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Getting "Smart": Crafting Economic Sanctions That Respect All Human Rights

Cover Page Footnote

J.D. Candidate, 2005, Fordham University School of Law, Notes & Articles Editor, Fordham Law Review. I would like to thank Professor Catherine Powell for her feedback and assistance; Mehlika Hoodbhoy for inspiring me to write about economic, social, and cultural rights; and my family and friends for their unconditional support.

NOTES

GETTING “SMART”: CRAFTING ECONOMIC SANCTIONS THAT RESPECT ALL HUMAN RIGHTS

*Amy Howlett**

INTRODUCTION

The international human rights idea is not monolithic, but rather is subject to deep internal divisions and controversy. A particularly long-standing controversy exists between countries, human rights advocates, and scholars who favor economic, social, and cultural human rights—mainly positive rights,¹ such as the right to food, the right to work, and the right to adequate health care²—and those that favor civil and political human rights³—mainly negative rights,⁴ such

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1. These rights are generally thought of as entitlement or positive rights requiring state action, but, in reality, they also contain negative analogues that prohibit state action. *See infra* notes 52-57 and accompanying text (explaining that ESC rights, though often thought of as purely positive, also contain negative elements). For example, the right to health requires states to not only take steps by passing relevant legislation or allocating funds to ensure access to quality health care (a positive right), but it also prohibits states from making commissions inconsistent with right to health guarantees by, for example, discriminating with respect to access to health care (a negative right). *See The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, U.N. ESCOR, 22d-24th Sess., Supp. No. 2, CESCR General Comment 14, at ¶¶ 1, 8, U.N. Doc. E/C.12/2004/4 (2001) [hereinafter General Comment 14]; *see also The Nature of State Parties Obligations (Art. 2, Para. 1 of the Covenant)*, U.N. ESCOR 5th Sess., CESCR General Comment 3, at ¶ 1, U.N. Doc. E/C.12/1990/4 (1990) [hereinafter General Comment 3].

2. *See infra* Part I.A.2 (describing the rights protected by the principal international document regarding economic, social, and cultural rights).

3. *See* Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 Hum. Rts. Q. 156, 158 (1987) (“[T]he debate remains at least as polarized today as it ever was in the days when the international community had yet to recognize formally the legitimacy of economic, social, and cultural rights . . . demonstrated in part by the number of commentators who continue to contest the

as the right to liberty, freedom of thought, and freedom of expression (more U.S.-centric rights).⁵

The use of economic sanctions by the United States to achieve human rights goals abroad illustrates this divide.⁶ The United States has imposed economic sanctions to punish violations of civil and political human rights abroad with increasing frequency in recent years.⁷ This increased use has contributed to establishing international human rights norms⁸ indicating that the behavior of the sanctioned country—usually violations of civil and political rights—is unacceptable under international law.⁹ But where economic sanctions cause severe human suffering, they jeopardize the economic, social, and cultural rights (“ESC rights”) of civilians living inside the sanctioned country by, for example, destroying jobs, contributing to poor health conditions, and increasing hunger and poverty.¹⁰ Thus, the same sanctions that are imposed to end human rights violations of a civil and political nature are causing human rights violations of an economic, social, and cultural nature, in the same country.¹¹

status of those rights . . .”); Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 *Yale J. Int’l L.* 1, 29 (2001) (“Western industrial nations . . . generally emphasize civil and political rights, and developing countries . . . often place greater emphasis on economic development.”). Many countries of the world have included economic, social, and cultural rights in their constitutions. See Alston & Quinn, *supra*, at 170 (citing the constitutions of Switzerland, Portugal, Greece, Sweden, Spain, and the Netherlands). Notably, the post-Apartheid constitution of South Africa includes comprehensive ESC rights. Mark S. Kende, *The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics*, 19 *Conn. J. Int’l L.* 617, 617 (2004).

4. See Louis Henkin et al., *Human Rights* 323-24 (1999). Just as economic, social, and cultural rights are not solely positive, civil and political rights are not solely negative. *Id.* For example,

a number of the rights articulated apply in the criminal process, by which a state may legitimately take liberty and property . . . in punishment, but in those cases the state is required not merely to leave the individual alone but “positively” to organize itself, by institutions and laws, to assure against arbitrary detention, and to provide due process, fair trial, and humane punishment.

Id.; see also Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* 35-40 (1980) (critiquing the description of the dichotomy between the two sets of rights as a positive/negative divide). Indeed, many economic, social, and cultural rights have a negative analogue. See *supra* note 1 and accompanying text; *infra* notes 55-57 and accompanying text.

5. See *infra* Part I.A.1 (describing the rights protected by the principal international document regarding political and civil rights); Part I.B (describing the U.S. preference for civil and political rights).

6. See *infra* Part III.A.

7. See *infra* notes 107-08 and accompanying text.

8. See *infra* Part II.B.

9. See *infra* Part III.A.1.

10. See *infra* Parts II.A.1-5 (describing the ramifications of sanctions on the population-at-large of the target country); Part III.A.2 (placing these violations under the lens of ESC rights).

11. See *infra* Part III.A.2.

This Note examines this schizophrenic role of economic sanctions in international human rights law,¹² focusing on the United States' frequent use of economic sanctions.¹³ It reconciles the tension between scholars who argue sanctions violate international human rights law,¹⁴ and those who argue sanctions bolster international human rights law¹⁵ by framing the tension as a conflict between ESC rights and civil and political rights.¹⁶ From this new perspective, sanctions do build up norms, but norms that favor civil and political human rights while undermining ESC rights.¹⁷

This effect is incongruous with international human rights law, which is predicated on the idea that human rights are universal.¹⁸ U.S. unilateral sanctions deprive international human rights law of this universality. They contribute to civil and political human rights norms favored by the United States at the expense of ESC rights favored by many other nations, and recognized on equal footing with civil and political rights in international human rights law.¹⁹

As a solution, the United States should only impose economic sanctions when it can be sure sanctions will not jeopardize ESC rights, through the use of narrowly tailored "smart" sanctions.²⁰ Sanctions legislation should also be drafted with a nod toward ESC rights by phrasing violations in rights-based language that clearly implicates ESC rights rather than merely citing civil and political violations as impetus for sanctions.²¹

12. See Richard N. Haass, *Introduction to Economic Sanctions and American Diplomacy* 1 (Richard N. Haass ed., 1998) ("The widespread use of economic sanctions constitutes one of the great paradoxes of contemporary American foreign policy. Sanctions are frequently criticized [for not working] At the same time, economic sanctions are fast becoming the policy tool of choice for the United States")

13. See *infra* notes 107-08 and accompanying text.

14. See *infra* Part II.A.

15. See *infra* Part II.B.

16. See *infra* Part III.

17. See *infra* Part III.

18. See *infra* notes 71-75 and accompanying text.

19. See Henkin et al., *supra* note 4, at 323-24; see also International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 173 [hereinafter ICCPR] ("[W]hereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S. 3, 5 [hereinafter ICESCR] ("[T]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights."); Maria McFarland Sanchez-Moreno & Tracy Higgins, *No Recourse: Transnational Corporations and the Protection of Economic, Social, and Cultural Rights in Bolivia*, 27 Fordham Int'l L.J. 1663, 1671 (2004) ("ESC rights are fully a part of international law, and have been established and described in numerous international and regional treaties").

20. See *infra* Part III.B.1; see also *infra* notes 102-04 and accompanying text (describing "smart" sanctions).

21. See *infra* Part III.B.2.

Part I describes relevant aspects of international human rights law: sources of international human rights law, how international law is developed, and the use of economic sanctions to enforce violations of human rights law. Part II provides an overview of the scholarly debate surrounding economic sanctions. Part II.A presents the view that economic sanctions are inhumane measures that jeopardize human rights, and Part II.B presents the seemingly contradictory position that economic sanctions enhance respect for international human rights law. Finally, Part III.A, through the use of several case studies, illustrates how both sides to the debate are, to a certain degree, correct. Economic sanctions do strengthen civil and political human rights norms, but they do so at the expense of ESC rights. To reconcile this problem, Part III.B recommends imposing sanctions for violations of ESC rights as well as for violations of civil and political rights, and only imposing sanctions when the ESC rights of civilians living in the target country will not be violated in the process through the use of “smart” sanctions.²²

In order to understand these recommendations, the Part I provides background information on international human rights law and economic sanctions. Part I.A discusses the primary international human rights documents with regard to civil and political, and ESC rights. Part I.B describes the U.S. aversion to ESC rights despite the universal and interrelated nature of both sets of rights under international law. It also looks into the territorial scope of ESC versus civil and political rights, which is important to examine in light of the extraterritorial quality of economic sanctions. After this overview of the primary documents’ scope and substance, Part I.C describes uncodified sources of international human rights law—customary international law—and how such sources are developed through state practice. Finally, Part I.D looks into enforcement of international human rights through economic sanctions and introduces several economic sanctions case studies that will be used throughout this Note.

I. THE HUMAN RIGHTS IDEA AND INTERNATIONAL HUMAN RIGHTS LAW

The human rights idea blossomed in the wake of World War II.²³ Appalled by the atrocities committed by Nazi Germany, the world community responded by establishing the United Nations and enacting seminal human rights treaties.²⁴ Over time, the international human rights idea grew and evolved into a complex web of laws

22. Other scholars have made this recommendation to use “smart” sanctions, but none, as far as my research has uncovered, has done so in the context of the dichotomy between civil and political and ESC rights. *See infra* notes 104-06.

23. Louis Henkin, *The Age of Rights* 1-5 (1990).

24. *Id.*

comprised of treaties, customary international law, and general principles.²⁵ The fountainhead of international human rights law, the International Bill of Rights, is described below.²⁶

A. *The International Bill of Rights*

The International Bill of Rights includes the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").²⁷ The UDHR does not require ratification and was intended to be a normative instrument, whereas the two covenants, which entered into force almost thirty years later, were intended to be binding and thus require ratification.²⁸

The UDHR was proclaimed, and shortly thereafter states began drafting the two covenants.²⁹ The UDHR provides the scope for the two subsequent charters—it encompasses civil and political rights as well as ESC rights.³⁰ The two subsets of human rights were not designated as such by the UDHR, but were bifurcated at the behest of western nations, especially the United States.³¹ The rationale for bifurcation was that the two sets stemmed from different theoretical backgrounds, requiring different language and steps to articulate and ensure their protection.³²

1. The International Covenant on Civil and Political Rights

The ICCPR³³ contains mainly negative rights (actions the government cannot take against you).³⁴ Examples include: the right to life,³⁵ the right to be free from slavery and forced labor,³⁶ the right to liberty,³⁷ and the right to a fair and public hearing by an impartial

25. Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987).

26. Henkin et al., *supra* note 4, at 73 (noting there is no document actually called The International Bill of Rights, rather it refers to three documents considered together—the Universal Declaration of Human Rights, the ICESCR, and the ICCPR).

27. *Id.*

28. See Henkin, *International Law: Politics and Values* 177-78, 186-88 (1995) [hereinafter Henkin, *International Law*].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. ICCPR, *supra* note 19, 999 U.N.T.S. at 171.

34. Bryan P. Wilson, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 Emory L.J., 627, 635 (2004). *But see supra* note 4.

35. ICCPR, *supra* note 19, art. 6(1), 999 U.N.T.S. at 174.

36. *Id.* art. 8, 999 U.N.T.S. at 175.

37. *Id.* art. 9, 999 U.N.T.S. at 175.

tribunal.³⁸ Rights protected by the ICCPR are immediately enforceable, and state parties must “adopt such legislative or other measures as may be necessary to give effect to the rights recognized” by the covenant.³⁹ The United States, along with 151 other states, is a party to the ICCPR.⁴⁰

2. The International Covenant on Economic, Social, and Cultural Rights

While the United States has not ratified the ICESCR, 150 nations are a party to the covenant.⁴¹ Therefore, roughly the same number of countries has ratified the ICESCR as the ICCPR. Nonetheless, while many human rights advocates instinctively accept civil and political human rights as fundamental to human existence, ESC rights have struggled to gain acceptance as fundamental rights.⁴²

38. *Id.* art. 14, 999 U.N.T.S. at 176.

39. *Id.* art. 2(2), 999 U.N.T.S. at 174.

40. United Nations, Multilateral Treaties Deposited with the Secretary General, International Covenant on Civil and Political Rights, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp> (last visited Sept. 3, 2004).

41. United Nations, Multilateral Treaties Deposited with the Secretary General, International Covenant on Economic, Social and Cultural Rights, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty5.asp> (last visited Sept. 3, 2004).

42. See Alston & Quinn, *supra* note 3, at 161 (arguing an “overriding concern” should be “to breathe life into provisions that have all too often been derided as meaningless simply because of their complexity and relative open-endedness”); see also Adrienne Germain, *Reproductive Health and Human Rights*, 363 *Lancet* 65, 65 (2004) (discussing the neglect of the right to health); Paul Hunt, *Neglected Diseases, Social Justice and Human Rights: Some Preliminary Observations 2* (2003) (Health and Human Rights Working Paper Series, No. 4), at http://www.who.int/hhr/news/en/Series_4_neglected%20diseases_social_justice_human_rights%20Paul_Hunt.pdf.

[M]any people do not grasp that [the right to health—an economic and social right] is a fundamental human right. They feel intuitively that a right to a fair trial and freedom of expression are human rights, but they do not instinctively regard the right to health as a human right. In other words, the right to health has not yet gained the same human rights currency as more established rights.

Id. See Mary Ann Torres, *The Human Right to Health, National Courts, and Access to HIV/AIDS Treatment: A Case Study from Venezuela*, 3 *Chi. J. of Int'l L.* 105, 105 (2002) (discussing the neglect of the right to health). This is unfortunate because many ESC rights are foundational rights on which civil and political rights depend. See General Comment 14, *supra* note 1, ¶ 1 (addressing this specifically with regard to the right to health). How can one enjoy liberty or free speech, for example, without adequate food or health? See Pierre de Vos, *Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution*, 1997 *S. Afr. J. Hum. Rts.* 67, 71 (“Starving people may find it difficult to exercise their freedom of speech . . .”); Human Rights Res. Ctr., *Circle of Rights, Module 1: Developing a Rights Based Perspective*, at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/toc.htm> (last visited Apr. 27, 2004).

The ICESCR, unlike the ICCPR, includes mainly positive rights (things the government must do for you).⁴³ These rights include the right to work and receive remuneration,⁴⁴ the right to form trade unions,⁴⁵ the right to an adequate standard of living and its continuous improvement,⁴⁶ the right to food,⁴⁷ the right to the highest attainable standard of health,⁴⁸ and the right to education.⁴⁹ It also affords special protection for mothers before and after childbirth⁵⁰ and for children from exploitation and child labor.⁵¹ ESC rights differ from civil and political rights in two significant ways.

a. *Difficulty in Assessing Positive Rights Violations*

First, because ESC rights are positive, it is more difficult to assess whether an ESC right has been violated.⁵² When has a government done enough to give effect to an ESC right? To oversimplify, must it merely make food available by building a healthy economy that can sustain grocery stores stocked with food, or must it go further and actually deliver food to hungry individuals?⁵³ Compare this with negative civil and political rights where it is simply a government act that constitutes a violation.⁵⁴

However, most ESC rights contain a negative element—a prohibition on state action incompatible with ESC rights.⁵⁵ These negative aspects are therefore easier to assess like civil and political rights. One specific application of this idea is the prohibition on discrimination with regard to ESC rights. ICESCR Article 2(2) provides that “rights . . . will be exercised without discrimination of

43. See ICESCR, *supra* note 19, 933 U.N.T.S. at 3. *But see supra* note 1; *infra* notes 52-57 and accompanying text (describing the negative analogues of ESC rights).

44. ICESCR, *supra* note 19, arts. 6-7, 933 U.N.T.S. at 6.

45. *Id.* art. 8, 933 U.N.T.S. at 6.

46. *Id.* art. 11, 933 U.N.T.S. at 6.

47. *Id.* art. 11(2), 933 U.N.T.S. at 6.

48. *Id.* art. 12, 933 U.N.T.S. at 8.

49. *Id.* art. 13, 933 U.N.T.S. at 8.

50. *Id.* art. 10(2), 933 U.N.T.S. at 7.

51. *Id.* art. 10(3), 933 U.N.T.S. at 7.

52. See Alston & Quinn, *supra* note 3, at 159 (“[C]ivil and political rights are characterized as negative in that they require only that governments should abstain from activities that would violate them . . . [whereas] [e]conomic, social, and cultural rights require active intervention on the part of governments . . .”).

53. *Cf. id.* at 166-68 (discussing the difficulty of determining what measures are sufficient with regard to ESC rights).

54. See *supra* note 52.

55. See *supra* note 1 and accompanying text. This negative element is expressed most generally through the idea that states must “respect” all ESC rights. Human Rights Res. Ctr., Circle of Rights, Module 8: Defining the Context of ESC Rights, at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/toc.htm> (last visited Aug. 14, 2004). The obligation to respect “requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health [an ESC right].” General Comment 14, *supra* note 1, ¶ 33.

any kind”⁵⁶ The most broadly sweeping expression of the prohibition on interference with ESC rights is the staunch prohibition on retrogressive measures—states cannot backslide with regard to ESC rights.⁵⁷

b. *Progressive Realization*

Second, whereas ICCPR rights are immediately enforceable,⁵⁸ under the ICESCR, states are obligated merely to “take steps” toward “full realization” of ESC rights.⁵⁹ States, however, cannot make ad infinitum arguments that doing nothing is justified in the name of progressive realization.⁶⁰ On the contrary, steps must be taken almost immediately even if complete realization of the right can be achieved progressively.⁶¹ Specifically with regard to health rights, states must take steps “immediate[ly],” and “such steps must be deliberate, concrete and targeted.”⁶²

B. *The United States and ESC Rights*

The United States is not a party to the ICESCR, and for the most part, U.S. policy has opposed giving ESC rights equal footing with civil and political rights.⁶³ Delegates of the United States have made public statements that it would be hard for the United States to accept ESC rights because they go beyond rights the U.S. Constitution

56. ICESCR, *supra* note 19, art. 2(2), 993 U.N.T.S. at 5.

57. General Comment 3, *supra* note 1, ¶ 9 (“[A]ny deliberately retrogressive measures . . . would require the most careful consideration and would need to be fully justified . . .”).

58. ICCPR, *supra* note 19, art. 2(1), 999 U.N.T.S. at 173. *But see* Alston & Quinn, *supra* note 3, at 172 (taking issue with “[c]ommentators invariably contrast[ing] the concept of progressive achievement with that of immediate implementation which is said to be required by Article 2 of the [ICCPR]”). Alston and Quinn conclude that, in reality, “the full realization of civil and political rights is heavily dependant both on the availability of resources and the development of the necessary societal structures.” *Id.*

59. ICESCR, *supra* note 19, art. 2(1), 993 U.N.T.S. at 5. However, over time, some ESC rights are no longer subject to progressive realization, but are also immediately enforceable. General Comment 14, *supra* note 1 (discussing the minimum core ESC rights from which no State can derogate).

60. *Cf.* Henkin et al., *supra* note 4, at 329 (“Despite what some might describe as the ‘softness’ of the undertakings in the ICESCR . . . they were designed to establish, and did establish, legally binding obligations.”).

61. *See* General Comment 3, *supra* note 1, ¶ 2. Comment 3 requires states to take steps within a “reasonably short time” of entry into force. *Id.* Thirty years later, this arguably means now.

62. General Comment 14, *supra* note 1, ¶ 30. ESC rights also have immediacy to the extent they are included in the “minimum core obligation,” rights that are no longer subject to progressive realization but form a baseline from which states cannot deviate. General Comment 3, *supra* note 1, ¶ 10 (“[A] minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.”).

63. *See* Alston & Quinn, *supra* note 3, at 158.

encompasses.⁶⁴ The United States Constitution contains mainly negative rights similar to those found in the ICCPR.⁶⁵

In general, the United States has done little with regard to ESC rights, as is partially evidenced by the United States' continued failure to ratify the ICESCR, the primary international document for protecting ESC rights.⁶⁶ And according to Philip Alston and Gerard Quinn, "[s]ince 1981 the United States has maintained that economic, social, and cultural rights belong in a 'qualitatively different category' from other rights, that they should be seen not as rights but as goals of economic and social policy"⁶⁷

This was not always the case. President Franklin D. Roosevelt's New Deal was a high point for ESC rights in the United States. Roosevelt's 1944 State of the Union address articulates this policy:

We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job . . . ;

The right to earn enough to provide adequate food and clothing . . . ;

. . . .

The right . . . to a decent home . . . ;

The right to adequate medical care and the opportunity to achieve and enjoy good health; [and]

. . . .

The right to a good education;

64. See Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in The International Bill of Rights: The Covenant on Civil and Political Rights* 32, 41-43 (Louis Henkin ed., 1981).

65. Cf. Louis Henkin, *Introduction to The International Bill of Rights: The Covenant on Civil and Political Rights* 10 (Louis Henkin ed., 1981) (describing the rights included in the ICCPR "in terms of the individual's rights," whereas the ICESCR "speaks only to the states," requiring them to take steps).

66. *Id.*

67. Alston & Quinn, *supra* note 3, at 158; see also *Statement to the World Conference on Human Rights*, U.N. ESCOR, 7th Sess., Supp. No. 2, at 83, U.N. Doc. E/1993/22/ (1993) ("[T]he international community as a whole continue[s] to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage").

All of these rights spell security. And after this is won, we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.⁶⁸

In addition, Eleanor Roosevelt played a pivotal role in the drafting of the Universal Declaration of Human Rights, ensuring the inclusion of ESC rights.⁶⁹ She also contributed to the drafting of the ICESCR.⁷⁰

Although the United States is opposed to ESC rights and views them as qualitatively different than civil and political rights, human rights documents recognize the interrelated nature of the two sets of rights and emphasize the importance of universal acceptance of all human rights.⁷¹ The preambles to both the ICCPR and the ICESCR recognize that neither set of rights can be protected in isolation, but instead both are interdependent.⁷² The preamble to the ICCPR “[r]ecogniz[es] that . . . the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”⁷³

The preambles to both covenants also “[c]onsider[] the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms”⁷⁴ And the UDHR proclaims: “[A] *common* understanding of these rights and freedoms is of the greatest importance”⁷⁵

Part I.C discusses *where* states are obligated to protect human rights, an important issue in light of the extraterritorial reach of economic sanctions.

C. Territorial Scope of International Human Rights Law

The ICCPR specifically precludes extraterritorial application of its obligations through Article 2(1): “Each State Party . . . undertakes to

68. Franklin D. Roosevelt, State of the Union Address of 1944 (Jan. 11, 1944), in 90 Cong. Rec. 55, 57 (1944).

69. See generally Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

70. See U.N. ESCOR 8th Sess., 271st mtg. at 12, U.N. Doc. E/CN.4/SR.271 (1952) (comments of Mrs. Roosevelt, U.S.A.).

71. See *infra* notes 72-74.

72. See ICCPR, *supra* note 19, pmbl., 999 U.N.T.S. at 173; see also ICESCR, *supra* note 19, pmbl., 993 U.N.T.S. at 5.

73. ICCPR, *supra* note 19, preamble, 999 U.N.T.S. at 173.

74. *Id.*; see also ICESCR, *supra* note 19, pmbl., 993 U.N.T.S. at 5.

75. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pmbl., U.N. Doc. A/810 (1948) (emphasis added); see also Henkin, *supra* note 23, at 2 (“Human rights are universal: they belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development.”).

respect and to ensure to all individuals *within its territory* and subject to its jurisdiction the rights recognized in the present Covenant."⁷⁶ The ICESCR, on the other hand, does not contain any extraterritorial exclusion. Rather, it contains language that calls for international cooperation to protect and ensure ESC rights.⁷⁷ This is important because economic sanctions are diplomatic measures that respond to extraterritorial human rights abuses.⁷⁸

Thus, the ICCPR and ICESCR codify different territorial applications of their respective rights. However, as Part I.D describes, state obligations stem from sources other than those codified in international treaties.

D. *Norms of International Human Rights Law and Customary International Law*

When a country ratifies a covenant or treaty, it becomes bound to uphold the rights in the treaty.⁷⁹ But a country is also bound to uphold certain rights, referred to as international human rights norms or customary international law, even if the rights are not found in any documents it has ratified.⁸⁰ Certain rights achieve the status of customary international law ("CIL") through "general and consistent" state practice conducted with "a sense of legal obligation."⁸¹ CIL "creates obligations by each state to all other states," and is, therefore, binding on all states.⁸² If a "significant number of important states" do not participate in the state practice, it can "prevent a principle from becoming general customary law."⁸³

According to the *Restatement (Third) of the Foreign Relations Law of the United States* ("Restatement"), the following rights have ripened into CIL: "(a) genocide, (b) slavery or the slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) consistent pattern of gross violations of internationally recognized human rights."⁸⁴

76. ICCPR, *supra* note 19, art. 2(1), 999 U.N.T.S. at 173 (emphasis added).

77. ICESCR, *supra* note 19, art. 2(1), 993 U.N.T.S. at 5.

78. See *infra* Part I.E (describing economic sanctions).

79. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art 18, 1155 U.N.T.S. 331, 336.

80. See Restatement, *supra* note 25, introductory note, at 18-19.

81. *Id.* § 102(2). International agreements may also create CIL when they are widely ratified. *Id.* § 102(3).

82. *Id.* § 702.

83. *Id.* § 102 cmt. b. The relevant norm, however, could become part of "particular customary law." *Id.*

84. *Id.* § 702. "The list is not necessarily complete, and is not closed . . ." *Id.* cmt. a. It is interesting to note that many of these rights are codified in the ICCPR, and largely absent from the list are ESC rights. See *supra* Part I.A.1 (discussing rights enshrined in ICCPR); Part I.A.2 (discussing rights enshrined in the ICESCR).

Other rights, through widespread consensus,⁸⁵ become a higher form of CIL, *jus cogens* norms, non-derogable norms that can be modified only by subsequent *jus cogens* norms.⁸⁶ Therefore, certain rights, whether or not they have been codified in international human rights documents, can bind states if the rights have ripened into CIL through general and consistent practice or *jus cogens* norms through the higher requirement of widespread consensus.

The reporters of the *Restatement* have described the kind of state practice required to create CIL. Such practice includes

the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or actions by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states.⁸⁷

Part II.B presents arguments that economic sanctions are an example of state practice. Part I.E provides more detail on the technical aspects of international sanctions and their role as an enforcement mechanism in international law.

E. Enforcement of Human Rights Violations Through Economic Sanctions

When an international human right is violated, states and, in some circumstances, individuals have recourse to various domestic, regional, and international forums for enforcement,⁸⁸ such as the International Criminal Court⁸⁹ and the International Court of Justice.⁹⁰ Unfortunately, there are significant barriers to international human rights law enforcement, and overall, the enforcement arm of international human rights law remains underdeveloped and often impotent.⁹¹ In light of these barriers, countries and international

85. See *Restatement*, *supra* note 25, § 102 reporters' notes 6 ("[T]he norm . . . must be 'accepted and recognized by the international community of States as a whole.'" (quoting from the Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 53, 1155 U.N.T.S. 331, 334)).

86. *Id.* § 102(k).

87. *Id.* § 102 reporters' note 2.

88. See generally Henkin et al., *supra* note 4, at 489-769 (discussing the various mechanisms available for enforcement of human rights).

89. However, "the United States' refusal to join the International Criminal Court . . . indicate[s] that effective international judicial enforcement for even the most fundamental human rights violations . . . may be years away." Cleveland, *supra* note 3, at 3.

90. But as Sarah Cleveland notes, the ICJ "remains limited in its effectiveness." *Id.*

91. See *id.* at 3-4.

bodies have turned to economic sanctions to economically coerce governments to comply with international human rights standards.⁹²

Gary Clyde Hufbauer, Jeffrey J. Schott, and Kimberly Ann Elliot, in their comprehensive study of 116 sanctions regimes, define economic sanctions as "the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations."⁹³ Withdrawals of trade relations, known as "trade sanctions," encompass embargoes (bans on exports to a target state) and boycotts (bans on imports from a target state).⁹⁴ Withdrawals of foreign assistance are accordingly referred to as "financial sanctions,"⁹⁵ which include measures such as the freezing of government assets, bans on loans from banks and international lending institutions, and visa denials. Economic sanctions also can include bans on foreign investment and denials of foreign aid.⁹⁶

Sanctions literature refers to the primary country or organization imposing sanctions as the "sender,"⁹⁷ and the country on which sanctions are imposed as the "target."⁹⁸ The sender can be one country acting alone (unilateral sanctions), a country acting in concert with several other states (collective sanctions), or an international organization such as the United Nations (multilateral sanctions).⁹⁹

Senders employ sanctions with the assumption that the sanctions will cause severe hardship within the target.¹⁰⁰ Traditionally, sanctions have targeted countries,¹⁰¹ and thus the expected scenario is that the population-at-large, experiencing severe hardship caused by sanctions, will rise up against its leaders to demand change.¹⁰² In another

92. See *id.* ("In light of the limited possibilities for multilateral enforcement of international norms, domestic law mechanisms... have become increasingly important... 'Unilateral' economic sanctions... have become one common domestic enforcement mechanism..."); Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 *Colum. J. Transnat'l L.* 33, 73 (2002).

93. 1 Gary Clyde Hufbauer, Jeffrey J. Schott, & Kimberly Ann Elliot, *Economic Sanctions Reconsidered: History and Current Policy 2* (1990) [hereinafter Hufbauer et al.].

94. Koenraad Van Brabant, *Sanctions: The Current Debate: A Summary of Selected Readings 5* (1999).

95. *Id.*

96. 1 Hufbauer et al., *supra* note 93, at 36.

97. 1 *Id.* at 35.

98. 1 *Id.* at 36.

99. 1 *Id.* at 35-36.

100. Margaret P. Doxey, *Economic Sanctions and International Enforcement 120* (1980).

101. See Joy K. Fausey, *Does the United Nations' Use of Collective Sanctions to Protect Human Rights Violate Its Own Human Rights Standards?*, 10 *Conn. J. Int'l L.* 193, 197 (1994) ("Economic sanctions typically are directed at the entire population of a country.").

102. *Id.* at 197-99.

scenario, the leaders acquiesce to the demands of sanctions out of guilt.¹⁰³

More recently, “smart” sanctions have targeted only the individuals responsible for the reprehensible behavior a sender wishes to punish, such as terrorist groups or specific leaders, instead of entire countries.¹⁰⁴ The assumption here is that the leaders or elite members of society affected by sanctions will demand or make changes to end their own suffering.¹⁰⁵ To achieve these results, “smart” sanctions could involve some form of limited financial sanctions such as visa denials or freezing assets of targeted individuals.¹⁰⁶

Part III.B presents “smart” sanctions as one part of the solution to the tension in scholarship that Part II lays out. To illustrate this controversy, this Note will utilize several case studies where the United States, the most frequent user of economic sanctions,¹⁰⁷ has used non-“smart” sanctions to achieve human rights goals abroad. In fact, for human rights purposes alone, the United States has imposed economic sanctions more than twenty times since World War II.¹⁰⁸ This Note explores United States sanctions against Poland, South Africa, Iraq, Haiti, and Burma.¹⁰⁹ These cases were chosen to provide

103. *Id.* at 199.

104. See Peter L. Fitzgerald, *Managing “Smart Sanctions” Against Terrorism Wisely*, 36 *New Eng. L. Rev.* 957, 960 (2002); Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 *Yale Hum. Rts. & Dev. L.J.* 1, 20 (2002); William H. Mever & Bovka Stefanova, *Human Rights, the UN Global Compact, and Global Governance*, 34 *Cornell Int’l L.J.* 501, 520 (2001); Anne-Marie Slaughter, *Rogue Regimes and the Individualization of International Law*, 36 *New Eng. L. Rev.* 815, 823 (2002). *But see* Eric S. O’Malley, *Destabilization Policy: Lessons from Reagan on International Law. Revolutions and Dealing with Pariah Nations*, 43 *Va. J. Int’l L.* 319, 341 (2003) (noting some problems with “smart” sanctions).

105. *Cf.* Slaughter, *supra* note 104 (“If we mean to target government, we must design sanctions that will in fact affect the lives of individual government officials.”).

106. *Cf.* Lori Fisler Damrosch, *The Civilian Impact of Economic Sanctions*, in *Enforcing Restraint: Collective Intervention in Internal Conflicts* 274, 275 (Lori Fisler Damrosch ed., 1993) (addressing several techniques being used to make sanctions “smart”) [hereinafter Damrosch, *Civilian Impact*]; Lori Fisler Damrosch, *The Collective Enforcement of International Norms Through Economic Sanctions*, 8 *Ethics & Int’l Aff.* 59, 74 (1994) (same) [hereinafter Damrosch, *Collective Enforcement*].

107. Cleveland, *supra*, note 3, at 4; 1 Hufbauer et al., *supra* note 93, at 66-67.

108. This tally is based on the chart created by Hufbauer and his co-authors, *supra* note 93, at 16-33. Several sanctions episodes that do not specifically list human rights as a goal have been included in this tally because their goals are sufficiently human rights related. Some examples are: sanctions against Rhodesia, imposed to promote majority rule by black Africans; sanctions against the USSR, imposed to promote the liberalization of the treatment of dissidents; sanctions against Poland, imposed to persuade Poland to lift martial law and release dissidents; sanctions against China, imposed in response to Tiananmen square; and sanctions against Iraq, imposed to restore the legitimate government of Iraq. *Id.* at 20-27.

109. *Id.* Other examples include Sudan, China, Somalia, Rhodesia, Uganda, South Korea, Chile, Kampuchea, Uruguay, Ethiopia, Paraguay, Guatemala, Argentina, Nicaragua, El Salvador, Brazil, the USSR, Bolivia, and Suriname. *Id.*

a cross section of sanctions policies over time and from different geographical regions. Each is fairly representative of U.S. sanctions policy in general.

1. Poland

President Ronald Regan imposed economic sanctions against Poland in 1981 to persuade Polish leaders to "free those in arbitrary detention, to lift martial law, and to restore the internationally recognized rights of the Polish people to free speech and association."¹¹⁰ And, though not mentioned in the U.S. sanctions legislation, the Polish government was violating other rights. For example, Poland had outlawed the Solidarity labor union,¹¹¹ and in general, was not able to "meet the economic needs" of its people.¹¹²

2. South Africa

President Regan imposed limited sanctions against South Africa starting in 1985, and then Congress, after overriding a Presidential veto, imposed more comprehensive economic sanctions—the Comprehensive Anti-Apartheid Act of 1986 ("CAAA")—against South Africa.¹¹³ According to section 311 of the CAAA, the sanctions would be lifted when South Africa released all political prisoners and those detained without trial from prison, lifted the ban on democratic political parties and the right to express political opinions, repealed discriminatory measures, and made efforts to make the political process more representative.¹¹⁴

Similar to the situation in Poland, violations in South Africa were more extensive than those mentioned in the U.S. sanctions legislation. The discrimination caused by Apartheid permeated most aspects of daily life in South Africa, such as work, culture, education, and access to health care.¹¹⁵ Despite such rampant discrimination, prior to sanctions, South Africa had a dynamic economy on which other

110. 1 Hufbauer et al., *supra* note 93, at 196 (quoting from President Reagan's 1981 Christmas address); *see also* Margaret P. Doxey, *International Sanctions in Contemporary Perspective* 32-33 (2d ed. 1996) [hereinafter Doxey, *International Sanctions*].

111. Doxey, *International Sanctions*, *supra* note 110, at 32; 1 Hufbauer et al., *supra* note 93, at 196.

112. 1 Hufbauer et al., *supra* note 93, at 196.

113. Pub. L. No. 99-440, 100 Stat. 1086, 1100-01 (repealed 1993).

114. § 101(b), 100 Stat. at 1089; 1 Hufbauer et al., *supra* note 93, at 236; *see also* Neta C. Crawford, *The Humanitarian Consequences of Sanctioning South Africa: A Preliminary Assessment*, in *Political Gain and Civilian Pain* 57, 57 (Thomas G. Weiss et al. eds., 1997).

115. *See* Crawford, *supra* note 114, at 77 ("Because of the persistent poverty and racial apartheid policies . . . , Asian, colored, and black populations have been denied the same access to water, health care, food, fuel, shelter, and education as white South Africans.").

countries in the region depended, though seventy-five percent of its wealth was concentrated in the hands of only twenty percent of the population.¹¹⁶

3. Iraq

On August 2, 1990, the United States imposed economic sanctions on Iraq, which included a comprehensive trade ban and a ban on financial relationships with Iraq.¹¹⁷ The United Nations also imposed economic sanctions on Iraq later that year with U.N. Security Council Resolution 661, calling upon member states to impose trade and financial sanctions against Iraq.¹¹⁸ The goal of the U.N. sanctions against Iraq was to get Saddam Hussein to withdraw from Kuwait, which Iraq had recently invaded.¹¹⁹ The U.S. sanctions shared this goal, and in addition, were imposed to “condemn[] . . . gross violations of internationally recognized human rights in Kuwait, including widespread arrests, torture, summary executions, and mass extrajudicial killings.”¹²⁰ And though not mentioned in either sanctions policy, human rights organizations were concerned at the time with Saddam Hussein’s gassing of Kurdish civilians at Halabja where, according to Human Rights Watch, “most likely tens of thousands—of civilians were killed during chemical and conventional bombardments stretching from the spring of 1987 through the fall of 1988.”¹²¹

Despite these brutal acts against the Kurds, Iraq, prior to sanctions, “was a relatively prosperous nation with a sophisticated health and welfare system . . . and ample food and water.”¹²² Eric Hoskins has assessed pre-sanctions Iraq as follows:

Iraq’s investment in its own economic and social development had a visible effect on the living conditions and health status of the civilian population. Iraq’s medical facilities and public health system were well developed By 1990, nearly all urban dwellers and 72 percent of rural residents had access to clean water, while 93 percent of Iraqis had access to health services.¹²³

116. *Id.* at 61.

117. Iraq Sanctions Act of 1990, 101 Pub. L. No. 513, 104 Stat. 2047 (1990) (codified at 50 U.S.C. § 1701 (2000)); *see also* 1 Hufbauer et al., *supra* note 93, at 283.

118. S.C. Res. 661, U.N. SCOR, 45th Sess., 2933rd mtg. at 19, U.N. Doc. S/RES/661 (1990); *see also* Geoff Simons, *The Scourging of Iraq* 35 (1986) (discussing the sanctions).

119. *See* 1 Hufbauer et al., *supra* note 93, at 290; *see also* Eric D. K. Melby, *Iraq, in Economic Sanctions and American Diplomacy*, *supra* note 12, at 107, 110.

120. § 586A(7), 14 Stat. at 2048.

121. Human Rights Watch, *Whatever Happened to the Iraqi Kurds?* (1991), available at <http://www.hrw.org/reports/1991/iraq/>.

122. Simons, *supra* note 118, at 107; *see also* Crawford, *supra* note 114, at 57-90.

123. Eric Hoskins, *The Humanitarian Impacts of Economic Sanctions and War in Iraq*, in *Political Gain and Civilian Pain*, *supra* note 114, at 92.

4. Haiti

In 1991, President George H.W. Bush imposed economic sanctions against Haiti, one of the most impoverished countries in the western hemisphere.¹²⁴ The sanctions were aimed at forcing a military coup to step aside and restoring the democratically elected leader, Jean-Bertrand Aristide, to power.¹²⁵ In the words of Sarah Zaidi in her assessment of the Haiti sanctions, "[t]he coup unleashed a campaign of terror and repression . . . including extrajudicial executions, disappearances, torture, rape, limitations on freedom of association and assembly, and disruption in personal and professional activities."¹²⁶

5. Burma

More recently, in 2003, the United States imposed sanctions on Burma.¹²⁷ A host of other countries and organizations have joined the United States by imposing sanctions on Burma in response to Burma's human rights violations:

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 [have all been imposed on Burma]¹²⁸

U.S. legislation authorizing sanctions describes the specific behavior the United States condemns via sanctions. The ruling military regime, the State Peace and Development Council ("SPDC"), failed to honor the results of a free election held in 1990.¹²⁹ Then, in 2003, the SPDC "brutally attacked [democracy] supporters . . . and arrested democracy . . . activists."¹³⁰ Further, the SPDC "continues egregious human rights violations" such as torture, conscription of child soldiers, ethnic cleansing against minorities in Burma, and the government-sponsored use of forced and slave labor.¹³¹ The sanctions will not be lifted until, inter alia, "[t]he SPDC has made measurable . . . progress toward implementing a democratic Government including . . . releasing all political prisoners; . . . allowing freedom of speech and

124. Doxey, *International Sanctions*, *supra* note 110, at 45.

125. Gideon Rose, *Haiti*, in *Economic Sanctions and American Diplomacy*, *supra* note 12, at 60.

126. Sarah Zaidi, *Humanitarian Effects of the Coup and Sanctions in Haiti*, in *Political Gain and Civilian Pain*, *supra* note 114, at 189.

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

128. Cleveland, *supra* note 3, at 19.

129. § 2(1), 117 Stat. at 864.

130. *Id.* § 2(4), 117 Stat. at 864.

131. *Id.* § 2(5)-(6), 117 Stat. at 864.

the press; . . . allowing freedom of association; . . . [and] permitting the peaceful exercise of religion.”¹³²

Like Haiti, but unlike Iraq and South Africa, Burma’s economy and public infrastructure on the eve of sanctions were already in ruins.¹³³ In Burma, wealth was concentrated tightly in the hands of the ruling military regime.¹³⁴ The ruling military junta monopolized benefits from foreign trade and investment and spent an inordinate amount of money on its military infrastructure rather than on public programs.¹³⁵

The five sanctions episodes described above have inspired both criticism and praise from human rights scholars and advocates. Part II addresses this tension.

II. THE TENSE RELATIONSHIP BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND ECONOMIC SANCTIONS

It seems odd to accuse economic sanctions of both jeopardizing and strengthening international human rights law. And yet, this is precisely what scholarship on economic sanctions does.¹³⁶ Until one views this controversy, as this Note does in Part III, through the lens of ESC rights versus civil and political rights, the controversy appears irreconcilable.¹³⁷ Before Part III sheds new light on this dilemma, a basic understanding of its underpinnings is necessary. To this end, Part II.A provides an overview of scholarship that argues economic sanctions jeopardize international human rights law, and Part II.B describes scholarship that argues economic sanctions strengthen international human rights law.

While digesting this conflict, it is important to bear in mind the second-class citizen status of ESC rights in the eyes of the United States. The United States has refused to ratify the ICESCR and regards ESC rights as qualitatively different than political and civil

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

133. See Burma UN Service Off., Nat’l Coalition Gov’t of the Union of Burma, & The Burma Fund, *The Crisis in Burma: An Agenda for the United Nations Security Council?* 4, 24, 28-29 (2003) [hereinafter *Crisis in Burma*]; see also Larry Jagan, *Deadlock in Burma*, *Asian Wall St. J.*, May 5, 2003, available at 2003 WL-WSJA 2688633 (discussing the low living standards, insufficient wages, and staggering inflation in Burma).

134. See Alternative Asean Network on Burma, *Ready, Aim, Sanctions: Special Report 93* (2003), available at www.altsean.org/readyaimsanction112003.pdf [hereinafter *ALTSEAN*]; see also *Crisis in Burma*, *supra* note 133, at 28-29.

135. See *ALTSEAN*, *supra* note 134, at 13.

136. Compare *infra* Part II.A (describing the arguments that economic sanctions undermine international human rights law), with Part II.B (describing the arguments that economic sanctions foster the growth of international human rights norms).

137. Sarah Cleveland’s article does not directly analyze sanctions from this civil and political versus ESC vantage point. She does, however, recognize that the use of economic sanctions “may conflict with other fundamental rights.” Cleveland, *supra* note 3, at 6.

rights,¹³⁸ despite the fact that sources of international human rights law regard ESC rights as equally important and interrelated to civil and political rights.¹³⁹ In general, ESC rights have struggled to gain the same credibility in international law as that enjoyed by civil and political rights.¹⁴⁰ Recall the *Restatement's* list of rights that have ripened into CIL includes predominantly civil and political rights.¹⁴¹

A. *The Effects of Economic Sanctions on Civilians*

Scholars have condemned economic sanctions for being inhumane and destructive diplomatic measures that jeopardize human rights in target countries.¹⁴² Daoudi and Dajani, in their book about economic sanctions, provide a harsh critique: "Like cancer, international economic sanctions kill minute cells within the economic structure of the target nation."¹⁴³ Geoff Simons has summarized some of the negative effects of economic sanctions on the population-at-large in countries targeted by sanctions:

[T]o deny a nation the means to purify water or to treat sewage . . . encourage[s] the spread of disease To deny a nation access to antiseptics, antibiotics and other essential medical supplies . . . render[s] disease untreatable To deny people adequate electricity for hospitals and factories, to deny people—including pregnant women, babies, infants, the sick, the old—sufficient food and clean water is . . . undeniably a gross violation of humanity.¹⁴⁴

Others have criticized the very rationale behind sanctions as inhumane and contrary to international human rights law.¹⁴⁵ Where the expected scenario is that sanctions will cause severe civilian suffering inspiring either guilt-driven reforms by the target's leaders or the population-at-large to revolt in response, such sanctions are, by definition, inhumane.

General economic sanctions have been criticized as blunt mechanisms, analogous to blowing up an entire airplane with innocent passengers on board to kill just one terrorist.¹⁴⁶ Richard Haass, in his

138. See *supra* notes 63-67 and accompanying text.

139. See *supra* notes 72-75 and accompanying text.

140. See *supra* note 42 and accompanying text.

141. See *supra* note 84 and accompanying text.

142. See *infra* Part III.A.

143. M.S. Daoudi & M.S. Dajani, *Economic Sanctions: Ideals and Experience* 168 (1983).

144. Simons, *supra* note 118, at 33-34.

145. See, e.g., Fausey, *supra* note 101, at 200 ("In any event, in anticipating how the sanctions will reach their goal, the U.N. intentionally expects to cause deprivation within an entire population of a nation. This characteristic of sanctioning forms the basis of the argument that collective sanction imposition may defy the U.N. Charter.").

146. See Thomas G. Weiss et al., *Introduction to Political Gain and Civilian Pain*, *supra* note 114, at 6.

comprehensive book on U.S. economic sanctions notes: “Political leaders and other elites often are able to shield themselves from the worst effects of broad sanctions, something most of the population is unable to do.”¹⁴⁷

Such criticism has led to the development of “smart” sanctions, which focus on the specific individuals the United States wishes to punish by narrowly tailoring sanctions to affect just these guilty few.¹⁴⁸ However, general economic sanctions are still commonly used by the United States and others. This Note next highlights scholarship critical of some of these specific sanctions regimes.

1. Poland

Critics have accused the Poland sanctions of causing hunger problems among the population-at-large in Poland.¹⁴⁹ The sanctions denied Poland a \$740 million credit to buy U.S. corn, and Poland’s poultry industry depended largely on U.S. feed corn.¹⁵⁰ According to Hufbauer, in a country where chicken accounts for “10 percent of each person’s average consumption of 5.5 pounds of meat per month,” such a denial obviously caused food shortages.¹⁵¹

2. South Africa

The sanctions against South Africa, combined with other factors, reportedly caused a rise in unemployment.¹⁵² One estimate shows 100,000 jobs were lost because of sanctions.¹⁵³ Neta Crawford, in an analysis of the humanitarian consequences of the South Africa sanctions, contends sanctions pushed “already vulnerable populations . . . over the edge into deeper suffering.”¹⁵⁴ The vulnerable populations included destitute blacks, who made up almost half of the country’s unemployed.¹⁵⁵

3. Iraq

Less than a year after initial imposition of sanctions, Iraq had no substantial food stockpiles—meat stockpiles were negligible, feed for chickens was almost exhausted, and cooking oils and vegetables were

147. Haass, *supra* note 12, at 6.

148. *Id.*; see also Damrosch, *Civilian Impact*, *supra* note 106, at 279; Damrosch, *Collective Enforcement*, *supra* note 106, at 74.

149. See *infra* notes 150-51.

150. 1 Hufbauer et al., *supra* note 93, at 199.

151. *Id.*

152. Crawford, *supra* note 114, at 75-77.

153. *Id.* at 77.

154. *Id.* at 75.

155. Bill Keller, *South Africa Sanctions May Have Worked, at a Price*, N.Y. Times, Sept. 12, 1993, at 168.

in short supply.¹⁵⁶ In the years following the Persian Gulf War, the situation deteriorated further. The war completely devastated the country, leaving the people in abject poverty with minimal infrastructure. Then, according to Simons, the sanctions exacerbated the problem. They blocked Iraq from importing much-needed food, a serious impediment as prior to sanctions food imports had accounted for seventy percent of national requirements.¹⁵⁷

After the Gulf War, international organizations warned of grave humanitarian disasters in Iraq if then-present conditions were left unassuaged.¹⁵⁸ For the duration of the sanctions policy, there were reports of: "malnutrition, diarrhoea [sic] and dehydration among children, [and] sick people being given contaminated drinking water . . ." ¹⁵⁹ Simons reports children drinking contaminated water, making them susceptible to "severe malnutrition, marasmus, gastrointestinal illnesses and other diseases."¹⁶⁰ Despite such warnings and reports, economic sanctions remained firmly in place,¹⁶¹ which, according to critics, further contributed to the health crisis. The ban on food imports was contributing to malnutrition by blocking the flow of food into the starving country,¹⁶² and the health situation for children was particularly severe. The infant mortality rate tripled in 1991, the mortality rate for children under five nearly quadrupled,¹⁶³ and items such as baby food, incubators, and catheters for babies were not allowed into the country.¹⁶⁴

4. Haiti

The Haiti sanctions have been similarly criticized for "wreaking severe damage" on the country's civilian population.¹⁶⁵ Among other provisions, the sanctions suspended thirty million dollars in U.S. aid to Haiti—money earmarked for public works projects "to build roads, help farmers and improve medical care."¹⁶⁶ The United States did take steps to assuage the situation by maintaining a humanitarian

156. Simons, *supra* note 118, at 136-50; *see also* Hoskins, *supra* note 123, at 91, 106-08, 113-16.

157. Simons, *supra* note 118, at 105-06; *see also* Hoskins, *supra* note 123, at 106-08, 113-16.

158. Simons, *supra* note 118, at 106; *see also* Hoskins, *supra* note 123, at 106-08, 113-16.

159. Simons, *supra* note 118, at 106.

160. *Id.* at 107; *see also* Hoskins, *supra* note 123, at 106-08, 113-16.

161. Simons, *supra* note 118, at 106.

162. *Id.* at 108-09.

163. *Id.* at 124.

164. *Id.* at 118.

165. Doxey, International Sanctions, *supra* note 110, at 46 (noting that while the civilian populations suffered, the military leaders "suffered little and proved unresponsive").

166. 2 Hufbauer et al., *supra* note 93, at 603 (internal citations omitted).

stream of money to nongovernmental organizations in Haiti.¹⁶⁷ Nonetheless, “[t]he U.S. cutoff of direct aid . . . coupled with the cancelled loans by multilateral organizations, cost Haiti \$150 million, economists say—the equivalent of the annual budget.”¹⁶⁸ As a result, prices nearly doubled, unemployment skyrocketed,¹⁶⁹ and the minimum wage fell to three dollars a day in towns and less in rural areas.¹⁷⁰

Reductions in spending also made food very expensive, reduced the availability of medicine and medical supplies, stopped garbage collection and the maintenance of sewage treatment plants, and decreased the supply of drinking water.¹⁷¹

5. Burma

Preliminary reports have indicated negative effects on the civilian population of Burma as a result of the sanctions.¹⁷² The sanctions have already reportedly caused 400,000 layoffs in the textile industry, and reports predict that 100,000 Burmese—mainly women working in the textile industry—stand to lose their jobs as a result of sanctions.¹⁷³ Many women who have already lost their jobs in the textile industry have been forced into prostitution.¹⁷⁴ As Nicholas Kristof has pointed out, this will cause many of these women to die from AIDS.¹⁷⁵

B. *Economic Sanctions and the Growth of International Human Rights Norms*

Despite such harsh criticism of economic sanctions by scholars and advocates, others have argued these same sanctions have strengthened international human rights law by fostering the growth of international human rights norms.

Professors Myres McDougal and W. Michael Reisman argue that international norms are identified by how the world responds to breaches of international law.¹⁷⁶ Accordingly, Sarah Cleveland, in her article on sanctions and norm internalization, argues that sanctions, as a form of diplomatic communication that responds to human rights

167. Zaidi, *supra* note 126, at 206-07.

168. 2 Hufbauer, *supra* note 93, at 603 (internal quotations omitted).

169. Doxey, *International Sanctions*, *supra* note 110, at 46.

170. 2 Hufbauer, *supra* note 93, at 603-04.

171. Zaidi, *supra* note 126, at 199-205.

172. *See infra* notes 173-75 and accompanying text.

173. Nicholas D. Kristof, Editorial, *Our Man in Havana*, N.Y. Times, Nov. 8, 2003, at A15.

174. *Id.*

175. *Id.*

176. Cleveland, *supra* note 3, at 6-7 (discussing 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 (1995-1996)).

violations by another state, "contribute[] to the development and identification of international rules."¹⁷⁷ Cleveland 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."¹⁷⁸

The imposition of economic sanctions also fosters norm internalization, which subsequently contributes to the establishment of international human rights norms.¹⁷⁹ Norm internalization occurs when states use international law as the basis for domestic policies.¹⁸⁰ According to Harold Koh, "[t]o the extent that those norms are successfully internalized, they become future determinants of why nations obey" international laws.¹⁸¹

Along these lines, Cleveland argues economic sanctions encourage norm internalization within the target country by encouraging it to comply with international human rights treaties.¹⁸² Where economic sanctions are imposed to coerce a government to change its human rights policies, and the government capitulates or at least makes some concessions in its policies in response to sanctions, it is incorporating human rights into its domestic policies.¹⁸³

Cleveland provides the example of Burma to illustrate how economic sanctions contribute to international human rights norms. The Burma sanctions have drawn substantial international attention to the human rights violations in Burma, mainly to speech and labor violations.¹⁸⁴ U.S. economic sanctions have not only expressed condemnation in their own right, but have also spurred sanctions by other countries, regional organizations, and international organizations.¹⁸⁵ In Cleveland's view, the combined effect of these sanctions has brought "substantial international attention, pressure, and condemnation to bear on the Burmese regime 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

177. *Id.* at 7; see also Damrosch, *Collective Enforcement*, *supra* note 106, at 61-62 ("Scholars who have scrutinized sanctions from a moral or legal perspective have underscored the important contribution that sanctions can make to reinforcement of international norms . . .").

178. *Id.* at 6.

179. *Id.*

180. *Id.*

181. *Id.* (quoting Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *Yale L.J.* 2599, 2646 (1997) (internal citations omitted)).

182. *Id.*

183. *Id.* at 6-7.

184. *Id.* at 19.

185. *Id.* ("The response to the human rights crisis in Burma illustrates [how] . . . U.S. unilateral measures and diplomatic efforts to garner international support have played a catalytic role in broadening and deepening the global response [to human rights violations in Burma].").

improved human rights conditions and democratic governance in Burma.”¹⁸⁶ As a result, sanctions have helped “define and clarify international norms prohibiting forced labor and promoting democracy and free speech.”¹⁸⁷

Moreover, when countries, such as the United States, respond to human rights violations in Burma, they are incorporating ideas of international human rights law into their domestic institutions.¹⁸⁸ Similarly, when Burma responds to economic sanctions, as it has in several limited circumstances,¹⁸⁹ it is internalizing international human rights standards into its domestic system.¹⁹⁰

III. ECONOMIC SANCTIONS STRENGTHEN CIVIL AND POLITICAL RIGHTS BUT WEAKEN ESC RIGHTS

The controversy described in Part II is enough to cause cerebral apoplexy. How can a single act both bolster and violate international human rights law? Luckily, simply focusing on the dichotomy between the two sets of international human rights—civil and political versus ESC rights—adds clarity. Under this new light, economic sanctions strengthen civil and political rights but undermine ESC rights. Part III.A places economic sanctions under the lens of the two sets of rights and uses the case studies to illustrate how sanctions undergird civil and political rights but weaken ESC rights. Part III.B recommends strategies for assuaging the negative effects of economic sanctions on ESC rights.

A. *Viewing the Controversy in the Context of the Dichotomy Between Civil and Political and ESC Rights*

As described in Part II.B, economic sanctions foster the development of international human rights norms by articulating human rights violations as the impetus for imposing sanctions and thereby contributing to state practice. However, human rights violations mentioned in sanctions legislation have been primarily of a civil and political nature. Thus, sanctions primarily reinforce the strength of civil and political rights in international human rights law. Unfortunately, in the process of bolstering these civil and political rights, U.S. sanctions have been severely criticized for causing suffering among the population-at-large of the target country. This

186. *Id.*

187. *Id.* at 20.

188. *See id.* They do this “by incorporating into their systems an awareness of international human rights standards and Burma’s noncompliance with those standards.” *Id.*

189. *Id.* at 19 (describing some of the responses by the Burmese government).

190. *Id.* at 20 (“The effort also has produced incremental *transnational* norm internalization by encouraging Burma to accept international treaty obligations and modestly alter its human rights conduct . . .”).

suffering, if articulated in rights-based language, mainly implicates ESC rights.

Part III.A.1 demonstrates how sanctions have reinforced civil and political rights, and Part III.A.2 describes how the detrimental effects of each sanctions policy implicates ESC rights.

1. Sanctions Build Up International Civil and Political Human Rights Norms

Sanctions contribute to and advance respect for international human rights law by defining and reinforcing international human rights norms.¹⁹¹ When the United States responds with sanctions to a violation of international human rights law, it reinforces a commitment to international norms that such behavior is unacceptable.¹⁹² Because the United States usually uses sanctions to express displeasure regarding violations of civil and political rights, it is bolstering the normalization of this class of rights.¹⁹³

Arguments made by scholars in Part II.B that economic sanctions are examples of state practice are compelling, especially in light of the *Restatement's* definition of state practice.¹⁹⁴ For example, sanctions are national laws that incorporate human rights provisions—the U.S. Congress passes legislation authorizing or implementing sanctions to punish human rights violations in a target country.¹⁹⁵ In addition, sanctions are a diplomatic communication by a state expressing the view that certain target actions violate international human rights law.¹⁹⁶

Similarly, the imposition of economic sanctions helps normalize the idea that states have obligations to do something about civil and political human rights violations perpetrated against citizens of other countries.¹⁹⁷

a. *Sanctions Reinforce the Substantive Content of Civil and Political Human Rights Norms*

Because international norms are created through state practice, the use of state-sponsored economic sanctions to discipline human rights violators contributes to the development of international law. As a result, the United States' frequent use of economic sanctions since

191. *Id.* at 5.

192. Haass, *supra* note 12, at 2.

193. It is not, however, providing this same service to ESC rights. *See infra* Part III.A.2 (arguing economic sanctions weaken ESC rights).

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

195. *Cf.* Cleveland, *supra* note 3, at 71 (arguing that economic sanctions build CIL but not referring specifically to the *Restatement's* definition of state practice).

196. *Cf. id.* (same).

197. Again, ESC rights are not similarly benefited.

World War II to achieve human rights goals has contributed to the state practice necessary to establish human rights norms. Accordingly, by contributing to a significant portion of the requisite state practice, the United States is able to ensure its foreign-policy bias is reflected in developing norms—recall the U.S. preference for civil and political rights.¹⁹⁸ In fact, U.S. economic sanctions have been employed, almost without exception, to punish violations of civil and political rights.¹⁹⁹ Therefore, economic sanctions do not generally build norms that require respect for all international human rights, but instead build up norms that focus mainly on civil and political rights such as those codified in the ICCPR.²⁰⁰

The following cases are presented to illustrate this phenomenon. In each, the goals of the U.S. sanctions policies are predominantly civil and political. It is important to note that in each case, the target government could also have been, or could be accused of, violations of ESC rights.

i. Poland

The goals of the U.S. sanctions against Poland were to “free those in arbitrary detention, to lift martial law, and to restore the internationally recognized rights of the Polish people to free speech and association.”²⁰¹ It is easy to categorize these rights as civil and political by comparing them to provisions of the ICCPR. ICCPR Article 9, for example, guarantees liberty and that “no one shall be subjected to arbitrary arrest or detention.”²⁰² Article 19 guarantees freedom of expression which includes free speech: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information . . . either orally, in writing or in print . . .”²⁰³ Finally, Article 22 proclaims, “[e]veryone shall have the right to freedom of association . . .”²⁰⁴ Thus, in the Polish sanctions, civil and political rights are clearly reinforced.

ii. South Africa

The South Africa sanctions called for the release of all political prisoners and those detained without trial, the lifting of the ban on democratic political parties, the right to express political opinions, the

198. See *supra* Part I.B.

199. See *infra* Parts III.A.1a.i-vi.

200. See *infra* Part III.A.1a.vi.

201. 1 Hufbauer et al., *supra* note 93, at 196 (quoting from President Reagan’s Christmas 1981 address (internal citations omitted)); see *supra* notes 110-112 and accompanying text.

202. ICCPR, *supra* note 19, art. 9, 999 U.N.T.S. at 175.

203. *Id.* art. 19, 999 U.N.T.S. at 178.

204. *Id.* art. 22, 999 U.N.T.S. at 178.

repeal of discriminatory measures, and efforts to make the political process more representative.²⁰⁵ Again, the civil and political rights implications are quite clear-cut. Holding political prisoners and people detained without trial violates, among other provisions, the liberty provisions found mainly in ICCPR Article 9, which bars arbitrary detention for grounds other than those established by law and prohibits detention without "proceedings before a court . . . without delay . . ."²⁰⁶ In addition, denying expression of political opinions implicates ICCPR Article 19(2).²⁰⁷ Further, the discriminatory measures of Apartheid violated the general proviso in ICCPR Article 2(1) that requires all rights recognized in the covenant to be upheld "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²⁰⁸

iii. Sanctions Against Iraq

The Iraq sanctions were imposed to get Saddam Hussein to withdraw from Kuwait, and to "condemn[] . . . gross violations of internationally recognized human rights in Kuwait, including widespread arrests, torture, summary executions, and mass extrajudicial killings."²⁰⁹ ICCPR Article 7 prohibits torture.²¹⁰ The extra judicial killings and summary executions violate ICCPR Article 6(1), which prohibits arbitrary deprivation of the right to life²¹¹ and Article 14, which requires a "fair and public hearing."²¹² Thus, as in Poland and South Africa, the rights the U.S. sought to redress by sanctions in Iraq were mainly civil and political.

iv. Haiti

The Haiti sanctions aimed at forcing a military coup to step aside and restore Aristide to power.²¹³ The coup had caused "extrajudicial executions, disappearances, torture, rape, limitations on freedom of association and assembly, and disruption in personal and professional activities."²¹⁴ As is probably clear by now, the majority of the named offenses clearly implicate the civil and political rights codified in the

205. See *supra* notes 113-16 and accompanying text.

206. ICCPR, *supra* note 19, art. 9, 999 U.N.T.S. at 175.

207. *Id.* art. 19, 999 U.N.T.S. at 178.

208. *Id.* art. 2(1), 999 U.N.T.S. at 173; see also *id.* art. 26, 999 U.N.T.S. at 179.

209. 101 Pub. L. No. 513, § 596A(7), 104 Stat. 2048 (1990) (codified at 50 U.S.C. § 1701 (2000)); see *supra* notes 117-23 and accompanying text.

210. ICCPR, *supra* note 199, art. 7, 999 U.N.T.S. at 175.

211. *Id.* art. 6(1), 999 U.N.T.S. at 174.

212. *Id.* art. 14, 999 U.N.T.S. at 176.

213. See *supra* notes 124-26 and accompanying text.

214. Zaidi, *supra* note 126, at 189.

ICCPR, and the official U.S. policy implementing the sanctions names predominantly civil and political rights as impetus for sanctions.²¹⁵

v. Burma

The Burma sanctions were imposed to condemn the SPDC's attack and arrest of democracy supporters and activists, and for other human rights violations such as torture, conscription of child soldiers, ethnic cleansing against minorities in Burma, and the government-sponsored use of forced and slave labor.²¹⁶ The sanctions call upon the Burmese government to release political prisoners, allow freedom of speech and the press, allow freedom of association, and to permit free exercise of religion.²¹⁷

Most of the violations listed in the text of the Burma sanctions are core ICCPR rights. The arrest and continued detention of democracy activists and other political prisoners implicates liberty rights enshrined in Articles 9 through 15 of the ICCPR,²¹⁸ such as the right to be free from arbitrary detention²¹⁹ and the right "to a fair and public hearing by . . . [an] impartial tribunal."²²⁰ Article 7 of the ICCPR prohibits torture,²²¹ Article 8 prohibits slave or forced labor,²²² and Article 18 guarantees freedom of thought and religion.²²³ The ICCPR also calls for freedom of expression, freedom of association, and the right of peaceful assembly²²⁴—rights the SPDC infringes upon by arresting pro-democracy activists and continuing to hold and arrest political prisoners because of their political views.²²⁵

vi. Summary of the Case Studies

All five cases discussed above were provided as samples to illustrate the idea that U.S. economic sanctions bolster civil and political rights. In each case, it was fairly clear; the rights mentioned in the text of the legislation are violations of civil and political rights codified in the ICCPR. If all U.S. sanctions policies imposed with human rights goals were examined, they would be further evidence of this same

215. *See supra* notes 124-26 and accompanying text.

216. *See supra* notes 129-32 and accompanying text.

217. *See supra* notes 129-32 and accompanying text.

218. ICCPR, *supra* note 19, arts. 9-15, 999 U.N.T.S. at 175-77.

219. ICCPR, *supra* note 19, art. 9, 999 U.N.T.S. at 175.

220. ICCPR, *supra* note 19, art. 14, 999 U.N.T.S. at 176-77.

221. *Id.* art. 7, 999 U.N.T.S. at 175.

222. *Id.* art. 8, 999 U.N.T.S. at 175.

223. *Id.* art. 18, 999 U.N.T.S. at 178.

224. *Id.* arts. 21-22, 999 U.N.T.S. at 178.

225. Moreover, Burma's forced conscription of child soldiers violates Article 24, which affords special protection to juveniles. *Id.* art. 24, 999 U.N.T.S. at 179. However, as discussed *infra* Part III.B.2.e, this right cuts across both covenants, and could therefore be construed as a small nod to economic and social rights.

phenomenon.²²⁶ In other words, these cases were not chosen because they are anomalous and bolster the main thrust of this Note. On the contrary, they were selected because they are quite ordinary and represent the norm for how and why the United States imposes sanctions for human rights goals. As a result, U.S. sanctions have at least some positive effects on international law. They build civil and political human rights norms.

b. *Sanctions Reinforce Human Rights Beyond the Waters Edge— But Only for Civil and Political Rights*

In addition to bolstering support for the substantive content of civil and political rights, economic sanctions assist the burgeoning idea that states have obligations with regard to human rights beyond national borders. Recall, the ICCPR specifically precludes extraterritorial application of its obligations through Article 2(1).²²⁷ As discussed above, however, states can become obligated to more than is expressed in international human rights documents if a right ripens into CIL through state practice.²²⁸ Economic sanctions, as a form of state practice, water down this territorial limitation.

Economic sanctions are a response to extraterritorial human rights violations, and they are a response that has come often and with increasing frequency since the Cold War. The United States alone has imposed economic sanctions more than twenty times for human rights purposes and, overall, more than eighty-five times between 1996 and 2001.²²⁹ Thus, the United States is establishing a precedent through its consistent use of economic sanctions that human rights violations abroad are our concern, and states should do something about extraterritorial violations.²³⁰

For example, the Burma sanctions were imposed by the United States to punish human rights violations in Burma committed against Burmese citizens.²³¹ Similarly, the Poland sanctions were imposed by

226. See generally 1 Hufbauer et al., *supra* note 93; 2 *id.*

227. See ICCPR, *supra* note 19, 999 U.N.T.S. at 173.

228. See *supra* notes 80-87 and accompanying text.

229. Kristof, *supra* note 173.

230. To bolster this argument of general practice, economic sanctions have been around since ancient Greece. See Simons, *supra* note 118, at 174-211 (describing the Megarian decree, an early example of economic sanctions, enacted by Pericles in 432 BC). And other countries continue to resort to economic sanctions. See generally 1 Hufbauer et al., *supra* note 93. Thus, sufficient "widespread practice" has perhaps already been established with regard to this proposition. If so, this would make the idea that civil and political rights should be protected extraterritorially a *jus cogens* norm. Cf. Simons, *supra* note 118, at 35 (quoting a U.S. official that making U.S. sanctions binding on international branches of U.S. banks was easily done because "a norm of customary international law has been created that recognizes the validity of extraterritoriality in such circumstances").

231. See *supra* Part I.E.5.

the United States to punish human rights abuses in Poland against Polish citizens.²³²

Unfortunately, sanctions do not similarly benefit ESC rights, and as shown below, economic sanctions actually weaken respect for ESC rights.

2. Sanctions Weaken ESC Rights

Because economic sanctions are a form of state practice, when the United States imposes economic sanctions and fails to take into account or even try to prevent dire civilian consequences that implicate ESC rights, it is weakening these rights. Such actions foster the growth of the idea that ESC rights are irrelevant, and that jeopardizing ESC rights for civil and political goals is perfectly acceptable.

a. *Sanctions Undermine the Substantive Content of Economic and Social Rights*

Geoff Simons has summarized some of the negative effects of economic sanctions on the population-at-large in countries targeted by sanctions.²³³ If economic sanctions have such effects, they not only cause undeniable “violation[s] of humanity,”²³⁴ but also directly implicate international human rights obligations found in the ICESCR. Sanctions would violate, for example, the right to health, which requires “the improvement of all aspects of environmental and industrial hygiene; the prevention, treatment and control of . . . diseases; [and] the creation of conditions” to ensure medical services to all “in the event of sickness.”²³⁵

This Note next provides examples where economic sanctions have allegedly had such deleterious effects on target nations.²³⁶

i. U.S. Sanctions Against Poland

As noted above, In Poland, economic sanctions denied Poland a \$740 million credit to buy U.S. corn.²³⁷ Poland’s poultry industry

232. See *supra* Part I.E.1.

233. See *supra* note 144.

234. Simons, *supra* note 118, at 34.

235. ICESCR, *supra* note 19, art. 12, 993 U.N.T.S. at 8.

236. There are obviously problems with causation in each case. Because this is the real world and not a laboratory, holding all other variables constant is impossible. However, taking this into consideration, it is still possible to see how economic sanctions contribute to the described circumstances. See Crawford, *supra* note 114, at 59-60 (discussing causation problems); see also Zaidi, *supra* note 126, at 200 (discussing problems with establishing causation and with finding reliable data).

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

depended largely on U.S. feed corn.²³⁸ In a country where "[c]hicken accounts for 10 percent of each person's average consumption of 5.5 pounds of meat per month" such a denial caused food shortages.²³⁹ If this effect can be attributed clearly to the sanctions policy,²⁴⁰ it would implicate the right to food provisions of the ICESCR.²⁴¹

ii. U.S. Sanctions Against South Africa

As noted above, the sanctions against South Africa, combined with other factors, reportedly caused a rise in unemployment and the loss of 100,000 jobs.²⁴² Critics of the South Africa sanctions contend the sanctions may have pushed "already vulnerable populations . . . over the edge into deeper suffering . . ."²⁴³ The vulnerable populations included destitute blacks, who made up almost half of the country's unemployed.²⁴⁴ Such effects would jeopardize right to work provisions of the ICESCR,²⁴⁵ and because blacks were disproportionately hurt, would also violate Article 2(2) barring discrimination with regard to ESC rights.²⁴⁶

iii. U.S. Sanctions Against Iraq

U.S. sanctions against Iraq have been widely criticized for their disproportionate impact on the Iraqi population-at-large.²⁴⁷ As noted above, such effects implicate many of the fundamental ESC rights codified in the ICESCR; the right to food, for example, found in Article 11 of the covenant.²⁴⁸ Less than a year after initial imposition of sanctions, Iraq had no substantial food stockpiles—meat stockpiles were negligible, feed for chickens was almost exhausted, and cooking oils and vegetables were in short supply.²⁴⁹ In the years following the Persian Gulf War, the situation deteriorated further.²⁵⁰ The war completely devastated the country leaving the people in abject poverty with minimal infrastructure.²⁵¹ The sanctions exacerbated the problem because they blocked Iraq from importing much-needed food—a serious impediment because in the period prior to sanctions

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

239. 1 Hufbauer et al., *supra* note 93, at 199.

240. 1 *Id.* at 199-200 (noting the possible role of Polish farmers in the poultry shortage).

241. See ICESCR, *supra* note 19, art. 11, 993 U.N.T.S. at 7.

242. See *supra* notes 152-53.

243. Crawford, *supra* note 114, at 75.

244. See *supra* note 155 and accompanying text.

245. See ICESCR, *supra* note 19, art. 6, 993 U.N.T.S. at 6.

246. See *id.* art. 2(2), 999 U.N.T.S. at 5.

247. See *supra* notes 156-64.

248. See ICESCR, *supra* note 19, art. 11, 993 U.N.T.S. at 7.

249. See *supra* notes 156-64 and accompanying text.

250. See *supra* notes 156-64 and accompanying text.

251. See *supra* notes 156-64 and accompanying text.

food imports had accounted for seventy percent of national requirements.²⁵²

The Iraq sanctions also implicate health rights as embodied in Article 12 of the covenant.²⁵³ Iraqis were drinking contaminated water, making them more susceptible to disease.²⁵⁴ Because the health implications were particularly severe for children,²⁵⁵ Article 10 is implicated as well, which requires special protection for children.²⁵⁶ Article 10 also requires special protection for mothers before and after childbirth²⁵⁷—the sanctions blocked some medical supplies useful for women in labor as well as other vital medical supplies.²⁵⁸

iv. U.S. Sanctions Against Haiti

The Haiti sanctions cost Haiti the equivalent of its national budget, prices nearly doubled, unemployment skyrocketed, and the minimum wage fell to three dollars a day in towns and less in rural areas.²⁵⁹ Such effects most clearly jeopardize Article 6 of the ICESCR, which ensures the right to work and to be paid fair wages.²⁶⁰

The reduction in government spending combined with the loss of U.S. aid intended for public works projects made food very expensive, reduced the availability of medicine and medical supplies, stopped garbage collection and the maintenance of sewage treatment plants, and decreased the supply of drinking water.²⁶¹ Such effects implicate several ICESCR provisions. The problems with sanitation and clean drinking water and the reduced availability of medicine violate the right to health guarantees found in Article 12: "States Parties . . . recognize the right of everyone to the . . . highest attainable standard of . . . health," and pledge to take steps "necessary for . . . the improvement of all aspects of environmental and industrial hygiene . . ."²⁶² The food shortages violate Article 11, which recognizes "the right of everyone to . . . adequate food . . . [and] to be free from hunger."²⁶³

252. *See supra* notes 156-64 and accompanying text.

253. *See ICESCR, supra* note 19, art. 12, 993 U.N.T.S. at 8.

254. *See supra* notes 159-60 and accompanying text.

255. *See supra* notes 159-64 and accompanying text.

256. *See ICESCR, supra* note 19, art. 10, 993 U.N.T.S. at 7.

257. *See id.*

258. *See supra* notes 159-64 and accompanying text.

259. *See supra* notes 165-71 and accompanying text.

260. *See ICESCR, supra* note 19, art. 6, 993 U.N.T.S. at 6.

261. *See supra* notes 165-71 and accompanying text.

262. ICESCR, *supra* note 19, art. 12, 993 U.N.T.S. at 8.

263. *Id.* art. 11, 993 U.N.T.S. at 7.

v. Burma Sanctions

Like Haiti, but unlike Iraq and South Africa, Burma's economy and public infrastructure on the eve of sanctions, were already in ruins.²⁶⁴ As noted above, prior to sanctions, South Africa had a dynamic economy on which other countries in the region depended—though seventy-five percent of wealth was concentrated in the hands of only twenty percent of the population.²⁶⁵ Similarly, Iraq prior to sanctions "was a relatively prosperous nation with a sophisticated health and welfare system, . . . and ample food and water."²⁶⁶ In Burma, however, wealth was concentrated tightly in the hands of the ruling military regime. The regime monopolized benefits from foreign trade and investment and spent an inordinate amount of money on its military infrastructure rather than on public programs.²⁶⁷ Therefore, causation is obviously more difficult in the Burma situation concomitant with the lack of historical perspective on the sanctions—enhanced sanctions were only imposed in July 2003.²⁶⁸

As Kristof has noted, however, preliminary reports have indicated a negative effect on civilians in Burma as a result of the sanctions; for example, 400,000 layoffs (mainly among women in the textile industry).²⁶⁹ This effect implicates the right to work found in Article 6 of the ICESCR, which "includes the right of everyone to the opportunity to gain [her] living by work which [she] freely chooses," and that state parties should take steps to protect this right.²⁷⁰ Imposing economic sanctions that cost thousands of jobs is essentially the opposite of taking steps to safeguard this employment right, but instead is directly interfering with the right; in other words, a frowned upon retrogressive measure.²⁷¹

Kristof has predicted that many of these women who lost their jobs and have since resorted to prostitution will die from AIDS.²⁷² If this occurs, it would implicate Article 7(b), which calls for healthy work conditions,²⁷³ and it would also violate right to health guarantees from Article 12, including 12(2)(c), calling for specific steps to be taken with regard to "the prevention, treatment and control of epidemic, endemic, [and] occupational . . . diseases" ²⁷⁴ AIDS, a global epidemic, certainly fits the bill.

264. See *supra* note 133 and accompanying text.

265. See *supra* note 116 and accompanying text.

266. Simons, *supra* note 118, at 107.

267. See *supra* note 135 and accompanying text.

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

269. See *supra* notes 172-75 and accompanying text.

270. ICESCR, *supra* note 19, art. 6, 993 U.N.T.S. at 6.

271. See *supra* note 57 (discussing the prohibition against retrogressive measures).

272. See *supra* note 173 and accompanying text.

273. See ICESCR, *supra* note 19, art. 7(b), 993 U.N.T.S. at 6.

274. See *id.* art. 12(2)(c), 993 U.N.T.S. at 8.

b. *Sanctions Contribute to Disrespect for ESC Rights at Home and Abroad*

Unlike the ICCPR that requires state parties to ensure rights specifically within their own territories or subject to their sovereignty,²⁷⁵ the ICESCR requires state parties to take steps “individually and through international assistance and co-operation” to ensure fulfillment of the relevant rights.²⁷⁶ Unfortunately, the frequent imposition of economic sanctions that thwart ESC rights in other countries weakens this language by building customary law to the contrary.²⁷⁷ Therefore, rather than fostering the norm that countries should cooperate with other countries to aid fulfillment of ICESCR obligations, the frequent imposition of economic sanctions reinforces the idea that states not only do not have to take steps domestically to assist these rights, but also can jeopardize these rights in other countries with no repercussions.

Part III.B recommends a two-pronged course of action for creating economic sanctions that no longer hinder the development of ESC rights.

B. *Putting Economic, Social, and Cultural Rights in U.S. Sanctions Policy*

It is time for the United States to send a message to the world that civilized nations should not contribute to poverty, hunger, and poor health conditions through economic sanctions. To do so, the United States must take the following course of action: (1) It must only employ narrowly targeted smart sanctions, thus affirming the idea that ESC rights cannot be subjugated to civil and political goals; and (2) The United States must articulate its sanctions policies using ESC-rights language in order to give credence to ESC rights. Such measures will nurture the development of ESC rights into CIL and help garner respect for the notion that countries are obligated to respect these rights both domestically and extraterritorially.

275. See ICCPR, *supra* note 19, art. 2(1), 999 U.N.T.S. at 173.

276. ICESCR, *supra* note 19, art. 2(1), 993 U.N.T.S. at 5.

277. See *supra* Part II.A (discussing the effects of economic sanctions on civilians); Part III.A.2.a (explaining that these negative effects implicate mainly ESC rights).

1. Only Impose Smart Sanctions

First, the United States should only impose smart sanctions.²⁷⁸ Smart sanctions are narrowly tailored to minimize civilian suffering through measures such as visa denials and the freezing of assets.²⁷⁹ This will prevent or at least minimize violations of ESC rights in target countries.²⁸⁰ The United States should formalize this foreign policy decision by articulating it clearly in legislation authorizing sanctions. In this way, the United States will contribute to state practice that pays homage to, and consequently strengthens, ESC rights.

The United States should not be averse to recognizing ESC rights in this manner because it would be acknowledging more U.S.-centric negative elements of ESC rights. The United States would be condemning the imposition of sanctions (a state action) that harms ESC rights. This allows the United States to skirt sticky issues surrounding positive aspects of ESC rights.²⁸¹

2. Impose Sanctions for Violations of ESC Rights

Second, the United States should include ESC rights as official reasons for implementing sanctions. This would simply entail adding language that acknowledges ESC rights violations are also occurring in the target state, and thus, the United States is imposing sanctions to protect these rights in addition to the usual civil and political goals.

If the United States finds the entitlement aspects of ESC rights completely distasteful,²⁸² it can simply choose to cite more negative aspects of ESC rights in its sanctions policies.²⁸³ Obviously, it would be preferable to build full-fledged respect for comprehensive ESC

278. Cf. Fausey, *supra* note 101, at 197 (arguing U.N. sanctions should target "those controlling the behavior of the nation," and therefore "most likely meant to be influenced by [sanctions]" (internal quotations omitted)); Richard N. Haass, *Conclusion: Lessons and Recommendations, in Economic Sanctions and American Diplomacy, supra* note 12, at 197, 207 (recommending that sanctions "should focus to the extent possible on those responsible for the offending behavior").

279. See *supra* notes 104-06 and accompanying text.

280. This recommendation is particularly pertinent in light of the many sanctions studies that conclude sanctions are rarely effective in achieving their goals. See Daoudi & Dajani, *supra* note 143, at 168 (considering the consensus regarding the ineffectiveness of sanctions); 1 Hufbauer et al., *supra* note 93, at 12 ("Sanctions often do not succeed in changing the behavior of foreign countries."). How can we justify a blunt tool like general economic sanctions when such sanctions usually do not even work? See Damrosch, *Collective Enforcement, supra* note 106, at 74 ("The overwhelming impression remains that internationally sponsored sanctions have had the perverse effects of enriching the targeted elites, while simultaneously causing ever greater impoverishment of civilian populations.").

281. See *supra* notes 52-62 (discussing difficulties in assessing positive rights violations and gauging whether a state party is doing enough to progressively realize ESC rights).

282. See *supra* Part I.B (discussing U.S. aversion to ESC rights).

283. See *supra* notes 55-57 and accompanying text.

rights, but nurturing the negative analogues of ESC rights would be a step in the right direction.

The following cases illustrate the type of ESC rights that could have been included in U.S. sanctions regimes. The list of possible ESC rights for each case is by no means exhaustive but serves to provide a brief taste of how ESC rights can be included in sanctions legislation.

a. *Poland*

Though not mentioned as an official impetus for economic sanctions, ESC rights violations were also occurring in Poland that could have been listed by the United States in its sanctions policy. Poland had outlawed the Solidarity labor union,²⁸⁴ and according to ICESCR, Article 8(1)(a), everyone has the right “to form trade unions and join the trade union of his choice”²⁸⁵ If the United States addressed such a violation in its sanctions legislation, it would be condemning a government action—Poland outlawed a labor union—rather than an entitlement ESC right.

Also, Poland, in general, was not able to meet the “economic needs” of its people.²⁸⁶ This could encompass numerous provisions of the ICESCR. Article 6, for example, requires state parties to ensure the right to work, remuneration, fair wages, and workers’ ability to “a decent living for themselves and their families.”²⁸⁷ Realistically, the United States would be less apt to address this pure entitlement right where it was Poland’s failure to act rather than a specific incompatible commission at issue.

b. *South Africa*

As was the case in Poland, the United States could have cited violations of ESC rights as a reason for imposing sanctions on South Africa. Notably, the discriminatory practices of Apartheid affected work, culture, education, and health.²⁸⁸ All are within the scope of the ICESCR,²⁸⁹ which contains a general provision identical to ICCPR Article 2(1)²⁹⁰ that prohibits discrimination.²⁹¹ Discrimination with regard to ESC rights is an incompatible state commission (a violation of a negative right), rather than a step states are required to

284. See *supra* note 111 and accompanying text.

285. ICESCR, *supra* note 19, art. 8(1)(a), 993 U.N.T.S. at 6.

286. See *supra* note 112 and accompanying text.

287. ICESCR, *supra* note 19, art. 6, 993 U.N.T.S. at 6.

288. See *supra* note 115 and accompanying text.

289. See ICESCR, *supra* note 19, art. 6, 993 U.N.T.S. at 6 (recognizing the right to work); *id.* art. 15(a), at 9 (recognizing the right to take part in cultural life); *id.* art. 12, 993 U.N.T.S. at 8 (recognizing the right to health).

290. ICCPR, *supra* note 19, art. 2(1), 999 U.N.T.S. at 173.

291. ICESCR, *supra* note 19, art. 2(2), 993 U.N.T.S. at 5.

progressively achieve (a violation of a positive right).²⁹² Therefore, this is another example of a negative ESC right that the United States would be more prone to accept in its sanctions policy.

c. Iraq

According to Eric Hoskins in his assessment of pre-sanctions Iraq:

Iraq's investment in its own economic and social development had a visible effect on the living conditions and health status of the civilian population. Iraq's medical facilities and public health system were well developed By 1990, nearly all urban dwellers and 72 percent of rural residents had access to clean water, while 93 percent of Iraqis had access to health services.²⁹³

However, even though Iraq, in general, may have been providing adequate health care, chemical warfare against the Kurds²⁹⁴ violated health rights guaranteed by Article 12.²⁹⁵ In addition, the ICESCR encompasses a wider range of rights than health and access to clean water.²⁹⁶ Thus, it would probably be a short search to find possible ESC rights violations, which the United States could have mentioned in its sanctions legislation. The gassing of the Kurds, for example, could also violate Article 15(1)(a), which recognizes the right of everyone to "take part in cultural life."²⁹⁷ Warfare singled out a cultural group and thus, arguably, denied members of the group their right to take part in cultural life. The sanctions might also have utilized Article 2(2) prohibiting discrimination with regard to ESC rights.²⁹⁸ Here again, the gassing of the Kurds is a state commission incompatible with ESC rights, which would place the United States in the safe territory of more negative ESC rights.²⁹⁹

292. For a discussion of the distinction between negative and positive rights, see *supra* notes 52-57 and accompanying text.

293. Hoskins, *supra* note 123, at 92.

294. See *supra* note 121 and accompanying text.

295. See ICESCR, *supra* note 19, art. 12, 993 U.N.T.S. at 8.

296. See *supra* Part I.A.2 (describing some of the main rights included in the ICESCR).

297. ICESCR, *supra* note 19, art. 15(1)(a), 993 U.N.T.S. at 9.

298. *Id.* art. 2(2), 993 U.N.T.S. at 5.

299. The gassing of the Kurds could also implicate Article 27 of the ICCPR: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right . . . to enjoy their own culture, to profess and practice their own religion, or to use their own language." ICCPR, *supra* note 19, art. 27, 999 U.N.T.S. at 179. Gassing the Kurds, an ethnic minority in Iraq, quashes their ability to enjoy these rights.

d. *Haiti*

There were ESC human rights violations occurring in Haiti as well.³⁰⁰ “The disruption in personal and professional activities”³⁰¹ mentioned by Zaidi violated ESC rights by impeding the right to work³⁰² and the right to take part in cultural life.³⁰³ Here again, the violations invoke negative aspects of ESC rights.

And because Haiti is one of the most impoverished countries in the western hemisphere,³⁰⁴ violations of ICESCR Article 11, which recognizes the right to an adequate standard of living and the right to be free from hunger,³⁰⁵ could also have been mentioned by the United States in its sanctions legislation. However, because such violations require recognition of entitlement aspects of ESC rights—Haiti’s failure to *provide* food for its citizens—recommending the United States include this in its sanctions policy is a bit unrealistic.

e. *Burma*

The U.S. sanctions legislation’s list of human rights violations occurring in Burma is by no means extensive. Myriad other human rights violations have occurred there,³⁰⁶ some of which implicate ESC rights. Although the drafters overlooked many ESC rights, the Burma sanctions do give minimal credence to ESC rights by focusing on labor rights and child soldiers³⁰⁷—rights areas that cut across both covenants. ICCPR Article 8 prohibits slave and forced labor,³⁰⁸ and ICESCR Article 7 calls upon states to ensure decent working conditions and remuneration.³⁰⁹

The language used by the United States in its sanctions policy categorizes labor rights more under the lens of negative rights by condemning the Burmese government’s actions against its people rather than calling upon it to ensure better working conditions.³¹⁰ Similarly, with regard to child soldiers, the U.S. sanctions color the violations as negative rights by criticizing the Burmese government’s conscription of children rather than its failure to take measures to protect children.³¹¹ Therefore, the Burma sanctions, at least in this regard, provide a good example of how the United States could

300. *See supra* note 126 and accompanying text.

301. *See Zaidi, supra* note 126.

302. ICESCR, *supra* note 19, art. 6, 993 U.N.T.S. at 6.

303. *Id.* art. 15(1)(a), 993 U.N.T.S. at 9.

304. *See supra* note 124 and accompanying text.

305. ICESCR, *supra* note 19, art. 11, 993 U.N.T.S. at 7.

306. *See supra* notes 133-35 and accompanying text.

307. *See supra* notes 133-35 and accompanying text.

308. ICCPR, *supra* note 19, art. 8, 999 U.N.T.S. at 175.

309. ICESCR, *supra* note 19, art. 7, 993 U.N.T.S. at 6.

310. *See supra* notes 129-32 and accompanying text.

311. *See supra* notes 129-32 and accompanying text.

acknowledge ESC rights and remain within the safe territory of negative rights. Ideally, the United States could find a way to go further with ESC rights and recognize some positive aspects that seem particularly reasonable. For example, it could color the use of child soldiers as a failure to take "[s]pecial measures . . . on behalf of all children." to protect them "from economic and social exploitation" as required by the ICESCR.³¹²

CONCLUSION

Economic sanctions have caused suffering in Poland,³¹³ South Africa,³¹⁴ Iraq,³¹⁵ Haiti,³¹⁶ and Burma³¹⁷ in ways that disproportionately implicate ESC rights.³¹⁸ Because these sanctions serve as state practice, which builds international human rights norms, imposing them in this fashion undermines ESC rights and retards their growth into widely recognized and easy-to-enforce human rights. To rectify this, the United States must design sanctions policies that acknowledge the importance of ESC rights and minimize human suffering.

Ideally, the United States should ratify the ICESCR. But this is not very realistic unless we can resurrect Roosevelt and revitalize his visionary second bill of rights.³¹⁹ Therefore, the recommendations made in this Note represent a less overt way for the United States to recognize the importance of ESC rights while continuing to utilize a favored tool of U.S. foreign policy. Everybody wins—the United States can still fight human rights abuses with economic sanctions, the population-at-large of the target country can receive relief from human rights abuses, and ESC rights will no longer suffer in the shadow of civil and political rights.

312. ICESCR, *supra* note 19, art. 10, 993 U.N.T.S. at 7.

313. *See supra* Part II.A.1.

314. *See supra* Part II.A.2.

315. *See supra* Part II.A.3.

316. *See supra* Part II.A.4.

317. *See supra* Part II.A.5.

318. *See supra* Part III.A.2.

319. *See supra* note 68 and accompanying text.

Notes & Observations