to protect children from exploitation in the workplace, including a prohibition of forced and bonded labor and policies regarding acceptable working conditions," and "the extent to which each country enforces such policies, including the adequacy of the resources and oversight dedicated to such policies."

198. 22 U.S.C. § 2151n(d)(5) (2000).

199. 22 U.S.C. § 2151n(d)(7) (2000); *see also* 22 U.S.C. § 2304(b) (2000) (requiring the State

Burma Statute requires periodic reports to Congress on the progress toward democratization in that country and the development of multilateral responses,[200] while the International Religious Freedom Act requires separate annual reporting by the State Department on religious freedom.[201]

The human rights statutes also have fostered the development of administrative oversight and reporting mechanisms within responsible U.S. agencies. During the late 1970s, Congress established the Human Rights Bureau in the U.S. State Department—an office that has evolved into the present office of Democracy, Labor, and Human Rights.[202] In 1994, Congress created the position of Senior Advisor for Women's Rights in the State Department. In 1998, an Office of International Religious Freedom headed by an Ambassador-at-Large for religious freedom was added.[203] In response, labor groups successfully demanded the creation of an equivalent labor rights position in the State Department and additional funding for international labor rights oversight.

B. *U.S. Practice Under the Human Rights Measures*

Given the variety of statutory and regulatory options available under U.S. law for imposing human and labor rights sanctions, comprehensive data on U.S. sanctions practice is extremely difficult to compile. Between 1993 and 1996, the United States acted approximately sixty-one times to impose sanctions for overall foreign policy purposes.[204] Twenty-two of these actions were designed to promote human rights and democratization abroad, and targeted the countries of Angola, Bosnia-Herzegovina, Burma (Myanmar), Burundi, China, Croatia, Cuba, Gambia, Guatemala, Haiti, Nicaragua, Nigeria, and Yugoslavia. Six other actions promoted compliance with labor rights. The human rights sanctions primarily involved restrictions on foreign assistance, private investment support through OPIC, or the sale of military goods. Only a relatively small portion imposed restrictions on trade. Many other earlier measures, however, also remain in effect. The present Section

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Department to report on human rights conditions in all countries receiving Section 502B security assistance, including reporting on the country's population control and religious freedom practices).

200. 1997 Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 570(d), 110 Stat. 3009, 3116 (1996).

201. International Religious Freedom Act of 1998, 22 U.S.C. § 6412 (2000).

202. The position of Coordinator of Human Rights was created in 1976 and elevated to Assistant Secretary of State in 1978. Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105 § 109, 91 Stat. 846 (1977). The Bureau of Human Rights and Humanitarian Affairs was reorganized and named the Bureau of Democracy, Human Rights, and Labor in 1994, and the Assistant Secretary in charge of the office was renamed Assistant Secretary for Human Rights, Democracy, and Labor.

203. International Religious Freedom Act of 1998, § 6411.

204. NATIONAL ASSOCIATION OF MANUFACTURERS, A CATALOG OF NEW U.S. UNILATERAL ECONOMIC SANCTIONS FOR FOREIGN POLICY PURPOSES 1993-1996 (1997) [hereinafter NAM REPORT]. The affected countries were Afghanistan, Angola, Bosnia-Herzegovina, Burma (Myanmar), Brazil, Burundi, Canada, China, Colombia, Croatia, Cuba, Gambia, Guatemala, Haiti, Iran, Iraq, Italy, Libya, Maldives, Mauritania, Mexico, Nicaragua, Nigeria, North Korea, Pakistan, Qatar, Russia, Rwanda, Saudi Arabia, Sudan, Syria, Taiwan, United Arab Emirates, Yugoslavia, and Zaire. *Id.* at 1. Some of the recorded actions were votes by the United States in international financial institutions. *Id.*

addresses representative actions taken by the United States to promote norm internalization over the past two decades.

1. *Foreign Development and Security Assistance*

In the early 1980s, Congress restricted foreign assistance to El Salvador unless the President found, among other things, that the government was making a concerted effort to comply with internationally recognized human rights and was bringing an end to "indiscriminate torture and murder of Salvadoran civilians" by the armed forces.[205] In fiscal years 1986 and 1987, Congress authorized the President to lift restrictions on foreign police assistance to Honduras and El Salvador if these governments had "made significant progress, during the preceding six months, in eliminating any human rights violations including torture, incommunicado detention, detention of persons solely for the nonviolent expression of their political views, or prolonged detention without trial."[206] Congress has authorized certain types of aid to Argentina in response to its "significant progress in complying with internationally recognized principles of human rights,"[207] and has barred aid in the face of deteriorating human rights conditions to nations such as Chile, Cambodia, and Uganda. In 1990, Congress required the President to make detailed findings regarding the human rights situation in Peru before that country could be eligible for anti-narcotics trafficking assistance.[208]

In 1992, Congress voted to terminate U.S. military aid to Indonesia following disclosures that U.S.-trained security units had been involved in human rights atrocities in East Timor.[209] (Congress renewed the funding in 1995, with the condition that the aid be used only for human-rights related training.)[210] In 1993, the United States suspended and prohibited development assistance to Guatemala[211] and Yugoslavia,[212] respectively. Congress also prohibited foreign assistance to Nicaragua until the country made significant

205. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1556 (1981).

206. 22 U.S.C. § 2420(d) (1994).

207. International Security and Development Cooperation Act of 1981, § 725, 95 Stat. 1553.

208. International Narcotics Control Act of 1990, Pub. L. No. 101-623, 104 Stat. 3350, 3353-54 (1990).

209. 142 CONG. REC. H6142 (daily ed. June 11, 1996) (statement of Rep. Reed); *see also* David R. Schmahmann et al., *Off the Precipice: Massachusetts Expands Its Foreign Policy Expedition From Burma to Indonesia*, 30 VAND. J. TRANSNAT'L L. 1021, 1030 (1997) (reviewing Congressional action regarding aid to East Timor from 1992 to 1996).

210. Schmahmann, *supra* note 209, at 1030; *see also* Tim Weiner, *U.S. Training of Indonesia Troops Goes on Despite Ban*, N.Y. TIMES, Mar. 17, 1998, at A3 (discussing Pentagon efforts to evade funding restrictions).

211. 29 Weekly Comp. Pres. Doc. 1029 (May 27, 1993), *cited in* NAM REPORT, *supra* note 204, at app., 21.

212. National Defense Authorization Act for Fiscal Year 1994 § 1511, Pub. L. No. 103-160, 107 Stat. 1547, 1839 (1993).

progress in specified areas, including implementing human rights recommendations.[213]

In 1993, Congress restricted military and police assistance to Haiti to avoid assisting individuals involved in drug trafficking or gross human rights abuse.[214] In 1996, Congress restricted certain foreign assistance until the Haitian government thoroughly investigated extrajudicial killings. Congress also attempted to promote democratic rule in Haiti by barring assistance to any government that acquired power through means other than Haiti's 1995 democratic election.[215] In the fall of 2000, the United States announced that it was withholding foreign election assistance to Haiti following irregularities in that country's elections.[216]

Congress has employed U.S. foreign assistance on several occasions to promote foreign compliance with international obligations. In 1995, Congress prohibited foreign aid to any country failing to comply with U.N. Security Council sanctions against Iraq, Serbia, and Montenegro, and authorized the President to bar imports from noncompliant states.[217] Congress employed both foreign assistance and IFI sanctions in 1996 to promote cooperation with the International Criminal Tribunals for the former Yugoslavia and Rwanda.[218]

In 1996, Congress limited military assistance to Guatemala and ordered the President to certify whether the Guatemalan military was cooperating with efforts to resolve Guatemala's past human rights abuses.[219] A 1997 Act regarding the Democratic Republic of the Congo required President Clinton to certify that the Congo was "cooperating fully with investigators from the United Nations in accounting for human rights violations committed in the [Congo] or adjacent countries" in order to qualify for economic assistance.[220]

As noted previously, in 1996, Congress suspended non-humanitarian or anti-narcotics assistance to Burma and ordered the U.S. to oppose IFI

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213. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994, § 562, Pub. L. No. 103-87, 107 Stat. 931, 968 (1993). The ban was also conditioned on Nicaragua's resolution of expropriation claims and reform of the military, police, and judicial system.

214. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994, § 563, Pub. L. No. 103-87, 107 Stat. 968 (1993). The President also prohibited the sale of arms, military vehicles and petroleum products to Angola or UNITA. Exec. Order No. 12,865, 58 Fed. Reg. 51,005 (1993).

215. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994, § 564, Pub. L. No. 103-87, 107 Stat. 931 (1993).

216. David Gonzalez, *U.S. to Withhold Money for Haiti's Presidential Election*, N.Y. TIMES, Sept. 6, 2000, at A10.

217. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, Pub. L. No. 103-306, § 538, 108 Stat. 1639 (1994). The act essentially expanded a similar 1991 law that had prohibited foreign assistance to countries failing to comply with the U.N. sanctions against Iraq. The new act authorized the President to waive the ban on foreign assistance under certain conditions.

218. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 582, 110 Stat. 751 (1996). The act ordered the United States to oppose IFI loans and withhold foreign assistance from countries that knowingly helped indicted individuals evade prosecution by the tribunals. Potential targets of the act were Yugoslavia, Bosnia-Herzegovina, Croatia, and Zaire. NAM REPORT, *supra* note 204, at app., 16.

219. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 578, 110 Stat. 750 (1996).

220. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 585, 111 Stat. 2386 (1997).

assistance. In 1997, President Clinton barred new investment in Burma. The same year, the United States authorized restrictions on foreign assistance and IFI measures to countries and entities doing business with Cuba.[221]

In 1998, the State Department acted under the Leahy Amendment[222] to block the sale of U.S. attack helicopters to Turkey until Turkey's human rights record significantly improved. The Department also refused to authorize Export-Import Bank loans to finance a sale of armored police vehicles to Turkey for use in provinces where the State Department had found that state-sponsored torture was "a longstanding and pervasive practice."[223]

Disclosures of human rights violations by Colombian army units that had been armed and trained by the United States provoked Congress to withhold U.S. aid to the Colombian army between 1994 and 1997 (aid to the police and other branches of the military continued). In 1996, the Clinton administration issued guidelines to relevant embassies regarding their obligations under the Leahy Amendment, and requested a formal written agreement with the Colombian government that the United States would not provide anti-drug trafficking assistance if it had "credible evidence" that Colombian security forces had engaged in human rights violations.[224] The Colombian army refused to cooperate, and U.S. military assistance Colombia was suspended during 1997 until a new military command consented to a Memorandum of Understanding with the United States.[225] On the other hand, in 2000, Congress voted a $1.3 billion military and narcotics trafficking assistance package to Colombia, despite evidence of continued human rights violations by the Colombian army. President Clinton waived human rights conditions to make the funding available.[226]

2. *Foreign Investment*

In response to China's violent 1989 attack on students in Tiananmen Square, the United States sought to defer consideration of international loans for China in IFIs, and suspended arms sales, OPIC investment support, and

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221. *See* discussion of Helms-Burton Act, *infra* Part V.

222. Leahy Amendment, Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).

223. Dana Priest, *New Human Rights Law Triggers Policy Debate*, WASH. POST, Dec. 31, 1998, at A34. Because Turkey is a NATO ally and a major purchaser of U.S. weapons ($15 billion in the past two decades), the action provoked substantial opposition from the U.S. Ambassador to Turkey and other U.S. officials, who argued the move would only aggravate Turkey's hostility toward human rights and endanger U.S. trade and national security interests. The net effect of the action was minimal, since General Dynamics, the U.S. partner to the transaction, privately financed the sale.

224. Carrillo-Suarez, *supra* note 13, at 128-34.

225. Memorandum of Understanding Between the Government of the Republic of Colombia and the Government of the United States of America Concerning the Transfer, Use, Security, and Monitoring of Articles, Services, or Related Training that may be Furnished to the Government of the Republic of Colombia by the Government of the United States of America, Aug. 1, 1997, *cited in* Carrillo-Suarez, *supra* note 13, at 130.

226. Marc Lacey, *Clinton Defends the Outlay of $ 1.3 Billion to Colombia*, N.Y. TIMES, Aug. 24, 2000, at A6 (discussing Clinton's waiver of human rights provisions).

high level diplomatic contacts between the United States and China.[227] Most of these restrictions were lifted in the early 1990s.

As discussed above, in 1996, Congress sought to use U.S. IFI votes to promote cooperation with international criminal tribunals. In 1997, Congress directed that the U.S. use its vote in IFIs to oppose loans to countries practicing female genital mutilation that had not implemented educational programs to deter the practice.[228]

Domestic investment support through OPIC occasionally has been conditioned on labor rights compliance. In the early 1990s, OPIC suspended insurance programs in Nicaragua, Paraguay, Romania, Chile, the Central African Republic, and Ethiopia at least in part as a result of labor rights practices.[229] In August 1994, OPIC discontinued its support for U.S. investors in Gambia,[230] and in 1995, Congress suspended OPIC activities in Burundi in response to a military coup in that country.[231] The same year, OPIC terminated its support for investors in Saudi Arabia, Qatar, and the United Arab Emirates due to their failure to take adequate steps to promote internationally recognized worker rights.[232]

3. *Trade Restrictions*

a. *National Emergencies—the IEEPA, TWEA and EAA*

In response to the 1979 hostage crisis, President Carter invoked IEEPA to impose sweeping sanctions against Iran.[233] President Reagan employed IEEPA to impose sanctions on South Africa in 1985,[234] and in 1990, the United States imposed trade and other sanctions on Iraq, motivated in part by Iraqi human rights violations in the Persian Gulf region.[235] The statute has also been invoked to impose sanctions for human rights purposes on

227. 135 CONG. REC. H3455 (daily ed. June 29, 1989) (statement of Rep. Fascell); Thomas L. Friedman, *U.S. Suspends High-Level Links To China as Crackdown Goes On*, N.Y. TIMES, June 21, 1989, at C12. The U.S. sanctions were accompanied by a limited international response. The European Community condemned the Chinese action, suspended high-level communications and ultimately adopted sanctions similar to those adopted by the United States. Alan Riding, *Europeans Adopt New Sanctions Against Chinese*, N.Y. TIMES, June 28, 1989, at A10. Italy suspended grants and loans to China, and Belgium suspended loans and development assistance. Clyde Halberman, *Economic Penalties Are Placed on China by Italy and Belgium*, N.Y. TIMES, June 25, 1989, at A11; *see also* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 196-97 (1990) (reviewing U.S. response to the Tiananmen massacre).

228. The Omnibus Consolidated Appropriations Act, 1997, § 579, Pub. L. No. 104-208, 170 Stat. 3009, 3170 (1990).

229. R. Michael Gadbaw & Michael T. Medwig, *Multinational Enterprises and International Labor Standards*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 149 (Lance A. Compa & Stephen F. Diamond eds., 1996).

230. OPIC acted under the authority of Section 508 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994, Pub. L. No. 103-87, § 508, 107 Stat. 931 (1993).

231. *Id.*

232. NAM REPORT, *supra* note 204, at app., 26.

233. Exec. Order No. 12,170, 3 C.F.R. 457 (1980).

234. Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985).

235. Pub. L. 101-513, §§ 586-586J, 104 Stat. 2047 (1990).

Nicaragua, Libya, Panama, Iraq, Haiti, Yugoslavia, Ethiopia and Eritrea, Burma and the Angolan rebel forces, UNITA.[236]

Export controls imposed under the EAA for foreign policy purposes generally form part of broader economic sanctions measures imposed by the President under IEEPA or the TWEA and may be imposed in part for human rights reasons. Restrictions were imposed on Iran during the Iranian hostage crisis and on agricultural exports to the Soviet Union following the invasion of Afghanistan. Following the 1982 suppression of the Polish Solidarity movement, the United States imposed export restrictions on the sale of U.S. petroleum equipment to the former Soviet Union[237] and also barred trade with Poland.[238] For decades, EAA sanctions have essentially prohibited all exports to North Korea, Vietnam, and Cuba, by requiring licenses for all exports to these countries and denying all license applications.[239]

In November 1994, in response to Nigeria's hanging of nine environmental activists, the United States expanded existing sanctions against Nigeria to ban exports of military goods.[240] In December 1995, the United States suspended all export licenses for commercial defense products and services to Nigeria. Export-Import Bank financing is barred for most products and services to Angola unless the President finds that Angola has held free and fair elections and taken other steps toward democratization.[241] In the spring of 2000, President Clinton lifted import restrictions on luxury goods from Iran in an effort to reward Iran for the recent election of a reform government and to encourage future democratization.[242]

Without question the most famous recent unilateral trade measure imposed on a single nation for human rights violations was the 1986 Comprehensive Anti-Apartheid Act,[243] which was adopted over President Reagan's veto.[244] The Act, which was supported by U.N. calls for sanctions,

236. For executive orders under IEEPA, see notes following 50 U.S.C. § 1701 (1994).

237. The sanctions were imposed under the Export Administration Act of 1979 and remained in place until the late 1980s. For further discussion, see CARTER, *supra* note 8, at 19-22.

238. *See generally* H. Moyer & Linda Mabry, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons of Three Recent Cases*, 15 LAW & POL. INT'L BUS. 1 (1983) (examining the U.S. response to the Iranian hostage crisis, the Soviet invasion of Afghanistan, and martial law in Poland).

239. 15 C.F.R. § 785.1 (1994).

240. 60 Fed. Reg. 66,334 (1995). The sale of defense goods to Nigeria was prohibited in June 1993. 58 Fed. Reg. 40,845 (1993). In April 1994, Nigeria had been rendered ineligible for assistance from the Export-Import Bank and OPIC due to narcotics trafficking activities.

241. 12 U.S.C. § 635(b)(11)(2000).

242. David Stout, *U.S. to Drop Longtime Ban on Luxuries from Iran*, N.Y. TIMES, Mar. 15, 2000, at A8.

243. Pub. L. No. 99-440, 100 Stat. 1086 (1986) (codified at 22 U.S.C. §§ 5001-5017 (West Supp. 1991)).

244. In 1985, President Reagan imposed limited sanctions on South Africa by executive order under IEEPA in an effort to avert support for broader sanctions legislation that was pending in Congress. Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985); *see also* Exec. Order No. 12,535, 50 Fed. Reg. 40,325 (1985) (forbidding imports of South African krugerrands). The more comprehensive sanctions legislation ultimately was adopted by Congress the following year and went into force over the President's veto. *See* MALLOY, *supra* note 227, at 444-49.

terminated new investment in South Africa, required U.S. companies in South Africa employing more than twenty-five South African nationals to comply with certain labor practices,[245] and restricted trade in many goods between the United States and South Africa. The Act was repealed in 1993, in conjunction with the transition to majority democratic rule in South Africa.[246]

b. Import Preferences

(i) *Most Favored Nation Status*

MFN status was withdrawn from Poland in 1982, following the suppression of the solidarity labor union movement.[247] Romania's MFN status was jeopardized in the 1980s due to its human rights practices, and Romania was excluded from the MFN system in 1988 as a result of its unwillingness to comply with U.S. human rights demands.[248] The end of the Cold War has resulted in the extension of MFN benefits to most formerly communist countries to the point that "most favored nation" status was recently redesignated "normal trade relations" by the Clinton administration.[249] Nevertheless, the United States continues to withhold normal trade relations from Afghanistan, Cuba, Laos, North Korea, Vietnam, and Yugoslavia (Serbia and Montenegro).[250]

China's MFN status was a source of controversy throughout the 1990s. Concern over the use of convict labor in China played a prominent role in the 1992 debates regarding China's MFN status. The United States and China reached an agreement regarding the use of prison labor in 1992,[251] and renewal of China's MFN status was conditioned in part on China's improved compliance with the agreement.[252] Opposition to MFN benefits for China in the aftermath of Tiananmen Square led President Clinton to grant only conditional MFN treatment to China in 1993, tied to China's immediate progress on various human rights issues.[253] In May 1994, Clinton barred

245. 22 U.S.C. § 5035 (1986) (repealed 1993); 22 C.F.R. pts. 60-65 & § 7.3(d), 7.5(b)(3), 7.8.

246. South African Democratic Transition Support Act of 1993, Pub. L. No. 103-149, 107 Stat. 1503.

247. Suspension of the Application of Column 1 Rates of Duty of the Tariff Schedules of the United States to the Products of Poland, 47 Fed. Reg. 49,005 (1982). Poland's MFN status was restored in 1987. Restoration of the Application of Column 1 Rates of Duty of the Tariff Schedules of the United States to the Products of Poland, 52 Fed. Reg. 5425 (1987).

248. Paul Lansing & Eric Rose, *The Granting and Suspension of Most-Favored-Nation Status for Nonmarket Economy States: Policy and Consequences*, 25 HARV. INT'L L.J. 329, 329 (1984). Romania's MFN status was renewed in 1993 and GSP status was granted in 1994. Notice of the Effective Date of the Trade Agreement Between the United States of America and the Government of Romania, 58 Fed. Reg. 60,226 (1993); 59 Fed. Reg. 8115 (1994).

249. Pub. L. No. 105-206, § 5003(b)(2), 112 Stat. 685 (1998).

250. Harmonized Tariff Schedule for the United States (2000), Supplement 1, General Note 3(b), *at* http://dataweb.usic.gov/SCRIPTS/tariff/0011gn.pdf (on file with Yale Journal of International Law).

251. China-United States Memorandum of Understanding on Prohibiting Import and Export Trade in Prison Labor Products, 31 I.L.M. 1071 (1992).

252. JACKSON, *supra* note 168, at 1008.

253. Exec. Order 12,850, 58 Fed. Reg. 31,327 (1993); Presidential Determination No. 93-23,

weapons and munitions imports from China[254] in response to China's failure to make adequate progress on five of the seven human rights issues. Business support for trade relations with China and the need for China's cooperation with non-nuclear proliferation policies toward North Korea led President Clinton to renew China's MFN status and de-link trade from human rights in 1994, despite the fact that China had made little progress on the terms from the prior year.[255] In exchange for renewed trade relations with China, Clinton agreed to help develop a voluntary code of conduct establishing labor and human rights standards for U.S. companies operating abroad.[256]

Like President Bush before him, Clinton has maintained that constructive engagement is the most effective way to promote improved human rights conditions in China while preserving U.S. interests in the region.[257] In the spring of 2000, President Clinton successfully pushed for Congress to normalize trade relations with China permanently and to authorize China's entry into the WTO, despite China's renewed belligerence toward Taiwan and the administration's acknowledgment that China's human rights situation had deteriorated.[258]

(ii) *Generalized System of Preferences*

The GSP system has been the primary trade provision utilized to promote labor rights. Labor unions and NGOs frequently request review of GSP status, and U.S. State Department's annual investigation and reporting of labor rights conditions plays an important role in the review process. Review petitions citing labor abuses were filed regarding forty countries between 1984 and 1995. While most of the countries were found to satisfy GSP standards, in the past twelve years, the following countries have been removed or suspended from GSP treatment as a result of substandard labor practices:[259]

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58 Fed. Reg. 31,329 (1993). The conditions included the granting of exit visas, compliance with the U.S.-China agreement on prison labor, progress in complying with the Universal Declaration of Human Rights, release of political prisoners, humane treatment of prisoners, protection for Tibetan religion and culture, and allowing international radio and television broadcasts into China.

254. Arms Export Control Act, 22 C.F.R. §126.1 (1994); Importation of Arms, Ammunition, and Implements of War, 27 C.F.R. § 47.52 (1994).

255. JACKSON, *supra* note 168, at 994-95.

256. This effort has resulted in the creation of the Apparel Industry Partnership, a coalition of government, labor, human rights, and industry representatives who have drafted a code of conduct for the apparel industry. U.S. companies doing business in China and elsewhere are not required to participate in the partnership. *See* Cleveland, *supra* note 3, at 1552-53.

257. President in Press Conference on China MFN Status, 1994 WL 209851, at 1 (White House).

258. Pub. L. No. 106-286, § 101, 114 Stat. 880 (2000); *see also* Joseph Kahn & Eric Schmitt, *Clinton to Send China Trade Bill to Congress Soon*, N.Y. TIMES, Mar. 4, 2000, at A1. For a discussion of China's human rights situation, see U.S. DEP'T OF STATE, 1999 STATE DEPARTMENT COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 1019 (2000) (concluding that "[t]he Government's poor human rights record deteriorated markedly throughout the year"), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/china.htm.

259. Recent Changes in the GSP Program, *at* http://www.ustr.gov/reports/special/changes.html (last visited Nov. 2, 2000).

Romania (removed 1987, restored 1994);[260] Nicaragua (removed 1987);[261] Paraguay (suspended 1987, restored 1991);[262] Chile (suspended 1987, restored 1991);[263] Burma (suspended 1989);[264] the Central African Republic (suspended 1989, restored 1991);[265] Liberia (suspended 1990);[266] Yugoslavia (suspended 1991);[267] Sudan (suspended 1991);[268] Syria (suspended 1992);[269] Mauritania (suspended 1993);[270] the Maldives (suspended 1995);[271] Pakistan (partially suspended 1996).[272] Pre-1993 sanctions remain in effect against North Korea for labor rights violations.[273] Furthermore, in 1993, the United States placed El Salvador, Guatemala, Indonesia, Thailand, Malawi, and Oman on "six-month continuing review status" to determine whether the countries made "'substantial concrete progress'" toward addressing worker rights.[274] In 1997, the United States commenced a GSP review of labor rights practices in Belarus and Swaziland.[275]

As with the imposition of sanctions on countries such as China for general human rights abuses, the decision whether to impose sanctions for foreign labor rights violations often poses difficult *realpolitik* questions for the U.S. Government. In 1994, for example, Indonesia's entitlement to GSP status was challenged by various groups, and a GSP Subcommittee review found substantial violations in every designated area of worker rights.[276]

260. Proclamation No. 5617, 3 C.F.R. 26, 26-27 (1988), *reprinted in* 101 Stat. 2086, 2086-87 (1987); 59 Fed. Reg. 8115 (1994).

261. Proclamation No. 5617, 3 C.F.R. 26, 26-27 (1988), *reprinted in* 101 Stat. 2086, 2086-88 (1987).

262. *Id.*; Proclamation No. 6245, 3 C.F.R. 7, 7-9 (1992), *reprinted in* 105 Stat. 2484, 2484-86 (1991).

263. Proclamation No. 6244, 3 C.F.R. 5, 5-7 (1992), *reprinted in* 105 Stat. 2482, 2482-83 (1991); Proclamation No. 5758, 3 C.F.R. 187, 187-88 (1988), *reprinted in* 102 Stat. 4941 (1988).

264. Proclamation No. 5955, 3 C.F.R. 29, 29-31 (1990), *reprinted in* 103 Stat. 3010, 3011-13 (1989).

265. Proclamation No. 6245, 3 C.F.R. 7, 7-9 (1992), *reprinted in* 105 Stat. 2484, 2484-86 (1991); Proclamation No. 5955, 3 C.F.R. 29, 29-31 (1990), *reprinted in* 103 Stat. 3010, 3011-13 (1989).

266. Proclamation No. 6123, 3 C.F.R. 52, 52-56 (1991), *reprinted in* 104 Stat. 5252, 5253-56 (1990).

267. Proclamation No. 6389, 56 Fed. Reg. 64,467 (1991).

268. Proclamation No. 6282, 56 Fed. Reg. 19,525 (1991).

269. Proclamation No. 6447, 3 C.F.R. 107, 108 (1993), *reprinted in* 106 Stat. 5320, 5321 (1992).

270. Proclamation No. 6575, 3 C.F.R. 65, 66 (1994), *reprinted in* 107 Stat. 2675, 2676 (1993).

271. Proclamation No. 6813, 3 C.F.R. 61, 62-63 (1996).

272. Proclamation No. 6942, 3 C.F.R. 94, 95-96 (1997). The suspension withheld GSP treatment for imports of surgical instruments, leather gloves, sporting goods and carpets from Pakistan.

273. NAM REPORT, *supra* note 204, at 1.

274. Gadbaw & Medwig, *supra* note 229, at 148. Guatemala was removed from review in 1997, following Guatemala's adoption of measures to reduce the intimidation of workers and to improve labor rights compliance. Press Release, Office of the U.S. Trade Representative, USTR Announces Termination of GSP Review of Guatemala and Initiation of Reviews of Belarus and Swaziland, May 2, 1997.

275. Press Release, *supra* note 272.

276. The GSP Subcommittee found that Indonesia substantially obstructed the rights to associate and to organize and bargain collectively, for example, by imposing registration requirements that thwarted the formation of unions, by requiring that all unions belong to a government-controlled national union structure, though government harassment of organizers, police and military intervention in strikes, and by erecting substantial legal obstacles to the right to strike. The GSP subcommittee further received credible reports that Indonesia condoned the use of forced labor by logging companies

Nevertheless, in light of Indonesia's large size and strategic and economic importance to the United States, the U.S. ultimately suspended the Indonesian review for six months while the GSP subcommittee monitored Indonesia's progress.[277]

Indonesia's experience is typical in that although many GSP cases are submitted and reviewed, relatively few countries are denied GSP benefits on grounds of worker rights violations. As the above list reflects, most countries from which preferences are withheld also have poor political relations with the United States for other reasons. Moreover, the Clinton administration recently has been less willing to impose GSP sanctions for labor violations, even as the administration has publicly advocated greater international labor-trade linkage. Nevertheless, the reviews do encourage labor rights compliance by GSP recipients, regardless of whether sanctions are ultimately imposed, and the OECD has concluded that the GSP system plays an important role in promoting global worker rights.[278]

(iii) *Import Restrictions*

During the 1990s, Section 307 of the Tariff Act prohibiting the importation of goods produced with prison or forced labor was invoked to exclude certain Mexican products.[279] In June 1993, the United States barred specified leather imports from China following a determination by the U.S. Customs service that goods produced at the Qinghai Hide and Garment Factory were produced with convict labor.[280] In April 1996, the Customs Service again acted under Section 307 to bar importation of certain iron pipe fittings from the Tianjin Malleable Iron Factory in China, based on a determination that the goods were being produced with prison labor.[281] Following the 1997 amendment to Section 307,[282] a petition was filed to ban

on Irian Jaya and that individuals had been sold as domestic or agricultural workers. Child labor remained a serious problem, regional minimum wages were consistently less than the amount required to meet basic needs, and enforcement of the minimum wage law was "virtually nonexistent." The Subcommittee concluded that it was "unable to recommend that Indonesia is taking steps to provide internationally recognized worker rights" and that Indonesia had made little progress in major areas of concern. Generalized System of Preferences Subcommittee of the Trade Policy Staff Committee, 1992 GSP Annual Review—Worker Rights Review Summary—Indonesia (Case 007-CP-92, July 1993), *reprinted in* JACKSON ET AL., *supra* note 168, at 999-1006.

277. *Id.* at 1006.

278. OECD STUDY, *supra* note 7, at 186.

279. Merchandise Produced by Convict, Forced, or Indentured Labor, 19 C.F.R. § 12.42(h) (2000).

280. Determination That Merchandise Imported from the People's Republic of China is Being Produced with Convict, Forced, or Indentured Labor by the Qinghai Hide and Garment Factory, 58 Fed. Reg. 32,746 (1993).

281. Determination That Merchandise Imported From the People's Republic of China Is Being Produced Using Convict, Forced, or Indentured Labor by the Tianjin Malleable Iron Factory, 61 Fed. Reg. 17,956 (1996).

282. Treasury, Postal Service, and General Government Appropriations Act of 1998, Pub. L. No. 105-61, § 634, 111 Stat. 1272 (1997) (barring use of customs service funds "to allow the importation into the United States of any good, ware, article, or merchandise minded, produced, or

importation of rugs from South Asia that are knotted by hand with child labor.[283]

c. *National and Sub-National Government Procurement*

In 1999, President Clinton barred federal agencies from purchasing products made with child labor.[284] In addition to the federal measures, state and local governments have adopted selective purchasing laws prohibiting government procurement agreements with specific foreign governments or with entities doing business in targeted states, including Burma, Nigeria, China, Cuba, Indonesia, and Switzerland.[285] Dade County, Florida, for example, has barred government contracts with companies doing business with Cuba since 1992, and expanded the provision to include Helms-Burton

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manufactured by forced or indentured child labor, as determined pursuant to section 307 of the Tariff Act of 1930").

283. International Labor Rights Fund, Labor Rights and Trade, at n.35 (1998), *at* www.laborrights.org (last visited Nov. 28, 2000) (on file with The Yale Journal of International Law).

284. Exec. Order 13,126, *supra* note 188.

285. According to the Organization for International Investment, a business organization which lobbies against U.S. economic sanctions, states and municipalities recently have imposed selective purchasing and/or investment sanctions as follows:

California (Holocaust survivor reparations, 1998, 1999);
Alameda County (Burma, 1996), (Nigeria, 1997);
Berkeley (Burma, 1995), (Nigeria, 1997), (China/Tibet, 1997);
Los Angeles (Burma, 1998);
Oakland (Burma, 1996), (Nigeria, 1997);
Palo Alto (Burma, 1997);
San Francisco (Burma, 1995);
Santa Cruz (Burma, 1997);
Santa Monica (Burma, 1995);
West Hollywood (Burma, 1997);
Boulder, Colorado (Burma, 1996);
Dade County, Florida (Cuba, 1992, broadened to include Helms-Burton companies, 1996);
Massachusetts (Burma, 1996);
Amherst (Nigeria, 1997);
Brookline (Burma, 1997);
Cambridge (Nigeria, 1997), (Burma, 1998), (Indonesia, 1998);
Newton (Burma, 1997);
Quincy (Burma, 1997);
Somerville (Burma, 1998);
Tacoma Park, Maryland (Burma, 1996);
Ann Arbor, Michigan (Burma, 1996);
Carrboro, North Carolina (Burma, 1996);
Chapel Hill, North Carolina (Burma, 1997);
New York, New York (Burma, 1997);
North Olmstead, Ohio (sweatshop labor, 1998);
Portland, Oregon (Burma, 1998);
Philadelphia, Pennsylvania (N. Ireland, 1989, amended 1991, 1994, 1995);
Vermont (Burma, 1999);
Washington (Holocaust survivor reparations, 1999);
Madison, Wisconsin (Burma, 1996).

Other state and local measures are pending. OFII Report, *supra* note 49; *see also* Paul Blustein, *Thinking Globally, Punishing Locally*, WASH. POST, May 16, 1997, at G1 (discussing proliferation of state and local sanctions measures); Robert S. Greenberger, *State, Cities Increase Use of Trade Sanctions, Troubling Business Groups and U.S. Partners*, WALL ST. J., Apr. 1, 1998, at A20 (discussing response to Massachusetts Burma Statute).

"traffickers" in 1996. [286] In 1998, North Olmstead, Ohio barred the government from doing business with countries where "sweatshop" labor is employed, defined as child labor, forced labor, sub-living wages, and a longer than 48-hour work week.[287] Local governments also have imposed sanctions on specific foreign entities, such as New York's recent sanctions to pressure Swiss banks to provide restitution for Holocaust accounts.[288] The domestic legality of such measures recently was called into question by the U.S. Supreme Court.[289]

In sum, the United States has utilized a wide range of economic measures to promote human rights compliance in a variety of contexts. The questions to be explored in the remainder of this Article are to what extent these actions are consistent with the international law system and promote the promulgation and internalization of human rights norms.

V. COMPLIANCE WITH THE INTERNATIONAL SYSTEM

As noted in the Introduction, unilateral economic sanctions cannot legitimately promote norm internalization unless they are employed in a manner consistent with the broader principles of the international system. A number of criticisms predicated on international law have been directed at unilateral sanctions generally, and at U.S. sanctions practices in particular.[290] The foreign targets of sanctions criticize U.S. economic unilateralism—like U.S. military unilateralism—as the hegemonic actions of a global "hyperpower," which violate state sovereignty and the principles of the U.N. system. The use of trade sanctions or foreign assistance limitations to impose secondary boycotts has been criticized for violating international law principles regarding state jurisdiction. Free trade advocates contend that trade

286. Jim Oliphant, *U.S. Appeals Court Ruling Heartens Foes of Dade Law Barring Cuba Trade*, FLA. DAILY BUS. REV., July 8, 1999, at A2. It is unclear whether the law has ever been enforced to impact substantial corporate interests. The county retains authority to waive application of the law on a case-by-case basis. The county invoked the ordinance to bar the use of county facilities for a Latin American musical conference because Cuban musicians were scheduled to play, but ultimately relented after the American Civil Liberties Union threatened suit. The county also waived application of the policy to AT&T, which conducts business in Cuba through a subsidiary, and allowed AT&T to submit a bid for the $50 million contract to manage Miami's pay phones. *Id.*

287. OFII Report, *supra* note 49.

288. David Johnston, *New York Officials to Impose Sanctions on Swiss Banks Sept. 1*, N.Y. TIMES, July 3, 1998, at A3; John Maggs, *Businesses Battle State Sanctions, Corporate Leaders to File Constitutional Challenge*, J. COM., Aug. 28, 1997, at 1A; David Sanger, *As U.S. Urges Delicacy on Swiss Gold, New York City Hints at a Bold Stroke*, N.Y. TIMES, Aug. 25, 1997, at A10; David Sanger, *Swiss Banks Said to Offer Holocaust Payment*, N.Y. TIMES, June 5, 1998, at A9.

289. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

290. For recent critiques of U.S. unilateralism, *see, e.g.*, Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EUR. J. INT'L L. 19 (2000); Peter Malanczuk, *The International Criminal Court and Landmines: What are the Consequences of Leaving the U.S. Behind*, 11 EUR. J. INT'L L. 77 (2000), *at* http://www.ejil.org/journal/Vol11/No1/index.html (last visited Dec. 2, 2000); Bernhard Jansen, *The Limits of Unilateralism from a European Perspective*, 11 EUR. J. INT'L L. 309 (2000), *at* http://www.ejil.org/journal/Vol11/No2/index.html (last visited Dec. 2, 2000).

restrictions to promote fundamental rights violate the GATT international trading system. And human rights advocates maintain that U.S. unilateral action undermines the development of international standards and a multilateral human rights enforcement system. All of these critiques essentially contend that unilateral economic action, at least as conducted by the United States, frustrates, rather than promotes, the broader international legal system. This Section addresses each of the above criticisms in turn. It concludes that while some U.S. unilateral measures may conflict, or fail to comport, with international rules regarding jurisdiction, free trade, and international human rights standards, unilateral measures do not *per se* undermine the international system, and, when properly tailored to comply with international rules, may play an important role in its development.

A. *The Validity of Nonforcible Unilateral Action Under International Law*

The first question raised by unilateral economic sanctions is whether they violate the sovereignty of the foreign target state—a principle protected both by customary international law and by the U.N. Charter, which recognizes the right of states to be free from foreign intervention in matters of purely domestic concern.[291] U.S. sanctions notoriously have been used to accomplish changes in foreign states' behavior. Some desired changes have been as modest as the release of political prisoners, while others as intrusive as the destabilization or restoration of governments. Sanctions have targeted cultural practices such as genital mutilation and domestic population control.[292] The U.S. embargo against Cuba has significantly debilitated that country's economy.[293]

States subject to sanctions and developing countries have often contended that economic interventions such as these constitute unlawful intrusions into their sovereign affairs.[294] This charge was also raised in 1989 by then U.N. Secretary General Javier Perez de Cuellar, who admonished, as Western states contemplated sanctions in the aftermath of China's Tiananmen Square massacre, that U.N. members should avoid interfering in what was essentially a domestic matter of another member.[295] The relationship between unilateral economic sanctions and state sovereignty raises two questions—whether such measures may be adopted consistent with the U.N. Charter and whether they comport with customary international law. Each question is considered below.

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291. Article 2(7) of the Charter provides that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . ."). U.N. CHARTER art. 2, ¶ 7.

292. *E.g.*, The Omnibus Consolidated Appropriations Act, 1997, § 579, Pub. L. No. 104-208, 170 Stat. 3009, 3170 (1990).

293. HUFBAUER ET AL., SUPPLEMENTAL CASE HISTORIES, *supra* note 8, at 203.

294. Barbara Crossette, *China Tries to Deflect Criticism on Rights*, N.Y. TIMES, Mar. 6, 2000, at A10.

295. MALLOY, *supra* note 227, at 197.

1. *Unilateral Intervention and the U.N. Charter*

The U.N. Charter expressly contemplates that *multilateral* economic sanctions may be imposed in order to preserve the peace and stability of the international system. Article 41 authorizes the Security Council to call for non-military measures, including "complete or partial interruption of economic relations," to respond to a breach of the peace or act of aggression under Article 39.[296] Multilateral U.N. sanctions, however, have proven of limited use in the promotion of human rights. In the first thirty years of the United Nations' existence, Security Council authorization for economic sanctions was provided only once—in the 1965 call for economic sanctions against Rhodesia.[297] The Security Council imposed a limited arms embargo on South Africa in 1977,[298] though the U.N. efforts to impose broader multilateral economic sanctions on South Africa were thwarted for nearly a decade by the vetoes of the United States and other Western nations.[299]

The decline of Cold War tensions has allowed the Security Council to employ economic sanctions more actively in recent years. The international community has also been increasingly willing to recognize human rights atrocities as matters which threaten international security and warrant economic, humanitarian, and even military intervention, in places as varied as Somalia, Rwanda, Bosnia, Haiti, Kosovo, and East Timor. In Somalia, for example, the United Nations found that the "magnitude of human tragedy" constituted a threat to international peace and security warranting armed intervention.[300] The United Nations has also recognized that human rights conflicts resulting in transnational refugee flows may constitute threats to international peace and security.[301] While these are positive developments,

296. U.N. CHARTER art. 46.

297. S.C. Res. 232, U.N. SCOR, 21st Sess., 1340th mtg., U.N. Doc. S/RES/232 (1966); Seventh Report of the Security Council Committee Established in Pursuance of Resolution 253 (1968) Concerning the Question of Southern Rhodesia, 30 U.N. SCOR, Spec. Supp. No. 2, Vol. II, at 100, U.N. Doc. S/11594/rev. 1 (1975); *see also* Myres S. McDougal & W. Michael Riesman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968) (discussing the propriety of the Security Council's imposition of mandatory sanctions against Rhodesia under Article 39 of the Charter). The sanctions remained in place until 1979, the year before Rhodesia became independent Zimbabwe.

298. S.C. Res. 418, U.N. SCOR, 32d Year, Res. & Dec., at 5-6, U.N. Doc. S/INF/33 (1977).

299. Jennifer Davis et al., *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment*, 15 L. & POL'Y. INT'L BUS. 529, 559 (1983). In 1985, the Security Council called for the suspension of new investment and export loans, and prohibitions on the sale of South African krugerrands, nuclear contracts, and the sale of computer equipment that could be used by the security forces. S.C. Res. 569, U.N. SCOR, 40th Sess., 2602d mtg., U.N. Doc. S/RES/569 (1985); S.C. Res. 418, U.N. SCOR, 32nd Sess. 2046th mtg., U.N. Doc. S/RES/418 (1977). More comprehensive sanctions had been called for by the General Assembly. *See, e.g.*, G.A. Res. 35/206, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/Res/35/206 (1980) (calling upon the Security Council to impose mandatory, comprehensive, and effective sanctions against South Africa).

300. Robert M. Cassidy, *Sovereignty Versus the Chimera of Armed Humanitarian Intervention*, 21 FLETCHER FORUM ON WORLD AFF. 47, 59 (1997).

301. U.N. Security Council Resolution 688 authorized military assistance to Kurdish refugees

most Security Council economic interventions in the 1990s have been driven more by the desire to prevent destabilization of the world order—as in the case of Iraq's invasion of Kuwait in 1990, the military coup against President Aristide in Haiti in 1991, and Libya's surrender of individuals suspected in the Pan Am 103 bombing—than by strictly human rights concerns. China, in particular, remains hostile to any U.N. action targeting governments for domestic human rights practices.

While multilateral economic sanctions are expressly provided for by the Charter, the Charter does not bar unilateral economic measures to promote its purposes. Unlike the unilateral use of force, which is expressly prohibited by Article 2(4) of the Charter,[302] the Charter does not expressly prohibit unilateral nonforcible interference such as economic sanctions or the curtailing of diplomatic relations by U.N. members. Some developing countries have argued that Articles 2(4) and 2(7) implicitly bar economic and other nonforcible intervention.[303] Article 2(4), however, is limited to "the threat or use of force," and Article 2(7) is limited to action by the United

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in northern Iraq as a result of threat of refugee flows to international peace and security. David A. Martin, *Strategies for a Resistant World: Human Rights Initiatives and the Need for Alternatives to Refugee Interdiction*, 26 CORNELL INT'L L.J. 753, 766-68 (1993). The Security Council also found that refugee flows in Bosnia contributed to the threat to international peace and security. Guenther Auth, *Protecting Minorities: Lessons of International Peacekeeping*, 91 AM. SOC. INT'L L. PROC. 429, 438 (1977); Christopher A. Riley, Note, *Neither Free Nor Fair: The 1996 Bosnian Elections and the Failure of the U.N. Election-Monitoring Mission*, 30 VAND. J. TRANSNAT'L L. 1173, 1202-03 (1997).

302. Article 2(4) forbids the "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, ¶ 4. The prohibition is subject to the right of self-defense from armed attack under Article 51.

303. In 1984, the U.N. General Assembly pronounced the following under the GATT:

> [D]eveloped countries should refrain from threatening or applying trade restrictions, blockades, embargoes and other economic sanctions, incompatible with the Charter of the United Nations and in violation of undertakings contracted, multilaterally or bilaterally, against developing countries as a form of political and economic coercion which affects their economic, political and social development.

G.A. Res. 39/210, U.N. GAOR, 39th Sess., Supp. No. 51, 104th plen. mtg., at 160, U.N. Doc. A/RES/39/210 (1984). Eighteen countries, including the United States, opposed the resolution. RESTATEMENT, *supra* note 141, § 905, Reporter's note 6. The Charter of the Organization of American States also provides that "[n]o State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." CHARTER OF THE ORGANIZATION OF AMERICAN STATES art. 19; *see also id.* art. 18 (prohibiting forcible and nonforcible "interference . . . against the personality of the State or against its political, economic, and cultural elements"); Declaration on the Inadmissibility of Intervention, G.A. Res. 2131 (XX) (1965), U.N. GAOR, 20th Sess., 1408 plen. mtg., at 9 (1965) (prohibiting, *inter alia*, the use of economic, political, or other measures to coerce another state into subordinating the exercise of its sovereign rights or to otherwise secure advantages from it); G.A. Res. 44/125, U.N. GAOR, 81st mtg., U.N. Doc. A/RES/44/125 (1989); G.A. Res. 38/197, U.N. GAOR 2d Comm., 38th Sess., 104th mtg., U.N. Doc. A/Res/38/197 (1983) (noting the use of economic coercion against developing countries). Although the General Assembly has adopted resolutions condemning the U.S. economic embargo of Cuba for the past nine years, the resolutions have focused primarily on the United States' use of extraterritorial measures. *E.g.*, Press Release, GA/9814, Nov. 9, 2000 (discussing G.A. Res. No. A/RES/55/20 (2000)). Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba*, 28 VAND. J. TRANSNAT'L L. 901, 950 (1995) (concluding that the resolutions have not altered international positions regarding a legal norm prohibiting economic coercion).

Nations, not by its member states.[304] No international consensus has emerged to support the contrary position.

Furthermore, one of the most significant developments of the past several decades has been the broad recognition of human rights as matters of international concern that warrant bilateral and multilateral intervention by states. The U.N. Charter itself obligates member states to respect human rights and fundamental freedoms and "to take joint and separate action in cooperation with the Organization for the achievement of [these] purposes."[305] Thus the Charter creates mutual obligations among states to respect human rights and anticipates unilateral as well as multilateral action to achieve this goal.[306] In short, nothing in the U.N. Charter bars the use of nonforcible, economic measures to promote human rights compliance. To the contrary, economic measures are fully consistent with the Charter's goal of joint and separate action to achieve its human rights goals, and, when properly calibrated, such measures complement, rather than contradict, the multilateral remedies available under that instrument.

2. *The Customary International Law of Nonintervention*

Customary international law likewise does not bar states from using economic measures to promote human rights compliance. As discussed below, although international law traditionally has protected the right of states to be free from intervention by other states in the conduct of their sovereign domestic affairs, this principle of nonintervention does not clearly apply to the use of nonforcible economic measures to promote international human rights. Even if human rights measures were to violate the nonintervention norm, they may still constitute an acceptable use of nonforcible countermeasures to retaliate against violations of international human rights.

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304. U.N. CHARTER art. 2(7) (barring intervention by the United Nations into the domestic affairs of states). Article 2(7) of Charter "does not exclude action, short of dictatorial interference, undertaken with the view to implementing the purposes of the Charter." OPPENHEIM, *supra* note 139, § 132; *see also* JEAN-PIERRE COT & ALLAIN PELLET, LA CHARTE DES NATIONS UNIES: COMMENTAIRE, ARTICLE PAR ARTICLE 141-60 (1985); CHARTA DER VEREINTEN NATIONEN 100-14 (Bruno Simma ed., 1991). Since 1945, Article 2(7) has been construed very narrowly, to the extent that many previously "internal" concerns of states, and particularly those relating to fundamental human rights, are recognized as matters of international concern. As early as 1946, the General Assembly intervened under the Charter, regarding the treatment of Indians in South Africa, Res. 44(I) (1946), *cited in* OPPENHEIM, *supra* note 139, § 433 n.23. For further discussion of economic coercion under the U.N. Charter, see generally ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER (Richard Lillich ed., 1976).

305. U.N. CHARTER art. 56; *see also supra* note 103 (giving text of Articles 55 and 56).

306. *See generally* John Dugard, *Sanctions Against South Africa: An International Law Perspective, in* SANCTIONS AGAINST APARTHEID 113 (Mark Orkin ed., 1989) (tracing U.N. responses to apartheid as a threat to international peace and security); McDougal & Reisman, *Rhodesia and the United Nations*, *supra* note 297 (same).

a. *The Nonintervention Norm*

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."[307] As a threshold matter, it is unclear whether economic interference constitutes a form of "coercion" within the meaning of the nonintervention norm. In particular, because economic assistance is voluntary and given at the donor country's discretion, the use of foreign assistance to alter a foreign state's behavior may not be subject to the nonforcible countermeasures analysis.[308] Customary international law traditionally has allowed states to use economic coercion for a wide range of purposes,[309] and the relatively frequent use of economic sanctions by the United States and other developed nations since World War II makes it difficult to conclude that a customary international norm exists against the practice.

The compatibility of economic coercion with international law was confirmed by the ICJ in the *Nicaragua* case, in which Nicaragua challenged both U.S. military support for the Contras and U.S. economic coercion (in the form of terminated foreign aid, the reduction of Nicaragua's sugar import quota, and a trade embargo). The ICJ concluded with respect to the U.S. economic measures that it was "unable to regard such action on the economic plane . . . as a breach of the customary-law principle of nonintervention."[310] Nothing in customary international law, therefore, appears to bar the use of economic coercion.

This is particularly true when economic measures are used to promote human rights norms, which are not strictly matters of domestic sovereignty. As the ICJ has recognized, an intervention prohibited by the nonintervention norm must "be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely."[311] Human rights are not such

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307. OPPENHEIM, *supra* note 139, § 129.

308. Oppenheim states:

> [A] state may, without thereby committing an act of intervention, . . . sever diplomatic relations with another state, discontinue exports to it or a programme of aid, or organise a boycott of its products . . . . Although such measures may . . . be intended . . . to persuade the other state to pursue, or discontinue, a particular course of conduct, such pressure falls short of being dictatorial and does not amount to intervention.

Id.; Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 39-42 (1989); 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 aggression "only when [...] the *objective* of the coercion is to liquidate an existing state or to reduce that state to the position of a satellite").

309. According to Vattel:

> [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.

VATTEL, THE LAW OF NATIONS, bk. I, ch. VIII, § 94 (Chitty ed., 1866).

310. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 126 (June 27).

311. *Id.* at 108.

principles subject to domestic discretion, but are matters of international concern which justify intervention by the international community.[312] As the *Barcelona Traction* court wrote, "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection."[313] Accordingly, international law recognizes a number of exceptions to state sovereignty to promote compliance with, and enforcement of, human rights. The Vienna Convention on the Law of Treaties provides that, with respect to "provisions relating to the protection of the human person contained in treaties of a humanitarian character,"[314] states may neither terminate their own obligations nor suspend performance due to a material breach by another party. In 1994, the U.N. Human Rights Committee confirmed this principle by ruling that signatories to the ICCPR could not validly enter reservations to provisions that reflected *jus cogens* and *erga omnes* obligations of international law.[315] Core international human rights principles have also been recognized as exceptions to the U.S. act of state doctrine[316] and to head of state immunity.[317] With respect to individual liability, principles of universal jurisdiction give states authority to punish *jus cogens* crimes such as genocide, torture, war crimes, and the slave trade, regardless of whether the state otherwise would enjoy jurisdiction, as a result of the global community's universal condemnation of those activities and collective interest in suppressing them.[318] This exceptional jurisdiction extends not only to the

312. *See, e.g.*, Damrosch, *supra* note 308, at 31-34, 45-47 (arguing that economic intervention in foreign states for human rights purposes does not violate the nonintervention norm).

313. Barcelona Traction, Light And Power Co. (Belg. v. Spain), 1970 I.C.J. 4, 32 (Feb. 5).

314. Vienna Convention on the Law of Treaties, May 23, 1969, art. 60, ¶ 5, 1155 U.N.T.S. 331, 346.

315. As the U.N. Human Rights Committee noted:

> Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise with human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant [ICCPR] that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations.

General Comment 24, *supra* note 157, ¶ 8.

316. RESTATEMENT, *supra* note 141, § 443, cmt. c ("A claim arising out of an alleged violation of fundamental human rights . . . [would] probably not be defeated by the act of state doctrine.").

317. *In re*: Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994) (holding that acts of torture, execution, and disappearance are not official acts protected by head of state immunity); *see, e.g.*, Genocide Convention, *supra* note 110, art. 4 (recognizing liability for rulers and public officials); Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, *Ex Parte* Pinochet Ugarte (No. 3) [2000], 1 A.C. 147 (1999) (holding that former head of state lacked immunity after torture and became subject to universal jurisdiction with ratification of Torture Convention).

318. *Cf.* United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820) (recognizing piracy "as an offense against the universal law of society"). *See generally In re*: Estate of Ferdinand Marcos, 25 F.3d at 1475 (recognizing torture, summary execution, and disappearance as violations of "universal" obligations); Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir.1985), *cert. denied*, 457 U.S. 1016 (1986), *vacated on other grounds*, 10 F.3d 338 (6th Cir. 1993) ("[T]he 'universality principle' is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people."); Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become like the pirate and the slave trader before him—*hostis humanis generis*, an enemy of all mankind."). The Statute of the International Criminal Court acknowledges that "it is the

actual perpetrators, but also to their aiders and abetters.[319] In sum, economic measures themelves do not appear to implicate the nonintervention norm. And because human rights protections enjoy the status of international, rather than domestic concerns, at a minimum, economic measures to promote international human rights do not constitute coercive intervention under customary international law.

b. *Nonforcible Countermeasures*

Even if economic sanctions for human rights purposes could constitute a form of prohibited coercion, the principle of nonforcible countermeasures would allow use of such sanctions to retaliate for another state's breach of its international obligations to protect human rights.[320] Customary international law generally provides that a state that has violated an international obligation to another state or an obligation to all states (*erga omnes*), is subject to peaceful retaliatory measures that would otherwise be illegal. The measures adopted, however, must be necessary to terminate the violation or prevent future violations and proportional to the violation or injury suffered.[321] Furthermore, nonforcible countermeasures may be used only after other attempts at mediation and compromise have failed.[322]

One question that might be raised regarding the application of nonforcible countermeasures analysis to human rights treaties is whether human rights violations involve the requisite breach of a mutual obligation, since few human rights treaties expressly recognize the right of states to act against other states to enforce human rights norms.[323] Some commentators

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duty of every state to exercise its criminal jurisdiction over those responsible for international crimes." Rome Statute, *supra* note 153, pmbl., ¶ 6; *see also* RESTATEMENT, *supra* note 141, § 404, cmt. a; STEVEN RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 141 (1997); DIANE F. ORENTLICHER, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (discussing duty of states to extradite or prosecute violations of universal norms of international law).

319. *E.g.*, Torture Convention, *supra* note 111, art. 3.

320. For a discussion of state authority to impose lawful countermeasures, see generally RESTATEMENT, *supra* note 141, § 905 & cmts. a, c; ECONOMIC COERCION, *supra* note 308; O.Y. ELAGAB, THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW (1988); FARER, *supra* note 308; David J. Gerber, *Beyond Balancing: International Law Restraints on the Reach of National Laws*, 10 YALE J. INT'L L. 185 (1984).

321. OPPENHEIM, *supra* note 139, § 131. Few courts have addressed the necessity and proportionality requirements of nonforcible retaliation, and most decisions that implicate the proportionality requirement appear to have found it satisfied. The broad U.S. sanctions against Iran imposed following the seizure of U.S. consular personnel were upheld by the ICJ as appropriate under the circumstances. *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 17 (May 24); *see also* Air Service Agreement of 27 March 1946 Between the United States of America and France (U.S. v. France), 18 R. Int'l Arb. Awards 417, 443-45 (Dec. 9, 1978) (upholding U.S. denial of air service rights to France following France's denial of equivalent rights, and observing that countermeasures should be equivalent in some measure to the breach and should seek "to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution").

322. RESTATEMENT, *supra* note 141, § 905, cmt. c.

323. Notable exceptions include the 1957 Slavery Convention, 266 U.N.T.S. 3, 41, art. I, which broadly obligates states parties "to take all practicable and necessary legislative and other measures to bring about . . . the complete abolition" of forced labor and all other slave-like practices, the 1957

have read this absence, combined with the reporting and oversight committees established by various human rights conventions (such as the ICCPR Human Rights Committee or the ILO complaint procedures), as precluding unilateral retaliation.[324] The *jus cogens* and *erga omnes* status of human rights norms under the U.N. Charter and customary international law, however, renders their breach subject to nonforcible countermeasures. Accordingly, the better view is that the formal treaty procedures—which lack enforcement mechanisms—were intended to complement the existing decentralized enforcement mechanisms that are available under customary international law. States that wish to be a part of the international community accept both the obligations of that community and the possibility that they will be held accountable through unilateral or multilateral sanctions for violations of its norms. Thus, resort to reasonable nonforcible countermeasures is justifiable if both the sanctioning and target states are party to the international human rights treaty being violated, or if the target state violates a *jus cogens* or *erga omnes* norm of international law.

In short, the use of unilateral economic sanctions to promote fundamental human rights is consistent with the obligations imposed by the U.N. Charter, various human rights instruments, and customary international law norms regarding nonintervention and nonforcible countermeasures. Whether human rights sanctions fall beyond the reach of the nonintervention norm altogether or are justifiable as reasonable nonforcible countermeasures, they are allowed under international law as an appropriate response to human rights violations.

B. *Secondary Boycotts and Extraterritorial Jurisdiction*

A second potential customary international law concern is raised by sanctions measures that target third party entities or states. Under traditional public international law principles, a state's prescriptive jurisdiction—or authority to legally regulate conduct—extends to persons and things present in the territory and to conduct substantially occurring in the territory or having substantial effects there. A state also may exercise jurisdiction over the actions and interests of its nationals.[325] "Extraterritorial" sanctions, or secondary boycotts, have long been criticized as violating these principles, since they

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Supplementary Convention, *supra* note 126, at art. I, and the Apartheid Convention, *supra* note 148, at art. IV(a) & (b), which requires states "to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid" without jurisdictional limitation. The Genocide Convention also authorizes actions against other states in the ICJ. Genocide Convention, *supra* note 110, art. IX.

324. Weisburd, *supra* note 19, at 115-16 (1995-96).

325. RESTATEMENT, *supra* note 141, § 402; OPPENHEIM, *supra* note 139, §§ 137-39 (discussing international law bases for state jurisdiction). Exercise of jurisdiction is subject to the goal of avoiding unreasonableness and conflict with other laws. RESTATEMENT § 403, cmt. g. States also have limited universal jurisdiction to regulate and punish conduct recognized by the international community as violating matters of universal concern. *Id.* § 404.

purport to exercise authority over foreign states and entities for engaging in conduct (business with third countries) that has no jurisdictional nexus with the sanctioning state. Such measures are also criticized as violating principles of nonforcible retaliation, due to the critical absence of any breach of duty between the sanctioning and target states.

The United States has specifically condemned secondary boycotts, such as the Arab League's boycott of Israel, for violating international law, and U.S. law opposes secondary boycotts.[326] Nevertheless, the United States has imposed sanctions on persons or property with extraterritorial effects in the past,[327] and present U.S. sanctions laws contain a number of extraterritorial provisions. The 1996 Helms-Burton Act withholds foreign assistance, not simply from the target state, but from countries that provide economic assistance, debt relief, or trade benefits to Cuba, and withholds entry visas and allows suits for damages against foreign entities doing business with Cuba.[328] Selective purchasing laws such as the Massachusetts Burma Statute deny government contracts to companies doing business with the target state.[329] Both types of laws have been criticized for violating international rules regarding jurisdiction and nonforcible countermeasures.[330]

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326. Export Administration Act, 50 U.S.C. app. § 2407(a)(1) (2000) (requiring the President to prohibit U.S. nationals from supporting boycotts against U.S. allies); *see also* Action Affecting Export Privileges, Baxter International Inc., 58 Fed. Reg. 16,813 (1993) (enforcing anti-boycott provisions).

327. Most extraterritorial U.S. laws purport to regulate the foreign subsidiaries of U.S. companies as "persons subject to U.S. jurisdiction." International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1702(a)(1) (2000); Export Administration Act, 50 U.S.C. app. §2405(a) (1994); Foreign Assets Control Regulations, 31 C.F.R. § 500.329(d) (2000); Cuban Assets Control Regulations, 31 C.F.R. §§ 515.201, 515.329 (2000). President Carter's IEEPA sanctions against Iran froze all Iranian assets in the control of persons subject to U.S. jurisdiction. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979). The notable exception to this practice was the 1982 Soviet pipeline embargo, which was imposed in response to the Soviets' suppression of the Polish solidarity movement. The regulations, which were adopted over the objection and ultimate resignation of Secretary of State Alexander Haig, purported to bar the sale of petroleum goods to the Soviets, including any goods sold by foreign entities that contained U.S. products or that were produced under licensing arrangements with U.S. companies. The European Community opposed the controls as violating international law, *see, e.g., European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., reprinted in* 21 I.L.M. 891 (1982), and a Dutch court concluded that international law barred application of the controls to the local subsidiary of a U.S. corporation. Compagnie Europeenne des Petroles S.A./Sensor Nederland B.V., Rb. Den Haag, Sept. 17, 1982, *reprinted in* 22 I.L.M. 66, 72-73 (1983). For further discussion of the international law compliance of the Soviet embargo, see Note, *Extraterritorial Application of the Export Administration Act of 1979 under International and American Law*, 81 MICH. L. REV. 1308 (1983).

328. The 1996 Congress passed a number of laws with controversial territorial implications. In addition to waiving foreign sovereign immunity for state sponsors of terrorism, *see supra* note 4, the Iran and Libya Sanctions Act of 1996 (ILSA), Pub. L. No. 104-172, 110 Stat. 1541, imposed extraterritorial sanctions on domestic and foreign entities investing in Iranian and Libyan petroleum industries. The Act was adopted to sanction Iran and Libya for their perceived participation in recent acts of terrorism. As with Helms-Burton, President Clinton tempered foreign opposition to ILSA some degree by declining to enforce its extraterritorial provisions against any foreign company. L. Dhooge, *Meddling with the Mullahs: An Analysis of the Iran and Libya Sanctions Act of 1996*, 27 DENV. J. INT'L L. & POL. 1, 55 (1998). In a tentative agreement with the European Union, the United States agreed not to impose ILSA sanctions on any European company, in exchange for the EU's agreement not to file a complaint with the WTO. Raf Casert, *EU, U.S., Fail to Settle Trade Dispute Over Cuba, Libya, Iran*, Assoc. Press, Oct. 15, 1997, 1997 WL 2555359.

329. MASS. GEN. LAWS ANN. ch. 7, § 22 H(a), J(a) (West 2000).

330. The measures also have been challenged as invalid under the GATT, a subject that is

1. *Helms-Burton Act*

The most controversial recent U.S. human rights statute is the Helms-Burton Act regarding Cuba.[331] Formally designated the Cuban Liberty and Democratic Solidarity Act of 1996, Helms-Burton was adopted in March 1996 in response to Cuba's attack on two planes operated by the Miami-based Cuban liberation group Brothers to the Rescue.[332] The Act's stated purposes are to secure international sanctions against the Castro regime, to promote democratization in Cuba, and to restore the expropriated property of U.S. nationals. Although the United States has maintained a near-complete embargo on U.S. interactions with Cuba since President Kennedy,[333] the law reflected Congress' frustration with both the failure of past sanctions to destabilize Castro and the international community's unwillingness to cooperate with the U.S. sanctions program. Accordingly, Helms-Burton codified existing executive sanctions against Cuba and imposed new sanctions on third parties doing business with the country.

Title I of the law codifies the existing system of sanctions against Cuba[334] and obligates the United States to oppose Cuban participation in the OAS and international financial institutions. It further directs the United States to oppose IFI assistance to Cuba and requires the U.S. Treasury to withhold funds from IFIs equaling the amount of any financial assistance awarded to Cuba over U.S. opposition.[335] Title II extensively details the steps that Cuba must take in order to be considered a democratically elected government for purposes of terminating the embargo.[336] These include

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beyond the scope of this Article.

331. The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785.

332. President Clinton had promised to veto the statute but, following the attack, he agreed to sign it, conditioned on the inclusion of the Title III waiver clause. Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 AM. J. INT'L L. 419, 419 (1996).

333. President Kennedy's embargo against Cuba, imposed by regulation pursuant to the Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 620(a), 75 Stat. 424 (codified at 22 U.S.C. § 2370(a)) (now (a)(1)), and the Trading with the Enemy Act, 50 U.S.C. app. § 5(b) (1994), barred trade with Cuba by "persons subject to the jurisdiction of the United States," including the foreign subsidiaries of U.S. corporations. Cuban Assets Control Regulations, 31 C.F.R. §§ 515.101, 515.329 (1963). The extraterritorial effect of the embargo was largely ameliorated by the issuance of licenses until Congress's passage of the Cuban Democracy Act of 1992, which barred the issuance of licenses to U.S. foreign subsidiaries and authorized denial of U.S. aid to countries providing assistance to Cuba. Pub. L. No. 102-484, 106 Stat. 2575 (1992) (codified at 22 U.S.C. § 6001-6010 (1994)).

334. Helms-Burton provides that the sanctions in place as of 1 March 1996 "shall remain in effect" until the President finds that Cuba has become a "democratically elected government," as defined in Section 204 of the statute. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub. L. No. 104-114, § 102(h), 110 Stat. 785 (1996). The codification of existing sanctions is significant, since it eliminates the Executive's annual review of the Cuban embargo and appears to foreclose executive modification of the sanctions absent congressional approval.

335. *Id.* § 105. The President has limited authority to suspend these restrictions to allow food, medical, and certain military assistance to Cuba upon a finding that a transitional democratic government is in place. *Id.* § 204(a).

336. 22 U.S.C. §§ 6065-66 (2000).

allowing Cuban prisons to be investigated by appropriate international human rights organizations;[337] conducting elections supervised by international monitors such as the United Nations and OAS;[338] respecting "internationally recognized human rights and basic freedoms set forth in the Universal Declaration;"[339] restoring Cuban citizenship to returning Cuban-born expatriates;[340] permitting unfettered international human rights monitoring of the country;[341] and making "demonstrable progress" toward returning property expropriated from U.S. citizens (including naturalized Cubans) or paying "full compensation in accordance with international law standards and practices."[342]

Helms-Burton contains a number of extraterritorial provisions. Although the 1992 Cuban Democracy Act authorized denial of U.S. aid to countries providing foreign assistance or trade benefits to Cuba,[343] Helms-Burton extends the definition of foreign assistance to include debt forgiveness by third party states.[344] Title III, the most controversial part of the Act, creates a private right of action in U.S. courts for "U.S. nationals"[345] whose property was expropriated by the Cuban government to sue individuals who "traffic" in such expropriated property.[346] The term "trafficking" is broadly defined to encompass most forms of doing business with Cuba, including "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property."[347] In a provision required by President Clinton "in order to afford the President flexibility to respond to unfolding developments in Cuba,"[348] Title III authorizes the President to suspend operation of the private right of action provision for six month periods if the suspension is necessary to promote U.S. interests and will "expedite a transition to democracy in Cuba."[349] Title IV denies U.S. entry visas to any foreign national who has either confiscated property, or trafficked in confiscated property in Cuba. The mandatory restriction[350] was implemented by the State Department and has resulted in the denial of entry visas to foreign nationals.

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337. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act, Pub. L. No. 104-114, § 205(a)(2), 110 Stat. 785 (1996).

338. *Id.* § 205(a)(4)(C).

339. *Id.* § 205(a)(6)(B).

340. *Id.* § 205(b)(2)(B).

341. *Id.* § 205(b)(4).

342. *Id.* § 206(6).

343. Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2575 (1992) (codified at 22 U.S.C. § 6001-6010 (1994)).

344. The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 102(f), 110 Stat. 785 (1996).

345. "U.S. nationals" includes individuals who were Cuban nationals at the time of the 1959 revolution and have subsequently been naturalized in the United States. *Id.* § 303(a)(4)(C).

346. *Id.* § 302(a). Litigants may recover damages totaling up to three times the value of the entire expropriation, regardless of the actual value of the benefit received by the trafficking entity.

347. *Id.* § 4(13).

348. Committee of Conference, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, H.R. REP. 104-468, at 65 (1996) [hereinafter Helms-Burton Conference Report]; *see also* Lowenfeld, *supra* note 332, at 426 (discussing compromise over Title III suspension provision).

349. 22 U.S.C. §§ 6085(b), (c)(1)(B) (2000).

350. Title IV allows waiver by the Secretary of State only on a case by case basis for medical

The extraterritorial provisions of Helms-Burton and the related Iran and Libyan Sanctions Act[351] spurred formal protests from the international community, which condemned the Act as violating both customary international jurisdictional rules and the GATT. Canada, Mexico and the European Union adopted "blocking" and "clawback" legislation, barring their companies from complying with Helms-Burton, prohibiting the enforcement of judgments entered under the Act, and authorizing companies to countersue for any damages resulting from the U.S. sanctions measure.[352] The OAS Inter-American Juridical Committee unanimously condemned Helms-Burton as an international law violation in a decision which the U.S. member joined.[353] Canada and Mexico pursued dispute resolution mechanisms under NAFTA,[354] and the European Community formally initiated dispute resolution proceedings in the WTO.[355]

In response to the international community's outrage over the Act's secondary boycott provisions, President Clinton has continuously waived the Title III private right of action provision, arguing that the purposes of the act would be better served if the United States built up international support for promoting democracy in Cuba.[356] President Clinton also recently promised EU leaders he would try to persuade Congress to rescind the Title IV visa restriction.[357] The Europeans ultimately suspended their WTO challenge in exchange for assurances that the United States would withhold enforcement of

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reasons or to allow entry into the country to defend against Title III litigation. *Id.* § 401(c).

351. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, 110 Stat. 1541. *See supra* note 328.

352. Act to Protect Trade and Investment from Foreign Norms that Contravene International Law, Oct. 23, 1996, 36 I.L.M. 133 (Mex.); Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act, Oct. 9, 1996, 36 I.L.M. 111 (Can.); Council Regulation 2271/96 of 22 November 1996 Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom, 1996 O.J. (L 309). The EU measure also applied to the Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (1994). Council Regulation 2271/96, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, Annex, 1996, O.J. (L309) 5-6.

353. Opinion of the Inter-American Juridical Committee in Response to Resolution AG/DOC.3375/96 of the General Assembly of the Organization, entitled: "Freedom of Trade and Investment in the Hemisphere," OEA/Ser.G, CP/doc.2803/96 (Aug. 23, 1996), 35 I.L.M. 1329, 1334 (1996) ("[T]he exercise of jurisdiction by a State over acts of 'trafficking' by aliens abroad, under circumstances whereby neither the alien nor the conduct in question has any connection with its territory and there is no apparent connection between such acts and the protection of its essential sovereign interests, does not conform with international law."), *available at* http://www.sice.oas.org/forum/p_sector/intl_org/iajc_e.asp.

354. Harvey Oyer, *The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations under NAFTA*, 11 FLA. J. INT'L L. 429, 456 (1997).

355. *United States—The Cuban Liberty and Democracy Solidarity Act*, WTO Doc. WT/DS 38/2 (Oct. 8, 1996).

356. David E. Sanger, *Clinton Grants, Then Suspends, Right to Sue Foreigners on Cuba*, N.Y. TIMES, July 17, 1996, at A1.

357. Stefaan Smis & Kim Van der Borght, *The E.U.-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227, 232 (1999); *see also* James Bennet, *To Clear Air with Europe, U.S. Waives Some Sanctions*, N.Y. TIMES, May 19, 1998, at A6 (discussing terms of U.S.-European agreement).

the Helms-Burton provisions and avoid extraterritorial sanctions measures in the future.[358]

2. *Selective Purchasing Laws*

Selective purchasing laws such as the Massachusetts Burma Statute[359] also raise extraterritorial concerns, since they punish companies or governments for their economic interactions with third party states. The Massachusetts statute has prompted significant outcry both at home and abroad. The European Union, Japan, and Thailand condemned the sanctions as violating WTO rules on governmental procurement,[360] and the European Community and Japan initiated dispute settlement proceedings in the World Trade Organization.[361] When discussions with the United States failed to resolve the Massachusetts issue, Japan and the European Commission requested the establishment of a WTO dispute panel, and a panel was established in October 1998 over the objection of the United States.[362] The international controversy over the Massachusetts law dissipated when the United States Supreme Court invalidated the measure, finding that it unreasonably conflicted with the Federal Burma Statute.[363] That decision did not bar state and local selective purchasing measures that are not preempted by federal statute, however, nor does it address the validity of any similar government procurement rules that might be adopted by the national

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358. In a summit meeting between the United States and the EU on May 18, 1998, the parties agreed that in the future they "will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators." Smis & Van der Borght, *supra* note 357, at 231-32.

359. MASS. GEN. LAWS ANN. ch. 7, § 22 (West 2000).

360. WTO Agreement on Government Procurement, 14 Int'l Trade Rep. (BNA), No. 26, at 1098, art. IV(1) (June 25, 1997) ("A Party shall not apply rules of origin to products or services imported or supplied for purposes of government procurement covered by this Agreement from other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same product or services from the same Parties."); *see, e.g.*, *Massachusetts Law on Burma Riles EU*, CHI. TRIB., Dec. 19, 1997, at A34; *A State's Foreign Policy: The Mass that Roared*, ECONOMIST, Feb. 8, 1997, at 32.

361. *United States—Measure Affecting Government Procurement; Request for Consultations by the European Communities*, WTO Doc. WT/DS88/1 (June 26, 1997); *United States—Measure Affecting Government Procurement; Request for Consultations by Japan*, WTO Doc. WT/DS95/1 (July 21, 1997); *see also* EUROPEAN COMM'N, REPORT ON UNITED STATES BARRIERS AND INVESTMENT § 4.6 (1998).

362. Christopher McCrudden, *International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement*, 2 J. INT'L ECON. L. 3, 24 (1999).

363. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000). The suit was brought by the National Foreign Trade Council, an association of U.S. companies doing business abroad, with whom the European Union joined as an *amicus*. Deidre Shesgreen, *Can States Set Trade Policy?* LEGAL TIMES, Aug. 17, 1998, at 4. For further discussion of the possible domestic and international law infirmities of the Massachusetts statute, see Daniel M. Price & John P. Hannah, *The Constitutionality of United States State and Local Sanctions*, 39 HARV. INT'L L.J. 443 (1998) (arguing that local sanctions measures unconstitutionally infringe on the national foreign affairs powers); Alejandra Carvajal, *State and Local "Free Burma" Laws: The Case for Sub-National Trade Sanctions*, 29 L. & POL'Y INT'L BUS. 257 (1998) (arguing that local measures are constitutionally sound).

government. The jurisdictional and GATT validity of human rights restrictions on government procurement thus remains an open question.

3. *Prescriptive Jurisdiction*

Despite the international outcry, the question of whether Helms-Burton violates principles of state jurisdiction remains unresolved. Supporters of Helms-Burton have contended that prescriptive jurisdiction is satisfied due to the "effects" on the United States of foreign entities' trafficking in U.S. expropriated property.[364] Purchase of previously confiscated properties in Cuba by foreign investors, so the argument goes, has direct effects in the United States by clouding title to properties and undermining Cuba's future ability to make restitution.[365] Whether the role of a foreign purchaser in potentially clouding title forty years after an expropriation would constitute a sufficiently direct, substantial and foreseeable U.S. "effect" to warrant the exercise of territorial jurisdiction, however, is dubious. Moreover, the Act is overbroad to achieve this purpose. "Trafficking" in expropriated property extends not only to entities that purchase such property, but to those doing business that in any way uses, or benefits from, the existence of confiscated property. President Clinton's refusal to enforce the private right of action provisions of Helms-Burton thus appears to be a valid attempt to bring that congressional effort in line with international law.

On the other hand, jurisdictional requirements appear to be satisfied in the selective purchasing context. Selective purchasing laws involve a clear nexus—in the form of a potential government contract—between the sanctioning and sanctioned entity. Massachusetts does not reach out to impose sanctions on countries doing business with Burma that have no territorial connection with the state, but instead declines to do business with them itself. Principles of prescriptive jurisdiction accordingly should not bar such measures, which appear to be consistent with international requirements. Moreover, from a normative perspective, selective purchasing laws may serve a valuable purpose. Local measures that affect third parties doing business with the target state often are adopted because the government has no other way to voice its economic objection to practices of the target state. Where the government does no direct business with the country or its companies, as in the case of Massachusetts and Burma, a ban on doing business with the target state would be meaningless.

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364. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 301(9), 110 Stat. 785 (1996) ("International law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have *substantial effect* within its territory.") (emphasis added).

365. Brice M. Clagett, *The Controversy Over Title III of the Helms-Burton Act: Who is Breaking International Law—The United States, or the States that have Made Themselves Co-Conspirators with Cuba in its Unlawful Confiscations?* 30 GEO. WASH. J. INT'L L. & ECON. 271, 277 (1996-97).

4. *Unlawful Countermeasures*

Even if jurisdictional concerns can be satisfied, both Helms-Burton and selective purchasing laws could be vulnerable to the charge that they violate principles of nonforcible retaliation due to the critical absence of any breach of duty between the sanctioning and target states. Under traditional countermeasures analysis, if Cuba expropriates the property of U.S. nationals, it has breached an international law duty to the United States for which the United States is entitled to peacefully retaliate. On the other hand, a French company that does business with Cuba has not thereby violated any duty to the United States and cannot be subject to retaliation.[366]

This charge, of course, is applicable only if economic measures actually violate the nonintervention norm, a premise which is rejected above. Moreover, to the extent that these laws target foreign *companies* rather than foreign *states*, the analogy to nonforcible countermeasures (which addresses conduct between states) may be misplaced. The exercise of authority under these circumstances is more analogous to an exercise of a state's jurisdiction to enforce through nonjudicial measures, and international rules regarding state-to-state behavior may not be implicated.[367]

Supporters of Helms-Burton contend that the Act properly retaliates against third parties because these actors have breached a duty to the United States by "aiding and abetting" Cuba's unlawful expropriation. Under this argument, those who do business with the Castro regime are abetting Cuba in its unlawful confiscations of U.S. property, and thus independently violating an international law duty to the United States. The argument is tenuous. It is not clear how presently doing business with Cuba aids or abets a confiscation that occurred nearly forty years ago. Moreover, while some international law norms extend liability to aiders and abetters, it is not at all clear that the prohibition against the uncompensated confiscation of property reaches this far. As the Inter-American Juridical Committee observed in reviewing the legality of Helms-Burton, a "claimant State does not have the right to attribute liability to nationals of third States for the use of expropriated property located in the territory of the expropriating State where such use conforms to the laws of this latter State, nor for the use in the territory of third States of intangible property or products that do not constitute the actual asset expropriated."[368] Finally, the right of individuals not to be deprived of property by their *own* government without compensation—which Helms-Burton also purports to enforce—is not a clearly established norm of international law.

The resolution of these questions regarding the validity of extraterritorial measures is beyond the scope of this Article. However, the Helms-Burton and the selective purchasing laws raise provocative questions for norm internalization and unilateral human rights measures. A significant portion of

366. *Cf.* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 127 (June 27) (nonforcible countermeasures are not available to third-party state).

367. RESTATEMENT, *supra* note 141, § 431.

368. Inter-American Juridical Committee, *supra* note 353, at 6, ¶ 6(d).

the Helms-Burton controversy may be attributable to the fact that the measure is viewed as a fruitless effort driven by domestic U.S. political concerns rather than a desire to promote valid international norms. But what if a secondary boycott were directed, instead, at a regime akin to Nazi Germany, which the international community acknowledged to be an egregious human rights violator? Are there circumstances in which doing business with a gross human rights violator itself breaches some duty to the international community sufficient to expose a state or its entities to unilateral economic retaliation from other states? International law regarding *jus cogens* norms authorizes states to prescribe and punish violations wherever they occur, and prohibits not only the direct commission of these acts, but their aiding and abetting.[369] The sale of weapons to a genocidal state presumably would violate the international prohibition against genocide, for example, and justify economic retaliation against the supplying state. The trials of the Nuremberg industrialists imputed international criminal liability to business entities that assisted the Nazi regime. If doing business with a gross human rights violator can be analogized to aiding and abetting, a third party entity may have sufficiently breached its international duties to justify peaceful retaliation. Of course, this is the argument urged in support of Helms-Burton. If viable, however, such a human rights exception for secondary boycotts could only be invoked in response to violations of international norms which extend obligations to aiders and abettors. Under this analysis, the use of secondary boycott measures to target those who directly and substantially aid and abet gross human rights violations, such as apartheid in South Africa or the genocide in Rwanda, might be appropriate. The use of such measures for the purpose of remedying lands expropriated forty years ago from U.S. and former Cuban nationals, as under Helms-Burton, would present a much more difficult case.

Helms-Burton ultimately underscores the current difficulties involved in using unilateral extraterritorial measures to promote human rights values. Supporters of Helms-Burton assert that the law "furthers both the development and implementation of international law by reinforcing otherwise rudimentary enforcement mechanisms . . . [and] represents a legitimate exercise of U.S. jurisdiction for the benefit of the international rule of law."[370] The general consensus of the international community, however, is that Helms-Burton – and particularly the Title III provision for suits against third parties – in fact abuses and distorts international law norms to serve peculiarly U.S. interests. As such, the secondary boycott provisions undermine the moral and normative persuasive power of U.S. unilateral sanctions measures and divert attention from the human rights message being promoted to the legitimacy of the selected messenger. Even if secondary boycotts of this type do not violate the letter of international law, they are

369. *See infra* Section IV.A.

370. Clagett, *supra* note 365, at 296.

sufficiently problematic that they are likely to undermine, rather than promote, the goal of norm definition and internalization.

C. *Compliance with the International Trade System*

Measures employing *trade* restrictions to promote internalization of human rights norms raise additional questions regarding compliance with the GATT/WTO system. The desire of Western states to promote fundamental international rights through trade restrictions have clashed directly with the values of the free trade system in recent years. Developing countries and free trade advocates charge that restrictions on trade with foreign states and government procurement policies eliminate the valid low-wage competitive advantage of developing states and are merely disguised protectionist measures that conflict with the anti-discrimination principles of the GATT/WTO system. The WTO Agreement on Government Procurement, which obligates participating states to purchase in a manner that does not discriminate against any other party to the agreement, may also raise obstacles to selective-purchasing laws such as the Massachusetts Burma Statute.[371]

The General Agreement on Tariffs and Trade (GATT) was adopted in 1947 to promote the goal of reducing trade barriers and eliminating disguised protectionism from the international trading system. Articles I and III[372] of the GATT accordingly require parties to give equal market access to similar products from all other GATT members and bar discrimination between a party's own products and the like products of another member state. Article XI of the GATT further prohibits non-tariff barriers to trade. GATT dispute panels and their successors in the WTO recently have applied these principles to invalidate U.S. import restrictions that were designed to prevent environmental degradation abroad. For example, the WTO found U.S. import laws that required foreign tuna to be harvested according to dolphin-safe methods to violate GATT rules,[373] and struck down U.S. requirements that imported shrimp be harvested through sea-turtle-safe methods.[374] The WTO has also concluded that EU banana import preferences, which were intended to promote economic development in former European colonies in the Caribbean, violated the GATT.[375] Decisions such as these have increased

371. WTO Agreement on Government Procurement, *supra* note 360. There are presently twenty-five parties to the government procurement agreement. For an excellent discussion of the implications of the procurement agreement for local selective purchasing laws, see McCrudden, *supra* note 362.

372. General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A-11, A-12, A-18-19, 55 U.N.T.S. 194, 196-200, 204-08.

373. United States—Restrictions on Imports of Tuna, GATT B.I.S.D. (39th Supp.) at 155, 205 (1993).

374. *WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc., WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp/Turtle*]. *See generally* Patricia Isela Hansen, *Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment*, 39 VA. J. INT'L L. 1017, 1053-57 (1999) (discussing the *Shrimp/Turtle* holding).

375. *WTO Appellate Body Report on European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc., WT/DS27/AB/R (Sept. 9, 1997).

pressure from advanced industrial nations, and particularly from labor and environmental groups, to loosen GATT free trade restrictions to accommodate domestic legislation promoting valid public policy concerns.[376]

WTO members, however, persistently have resisted any linkage between human and labor rights issues and trade relations. At the Uruguay Round of trade negotiations, the United States and France proposed that consideration of the relationship between labor standards, social justice, and trade concerns should be included on the WTO agenda.[377] In 1994 the United States brokered a tentative agreement to consider labor rights issues in the next WTO negotiations,[378] but these and subsequent efforts to discuss worker rights have been thwarted by developing countries. Linkage was strenuously opposed at the 1996 Singapore Ministerial Conference of the WTO by India and other developing nations, despite support for the initiative from Canada, the European Commission, Norway, and the United States.[379] Although the recent WTO talks in Seattle brought unprecedented attention to the relationship between WTO trade issues and labor, environmental, and other social concerns, the talks failed to make any progress toward accommodating these considerations in the free trade principles of the GATT.

The recent rulings of the WTO notwithstanding, however, the GATT does not impose an absolute free trade regime. Certain types of trade measures to promote human rights clearly are GATT compliant, such as GSP import preferences for developing countries[380] and measures barring imports made with prison labor.[381] Restrictions on trade in military technology for human

376. For an excellent analysis of the implications of WTO rulings for trade-labor linkage, see Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999).

377. The U.S. implementing statute for the Uruguay Round called for the establishment of a working group within the WTO "to examine the relationship of internationally recognized worker rights . . . to the articles, objectives, and related instruments of the [GATT and WTO]." OECD STUDY, *supra* note 7, at 188 (quoting Uruguay Round Agreements Act, Pub. L. No. 103-465, § 131, 108 Stat. 4809 (1994)).

378. Michael Bergsman, *Kantor Announces U.S. Has Secured GATT Deal to Discuss Labor Rights*, INSIDE U.S. TRADE, Apr. 8, 1994, at S1.

379. *WTO: Ministers Agree to Do Nothing on Labour Standards*, EUR. REP., Dec. 14, 1996, LEXIS, News Library, CURNWS file. The Singapore Ministerial Declaration addressed the issue as follows:

> We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these [ILO] standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.

Singapore Ministerial Declaration, WTO Doc. WT/MIN(96)/DEC (Dec. 13, 1996), *reprinted in* 36 I.L.M. 220, 221 (1997).

380. In 1971, GATT members adopted a ten-year waiver that permitted (but did not require) GATT countries to give more preferential treatment to less-developed countries. In 1979 the members adopted a decision on differential and more favorable treatment for developing countries that eliminated the need for extension of the GSP exception. JACKSON ET AL., *supra* note 168, at 1132-35.

381. GATT, *supra* note 372, art. XX(e) (creating a GATT exception for measures relating to the products of prison labor).

rights purposes likely may be justified under Article XXI(b)(ii)'s exception for measures "necessary for the protection of [a member's] essential security interests."[382] And if "international emergencies" under Article XXI(b)(iii) were construed to include systematic violations of *jus cogens* norms, unilateral trade measures could be imposed in situations such as the Rwandan genocide under this national security provision.

Article XX of the GATT includes a number of exceptions—notably those for measures necessary to protect public morals and human life—that also might be construed to include violations of human rights norms.[383] The GATT maintains that its provisions should be interpreted to be consistent with other relevant principles of international law, and this approach would support interpreting the Article XX provisions to embrace core international human rights norms. Nevertheless, the WTO has given a sufficiently restrictive interpretation to Article XX that even if the Article XX exceptions encompass human rights values, few trade measures would satisfy the Article XX requirements. GATT dispute panels, for example, have interpreted the requirement that a measure be "necessary" to promote public morals or human life as requiring the least trade-restrictive measure reasonably available to promote the goal.[384] Furthermore, the WTO has narrowly read the preamble or "chapeau" of Article XX as prohibiting many trade measures. In the *Shrimp/Turtle* case, for example, the Appellate Body concluded that although the U.S. measure served a legitimate Article XX purpose, by dictating the specific turtle-protective methods that foreign states must adopt, by banning all shrimp imports from uncertified states, by failing to pursue multilateral measures, and by employing non-transparent evaluation methods, the measure violated the chapeau.[385]

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382. The GATT national security exception was raised by the United States in support of Helms-Burton before agreement was reached with the European Union. In 1985, President Reagan prohibited all trade with Nicaragua, justifying the action on grounds of national security under GATT Article XXI. Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985). The United States further maintained that the GATT was not authorized to review a country's determination of its national security interests. 2 Int'l Trade Rptr. (BNA) 765 (1985). The GATT panel ultimately agreed with the United States that "it was not authorized to examine the justification for the U.S. invocation of a general exception" to the GATT, but observed that the U.S. embargo was "counter to the basic aims of the GATT." GATT, GATT ACTIVITIES 1986, 58-59 (1987). *See generally* Richard S. Whitt, *The Politics of Procedure: An Examination of the GATT Dispute Settlement Panel and the Article XXI Defense in the Context of the U.S. Embargo of Nicaragua*, 19 LAW & POL'Y INT'L BUS. 603 (1987) (analyzing the use of GATT Article XXI in the *Nicaragua* dispute). In 1975, Sweden also attempted to justify a bar on the import of shoes to Sweden on national security grounds. *Id.* at 619.

383. Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 INT'L L. REV. 565, 742 (1987); Howse, *supra* note 376, at 142.

384. *See, e.g., GATT Dispute Panel Report on United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R, at 41, ¶ 6.28 (Jan. 29, 1996). (stating that the U.S. effort to regulate smog-causing contaminants in domestic and imported gasoline was not "necessary" under GATT Article XX(b) because less trade-restrictive alternative measures were reasonably available and had not been pursued by the United States); *GATT Dispute Panel Report on Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 223 (1991) (holding that Thai ban on cigarette imports "could be considered to be 'necessary' in terms of Article XX(b) only if there were no [less trade-restrictive] alternative" available to achieve Thailand's goal of protecting human life).

385. *Shrimp/Turtle*, *supra* note 374, ¶¶ 146-86.

The restrictive approach to Article XX in part reflects concerns by WTO arbitrators that recognizing exceptions to GATT free trade principles will encourage abuse by states in the form of disguised protectionist measures. Trade restrictions imposed ostensibly to target coercive population control policies, for example, could be used to bar all imports from China. The use of trade laws to promote compliance with fundamental human rights norms, however, is not *per se* a protectionist measure that undermines the free trade system and should not automatically be construed to violate the GATT. Concerns about disguised protectionism can be addressed through ordinary GATT procedures and cannot justify a blanket prohibition against human rights measures. Moreover, states have a legitimate interest—indeed, an international law duty—to promote fundamental rights. Trade restrictions that promote fundamental rights recognized by the international community and target countries that have engaged in systematic abuse advance legitimate, nonprotectionist policies, and should be recognized as such. Also, certain rights violations constitute unfair trade practices—as GATT Article XX(e) regarding prison labor recognizes. An interpretation of trade liberalization that would allow producers who violate fundamental rights to gain a competitive advantage in the international market not only would distort the concept of free trade, but also would improperly exploit it to erode protection for basic human rights.

The compatibility of government selective purchasing laws with the GATT Agreement on Government Procurement also is uncertain at this time. While selective purchasing laws may potentially conflict with the WTO Agreement on Government Procurement,[386] that agreement may be less restrictive than the general GATT anti-discrimination provisions and is not clearly subject to the same WTO interpretations.[387]

I have argued at length elsewhere that Articles XX and XXI of the GATT may be reasonably interpreted to accommodate even broad trade sanctions designed to promote the fundamental, *jus cogens* values of the human rights regime.[388] For our purposes here, it is sufficient to note that much about the GATT/WTO approach to these provisions remains unclear. While the GATT clearly imposes some constraints on a state's ability to promote human rights through trade restrictions, if the GATT is interpreted in light of other international law principles, it is possible that core human rights

386. As stated in the WTO Agreement on Government Procurement:

> A Party shall not apply rules of origin to products or services imported or supplied for purposes of government procurement covered by this Agreement from other Parties, which are different from the rules of origin applied in the normal course of trade and at the time of the transaction in question to imports or supplies of the same product or services from the same Parties.

Supra note 360, art. IV.

387. For further discussion, see McCrudden, *supra* note 362, at 32-46.

388. Sarah H. Cleveland, *Human Rights Sanctions and the World Trade Organization*, *in* HUMAN RIGHTS, THE ENVIRONMENT, AND INTERNATIONAL TRADE (Francesco Francioni ed., forthcoming 2001).

measures may be accommodated within the free trade framework. Conversely, continued adherence to present WTO interpretations of the GATT anti-discrimination principles, and refusal to accommodate fundamental rights protections under the GATT's Art. XX and XXI exceptions, would deprive WTO members of an important means of promoting respect for human rights.

D. *Compatibility with the International Human Rights Regime*

The final potential tension between unilateral sanctions and the international system is the claim that unilateral action ignores and abuses international standards and undermines efforts to promote multilateral definition and enforcement of human rights. The United States, in particular, has been criticized for refusing to apply international standards and for manipulating the rhetoric of human rights to serve its own political purposes.[389] Specifically, Philip Alston has criticized the United States' "aggressive unilateralism" in the labor rights area for

> the use of the rhetoric but not the substance of "international standards;" the application to other countries of standards that have not been accepted by those countries and are not generally considered to be a part of customary international law; the invocation of international instruments that the United States itself has not ratified; and the neglect of existing and potential international mechanisms for achieving comparable objectives.[390]

In the environmental area, the WTO similarly has criticized the United States for failing to negotiate bilateral and multilateral agreements,[391] failing to pursue cooperative efforts through existing international mechanisms, and failing to ratify relevant international environmental instruments.[392]

The criticism of U.S. unilateralism thus is four-fold: U.S. sanctions 1) enforce against other states rights that are not binding on the United States; 2) fail to apply international standards regarding human and labor rights; 3) neglect available multilateral mechanisms; and 4) selectively and hypocritically enforce human and labor rights. Thus, by playing the global sheriff according to its own rules, the United States undermines the legitimacy of multilateral enforcement efforts. The following Section considers each of these criticisms in turn, and concludes that, historically, many of these criticisms of U.S. practice have been valid. But unilateralism is not inherently hegemonic, and unilateral measures which are crafted with proper respect for international law principles can complement, rather than compete with, the development of a multilateral system.

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389. *See supra* note 290.

390. Philip Alston, *Labor Rights Provisions in U.S. Trade Law: "Aggressive Unilateralism"?, in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 72 (Lance A. Compa & Stephen F. Diamond eds., 1996)

391. *Shrimp/Turtle, supra* note 374, at 65.

392. The United States had made no effort, for example, to raise the issue of sea turtle protection before the Convention on the International Trade in Endangered Species Standing Committee as a subject requiring concerted action. *Id.* at 70 n.174.

1. *U.S. Adherence to International Instruments*

The United States' failure to ratify and execute international human rights instruments that it purports to enforce has been a major structural weakness of U.S. unilateral sanctions efforts. U.S. statutes withholding development and security aid for acts of torture, cruel, inhumane or degrading treatment, arbitrary detention, disappearance, and other flagrant violations of life, liberty and the security of the person were enacted approximately fifteen years before the United States ratified the ICCPR and the Torture and Genocide Conventions. Federal statutes target the foreign exploitation, forced labor, and conscription of children, [393] despite the United States' failure to ratify the Convention on the Rights of the Child or the original ILO Child Labour Convention. The United States for fifteen years has purported to protect other "internationally recognized worker rights," such as the freedom to associate, organize, and bargain collectively and the prohibition against forced labor, despite the fact that the United States has ratified only one of the ILO conventions defining these rights.

Aggressive unilateralism by a country that refuses to be policed itself does little to advance the development of the international rights regime. Fortunately, however, in the last decade, the United States has made some progress on this front. U.S. ratification of the Genocide and Torture Conventions, the Worst Forms of Child Labour Convention, and the ICCPR formally obligated the United States to respect many of the fundamental human rights that it purports to enforce abroad.[394] The ICCPR also includes respect for the rights to freedom of association, including the right to form trade unions,[395] and the modern prohibition against slavery, servitude, and forced labor.[396] Finally, the 1998 ILO Declaration obligates the United States to adhere to the remaining core labor rights. The focus of many U.S. statutes on enforcement of *jus cogens* norms such as torture also reduces concerns about formal obligations, since these protections are universally recognized under international law. A remaining dissonance between U.S. ratifications and sanctions practice is the GSP enforcement of "internationally recognized" standards regarding minimum wages, hours of work, and occupational health and safety. The United States has not ratified the ILO conventions governing these principles, nor have these principles been recognized as core ILO labor rights. However, the United States also is unlikely to take measures against a foreign state solely for failure to comply with this requirement. In sum, the United States' recent embrace of core human rights conventions has reduced,

393. Foreign Assistance Act of 1961, 22 U.S.C. § 2151n (1990); International Financial Institutions Act of 1977, 22 U.S.C. § 262d(e) (1990).

394. Of course, by declaring the ICCPR to be non-self-executing and by declining to fully implement the Genocide and Torture Conventions, the United States has failed to fully incorporate the core international standards into its own domestic law. *See* discussion *infra* Part III.

395. ICCPR, *supra* note 107, art. 22.

396. *Id.*, art. 8.

though not eliminated, the dissonance between U.S. sanctions and ratification practice.

2. *Statutory Definitions and International Standards*

U.S. statutes and practice over the past decade also have conformed more closely to international standards. U.S. statutory definitions increasingly have been tied to international definitions of core human rights. Internationally recognized worker rights, for example, are defined in the GSP to include three of the four core ILO labor standards and directly incorporate the ILO definition of the worst forms of child labor.[397] Other than the exclusion of discrimination in employment and the inclusion of minimum conditions, the GSP appears facially consistent with these international norms.[398] The concept of a "consistent pattern of gross violations" of internationally recognized human rights as set forth in Section 116 of the Foreign Assistance Act itself is drawn from international practice. The phrase derives from Resolution 1503 of the United Nations Economic and Social Council, under which a Human Rights Commission working group examines communications regarding state practices that "appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms," even when committed by states that are not parties to any applicable international agreement.[399] Other U.N. bodies also have recommended sanctions against states engaging in "consistent patterns of gross violation," such as apartheid.[400] The focus of the major U.S. human rights sanctions statutes on fundamental rights of torture, cruel, inhuman, or degrading treatment or punishment, arbitrary detention, disappearance, and other fundamental rights also suggests a desire to construe "internationally recognized human rights" consistent with the universally-recognized norms. On the other hand, while Section 116 does not purport to be exclusive, the statute fails to include expressly such fundamental customary international law norms as genocide, slavery, summary execution, and crimes against humanity. The statutes do not expressly recognize the universal norm against systematic racial discrimination, though the 1998 amendments add severe forms of religious discrimination.[401] Moreover, U.S. laws seeking to target coercive population control policies and to promote democratization may advance norms that have not clearly achieved customary international law status.

The few sanctions provisions that define the international standard being applied correspond unevenly with international norms. Regulations

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397. 19 U.S.C. § 2467(6) (2000).

398. *See supra* note 182 and accompanying text.

399. Procedures for Dealing With Communications Relating to Violations of Human Rights and Fundamental Freedoms, E.S.C. Res. 1503 (XLVIII), 48 U.N. ESCOR, Supp. No. 1A, at 8-9, U.N. Doc. E/4832/Add.1 (1970), *cited in* RESTATEMENT, *supra* note 141, § 702, Reporters' n.10.

400. RESTATEMENT, *supra* note 141, § 703, Reporters' n.10 (noting that the term "gross violations" of human rights that appears in U.S. statutes derives from international U.N. practice).

401. 22 U.S.C. § 2151n(c) (1998).

promulgated under Section 307 of the Tariff Act essentially employ verbatim the definition of forced labor set forth in the ILO Forced Labor Convention (No. 29).[402] The 1999 Executive Order barring purchases of goods made with exploitative child labor, on the other hand, defines such labor more narrowly than the ILO Worst Forms of Child Labour Convention.[403] The sanctions statutes otherwise do not define the substantive norms at stake.

Despite the statutory discrepancies, consideration of international standards has been more or less formally incorporated into the U.S. sanctions review process. The International Religious Freedom Act, for example, seeks to effectuate the U.S. obligation to promote religious freedom under, *inter alia*, the Universal Declaration of Human Rights and the ICCPR.[404] The major statutes conditioning development and security assistance on human rights compliance now require that country determinations consider both a state's compliance with human rights monitoring efforts by international organizations such as the Red Cross, Amnesty International, and the United Nations, and the relevant findings of such international organizations and NGOs.[405] The GSP review process similarly is tied to ILO international tripartite agreements and procedures. Benefits determinations by the GSP Subcommittee take into account relevant ILO conventions and the findings of ILO supervisory bodies in determining labor rights compliance. The GSP committee maintains regular contact with ILO staff and deliberately seeks consistency between its evaluations and ILO recommendations. The

402. *Compare* 19 U.S.C. § 1307 (1994) (defining forced labor as "all work or service which is extracted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily"), *with* ILO Forced Labor Convention, *supra* note 123, art. 2(1) (defining "forced or compulsory labor" as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily").

403. *Compare* Exec. Order 13,126, 64 Fed. Reg. 32,383 (1999), § 6(c) (defining "forced or indentured child labor" as "all work or service (1) exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily' or (2) performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties"), *with* ILO Convention Concerning the Worst Forms of Child Labour (No. 182), art. 3, *at* http://ilolex.ilo.ch:1567/public/english/docs/convdisp.htm (last visited December 6, 2000) (on file with The Yale Journal of International Law).

404. International Religious Freedom Act, 22 U.S.C. § 6401(a)(2),(3) (1998); Universal Declaration, *supra* note 105, art. 18; ICCPR, *supra* note 107, art. 18(1). *Accord* International Religious Freedom Act § 6402(13) (defining "violations of religious freedom" as violations of the rights set forth in these instruments). The Act further defines "particularly severe violations of religious freedom" as breaches of such fundamental human rights norms as torture, arbitrary detention, disappearance, and other flagrant denial of the life, liberty, or security of persons. *Id.* § 6402(11).

405. *See generally* International Financial Institutions Act, 22 U.S.C. § 262d(e) (1990) (requiring consideration of the target country's cooperation with international human rights monitors such as the Red Cross, Amnesty International, the International Commission of Jurists, and U.N. and OAS entities); Foreign Assistance Act §115, 22 U.S.C. §2151n(c) (1990) (directing executive officials to consider the extent of a country's cooperation with international human rights investigations by international organizations such as the Red Cross or the United Nations); Foreign Assistance Act § 502B; 22 U.S.C. § 2304(b) (1990) (requiring the President to consider the relevant findings of international organizations and NGOs and the foreign state's cooperation with human rights investigations in determining whether a country is engaging in gross human rights violations).

Subcommittee frequently recommends that countries seek ILO technical assistance in achieving needed modifications of labor legislation.[406]

The centralization of U.S. monitoring and reporting efforts in the State Department plays an important role in ensuring the consistency of U.S. interpretations with international law. The Department has developed considerable expertise in monitoring and analyzing international human rights compliance. The annual Country Reports now expressly interpret international human and labor rights in light of the applicable international conventions[407] and draw on broad input from intergovernmental bodies and NGOs. The Country Reports are required by law to indicate relevant U.N. Human Rights Commission actions regarding state practice.[408] The Reports also significantly expand the consideration of human and labor rights norms beyond those designated by statute. The 1999 Country Report on Burma, for example, included lengthy consideration of, *inter alia*: political and extrajudicial killing; disappearance; torture and other cruel, inhuman and degrading treatment (including rapes by the military and prison conditions); arbitrary arrest, detention, or exile; denial of fair public trial; arbitrary interference with privacy, family, home, or correspondence; use of excessive force and violation of humanitarian law in internal conflicts; freedom of speech and the press; freedom of assembly and association; freedom of religion; freedom of movement, foreign travel, emigration and repatriation; political rights and democracy; governmental attitudes toward international rights monitoring; discrimination based on race, sex, religion, disability, language, or social status (including the rights of children and discrimination in employment); and worker rights, including the status of child labor practices, minimum age for employment, and trafficking in persons.[409] State Department monitoring practices and the Country Reports thus at least appear to narrow the major dissonances between the rights which the United States purports to enforce by statute and the core norms of the international human rights system.

3. *Cooperation with International Institutions*

Like U.S. treaty ratification practices, U.S. cooperation with international human rights institutions remains sporadic but is improving. After many years of withdrawal from the ILO, the United States has taken steps under the Clinton administration to assist in promoting the ILO's core labor rights agenda, particularly in the area of child labor. The United States ratified the ICCPR in 1992, in part to ensure that the United States could

406. OECD STUDY, *supra* note 7, at 185-86.

407. For example, according to the U.S. State Department, the GSP provisions recognize that "[a]n international consensus exists, based on several key International Labor Organization (ILO) Conventions, that certain worker rights constitute core labor standards." U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997 xxiv (1998), *available at* http://www.hri.org/docs/USSD-Rights/97/Overview97.htm (last visited Nov. 4, 2000).

408. 22 U.S.C. § 2151n(d)(4) (1990); 22 U.S.C. § 2304(b) (1990).

409. U.S. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999 984-1006 (2000), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/burma.html.

participate in U.N. Human Rights Committee decision-making processes. Recent statutes have increasingly emphasized the importance of multilateral cooperation in the protection and enforcement of human rights. Thus, the 1996 Federal Burma Statute instructs the President to develop "a comprehensive, multilateral strategy to bring democracy to and improve human rights practices" in Burma, and directs the President to cooperate with members of ASEAN and other countries with major trade and investment interests in Burma to devise such an approach.[410] The 1998 International Religious Freedom Act also encourages the President to enter into agreements with targeted countries to end religious persecution, or alternatively to impose a range of sanctions.[411] In 1998, the Clinton administration adopted new guidelines regarding the imposition of economic sanctions by the United States, which assert that sanctions should only be utilized after diplomatic efforts have failed and that international cooperation should be sought prior to the introduction of unilateral sanctions.[412] The United States has also employed unilateral measures to promote foreign compliance with international institutions, such as U.N. Security Council sanctions against Iraq, Serbia, and Montenegro,[413] and the International Criminal Tribunals for the former Yugoslavia and Rwanda.[414] Much room for progress remains in this area, but the United States' increased willingness to cooperate with international institutions in the past ten years is a promising development.

4. *Selective Enforcement*

Even if U.S. substantive definitions of human and labor rights substantially comport with international standards, U.S. selectivity in imposing sanctions undermines international respect for unilateral action. Federal policies may be challenged for promoting the "human rights *du jour*" of the congressional leadership, as in the example of the Helms-Burton Act, the provisions targeting China's forced population control policies, and the 1998 International Religious Freedom Act, which overnight elevated

410. Pub. L. No. 104-208, § 570, 110 Stat. 309, 3166 (1996).

411. International Religious Freedom Act § 401(b)(1), 22 U.S.C. § 6442 (1998).

412. Stuart Eizenstat, Undersecretary for Economic, Agricultural and Business Affairs, Remarks before the North American Committee of the National Policy Association (Jan. 7, 1998), *transcript available at* http://www.state.gov/www/policy_remarks/980107_eizen_policyassoc.html; *see also* Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901, Pub. L. No. 100-418, § 2423(a), 102 Stat. 1107 (1988) (urging that "the President should, through diplomatic means, employ alternatives to export controls").

413. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1995, Pub. L. No. 103-306, § 538, 110 Stat. 1608, 1639 (prohibiting foreign assistance to any country failing to comply with the U.N. sanctions and authorizing the President to bar imports from noncompliant states). The Act expanded a similar 1991 law that had prohibited foreign assistance to countries failing to comply with the U.N. sanctions against Iraq. The new Act authorized the President to waive the ban on foreign assistance under certain conditions.

414. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1996, Pub. L. No. 104-107, § 582, 110 Stat. 704, 751.

defending religious freedom to a primary goal of U.S. foreign policy. U.S. policies also unevenly penalize foreign states for engaging in similar human rights practices. Differential application of sanctions measures has led critics to contend that U.S. sanctions policies, far from being motivated by respect for international norms, simply reflect the whims and fads of U.S. domestic politics.[415] U.S. policy is criticized for picking and choosing among human rights violators, ignoring countries that are strategically and economically important to the United States, such as China and Indonesia, and targeting those that are already isolated from the United States for other reasons, such as Cuba and Iran, or those where the United States has little economically and strategically at stake, such as Burma and Haiti. Thus, presidential hopeful Patrick Buchanan recently criticized the "monumental hypocrisy" of Clinton administration policies, arguing, "[h]e blockaded, starved and invaded tiny Haiti for human rights violations, but he proudly chaperones China into the WTO."[416] As noted in Part II, states that are diplomatically, strategically, and economically isolated from the United States for other reasons, or that also violate other international norms, are most likely to be the targets of U.S. human rights sanctions. For example, President Clinton's 1997 suspension of investment in Burma specifically noted that Burma, in addition to escalating human rights abuse, was one of the world's leading illicit drug traffickers.[417] Thus, it is no accident that the states designated by the U.S. State Department as state-sponsors of terrorism—Sudan, Cuba, Iran, Iraq, North Korea, Syria, and Libya—are also targeted for human rights violations. By contrast, other states with egregious human rights records, such as Guatemala, Turkey, Colombia, China, and Indonesia, have not been equally isolated by the United States.

Together with resort to secondary boycotts, hypocrisy in the imposition of sanctions has done the most to undermine the normative legitimacy of U.S. unilateral actions. While differential treatment on occasion may have legitimate policy justifications, it is rarely justified from an international law perspective and is devastating to the credibility of unilateral actions. As explored more fully below, if U.S. unilateral enforcement practices are to complement the international system, rather than isolate and undermine it, unilateral measures must be applied in as principled a manner as possible.

a. *Selectivity and the Separation of Powers*

Part of the motivation for U.S. selective enforcement practices is purely political: The United States is more willing to target small countries than large ones and to target its enemies over its friends. These selective enforcement practices can be explained in part—though not justified—by the structural

415. Alston, *supra* note 390, at 79 ("It is difficult to escape the conclusion that the United States is, in reality, imposing its own, conveniently flexible and even elastic, standards upon other states.").

416. Francis X. Clines, *Buchanan, In a Change, Calls for End to Sanctions*, N.Y. TIMES, Dec. 17, 1999, at A26.

417. Letter from President Clinton to Congress, *supra* note 44.

division of responsibility over foreign policy within the national government. Economic sanctions laws suffer from many of the general difficulties in executive-congressional relations found in other foreign relations areas. Although Congress and the President share constitutional authority over foreign relations, the Executive's historic responsibility as the representative of the United States in the international field, and his or her institutional advantage in gathering information abroad and in responding quickly to changed circumstances, combine with congressional indecision, inertia, and lack of political will to make congressional control of the President in the foreign affairs area notoriously difficult.[418] Indeed, the leading U.S. Supreme Court decision upholding executive discretion over foreign relations, *United States v. Curtiss-Wright Export Corp.*,[419] involved a sanctions statute.[420] Nevertheless, a review of U.S. sanctions practices reveals that Congress, the Executive, and the courts share responsibility for the apparent selectivity of U.S. sanctions practices. Some degree of executive discretion in sanctions measures may be advantageous in many circumstances, by allowing the President to take greater steps than those necessarily contemplated by Congress, or allowing the President to modify congressional overreaching that proves out of step with the international community. Discretion, however, can also result in abuse. The Reagan administration's policies illustrate the difficulties posed when the Executive refuses to comply in good faith with sanctions requirements, thereby undermining the credibility of U.S. sanctions decisions. Helms-Burton, on the other hand, reflects the hazards incurred by misguided congressional efforts to dictate executive action, with equally problematic impact on the legitimacy of U.S. action in the international community.

(i) *Congress*

Sanctions statutes can contribute to selective enforcement either by targeting particular states or human rights violations over others, or by allowing the Executive to impose sanctions selectively through certification and waiver provisions. Under the latter circumstance, sanctions statutes may reflect efforts by Congress to shift the burden and responsibility of decision-making to the President. This is particularly true under statutes such as the

418. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY 47-67 (1993) (arguing for greater judicial and congressional involvement in foreign affairs); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988) (arguing that executive primacy over foreign relations results from a pattern of executive initiative, congressional acquiescence, and judicial tolerance).

419. 299 U.S. 304 (1936).

420. The Joint Resolution at issue in *Curtiss-Wright* criminalized the sale of weapons to countries engaged in a conflict between Paraguay and Bolivia, conditioned upon a presidential finding that such a prohibition "may contribute to the reestablishment of peace" in the region. 48 Stat. 811 (1934), *quoted in Curtiss-Wright*, 299 U.S. at 312. The Supreme Court upheld the statute as a constitutional delegation of power to the President over foreign affairs.

Federal Burma Statute, where Congress authorizes executive imposition of additional sanctions if the President finds that human rights conditions have deteriorated. Congress thus transfers to the President responsibility for deciding whether sanctions are appropriate, while setting forth certain factors to be considered in imposing sanctions and in defining the form sanctions should take. Delegation of enforcement responsibility to the President in this manner may invite abuse, allowing Congress to adopt political "show sanctions" while leaving the Executive to take the international heat. On the other hand, such certification procedures can build legitimate flexibility into sanctions measures where they are applied even-handedly and according to principled international standards by the executive branch.

(ii) *The Executive*

The broad discretion bestowed on the Executive by most sanctions laws contributes to the politicization of sanctions efforts. Discretion is incorporated into the statutes through vaguely defined standards, through delegation to the Executive of responsibility for finding a triggering violation, and through waiver provisions.

(a) *Drafting Ambiguity*

Statutory language establishing the standards for imposing sanctions has been criticized for failing to define clearly the rights to be applied. As noted above, of the U.S. measures examined, only the child labor provision of the GSP, the child labor executive order, and Section 307 of the Tariff Act specifically define the rights at stake.[421] Some sanctions statutes, such as Section 116 of the Foreign Assistance Act,[422] identify the basic rights intended to be enforced but do not define them. Other statutes simply refer generally to human rights or national security. Vagueness of this type reduces the guidance provided to the President, undermines the ability of Congress to analyze the validity of an executive decision, and eliminates any workable standards for judicial enforcement. Lack of congressional specificity in banning further military aid to Indonesia, for example, allowed the Department of Defense (DOD) to evade the spirit, if not the letter, of the restriction in the mid-1990s by providing the aid through another DOD appropriations account.[423] Statutory ambiguity also potentially allows either Congress or the President to promote a wide range of policy goals through the rhetoric of fundamental rights. Ambiguity in definitions can be substantially reduced, however, if the statutes are interpreted consistently with internationally recognized human rights standards.

421. *Supra* notes 402 & 403.

422. *See supra* note 179 and accompanying text.

423. Tim Weiner, *U.S. Training of Indonesian Troops Goes On Despite Ban*, N.Y. TIMES, Mar. 17, 1998, at A3.

(b) *Executive Certifications*

Discretion also is built into certification provisions that require the Executive to find that certain conditions are present before sanctions are imposed or withheld. Even when sanctions provisions are otherwise mandatory, certification requirements allow the Executive to avoid operation of the statute by declining to find—sometimes in the face of overwhelming contrary evidence—that a country is a gross human rights violator. President Reagan repeatedly certified that El Salvador was meeting congressional requirements on reducing torture and complying with international human rights in order to release foreign aid to the country in early 1980s, despite the dubious accuracy of the finding.[424] In January 1986, on the other hand, President Reagan declined to find that Haiti's Duvalier regime was taking steps to improve human rights, an act that suspended U.S. foreign assistance aid to Haiti and substantially contributed to Jean-Claude Duvalier's flight from Haiti in February of that year.[425] Discretion similarly is built into the GSP benefits review process through the Subcommittee's largely unbridled authority to accept or reject country practice petitions for review.[426]

Decisions to impose sanctions may be heavily disputed within the executive branch, with competing pressures from the State Department, national security personnel, and embassy officials in the target state. Executive reluctance to certify countries as human rights violators is exacerbated when the nation is a friend or important trading partner of the United States, or an important security ally.[427] As President Clinton observed

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424. *See* CARTER, *supra* note 8, at 43-44 n.38; Amy S. Griffin, Comment, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 AM. U. L. REV. 163, 190 (1983) ("As long as the administration provided a nominal factual basis for certifying that the human rights conditions had improved, the findings of the executive branch were conclusive."); Scott Horton & Randy Sellier, Commentary, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 WIS. L. REV. 825 (arguing that the statutory certification process was ineffective in ensuring that aid would be conditioned on human rights compliance). Reagan administration votes in IFIs consistently opposed loans to pro-leftist states such as South Yemen on grounds of human rights abuse but did not oppose similar loans to non-leftist human rights abusers such as Chile, Paraguay (until 1985), and pre-Alfonsin Argentina. CARTER, *supra* note 8, at 169 n.46.

425. CARTER, *supra* note 8, at 47 n.47; *see also* Section 705, 22 U.S.C. § 2347 (Supp. III 1985) (requiring the President to certify that Haiti was improving its human rights situation before Haiti could receive foreign aid).

426. OECD STUDY, *supra* note 7, at 185. Nearly half of the formal reviews for the forty countries whose labor practices were challenged in GSP petitions between 1984 and 1995 were postponed, while the remaining countries usually were found to be in compliance. *Id.*

427. Despite the central position that human rights played in the Carter Administration's foreign policy, the Carter State Department never determined formally, even in a classified finding, that any particular government was a gross human rights abuser. Stephen Cohen, who served as the Assistant Secretary of State for Human Rights in the Carter Administration, has described the political pressures giving rise to that administration's "fear of finding" as follows:

> It was feared that each country named would then consider itself publicly insulted, with consequent damage to our bilateral relationship. In addition, there was concern that once such a finding was revealed, the freedom to alter it might be severely constrained by public political pressures. Any attempt to name a country as a "gross violator" would

in opposing Congress's plan to impose mandatory sanctions in the Religious Freedom Act of 1998, mandatory sanctions place "enormous pressure" on the Executive to "fudge" the finding.[428] Executive findings, even when difficult to support, substantially shift to Congress the burden of disproving a presidential determination.[429]

Executive discretion, however, is not absolute. A certification or waiver decision that is difficult to support may cost the Executive valuable political capital and is subject to attack both in Congress and by the general public. Congress may hold hearings on the subject, and certain statutes require the President to defend his findings if Congress contests them.[430] The State Department's 1991 decision certifying that Peru had not engaged in gross human rights abuses and thus qualified for anti-narcotics trafficking assistance, for example, prompted protest from the human rights community and congressional hearings on the certification decision.[431] The outcry resulted in an agreement between Congress and the Bush administration to delay $10 million of Peru's military assistance.[432] Congress theoretically may override an executive decision, either by refusing to appropriate funds or restricting the use of existing appropriations, or by passing other legislation. Control through formal legislation, of course, is always potentially subject to presidential veto. In 1983, for example, President Reagan vetoed legislation that would have continued to condition military aid to El Salvador on findings of human rights compliance.[433] In 1986, Congress overrode President Reagan's veto to enact comprehensive sanctions against South Africa.[434]

> raise the ire of defense-minded conservatives who did not want military ties cut off. Any attempt to change the finding because a country had improved conditions would be subject to intense scrutiny by human rights partisans to determine whether the supposed improvements were cosmetic or genuine. Thus, maximum flexibility required that no country be formally found to be prohibited from receiving security assistance under section 502B.

Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 264-65 (1982).

428. Elaine Sciolino, *Clinton Argues for 'Flexibility' Over Sanctions*, N.Y. TIMES, Apr. 28, 1998, at A1.

429. Mark A. Chinen, *Presidential Certification in U.S. Foreign Policy Legislation*, 31 N.Y.U. INT'L L. & POL. 217, 239 (1999).

430. If the President makes a finding of extraordinary circumstances to waive restrictions on security assistance under Section 502B, Congress may request information from the Secretary of State regarding the nature of the alleged extraordinary circumstances. 22 U.S.C. § 2304(c)(1)(C) (1990). Likewise, a waiver based on improved human rights conditions requires the President first to report to Congress regarding the nature of assistance to be provided and the justification for the assistance, including information regarding the significant human rights improvements that have occurred. 22 U.S.C. § 2304(g) (1990).

431. Determination under Section 4(a) of the International Narcotics Control Act of 1990, 56 Fed. Reg. 38,165 (Aug. 12, 1991); Dep't of State, International Narcotics Control Act of 1990: Justification for Determination: Peru, *reprinted in Review of the Presidential Determination on Narcotics Control and Human Rights in Peru: Hearings Before the House Comm. on Foreign Affairs*, 102d Cong. 167 (1991).

432. Holly Burkhalter, *The Peruvian Coup on Capitol Hill*, LEGAL TIMES, Sept. 23, 1991, at 26; Eugene Robinson, *U.S. Drug-Fighting Program in Peru "Enormously Delayed"*, WASH. POST, Nov. 24, 1991, at A28. For further discussion, see Chinen, *supra* note 429, at 227-28.

433. CARTER, *supra* note 8, at 44 n.38.

434. *Id.* at 35.

(c) *Waiver Provisions*

Waiver provisions also incorporate substantial executive discretion into sanctions policies and, depending on their application, either allow reasonable flexibility or provide the legal cover for politically-motivated selective enforcement. Even where Congress itself finds that fundamental rights violations warrant the imposition of sanctions, sanctions statutes invariably authorize the Executive to waive the restrictions based on a discretionary finding that waiver will accomplish certain goals or further U.S. interests. Waiver and suspension provisions may be fairly specific, requiring a finding that the country has pursued a specified course of conduct (as in Helms-Burton), or they may generally allow waiver due to the presence of "extraordinary circumstances" or conditions in the national interest.[435] Although Congress is understandably reluctant to tie the hands of the President by imposing mandatory sanctions, broad waiver provisions invite Executives with competing priorities to refuse to impose sanctions on countries that would otherwise qualify. Once given discretion to impose or waive sanctions, the President is left with an easily manipulated instrument.

Greater specificity of language may not always constrain executive discretion. The waiver provision of Title III of Helms-Burton, for example, requires the President to find both that the suspension is "necessary" to U.S. national interests *and* that it "will expedite a transition to democracy in Cuba."[436] Congress adopted these requirements over the President's preferred formulation: that suspension was "'important to the national interests of the United States, *including* expediting a transition to democracy in Cuba.'"[437] Despite Congress's prediction that the President could not in good faith find that suspension under current conditions would expedite Cuba's transition to democracy,[438] President Clinton has repeatedly exercised the waiver, and international law scholars such as Alston would be likely to approve of his decision.

(d) *Executive Fact-Finding*

State Department Country Reports, which provide the factual basis for executive human and labor rights findings, also are subject to politicization. During the Reagan administration, State Department reports were heavily criticized by human rights NGOs and other watchdog entities for exaggerating human rights abuses in communist and leftist-allied countries such as Cuba and Nicaragua, while downplaying violations by friendly right-wing regimes such as El Salvador, Haiti, and Chile. For two decades commencing in 1978,

435. *Supra* note 193.

436. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 306(b)(1), 110 Stat. 785 (1996).

437. Helms-Burton Conference Report, *supra* note 348, at 65 (emphasis added).

438. *Id.* at 65-66.

the Lawyers Committee for Human Rights and other human rights NGOs jointly published an annual critique of the State Department reports.[439] The NGOs reported in 1984 with respect to Nicaragua, for example, that the State Department Country Report was pervaded by "[m]ajor omissions, misleading statements and highly slanted reporting . . . . Truth is distorted to serve the administration's policies toward Nicaragua."[440] In the labor rights area, State Department reports in the 1980s refused to acknowledge substantial labor rights violations occurring in Malaysia, and the Reagan and Bush administrations persistently refused to impose trade restrictions on Malaysia for labor rights violations.[441] Early Clinton administration reports on Haiti, while the administration was judicially defending its policy of forcibly returning Haitian refugees, were criticized for "severely distorting the reality of human rights violations."[442] The quality of the reports improved significantly after the administration's policy was upheld and progress was made negotiating President Aristide's return.[443]

One persistent critique of the State Department Country Reports' and GSP Review's methodology has been the agencies' excessive reliance on information from U.S. embassies, which are primarily concerned about maintaining cordial relations with the host country and official positions of foreign states, and their refusal to accept outside submissions from religious, human rights, and labor groups and international organizations.[444] With the end of the Cold War and the Clinton administration's greater sympathy for human rights concerns, both State Department Country Reports and the GSP

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439. The 1984 Human Rights NGO critique, for example, noted that:

> [T]here are important exceptions to the generally high standard of reporting. The most striking are the reports dealing with four countries in Central America: El Salvador, Guatemala, Honduras, and Nicaragua. In the case of the first three, the reports seem to make every effort to minimize abuses; in the case of Nicaragua, the report goes in the opposite direction, grossly exaggerating abuses. The effect is to paint an unrealistically rosy portrait of human rights condition in those countries in the region supported by the United States and an unrealistically grim portrait of human rights conditions in the country opposed by the United States.

After acknowledging the United States' active political and military involvement in the civil wars in Central America, the report continued:

> However compelling the Administration perceives its interests to be in those countries, there can be no excuse for distorting a factual discussion of human rights conditions to further Administration policy in other spheres. We question whether it is possible for the State Department to carry out even-handed human rights monitoring in situations where the United States is at war, either directly or by all-out support for one side.

Americas Watch Committee, The Helsinki Committee, & The Lawyers Committee for Human Rights, *Critique: Review of the Department of State's Country Reports on Human Rights Practices for 1984* (1985), *quoted in* LOUIS HENKIN ET AL., HUMAN RIGHTS 843 (1999).

440. *Id.* at 845.

441. Int'l Lab. Rights Educ. and Research Fund v. Bush, 954 F.2d 745, 753 (D.C. Cir. 1992) (Mikva, C.J., dissenting) (discussing labor rights groups' allegations that the U.S. Trade Representative had extended GSP benefits to Malaysia even after finding that Malaysia was violating worker rights). *See* discussion *infra* note 450 and accompanying text.

442. Lawyers Committee for Human Rights, *Critique: Review of the U.S. Department of State's Country Reports on Human Rights Practices for 1994* (1995), *excerpted in* HENKIN ET AL., HUMAN RIGHTS, *supra* note 439, at 852.

443. *Id.*

444. *Id.* at 853.

Reviews have become significantly less politicized and more professional. The process of compiling the annual State Department reports now requires embassy officials to gather information from a wide range of sources throughout the year, including government officials, jurists, military sources, journalists, academics, and human rights and labor activists.[445] The State Department then reviews and compiles the submissions using additional information from domestic and international human rights groups, foreign governments, the United Nations and international organizations.[446] The reports have improved in accuracy to the point that the human rights NGOs discontinued publishing their annual critique in 1999.[447] The GSP Subcommittee Review similarly includes consideration of information contained in ILO documents, the State Department Country Reports, U.S. Department of Labor reports, and information supplied by relevant U.S. embassy personnel, the GSP review petitioners, and the beneficiary government about its legislation and practices.[448]

(iii) *The Courts*

Judicial decisions granting great deference to the Executive in the foreign affairs area protect the Executive's ability to politically manipulate the sanctions process. Courts are notoriously reluctant to second-guess executive findings or otherwise enforce sanctions statutes. Vague language makes enforcement difficult. In *Dames & Moore v. Regan,*[449] the Supreme Court rejected a claim that President Reagan's resolution of sanctions against Iran exceeded the Executive's authority under IEEPA, finding the executive actions consistent with the spirit, if not the letter, of the sanctions statute. In *International Labor Rights Education and Research Fund v. Bush,*[450] labor and human rights groups claimed that the Bush administration had acted arbitrarily and contrary to the GSP statute by continuing to extend trading privileges to countries such as Malaysia, despite well-documented evidence of labor abuses. The district court dismissed the suit as nonjusticiable. It found that, by authorizing the Executive to make findings on countries' compliance with internationally recognized worker rights, the statute committed labor rights determinations to agency discretion and yielded "no law" for the court

445. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, at xii (2000), *available at* http://www.state.gov/www/global/hummmights/1999_hrp_report/preface.html (last visited Mar. 3, 2000).

446. *Id.*

447. HENKIN, *supra* note 439, at 842.

448. OECD STUDY, *supra* note 7, at 184.

449. 453 U.S. 654, 675-88 (1981); *see also* Regan v. Wald, 468 U.S. 222 (1984) (construing statutory language broadly to uphold executive expansion of Cuban embargo under IEEPA).

450. 752 F. Supp. 495 (D.D.C. 1990), *aff'd*, 954 F.2d 745 (D.C. Cir. 1992); *see also* Terry Collingsworth, *International Worker Rights Enforcement: Proposals Following a Test Case*, *in* Compa & Diamond, *supra* note 229, at 227, 228.

to apply.[451] The decision was affirmed on appeal in a per curium opinion with separate concurrences.[452]

Again, greater specificity may not remedy the problem. In *Japan Whaling Ass'n v. American Cetacean Soc.*,[453] Congress attempted to provide unilateral remedies for violations of the international whaling convention by requiring the President to sanction countries found to be in violation of the treaty. Although Japan was a clear violator and Congress had intended to make the imposition of sanctions mandatory, the Reagan administration avoided imposing sanctions by declining to make the relevant finding, and the Supreme Court deferred to the executive decision.[454] On the other hand, in *Population Institute, Population Council v. McPherson*,[455] a district court held that it was authorized to review USAID's decision to deny development assistance to China pursuant to the statutory bar on funding programs supporting coercive abortion or involuntary sterilization. The court found that it was entitled to determine whether the Administrator had relied upon a reasonable interpretation of the statute.[456]

In addition to substantive obstacles to review, procedural barriers such as standing preclude judicial consideration of many sanctions decisions. In *Clark v. United States*,[457] a federal district court rejected, on standing grounds, taxpayers' claims that the Reagan administration had violated the human rights provisions of Section 502B of the Foreign Assistance Act by giving military assistance to El Salvador and the Nicaraguan Contras.[458] In *Talenti v. Clinton*,[459] the D.C. Circuit held that an individual whose property allegedly had been expropriated by the Italian government could not sue to enforce a statute mandating sanctions against Italy for such conduct.[460] In *Smith v.*

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451. *Int'l Lab. Rights Educ. and Research Fund*, 752 F. Supp. at 497.

452. Judge Henderson would have dismissed the action on the grounds that the Court of International Trade had exclusive jurisdiction over the claims. Int'l Lab. Rights Educ. and Research Fund, 954 F.2d 745, 747-48 (D.C. Cir. 1992) (Henderson, J., concurring). Judge Sentelle believed that the labor union and human rights organization plaintiffs lacked standing. *Id.* at 749-52 (Sentelle, J., concurring). Chief Judge Mikva dissented, finding that the labor unions had standing and that the statute imposed a mandatory duty on the Executive that was subject to judicial review. *Id.* at 754-59 (Mikva, C.J., dissenting).

453. 478 U.S. 221 (1986).

454. *Id.* at 231 (holding that the statute dedicated certification to executive discretion); *see also* Associated Imports, Inc., v. Int'l Longshoremens' Ass'n, 609 F. Supp. 595, 597 (S.D.N.Y. 1985) (Section 307 commits determination whether products are produced with forced labor to discretion of the executive branch); *cf.* China Diesel Imports, Inc. v. U.S., 870 F. Supp. 347 (Ct. Int'l Trade 1994) (upholding Executive's exclusion of goods made with convict or forced labor under Section 307).

455. 797 F.2d 1062, 1068-69 (D.C. Cir. 1986).

456. *Id.* at 1069.

457. 609 F. Supp. 1249 (D. Md. 1985).

458. The Court found that the provision had been "enacted to effect the relationship between the Congress and the President over disbursing foreign aid funds in light of an official policy of concern for human rights," and that only the Executive or members of Congress could enforce its provisions. *Id.* at 1251.

459. 102 F.3d 573 (D.C. Cir. 1996).

460. In light of the President's authority to waive sanctions and the small likelihood that sanctions would compel Italy to provide restitution, the court concluded that it was "mere speculation" that a judgment would remedy the plaintiff's injury. *Id.* at 577.

Atwood,[461] a federal district court held that a Chinese national lacked standing to challenge a finding by USAID under the Foreign Assistance Act that a U.N. agency was not promoting forced population control measures in China and thus was eligible for U.S. assistance.[462] In *Aerotrade, Inc. v. Agency for International Development*, the court held that a statute authorizing withholding of foreign assistance did not create a cause of action for private enforcement, and "involve[d] political considerations more properly a subject for Congress than for the Court."[463] *Crockett v. Reagan*[464] similarly rejected an effort by members of Congress to challenge the reasonableness of President Reagan's certifications in the early 1980s under Section 502B of the Foreign Assistance Act of 1961 that El Salvador had succeeded in curbing torture and murder by the military and was making "a concerted and significant effort to comply with internationally recognized human rights."[465] Finally, in some statutes, such as the Export Administration Act, Congress has expressly barred judicial review, thus dedicating the decision whether to comply with the statute substantially to the Executive's absolute discretion.[466]

Frustration with congressional abdication of responsibility and executive implementation efforts has led some commentators to call for "clearer directives, less discretion, and more assiduous congressional oversight" of sanctions provisions.[467] Mandatory sanctions may in some circumstances provide political leverage for the President in his efforts to urge compliance with fundamental rights by foreign states, by allowing him to argue that his hands have been tied by Congress. Recent legislation such as Helms-Burton has attempted to detail more specifically the sanctions to be imposed and to reduce executive discretion, though the measures chosen in this case merely exacerbated international objections.

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461. 845 F. Supp. 911 (D.D.C. 1992).

462. While acknowledging that the plaintiffs fell within the statute's protection, the court found the relationship between withholding of U.S. aid and any harm to the plaintiffs "entirely too remote to provide them with the requisite standing." *Id.* at 914 n.3. The court suggested that congressmembers could sue to ensure that the agency applied the correct statutory standard. *Id.* at 914-15. *Accord* McKinney v. U.S. Dept. of Treasury, 799 F.2d 1544 (Fed. Cir. 1986) (rejecting, on standing grounds, effort to require Secretary of Treasury to bar importation of goods made with forced or convict labor under Section 307 of the Tariff Act).

463. 397 F. Supp. 974, 976-77 (D.D.C. 1974).

464. 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).

465. *Id.* at 902. Invoking the doctrine of equitable discretion, the Court found that the President's findings had satisfied the formal requirements of the statute and that the appropriate response, if members of Congress were displeased with the finding, was resort to the legislative process, not the courts. *Id.* at 902-03.

466. 50 U.S.C. App. § 2412(a) (2000) (excluding EAA actions from review under the Administrative Procedure Act); *see also* International Religious Freedom Act of 1998, 22 U.S.C. § 6450 (2000) (barring judicial review of executive actions under the Act).

467. Cohen, *supra* note 172, at 277; *see also* Diane Orentlicher, *The Power of an Idea: The Impact of United States Human Rights Policy*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 43 (1991); International Labor Rights Fund, *History of Trade-Worker Rights Linkage in U.S. Trade Law*, *in* DEVELOPING EFFECTIVE MECHANISMS FOR IMPLEMENTING LABOR RIGHTS IN THE GLOBAL ECONOMY 2 (1998), *at* http://www.laborrights.org/projects/globalecon/ilrf/ilrf2b.htm (last visited Nov. 4, 2000) (on file with The Yale Journal of International Law).

E. *Toward a Normatively Legitimate Sanctions Policy*

Some selective enforcement inevitably will result from the shared political process by which sanctions are adopted, and so mere selectivity in the actual imposition of sanctions does not necessarily render U.S. enforcement efforts illegitimate. The appropriateness of sanctions may vary widely in any given circumstance. Where the U.S. is on good diplomatic terms with a state, for example, informal diplomatic pressure may be a more effective instrument of first resort than broad restrictions on trade and aid. Where the United States has few existing economic interests in a country, or where sanctions are not likely to be respected by other trading partners, economic sanctions may not be the most effective means of compelling future international rights compliance. Determining what course of action is most likely to encourage a change in state behavior thus should remain, within reasonable and principled boundaries, a matter of political discretion.

Consistency in application, however, is important to the legitimacy of unilateral human rights enforcement efforts. States are much more likely to voluntarily comply with international norms that they perceive to be fair,[468] and reliable *interpretation* and *application* of international norms by transnational actors is critical to encouraging nations to recognize, internalize, and obey international law. Politicization of sanctions efforts, and unreasonable inconsistency in their application, accordingly, erodes the U.S. capacity for moral leadership in promoting international human rights.

Whether or not U.S. sanctions practices will advance or undermine international rights enforcement efforts in the future thus will turn heavily on the consistency of the United States' interpretation of human rights norms with international law. If U.S. unilateral action is to contribute constructively to the development of the international rights regime, a number of steps must be taken. *First*, sanctions should be imposed only to promote rights that are mutually binding on the United States and the target state, either through treaty ratifications or as customary *jus cogens* and *erga omnes* obligations. This requirement is necessary to ensure that U.S. actions comport with international rules regarding economic interference and jurisdiction. *Second*, the United States must continue to look to international standards in applying its domestic sanctions laws. This requires complying with the definitions set forth in international instruments and acting consistently with the interpretations and recommendations of intergovernmental bodies such as the Human Rights Committee, the ILO, and NGOs. *Third*, the documentation of violations by the State Department and condemnation by the United States should be as even-handed as possible. The United States cannot be selective in its condemnation of regimes that engage in fundamental rights violations without severely weakening the credibility of its unilateral enforcement efforts. *Fourth*, extraterritorial enforcement should be avoided except for the

468. *See generally* THOMAS M. FRANK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7-8 (1995).

possible purpose of enforcing core human rights norms against direct aiders and abetters of gross human rights violations. Extraterritorial provisions, such as Title III of the Helms-Burton Act, simply focus the attention of the international community on the legality of the extraterritorial sanctions rather than on the substantive violations of the target state. *Finally*, once a gross violation is acknowledged, sanctions decisions should be made based on good faith determinations by Congress and the Executive regarding the utility of sanctions for strengthening the international system and improving international rights compliance. This principle is perhaps the most difficult to fulfill or monitor, since a decision to deny sanctions can always be justified, however disingenuously, on the grounds that constructive engagement is more likely to bring positive results. Yet compliance with this principle is ultimately critical to the United States' capacity for moral leadership. A unilateral sanctions policy that is based on a consideration of its international implications could accomplish U.S. domestic goals while complementing and strengthening the international rights regime.

VI. INTERNALIZATION OF GLOBAL NORMS

Economic sanctions are often criticized as ineffective in terms of altering the behavior of the target state.[469] Opponents of sanctions contend that unilateral sanctions simply isolate and entrench human rights violators and hurt U.S. industry by opening opportunities for foreign competitors, without accomplishing desired changes in the target state. Given the hostility of the business community to many economic sanctions and the uncertainty that exists regarding the ability of sanctions to alter the behavior of foreign states, one may wonder why the use of sanctions has persisted in the human rights field. One reason may be that the traditional measures of sanctions' "effectiveness" are underinclusive. Sanctions may have a number of less tangible but nevertheless desireable effects on the behavior of both the target and other foreign states. As Richard Parker puts it,

> the failure of sanctions to topple Castro is often cited as support for the inefficacy of economic sanctions employed for high foreign policy purposes. Yet the alert citizen and policy-maker might well ask, did sanctions nonetheless weaken Castro's ability to finance counter-revolutionary movements in Latin America; did they force the Soviet Union to deplete its own resources subsidizing Castro; and/or did economic sanctions force Castro to liberalize his state-run economy more than he otherwise might have done? Did the hardships imposed by sanctions on Cuba serve to deter other countries from choosing the 'Communist' and expansionist path during those years when international communism still had some charisma overseas?[470]

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469. *E.g.*, HUFBAUER ET AL., *supra* note 6, at 41 (defining sanctions' "success" in terms of "changes in the policies, capabilities, or government of the target country").

470. Richard Parker, *The Problem With Scorecards: How (and How Not) to Measure the Cost-Effectiveness of Economic Sanctions*, 21 MICH. J. INT'L L. 235, 250 (2000). Parker argues that "'effectiveness' cannot be accurately measured by counting the immediate results of individual face-offs

Current evaluations of sanctions' effectiveness are incapable of taking such considerations into account. They also fail to take into account the role of sanctions that are threatened but not ultimately imposed, as well as the expressive value of sanctions in distancing domestic regimes from the conduct of foreign states.[471] Indeed, current empirical methods are inadequate even to measure the costs and effectiveness of sanctions even in the narrow sense.[472] To be accurate, the "effectiveness" or success of sanctions should be measured in terms of the international community's overall progress towards accepting and implementing the normative values being advanced by the sanctioning state.

Consistent with this approach, I would argue that the persistent resort to unilateral sanctions reflects the important role of sanctions in the transnational process of defining and clarifying international norms, and in internalizing global norms into the domestic processes of states. Sanctions are a primary means by which various members of the international community articulate collective standards, monitor international behavior, and communicate outrage at noncompliance by rogue states. Just as repeated bombardment of atoms in a particle accelerator produces fission, repeated confrontations between states and transnational actors facilitates the formulation and internalization of global human rights norms.

While undoubtedly "haphazard" in their range and complexity, U.S. unilateral sanctions programs share the common function of creating a forum for various domestic and foreign governmental agencies and nongovernmental entities to conduct an ongoing dialogue with foreign states regarding international human rights compliance. The sanctions imposition, review, and removal processes formally provoke numerous interactions between the United States and foreign governments in which global norms are raised and clarified, and norm internalization is promoted. While sanctions alone cannot be a panacea for universal human rights compliance, the "bombardment" of foreign states that results from U.S. and other unilateral efforts substantially increases the transnational interactions that ultimately yield the development and domestic and transnational internalization of global norms. U.S. trade and aid sanctions thus promote both the internalization of human rights norms into U.S. and foreign practices and the broader interplay of a concerted transnational system of rights enforcement.

A. *Domestic Norm Internalization*

Trade and aid sanctions advance the goal of internalization in a number of ways. Laws conditioning U.S. foreign assistance and trade benefits on foreign countries' compliance with internationally recognized human and

between sender and target states. Sanctions may fail, for example, to achieve reversal of a politically motivated expropriation by a target state but nonetheless deter further expropriations by that state or others." *Id.* at 294.

471. DAVID BALDWIN, ECONOMIC STATECRAFT 130-38 (1985) (discussing the difficulty of measuring the intangible effects of economic sanctions).

472. Parker, *supra* note 470, at 241.

labor rights formally structure consideration of fundamental global norms into U.S. legislative and executive processes. The annual State Department, GSP, and congressional review processes formally inject consideration of human and labor rights conditions into U.S. foreign policy and make it a continual subject of public debate. In making decisions about export licensing and foreign assistance, presidents are required to consider the human rights conditions in a country, to publish findings in the Federal Register, and to report to Congress. If an executive finding is challenged, the Executive must provide factual support to defend its position. Congress, on the other hand, must consider periodically whether to extend, withdraw, or modify existing appropriations, and whether to continue or suspend trade benefits, based in part on human and labor rights compliance. The sanctions provisions thus create a constant dialogue between Congress and the Executive regarding fundamental global norms.

The human rights dialogue, moreover, extends beyond Congress and the President. Responsibility for compiling information for the annual State Department reports has helped internalize respect for fundamental rights into the State Department bureaucracy. Incorporation of human rights considerations in trade and assistance laws also creates an organizing mechanism for "transnational moral entrepreneurs"[473] and "norm interpreters" such as NGOs, consumer groups, and other private transnational actors to participate in norm enunciation and clarification by lobbying Congress and the Executive and publicizing rights abuses. Consideration of a major foreign assistance package for Colombia in the spring of 2000, for example, presented an opportunity for Human Rights Watch to release a report on human rights conditions in Colombia and resulted in substantial news coverage and congressional hearings on the subject. (Congress ultimately awarded an anti-narcotics aid package to Colombia conditioned on human rights considerations, which the President waived on national security grounds.) These public-private dialogues in turn are picked up by the media and disseminated to the national and international communities, thereby heightening public knowledge of human rights standards and conditions and contributing to domestic and global participation in transnational legal developments. Sanctions thus play an important role in generating domestic respect for fundamental rights and represent a significant example of legislative and executive participation in transnational legal process.

473. Ethan Nadelmann has portrayed international NGOs as "transnational moral entrepreneurs" who (1) "mobilize popular opinion and political support both within their host country and abroad;" (2) "stimulate and assist in the creation of like-minded organizations in other countries;" (3) "play a significant role in elevating their objective beyond its identification with the national interests of their government;" and (4) direct their efforts "toward persuading foreign audiences, especially foreign elites, that a particular prohibition regime reflects a widely shared or even universal moral sense, rather than the peculiar moral code of one society." Ethan Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT'L ORG. 479, 482 (1990).

B. *Transnational Norm Internalization*

Conditioning U.S. trade and economic aid on human rights considerations also has transnational impact by promoting norm development and internalization by both the broader international community and the target states. The periodic review of foreign state practices mandated by the aid and trade statutes continually communicates to foreign states U.S. concern over human rights compliance. One of the primary objections raised to permanent normalization of trade relations with China, for example, was that the decision would surrender the leverage of Congress's annual review of China's human rights practices.[474] As the Burma example suggests, U.S. sanctions debates also have a cross-pollinating effect and encourage other members of the international community to examine and support or reject sanctions against the target state and ultimately to mobilize shame against egregious human rights violators.

The GSP system and labor rights reviews similarly promote transnational dialogue regarding labor rights compliance. GSP petitions commonly are initiated by transnational non-governmental actors such as domestic or international trade unions and NGOs. Once a GSP petition is accepted for review, the United States, through various domestic agencies, engages in a bilateral communication process with the country whose beneficiary status is challenged, which may last a year or more. During the review, an exhaustive examination is conducted of the country's labor legislation and practices and the relevant international norms. Information is gathered from numerous domestic and international sources, including the petitioners. The review process includes ILO participation and generally concludes with recommendations regarding a future desired course of action for the country and use of ILO technical assistance. The OECD has concluded that, perhaps even more than the actual imposition of sanctions, the process of reviewing a country's labor rights practices has created an important impetus for improved labor rights conditions:

> The administration of the country practice reviews encourages improved workers' rights practices principally by raising consciousness and applying international peer pressure. A great deal of information about a country's labour regime is exposed during the GSP's review process. Beneficiary governments do not want to be judged negatively for fear of discouraging potential foreign investment.[475]

The GSP review process also has been successful in internalizing global norms into foreign domestic practices. Progress in improving core labor practices has generally been made in countries subject to the GSP review process, particularly when the review process is extended for several years.[476]

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474. Eric Schmitt, *White House Says Votes Are Lacking on Chinese Trade*, N.Y. TIMES, Mar. 10, 2000, at A10.

475. OECD STUDY, *supra* note 7, at 186.

476. *Id.* at 186.

Preparation of the State Department's annual reports on country conditions also plays an important role in norm identification, clarification, and internalization by foreign states. The process of gathering information and preparing the reports subjects foreign practices to constant scrutiny and obligates U.S. embassy personnel abroad to be aware of human and labor rights issues and to maintain contact throughout the year with local religious, human rights, labor and other groups capable of bringing abuses to their attention.[477] Compiling information for the annual reports provokes constant interactions around human rights norms between U.S. and foreign government personnel and other foreign actors. The release of the annual State Department reports themselves helps direct national and international attention to human rights conditions and plays an important role in educating the broader public about human rights conditions.

In short, efforts by the United States to use its economic power to promote international human and labor rights compliance represent an important example of how to promote the universalization of these international norms and to incorporate them into states' domestic practice. Economic sanctions are by no means the only option available to states to advance these goals, as the Burma example makes clear. Nevertheless, in an international society lacking global enforcement mechanisms, sanctions have a role to play in the norm internalization process.

VII. CONCLUSION

Fifty years ago, the U.N. human rights system was conceived as a system of uniform, organized processes for the articulation, oversight, and dissemination of human rights norms. That early vision has been gradually modified, transformed, and adapted by the Cold War and state and institutional practice into a system in which multiple actors utilize a wide range of mechanisms which loosely coalesce to promote recognition and internalization of global norms. While the United Nations retains a critical function in mobilizing international consensus around global norms, its efforts are complemented by those of other transnational actors, many of whom may concentrate their efforts on the promotion of a specific right or on improving the practices of a single region or state.

U.S. unilateral economic sanctions play an important role in this complementary process. A review of U.S. laws and practices imposing unilateral sanctions for international labor and human rights violations demonstrates that the United States has taken significant steps towards cooperating as an international player in promoting respect for fundamental rights in recent years. The United States has worked to incorporate international standards and international monitoring efforts into U.S. sanctions

477. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS FOR 1994, *reprinted in* HENKIN, HUMAN RIGHTS, *supra* note 439, at 845-46.

practices and to conform its sanctions decisions to both substantive global norms and international rules governing the propriety of unilateral conduct. States targeted today by U.S. sanctions for torture or forced labor cannot reasonably contend that their practices do not violate international standards or that U.S. unilateralism is contrary to international practice. The United States' unilateral enforcement regime remains vulnerable to politicization and abuse of the human rights agenda. But when employed consistently with international standards, the incorporation of international norms into U.S. economic practice contributes significantly to the development of the transnational enforcement system for human and labor rights.

APPENDIX: U.S. HUMAN RIGHTS SANCTIONS LAWS

MAJOR U.S. HUMAN RIGHTS SANCTIONS STATUTES
FOREIGN ASSISTANCE

Title & Citation	Foreign Assistance Act, §116 22 U.S.C. § 2151n (1994)	Foreign Assistance Act, §502B 22 U.S.C. § 2304 (2000)
Operative Provisions	Bars development assistance to governments engaging in "a consistent pattern of gross violations of internationally recognized human rights" (§ 2151n(a)).	Bars security assistance (including licenses under the Export Administration Act and Arms Export Control Act) to governments engaging in "a consistent pattern of gross violations of internationally recognized human rights" (§ 2304 (a)(2)).
Rights Targeted	Includes torture, cruel, inhumane or degrading treatment, prolonged detention without charges, disappearance, or other flagrant denial of the right to life, liberty, and security of persons (§ 2151n(a)); protection of children from exploitation, abuse, or forced military conscription (§ 2151n(b)); and severe violations of religious freedom (§ 2151n(c)(3)).	Includes torture, cruel, inhumane or degrading treatment, prolonged detention without charges, disappearance, or other flagrant denial of the right to life, liberty, and security of person (§ 2304(d)(1)); and severe violations of religious freedom (§ 2304 (a)(4)).
Definitions / International Standards	Reporting on Genocide as defined under Art. 2 of Genocide Convention & U.S. Implementation Act (§ 2151n(d)(8)); trafficking in persons defined as "the use of deception, coercion, debt bondage, the threat of force, or the abuse of authority to recruit, transport within or across borders, purchase, sell, transfer, receive, or harbor a person for the purposes of placing or holding such person, whether for pay or not, in involuntary servitude, slavery or slavery-like conditions, or in forced, bonded, or coerced labor" (§ 2151n(f)(3)(A)).	Actions to be taken in accordance with international obligations under the U.N. Charter. (§ 2304(a)(1)). Reporting on genocide as defined under Art. 2 of Genocide Convention & U.S. Implementation Act (§ 2304(b)).
Waiver	Restriction may be overridden with executive finding that the prohibited assistance "will directly benefit the needy people in such country" (§ 2151n(a)). Congress may request written support for this finding (§ 2151n(b)).	Restriction may be overridden based on presidential certification that "extraordinary circumstances exist warranting provision of such assistance" (§ 2304(a)(2)), or of "a significant improvement in its human rights record" (§ 2304(e)). Congress may request a report on the extraordinary circumstances which necessitate assistance (§ 2304(c)(1)(C)), and President must first report to Congress on the significant human rights improvements that have occurred (§ 2304 (g)).
Reporting Requirements	Annual report from State Dept. to Congress regarding the status of internationally recognized human rights in all U.N. member states. Reporting includes population control, child labor policies, votes of the U.N. Human Rights Comm'n, refugee protection, religious freedom, commission of war crimes, crimes against humanity, and genocide, and trafficking in persons (§ 2151n(d), (f)).	Annual Report from State Dept. to Congress regarding respect for internationally recognized human rights in each country considered for security assistance. Reporting includes war crimes, crimes against humanity, genocide, population control, religious freedom, refugee protection, and votes of Human Rights Comm'n. (§ 2304(b)).
International Consultation / Multilateralism	Requires consideration of target country's cooperation with international human rights investigations by organizations such as the International Red Cross, the U.N., or the OAS (§ 2151n(c)(1)).	Requires consideration of the relevant findings of international organizations, such as the International Red Cross, and the target government's cooperation with human rights investigations by international organizations (§ 2304(b)(1), (2)).

MAJOR U.S. HUMAN RIGHTS SANCTIONS STATUTES
FOREIGN ASSISTANCE (CONT.)

Title & Citation	Leahy Amendment Pub. L. No. 104-208, 110 Stat. 3009-133 (1996), *as amended by* Amendment No. 3406, S94621 (July 30, 1998)	Agricultural Trade Development & Assistance Act, 7 U.S.C. § 1733(j) (2000)	Support for Economic and Democratic Development of the Independent States of the Former Soviet Union, 22 U.S.C. § 2295a (2000)
Operative Provisions	Prohibits Secretary of State and Defense Dept. from providing assistance to foreign security force units if there is credible evidence to believe that a member of such a unit has committed gross violations of human rights.	Bars agreements to provide or finance agricultural commodities to the government of any country engaging in a consistent pattern of gross violations of internationally recognized human rights (§ 1733(j)(1)).	Bars development assistance to governments that the President determines are engaged in a consistent pattern of gross violations of internationally recognized human rights or international law (§ 2295(b)(1)).
Rights Targeted		Includes torture, cruel, inhumane or degrading treatment; and prolonged detention without charges, disappearance, or other flagrant denial of the right to life, liberty, and security of person (§ 1733(j)(1)).	Includes the rights of minorities, freedom of religion and emigration (§ 2295(a)(3)).
Definitions / International Standards			
Waiver	Secretary of State may waive prohibition based on finding and report to Congress that the government is taking steps to bring responsible members of the security forces unit to justice. Secretary of Defense may waive prohibition if required by extraordinary circumstances (1998 Amendment at (c)). Secretary must report to Congress thereafter describing extraordinary circumstances justifying the waiver (*Id.* at (d)).	Restriction waived "if the assistance is targeted to the most needy people in such country and is made available . . . through channels other than the government" (§ 1733(j)(2)).	Restriction waived if the President finds and reports to Congress that furnishing assistance is "important to the national interest of the United States," "will foster respect for internationally recognized human rights" or democratic development, or will alleviate disaster (§ 2295(c)).
Reporting Requirements			
International Consultation / Multilateralism			

MAJOR U.S. HUMAN RIGHTS STATUTES
INTERNATIONAL INVESTMENT

Title & Citation	Export-Import Bank, 12 U.S.C. § 635 (2000)	Export-Import Bank, 12 U.S.C. § 635i-8 (2000)	Multilateral Investment Fund, 22 U.S.C. §§ 283z-9(a), 290k-3 (2000)
Operative Provisions	Allows bank to deny export-import credit applications only where the President determines that "such action would clearly and importantly advance United States policy in . . . human rights (including child labor)" (§ 635(b)(1)(B)). Bank shall not support sales of defense articles or services unless the President determines and reports to Congress that the purchasing country "has not used any such defense articles or services to engage in a consistent pattern of gross violations of internationally recognized human rights" and applies requirements of 22 U.S.C. § 2304 to such sales (§ 635(b)(6)(D)(i), (E)). Bars support for exports to Angola until President certifies that free and fair elections have been held and that Angola has demonstrated progress in protecting internationally recognized human rights (§ 635(b)(11)(B)).	Authorizing debt reduction only for countries whose government "does not engage in a consistent pattern of gross violations of internationally recognized human rights" (§ 635i-8(c)(4)).	Limiting MFI financial support to countries with democratically elected governments that do not engage in a consistent pattern of gross violations of internationally recognized human rights (§ 283z-9(a)). Instructing the U.S. Director to oppose investment support in countries barred from GSP status for failing to afford internationally recognized worker rights (§ 290k-3(1)).
Rights Targeted	For Angola restriction: military involvement in political violence and human rights abuses; freedom of press, speech, assembly, association, worker rights, democracy (§ 635(b)(11)(C).		
Definitions / International Standards			
Waiver			
Reporting Requirements			
International Consultation / Multilateralism			Instructs U.S. Director to actively seek the concurrence of other Directors in opposing support to countries violating worker rights (§ 290k-3(1)).

MAJOR U.S. HUMAN RIGHTS STATUTES INTERNATIONAL INVESTMENT (CONT.)

Title & Citation	International Financial Institutions Act of 1977, 22 U.S.C. § 262d(a), § 262p-4p (2000)	Overseas Private Investment Corp., 22 U.S.C. §§ 2191a, 2199(i) (2000)
Operative Provisions	Directs the United States to use its "voice and vote" in international financial institutions to oppose assistance to countries whose governments engage in a pattern of gross violations of internationally recognized human rights (§ 262d(a)(1), (f)), and to adopt policies to encourage borrowing countries to guarantee internationally recognized worker rights and to include the status of such rights as an integral part of the institution's policy dialogue with each borrowing country (§ 262p-4p(a)(1)).	Bars OPIC insurance, guarantee, or finance support for projects in countries which fail to take steps to implement laws that extend the GSP internationally recognized worker rights, and requires labor rights protections in OPIC contracts (§§ 2191(a)(1)). Applies restrictions in 22 U.S.C. § 2151n to bar OPIC support for projects in countries engaging in gross violations of internationally recognized human rights (§ 2199(i)).
Rights Targeted	Includes torture, cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person (§ 262d(a)(1)), severe violations of religious freedom (262d(g)), and GSP worker rights (§ 262p-4p(a)(1)).	Includes freedom of association, right to organize and bargain collectively, minimum age for child labor, minimum standards for wages, hours, health & safety, forced labor (§ 2191(a)(1)). Internationally recognized human rights in § 2151n
Definitions / International Standards	GSP worker rights as defined in the relevant ILO conventions (262p-4p(a)(2)).	See § 2151n.
Waiver	Human rights restriction may be overridden if the assistance will specifically "serve the basic needs of the citizens of such country" (§ 262d(f)).	OPIC may support a project in a country failing to comply with the labor rights provisions if the President finds and reports to Congress that such support "would be in the national economic interests of the United States" (§ 2191(a)(3)). OPIC may support a project in a country violating human rights that will directly benefit the needy people in such country or "if the national security interest so requires" (§ 2199(i)).
Reporting Requirements	Requires quarterly reports to Congress on votes implicating human rights and the human rights conditions in the country (§ 262d(c)(2)), and consultation (§ 262d(g)). Requires annual reports to Congress on the extent to which each borrowing country guarantees internationally recognized worker rights to its labor force and on progress toward achieving statute's goals (§ 262p-4p(b)).	Requires OPIC to report annually to Congress regarding any project which OPIC declined to support on human rights grounds, or for which OPIC exercised its human rights waiver authority. (22 U.S.C. § 2200a(2) (2000)).
International Consultation / Multilateralism	Human rights provision requires consideration of the target country's cooperation with investigations by international human rights organizations such as the International Red Cross, Amnesty International, the International Commission of Jurists, and U.N. and OAS entities (§ 262d(e)). Labor rights provision requires U.S. to encourage institution to develop formal procedures for promoting worker rights (§ 262p-4p(a)(3)).	

MAJOR U.S. HUMAN RIGHTS STATUTES
IMPORT PREFERENCES

Title & Citation	Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2702, 2703	Andean Trade Preference Act, 19 U.S.C. §§ 3201-3205	African Growth & Opportunity Act, 19 U.S.C. §§ 3703, 2466a (2000)
Operative Provisions	Provides tariff preferences imports from twenty-seven Caribbean nations so long as the country is "taking steps to afford [its workers] . . . internationally recognized worker rights" as defined in the GSP (§ 2702(b)(7), (c)(8), § 2703(b)(5)).	Bars tariff preferences to four Andean nations if the country is not "taking steps to afford [its workers] . . . internationally recognized worker rights" as defined in the GSP (§ 3202(c)(7), (d)(8)).	Authorizes tariff preferences to sub-Saharan African countries that have established or are making progress toward establishing rule of law, political pluralism, the right to due process, a fair trial, and equal protection; establishing protection of the GSP internationally recognized worker rights; and are not engaging in gross violations of internationally recognized human rights and cooperate in international efforts to eliminate human rights violations (§ 3703(a), § 2466a(a)(1)).
Rights Targeted	Includes GSP worker rights, including worst forms of child labor (§ 2703(b)(5)).	Includes GSP worker rights (excluding worst forms of child labor).	Includes internationally recognized human rights; GSP worker rights (excluding worst forms of child labor).
Definitions / International Standards			
Waiver	Restriction will not apply if the President finds and reports to Congress that bestowal of preferences is "in the national economic or security interest of the United States" (§ 2702(b)).	Restriction will not apply if the President finds and reports to Congress that bestowal of preferences is "in the national economic or security interest of the United States" (§ 3702(c)).	Restriction will not apply if the President determines and reports to Congress that bestowal of preference designation "will be in the national economic interest of the United States" (§ 2466a (a)(1)(B)).
Reporting Requirements	Requires biennial reports to Congress on country status (§ 2702(f)(1)).	Requires report to Congress in 2001 on country status (§ 3702 (f)).	Requires President to monitor, review, and report to Congress annually regarding each country's progress toward meeting the eligibility requirements (§ 3705, § 2466a (a)(2)).
International Consultation / Multilateralism			Urges President to meet biennially with qualifying countries (§ 3704(c)(3)).

MAJOR U.S. HUMAN RIGHTS STATUTES IMPORT PREFERENCES (CONT.)

Title & Citation	Jackson-Vanik (MFN) Amendment to the Trade Act of 1974, 19 U.S.C. § 2432 (2000)	Generalized System of Preferences(GSP), 19 U.S.C. §§ 2462, 2464, 2467
Operative Provisions	Bars most-favored-nation treatment (now "normal trade relations") and credit/investment assistance to communist countries if the President determines that the country denies its citizens the freedom to emigrate (§ 2432(a)(1)).	Requires the President to withhold GSP tariff preferences from any developing country that "is not taking steps to afford [its workers] internationally recognized worker rights" or "has not implemented its commitments to eliminate the worst forms of child labor" (§ 2462(b)(2)(G), (H)).
Rights Targeted	Act focuses on emigration policies but also considers country's record on "fundamental human rights" (§ 2432(a)).	Includes freedom of association, the rights to organize and bargain collectively, forced labor, child labor under a certain age, minimum acceptable employment conditions, and worst forms of child labor (§ 2467(4), (b)).
Definitions / International Standards		Worst forms of child labor defined as slavery or practices similar to slavery, including sale or trafficking of children, debt bondage, serfdom, forced or compulsory labor, including compulsory recruitment for armed conflict; use of a child for prostitution or pornography; use of a child for illicit activities (esp. drug trafficking); and work which is likely to harm the child's health, safety, or morals (§ 2467(6)).
Waiver	President may waive the Act's operation annually if he determines and reports to Congress that waiver will substantially promote the purposes of the Act or if the foreign government provides assurance that its emigration practices will improve (§ 2432(c), (d)).	Restriction will not apply if the President determines and reports to Congress that GSP designation "will be in the national economic interest of the United States" (§ 2462(b)(2)(H)).
Reporting Requirements	Requires the President to report annually to Congress that the nation is not violating freedom of emigration (§ 2432(b)).	Requires the President to submit an annual report to Congress on the status of internationally recognized worker rights in each beneficiary developing country (§ 2464).
International Consultation / Multilateralism		

MAJOR U.S. HUMAN RIGHTS STATUTES
TRADE RESTRICTIONS

Title & Citation	U.S. Tariff Act, § 307 19 U.S.C. § 1307 (2000)	Trade Act of 1974, § 301 19 U.S.C. § 2411 (2000)	Government Procurement Exec. Order 13,126, 64 Fed. Reg. 32,383 (1999)
Operative Provisions	Bars importation of goods made with forced, indentured, convict labor, or forced or indentured child labor.	Authorizes the imposition of trade restrictions in response to unreasonable trade practices by a foreign state, including engaging in a persistent pattern of conduct that denies the GSP worker rights (§ 2411(d)(3)(B)(IV) (iii)).	Prohibits federal agencies from purchasing goods made with forced or indentured child labor. Does not apply to goods from countries party to NAFTA or the WTO Agreement on Government Procurement.
Rights Targeted	Includes forced, indentured, and convict labor.	Includes GSP worker rights (not including worst forms of child labor).	Includes forced or indentured child labor.
Definitions / International Standards	"Forced labor" is defined as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily."		Forced or indentured child labor is defined as "all work or service (1) exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or (2) performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties."
Waiver			
Reporting Requirements			Requires report within two years of implementation to Office of Management and Budget on actions taken under order.
International Consultation / Multilateralism			

MAJOR U.S. HUMAN RIGHTS STATUTES TRADE RESTRICTIONS (CONT.)

Title & Citation	International Emergency Economic Powers Act (IIEPA), 50 U.S.C. §§ 1701-1706 (2000)	Export Administration Act of 1979, 50 U.S.C. App. §§2401-2420 (1994)[1]
Operative Provisions	Authorizes imposition of broad economic sanctions, including restricting currency, trade, and freezing foreign assets, if the President finds that a national emergency exists that threatens U.S. national security, foreign policy, or the U.S. economy (§ 1701, § 1702 (a)(1)).	Authorizes the President to impose export controls on goods or technology for reasons of foreign policy, national security, or short supply, and to fulfill U.S. international obligations (§ 2401, § 2404, § 2405(a)(1)).
Rights Targeted	None specified. Has been used for human rights purposes.	None specified. Has been used for human rights purposes.
Definitions / International Standards		
Waiver		
Reporting Requirements	President shall consult with and report to Congress periodically regarding the exercise of authorities under the Act (1703).	President must consult with and report to Congress regarding actions taken (§ 2405 (f)).
International Consultation / Multilateralism		Directs State Dept. to consult with other countries to obtain foreign support for U.S. export control policies (§ 2404(k)).

1. The EAA lapsed in 1994, and the President currently sustains EAA restrictions through his authority under IIEPA.

MAJOR U.S. HUMAN RIGHTS STATUTES COUNTRY & RIGHTS SPECIFIC MEASURES

	Cuban Liberty & Democracy Solidarity (LIBERTAD) Act of 1996, Pub. L. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. § 6021, et seq. (2000) (Helms-Burton)	People's Republic of China—Trade Relations, Pub. L. No. 106-286, 114 Stat. 880 (2000)	Federal Burma Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 (1996)
Title & Citation			
Operative Provisions	Bars private or public loans or credit to any person to finance a transaction involving property confiscated from U.S. nationals (§ 6033(a)); requires U.S. to oppose Cuban membership in IFIs and the OAS and to withhold funding from IFIs that approve assistance to Cuba (§ 6034(a), (b), § 6035). Authorizes suits by U.S. nationals against persons who traffic in confiscated property (§ 6082). Bars entry visas to aliens who have trafficked in confiscated property (§ 6091).	Removes China from MFN review and establishes normal trade relations with China. Establishes congressional-executive commission to monitor China's compliance with human rights (§ 302). Establishes task force to promote effective enforcement of 19 U.S.C. § 1307 prohibiting importation of products of forced or prison labor from China (§§ 501-505).	Bars foreign assistance (other than humanitarian, anti-narcotics, and human rights) to Burma and entry visas to Burmese government officials, and instructs U.S. to oppose IFI assistance to Burma until President certifies to Congress that Burma "has made measurable and substantial progress in improving human rights practices and implementing democratic government" (§ 570(a)). Authorizes President to bar new investment to Burma if he finds and certifies to Congress that the government of Burma has acted against Aung San Suu Kyi or committed large-scale repression against the democratic opposition (§ 570 (b)).
Rights Targeted	Human rights, democracy, expropriation of property	Includes rights to free expression, assembly, religious freedom, freedom of movement, criminal due process, internationally recognized worker rights, freedom of employment, and protection from torture, cruel or unusual punishment, arbitrary arrest or detention (§ 302(a)).	Human rights, democracy.
Definitions / International Standards	Expresses U.S. obligation to promote human rights as expressed in the U.N. Charter and the Universal Declaration (§ 6021(9)), invokes U.N. Human Rights Commission reports and General Assembly resolutions condemning Cuban human rights situation. (§ 6021(20),(22)), right of multilateral intervention under Article 39 of U.N. Charter (§ 6201(22-26)).	Emphasis on rights contained in the ICCPR and Universal Declaration (§ 302(a), (c)(7)).	

MAJOR U.S. HUMAN RIGHTS STATUTES COUNTRY & RIGHTS SPECIFIC MEASURES (CONT.)

Title & Citation	Cuban Liberty & Democracy Solidarity (LIBERTAD) Act of 1996, Pub. L. 104-114, 110 Stat. 785 (1996) (codified at 22 U.S.C. § 6021, et seq. (2000) (Helms-Burton)	People's Republic of China—Trade Relations, Pub. L. No. 106-286, 114 Stat. 880 (2000)	Federal Burma Act, Pub. L. No. 104-208, § 570, 110 Stat. 3009-166 (1996)
Waiver	President may suspend sanctions (except visa restrictions) after submitting determination to Congress that a transition government is in power, taking into consideration a wide range of human rights concerns, including Cuba's compliance with the Universal Declaration and ILO conventions regarding free association (§ 6064(a), § 6065(a)(6)). President may suspend private right of action under § 6082 for 6-month periods upon finding and reporting to Congress "that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba" (§ 6085(b)).		President may waive the mandatory or conditional sanctions if he finds and certifies to Congress that the sanction would be contrary to U.S. national security interests (§ 570(e)).
Reporting Requirements	President must report annually to Congress regarding foreign commerce and assistance to Cuba (§ 6038).	Commission shall report to President and Congress annually regarding findings and recommendations, and mandates congressional hearings on the report (§ 302(g), (i)). Task force shall report annually to Congress regarding violations of § 1307 (§ 505).	Requires biannual reports to Congress on human rights conditions in Burma, including living standards, labor standards, and use of forced labor (§ 570(d)).
International Consultation / Multilateralism	Encourages President to obtain foreign compliance with U.S. embargo, (§ 6032(a)(1)), and with transition to democracy (§ 6062(e)).		Requires President to seek to develop a comprehensive, multilateral strategy with Burma's trading partners to improve democracy and human rights in Burma (§ 570(c)).

MAJOR U.S. HUMAN RIGHTS STATUTES
COUNTRY & RIGHTS SPECIFIC MEASURES (CONT.)

Title & Citation	International Religious Freedom Act of 1998, 22 U.S.C. § 6401, et seq. (2000)
Operative Provisions	Requires the President to identify countries violating or engaging in particularly severe violations of religious freedom and to impose a range of sanctions or to enter into an agreement with the country (§ 6441(b)(1), § 6442(a)(2)). Authorizes imposition of a range of sanctions, including diplomatic reprimand, withholding of diplomatic visits, withholding of non-humanitarian foreign assistance or investment guarantees, votes to deny assistance in international financial institutions, export restrictions, and other actions (§ 6445(a)). The Act also bars entry visas to foreign officials who have engaged in particularly severe violations of religious freedom (8 U.S.C. § 1182(a)(2)(G)). Restricts exports of crime control equipment under the Export Admin. Act if technology is directly used to carry out particularly severe violations of religious freedom (§ 6461).
Rights Targeted	Religious freedom
Definitions / International Standards	"Violations of religious freedom" as set forth in the Universal Declaration (art. 18), ICCPR (art. 18(a)), Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion, the U.N. Charter, and the European Convention for Human Rights, including arbitrary prohibitions, restrictions, or punishment for religious assembly, speech, changing one's beliefs and affiliation, possession and distribution of literature, and raising of children, or detention, interrogation, fines, forced labor or mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder and execution (§ 6401(a)(2)-(3), § 6402(13)). "[P]articularly severe violations of religious freedom" means systematic, ongoing, egregious violations, including torture, cruel, inhuman, or degrading treatment, prolonged detention without charges, disappearance, or other flagrant denial of the right to life, liberty, or the security of persons (§ 6402(11)).
Waiver	Waiver of sanctions is authorized if the President reports to Congress and waiver would further the purposes of the Act or promote U.S. national security (§ 6447(a)).
Reporting Requirements	International religious freedom practices to be included in the State Dept. Country Reports under § 116 & 502B of the Foreign Assistance Act of 1961 (6412(a)); also requires separate annual report to Congress on religious freedom (6412(b)). President must report to Congress regarding countries found responsible for particularly severe violations of religious freedom (§§ 6442(b)(3), 6444)).
International Consultation / Multilateralism	Requires President to consult with foreign governments prior to taking action (§ 6443(b)), and to make every reasonable effort to enter binding bilateral agreements to protect religious freedom (6441(c)(1)(C)). Requires U.S. embassies to maintain a consistent reporting standard, to thoroughly investigate reports of violations of religious freedom, and to maintain contacts with religious and human rights NGOs (§ 6412(c)(1)).