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Human Rights Legislation and U.S. Foreign Policy

David Weissbrodt
University of Minnesota Law School, weiss001@umn.edu

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*David Weissbrodt**

INTRODUCTION

Several weeks before his election President Carter sketched some of his intentions for the conduct of foreign policy:

> I do not say that we can remake the world in our own image. I recognize the limits on our power, and I do not wish to see us swing from one extreme of cynical manipulation to the other extreme of moralistic zeal, which can be just as dangerous. But the present administration has been so obsessed with balance of power politics that it has often ignored basic American values and a proper concern for human rights. The leaders of this administration have rationalized that there is little room for morality in foreign affairs, and that we must put self-interest above principle. I disagree strongly.
>
> Ours is a great and powerful nation, committed to certain enduring ideals, and those ideals must be reflected in our foreign policy. There are practical, effective ways in which our power can be used to alleviate human suffering around the world. We should begin by having it understood that if any nation, whatever its political system, deprives its people of basic human rights, that fact will help shape our people's attitude toward that nation's government. If other nations want our friendship and support, they must understand that we want to see basic human rights respected.[1]

Was this statement campaign rhetoric? Of course. But President Carter has repeated these thoughts often enough before the election[2]

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* Associate Professor of Law, University of Minnesota; A.B., Columbia,1966; J.D., University of California (Berkeley), 1969.

[1] Address by Jimmy Carter, B'nai B'rith Convention (Sept. 8, 1976) (paragraphing omitted).

[2] *See, e.g.*, Address by Jimmy Carter, Chicago Council on Foreign Relations (Mar. 15, 1976): "[I]t must be the responsibility of the President to restore the moral authority of this country in its conduct of foreign policy . . . . Policies that strengthen dictators or create refugees, policies that prolong suffering or postpone racial justice weaken that authority. Policies that encourage economic progress and social justice promote it." Address by Jimmy Carter, Foreign Policy Association-New York City (June 23, 1976):

> We and our allies, in a creative partnership, can take the lead in establishing and promoting basic global standards of human rights. We respect the independence of all nations, but by our example, by our utterances, and by the various forms of

and afterwards,[3] so as to indicate more than a speech writer's turn of phrase. In fact, Carter's human rights campaign has substantially shifted the apparent direction of United States foreign policy.[4]

Part I of this article sets forth the historical precedents for the new United States human rights activities.[5] Part II then outlines the human rights legislation which mandates and shapes the United States human rights efforts.[6] Part III suggests a tentative approach for pursuing the fundamental mandate of the human rights legislation to make internationally recognized human rights a central focus of United States foreign policy.[7]

I. HISTORICAL BACKGROUND

The historical basis for the present human rights concern of the United States Government comes from the late 18th century into the early 20th century, when the United States regularly spoke out in favor of at least two basic rights closely associated with the American national experience — the right of self-government and the right to freedom of religion.[8]

As early as 1872 the United States joined with European powers in calling upon the Romanian Government to cease its mistreat-

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economic and political persuasion available to us, we can quite surely lessen the injustice in this world. We must certainly try.

Address by Jimmy Carter, Center for Civil Rights and the Law School of the University of Notre Dame (Oct. 10, 1976):

> We should not insist on identical governments in all nations of the world . . . but we cannot look away when a government tortures its own people or jails them for their beliefs, or denies minorities fair treatment or the right to emigrate or the right to worship. . . . We ought to speak out forcefully whenever there is human torture in the world.

[3] *See, e.g.*, Address by President Carter, United Nations, *reprinted in* N.Y. Times, Mar. 18, 1977, at 10, col. 1; Walsh, *Carter Stresses Arms and Rights in Policy Speech*, Wash. Post, Mar. 18, 1977, § A, at 1, col. 5; Gwertzman, *Carter Urges U.N. to Step up Efforts for Human Rights*, N.Y. Times, Mar. 18, 1977, at 1, col. 6; *Transcript of the President's News Conference on Foreign and Domestic Matters*, N.Y. Times, Mar. 10, 1977, at 26, col. 1; N.Y. Times, Mar. 8, 1977, at 3, col. 1; Hovey, *Carter Denies U.S. Singles Out Soviet in Rights Protest*, N.Y. Times, Feb. 24, 1977, at 1, col. 6; Teltsch, *U.S. Seeks Changes in U.N.'s Handling of Rights Abuses*, N.Y. Times, Feb. 10, 1977, at 6, col. 1; Inaugural Address by President Carter, Jan. 20, 1977, *reprinted in* 123 CONG. REC. S1131 (daily ed. Jan. 20, 1977).

[4] *See* text *infra* at notes 151-57.

[5] *See* text and notes 8-35 *infra*.

[6] *See* text and notes 36-150 *infra*.

[7] *See* text and notes 151-79 *infra*.

[8] DEP'T STATE, *United States Policy in the Promotion of Human Rights Abroad* 1-2, 6 (unpublished memorandum 1976) [hereinafter cited as *United States Policy in the Promotion of Human Rights Abroad*].

ment of Jews.[9] In 1880 the American minister to Russia informed the foreign minister of that country that the United States "took a great interest in the amelioration of the condition of [Jews] in other countries" and that it hoped for a liberalization of Russian laws in this regard.[10] Following the Russian pogrom of 1903, President Theodore Roosevelt and Secretary of State Hay made public statements about the mistreatment of Jews is Russia.[11] Similarly, the United States Congress adopted a joint resolution in 1906 which stated that the people of the United States were "horrified" by reports of the massacre of Russian Jews.[12]

Just prior to World War I the United States Government attempted through diplomatic means to halt the killing by the Turks of some 200,000 Armenians.[13] And as early as 1935 the Ambassador to Germany publicly and pointedly emphasized the need to respect human rights in that country.[14] It was the horrors of that era that

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[9] In early February 1872 "on the occurrence of the recent outrages," the United States Consul in Bucharest addressed a note of "remonstrance" to the Romanian Government regarding its failure to protect religious liberties of Jews in Moldavia and Wallachia. On April 18, 1872, the U.S. joined with the six European powers in a collective note characterizing the violence against the Jews "as unworthy of a civilized country." [1872] H.R. EXEC. DOC. No. 318, 42d Cong., 2d Sess. 1 (1872).

[10] *United States Policy in the Promotion of Human Rights Abroad, supra* note 8, at 7. In September 1880 the United States Consul in St. Petersburg delivered a vigorous protest to the Russian Foreign Minister regarding the expulsion of Jews from Russian cities. In particular, the United States objected to the expulsion of an American Jew, Henry Pinkos, "in the presence of the fact that [Pinkos] has been ordered to leave Russia on no other ground than that he is the professor of a particular creed or the holder of certain religious views." Letter from the U.S. legation in St. Petersburg to the Russian Foreign Minister, [1880] Foreign Rel. U.S. 873-82 (1880).

[11] *United States Policy in the Promotion of Human Rights Abroad, supra* note 8, at 7-8; *see* [1903] FOREIGN REL. U.S. 713 (1904).

[12] Pub. Res. No. 36 of June 26, 1906, 34 Stat. 835.

[13] *See* L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 181-94 (1973). [hereinafter cited as SOHN & BUERGENTHAL]. Diplomatic representations concerning treatment of the Armenians began in the late 19th century and continued until the entry of the United States into World War I in 1917. *See, e.g.,* [1906] FOREIGN REL. U.S. 1417-19 (1909); [1915] *id.* at 981-90 (Supp. 1928); [1916] *id.* at 847-57 (Supp. 1929).

[14] Ambassador William Dodd suggested a United States protest regarding discrimination against American Jews recognizing that the German Government was "still very sensitive to foreign criticism." [1935] 2 FOREIGN REL. U.S. 410-12 (1952). In 1938 Secretary of State Cordell Hull directed Ambassador Hugh Wilson to enter an "emphatic protest" against the application to American citizens of a German decree which required all Jews, including foreign nationals, to declare assets located in Germany. [1938] 2 FOREIGN REL. U.S. 369-70 (1955). In response to "wholesale arrests, plundering, pillaging and terrorizing of innocent and helpless men and women throughout Germany," Ambassador Wilson was ordered to return to the U.S. *Id.* at 396-98. *See also United States Policy in the Promotion of Human Rights Abroad, supra* note 8, at 9.

firmed the resolve of this nation and others to establish human rights principles so that another such holocaust would never again occur.[15]

With the advent of the Cold War, however, the United States concern for human rights became more selective.[16] The Government protested vigorously against violations of human rights by Communist governments which seized and maintained power in Eastern Europe,[17] North Korea,[18] Tibet,[19] and Cuba.[20] But the Government fell strangely silent about massacres and other grave human rights

[15] Accordingly, human rights were significantly mentioned in: Roosevelt's Four Freedoms speech of 1941, *reprinted in* 87 CONG. REC. 44, 46-47 (1941); The Atlantic Charter, 55 Stat. 1603 (1942); The Yalta Declaration of Liberated Europe, [1945] FOREIGN REL. U.S. CONFERENCES AT MALTA AND YALTA 968 (1955); the peace treaties with the defeated powers, *see, e.g.*, Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490, *entered into force* Apr. 28, 1952; Convention in Relations Between the Three Powers and the Federal Republic of Germany, 6 U.S.T. 5599, T.I.A.S. No. 3425, *entered into force* Oct. 23, 1954; the North Atlantic Treaty of 1949, Apr. 4, 1949, 63 Stat. 2241 (1950), T.I.A.S. No. 1964, *entered into force* Aug. 24, 1949. The United States was instrumental in establishing respect for human rights as a central obligation of the U.N. Charter, 59 Stat. 1031 (1945), 16 U.S.T. 1134, T.I.A.S. No. 5857; U.N. CHARTER, preamble, arts. 55, 56, and in further defining these duties in 1948 by the U.N. General Assembly adoption of the Universal Declaration of Human Rights. *See International Protection of Human Rights Hearings, infra* note 16, at 337. *See also* Henkin, *The United States and the Crises in Human Rights*, 14 VA. J. INT'L L. 653, 654 (1974). Still further definition was supplied by the O.A.S. acceptance of the American Declaration of the Rights and Duties of Man (Res. XXX), adopted by the Ninth International Conference of American States, Bogota, Colombia, Mar. 30 - May 2, 1948. PAN AMERICAN UNION, FINAL ACT OF THE NINTH CONFERENCE OF AMERICAN STATES 38-45 (Washington, D.C., 1948).

[16] *See generally, International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on International Organizations and Movements of the Howe Comm. on Foreign Relations*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *International Protection of Human Rights Hearings*]. *See also* Salzberg & Young, *The Parliamentary Role in Implementing International Human Rights: A U.S. Example*, 12 TEX. INT'L L.J. 251 (1977).

[17] *See, e.g., Concern over violation of Civil Liberties in Bulgaria*, 16 DEP'T STATE BULL. 1218 (1947); United States, France, and the United Kingdom condemn the Soviet takeover in Czechoslovakia, 18 *id.* at 304 (1948); U.S. objection to trials of Bulgarians opposed to Communism, 19 *id.* at 710 (1948); statement by Secretary of State Acheson, 20 *id.* at 611 (1949); note of protest regarding "ruthless measures" taken by the Hungarian Government, 25 *id.* at 94 (1951). *See generally* Stone, *American Support of Free Elections in Eastern Europe*, 17 *id.* at 407 (1947); *Soviet Violations of Treaty Obligations*, 18 *id.* at 738 (1948); diplomatic correspondence to Bulgaria, Hungary, and Romania, 20 *id.* at 755 (1949).

[18] *See, e.g.*, statement by Secretary of State Dulles, 19 DEP'T STATE BULL. 758 (1948).

[19] *See, e.g.*, statement by Acting Secretary of State Herter, 40 DEP'T STATE BULL. 514-15 (1959). *See also United Nations Resolution on Tibet*, 10 INT'L COMM'N OF JURISTS BULL. 37-40 (1960).

[20] *See, e.g.*, U.S. protest regarding trials of U.S. citizens in Cuba, 43 DEP'T STATE BULL. 814 (1960); U.S. and Soviet Union messages regarding events in Cuba, 44 *id.* at 661-67 (1961).

violations in Algeria (1958),[21] South Africa (1960),[22] Indonesia (1965),[23] Burundi (1971),[24] East Pakistan (1971),[25] and the Sudan (1971).[26] Finally, in pursuit of his policies of detente, Secretary Kis-

[21] *See* policy statement regarding Algeria by Secretary of State Dulles, 37 DEP'T STATE BULL. 14 (1957); statement by U.N. Ambassador Lodge, 36 *id.* at 421 (1957). *See generally France and the Rule of Law in Algeria*, 7 INT'L COMM'N OF JURISTS BULL. 14-20 (1957); *The Algerian Conflict and the Rule of Law*, 11 *id.* at 5-20 (1960).

[22] *See* statement by U.N. Ambassador Lodge, 42 DEP'T STATE BULL. 668-69 (1960); SOHN & BUERGENTHAL, *supra* note 13, at 672-89.

[23] *See* Joint Communique issued following the visit of Ambassador Bunker to Indonesia, 52 DEP'T STATE BULL. 654-55 (1965); statements by Secretary of State Rusk, 52 *id.* at 447 (1965), 54 *id.* at 923 (1966).

[24] *International Protection of Human Rights Hearings*, *supra* note 16, at 65-70, 974-81.

[25] *Id.* at 421-32, 913-29.

[26] *See* 67 DEP'T STATE BULL. 191, 194 (1972). Despite these noticeable lapses in its concern for human rights, however, the government continued to promote self-determination for colonial peoples (except in Algeria, Bangladesh, and the formerly Portuguese areas of Southern Africa) and to assist in the formulation of international human rights standards by participating in the drafting of a number of important international human rights instruments. *See generally* Sohn, *A Short History of United Nations Documents on Human Rights* in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 39, 43-56 (1968). Among the most important of these documents were the following:

a) International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, *entered into force* Mar. 23, 1976; G.A. Res. 2200, U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1967);

b) International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, *entered into force* Jan. 3, 1976; G.A. Res. 2200, U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1967);

c) International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, *entered into force* Jan. 4, 1969, G.A. Res. 2106, U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6014 (1966), 660 U.N. T.S. 195. *See* N. NATHANSON & E. SCHWELB, THE UNITED STATES AND THE UNITED NATIONS TREATY ON RACIAL DISCRIMINATION 2-4 (1975);

d) American Convention on Human Rights, *opened for signature* Nov. 22, 1969, OASOR, OEA/Ser. K/XVI/I.1, Doc. 65, Rev. 1, Corr. 2 (1970), *reprinted in* 65 AM. J. INT'L L. 679 (1971).

e) Convention Concerning the Abolition of Forced Labor, *adopted* by the General Conference of the International Labor Organization at its Fortieth Session, June 25, 1957, *entered into force* Jan. 17, 1959, 320 U.N.T.S. 292. *But see* Schmidhouser & Berg, *The American Bar Association and the Human Rights Conventions: The Political Significance of Private Professional Associations*, 38 SOCIAL RESEARCH 362 (1971).

Despite participation in the initial formulation of major U.N. human rights instruments, this country found itself unable to ratify these same instruments due largely to congressional opposition during the early 1950's. Several members of the Congress, including most prominently Senator Bricker, became fearful that the Genocide Convention and the various U.N. treaty drafts which later became the bases for the International Convention on Civil and Political Rights and the International Convention for the Elimination of all Forms of Racial Discrimination might establish a basis for international scrutiny of domestic human rights practices, particularly the practice of racial discrimination, and might infringe on perogatives of the states in the United States federal system. *See* remarks by Senator Bricker, 98 CONG. REC. 907-14 (1952); *see also Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of*

the Senate Comm. on the Judiciary, 83d Cong., 1st Sess. 10-11 (1953) (Bricker attack on the International Covenants); Bricker & Webb, *The Bricker Amendment—Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME LAW. 529 (1954). As a result of these concerns, a series of proposals known popularly as the Bricker Amendment were introduced to amend the United States Constitution so as to restrict the government from entering into international agreements which might infringe on the powers of the states or which might be applicable domestically in courts without implementing legislation. The various versions of the Bricker Amendment are reproduced in 12 REC. N. Y. CITY B. A. 320, 343-46 (1957).

An amended version of the Bricker Amendment failed by only one vote to pass the Senate in 1954. 100 CONG. REC. 2251 (Feb. 26, 1954). To secure the defeat of the Amendments Secretary of State Dulles was forced to make a commitment that this country did "not intend to become a party to any such covenant [on human rights] or present it as a treaty for consideration by the Senate." *See Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. 825 (1953). Dulles also indicated that the United States would not sign the Convention on the Political Rights of Women, nor would the Eisenhower Administration seek ratification of the Genocide Convention. Schmidhauser & Berg, *The American Bar Association and the Human Rights Conventions*, 38 SOCIAL RESEARCH 362 (1971). *See also* Buergenthal, *International Human Rights: U.S. Policy and Priorities*, 14 VA. J. INT'L L. 611, 613 (1974).

The Kennedy Administration attempted to relax the 1953 Dulles Doctrine, submitting three minor human rights conventions to the Senate for approval. However, only one of these instruments, the Supplementary Slavery Convention, was eventually acceded to by the United States. *See International Protection of Human Rights Hearings, supra* note 16, at 266; 113 CONG. REC. 15750-51 (1967); *see generally, Hearings on Human Rights Conventions Before a Subcomm. of the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. 40 (1967). The two major covenants on Human Rights and the Racial Discrimination Convention were never even submitted to the Senate for consideration.

With the enactment of civil rights legislation, the announcement of court decisions to eradicate some of the worst injustices of racial discrimination, the related decrease in interest about States rights, and the increasing interest in international human rights, the climate for ratification of these multilateral treaties has considerably improved. In 1974, the report of Rep. Donald Fraser's Subcommittee on International Organizations and Movements listed 29 human rights conventions which the United States had not ratified and recommended immediate ratification. *Human Rights in the World Community: A Call for U.S. Leadership, Report of the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 2d Sess. 21, 24 (1974). In 1976 further inroads into the Dulles Doctrine have finally been made. In January 1976, the Senate ratified the *Inter-American Convention on Granting of Political Rights to Women* and the *U.N. Convention on the Political Rights of Women*, 122 CONG. REC. S356-57 (daily ed. Jan. 22, 1976). The Convention on the Prevention and Punishment of the Crime of Genocide may be nearing Senate ratification now that the American Bar Association has reversed its long-standing opposition to the treaty. *See* Comment, *The United States and the 1948 Genocide Convention*, 16 HARV. INT'L L. J. 683 (1975). While campaigning for the Presidency, Carter pledged:

> Insofar as they comply with our own Constitution and laws, we should move toward Senate ratification of several important treaties drafted in the United Nations for the protection of human rights. These include the Genocide Convention that was prepared more than 25 years ago, the Convention against racial discrimination that was signed during the Johnson Administration, and the covenants on political and civil rights, and on economic and social rights. Until we ratify these covenants we cannot participate with other nations in international discussions of specific cases involving freedom and human rights.

Address by Jimmy Carter, B'nai B'rith Convention, note 1 *supra*.

And, in a speech before the United Nations, President Carter again promised:

singer began even to desist from discussing human rights problems in Communist countries.[27]

> I will seek Congressional approval and sign the U.N. covenants on economic, social and cultural rights. And I will work closely with our Congress in seeking to support the ratification of not only these two instruments, but the United Nations Genocide Convention and the Treaty for the Elimination of All Forms of Racial Discrimination as well.

Address by President Carter, United Nations, note 3 *supra*.

Ratification by the United States would significantly contribute to United Nations efforts to implement human rights. By ratifying the Racial Discrimination Convention and the two International Covenants on Human Rights, the United States would obtain a voice in the interpretation and enforcement of those instruments so as to make them more effective in insuring human rights around the world. Also, those international instruments will have an impact on the interpretation of sections 116 and 502B of the Foreign Assistance Act.

[27] Secretary Kissinger mentioned human rights particularly during his last year, but his rhetoric may not have been translated into his policies. *See, e.g.*, Address by Secretary Kissinger, Synagogue Council of America, Nov. 15, 1976, 75 DEP'T STATE BULL. 600, in which Secretary Kissinger listed among the three great challenges confronting the United States the defense of the "rights and dignity of man." He did, however, suggest that human rights concerns must remain secondary to United States interests in maintaining peace and world order. *See, e.g.*, remarks quoted in 69 DEP'T STATE BULL. 529 (1973):

> We shall never condone the suppression of fundamental liberties. We shall urge humane principles and use our influence to promote justice. But the issues come down to the limits of such efforts. How hard can we press without provoking the Soviet leadership into returning to practices in its foreign policy that increase international tensions? Are we ready to face the crises and increased defense budgets that a return to cold war conditions would spawn?

See also Kissinger's response to a question posed during an interview on *Face the Nation* in October, 1976:

> In foreign policy, the United States has two objectives — at least two objectives. One is to maintain our security and the security of our allies. The second one is to live in a world which is compatible with our values. Both of these objectives are important. We therefore, wherever we possibly can, try to encourage political forces that represent humane values and the democratic values for which we stand . . . . At the same time, there are certain security requirements. And you cannot implement your values unless you survive.

75 STATE DEP'T BULL. 607-08 (1976).

Where security and human rights interests were in conflict, Kissinger suggested that a very inclusive view of the security interest must always predominate. Thus, for example, in allocating foreign aid Kissinger believed the United States should be willing to overlook human rights violations in situations where continued good relations with a country advanced world peace:

> It is our obligation as the world's leading democracy to dedicate ourselves to assuring freedom for the human spirit. But responsibility compels also a recognition of our limits. Our alliances . . . serve the cause of peace by strengthening regional and world security. If well conceived, they are not favors to others but a recognition of common interest. They should be withdrawn when those interests change; they should not, as a general rule, be used as levers to extort a standard of conduct or to punish acts with which we do not agree.

75 DEP'T STATE BULL. 603 (1976).

Since Congress believed that the State Department was unwilling actively to pursue human rights objectives, the Congress saw an opportunity to make human rights a focus for a larger congressional role in United States foreign policy-making.[28] In 1973 concern "over rampant violations of human rights and the need for a more effective response from both the United States and the world community" prompted the House Foreign Affairs Subcommittee on International Organizations to commence an extensive series of hearings.[29] These hearings chaired by Representative Donald Fraser of

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See also Kissinger's statement to the Subcommittee on Foreign Assistance of the Senate Committee on Foreign Relations in which he asserted that withdrawal of assistance "is an extreme measure that harms our other objectives while holding little promise for effecting desirable changes . . . . Moreover, such withdrawal, or even the threat of withdrawal, depreciates the strength of the mutual defense relationship which we share with our allies and offers encouragement to potential enemies." Dept. of State, *The Secretary of State,* Mar. 26, 1976, at 4. *But see,* Address by Secretary Kissinger, Upper Midwest Council on Foreign Relations, July 15, 1975, 73 DEP'T STATE BULL. 161: "We do not and will not condone repressive practices. This is not only dictated by our values but also a reflection of the reality that regimes which lack legitimacy or moral authority are inherently vulnerable. There will therefore be limits to the degree to which such regimes can be congenial partners."

Finally, Kissinger's statements regarding human rights reflect a general skepticism as to the ability of the United States to effect the policies of other governments, and a consequential rejection of bold pronouncements on human rights in favor of more subtle human rights initiatives:

> We are concerned . . . that when sensitive issues are transformed into tests of strength between governments, the impulse for national prestige will defeat the most worthy goals. We have generally opposed attempts to deal with sensitive international human rights issues through legislation, not because of the moral view expressed, which we share, but because legislation is almost always too inflexible, too public, and too heavyhanded a means to accomplish what it seeks.

75 DEP'T STATE BULL. 603 (1976).

[28] Members of the Congress were dissatisfied with the Republican Administration's attitude towards foreign affairs. *See, e.g.,* statements by Senators Clark, Kennedy, Abourezk and Cranston in 122 CONG. REC. S16968 (daily ed. Sept. 29, 1976). The role of human rights in United States foreign policy was, however, only a small part of the more general conflict between Congress and the previous Administration as to the leadership of this country. *See, e.g.,* statements by members of Congress reacting to President Nixon's impoundment of funds, 117 *id.* 8567 (1971) (remarks of Senator Ervin); *id.* at 12085 (remarks of Congressman O'Neill); 122 *id.* S12538 (daily ed. July 27, 1976) (remarks of Senator Humphrey concerning the Congress and Foreign Policy).

[29] *Human Rights in the World Community: A Call for U.S. Leadership: Report of the Subcomm. on International Organizations and Movement of the House Comm. on Foreign Affairs,* 93d Cong., 2d Sess. 1 (1974) [hereinafter cited as *Fraser Subcommittee Report*]. During the 94th Congress, the Fraser Subcommittee conducted a total of 40 hearings relating to human rights problems in 18 different countries: Chile, South Korea, the Philippines, the Soviet Union, South Africa (Namibia), Rhodesia, Paraguay, Indonesia, Iran, Cuba, Haiti, North Korea, Guatemala, Nicaragua, Uruguay, El Salvador, Argentina, and India. *See* 122 CONG. REC. E5440 (daily ed. Oct. 1, 1976) (remarks by Rep. Fraser). In addition, during the

Minnesota and the resulting Subcommittee reports have heralded a new era in United States foreign policy in regard to human rights.[30]

At the conclusion of its first round of hearings, the Subcommittee in 1974 issued a brief 54-page report entitled "Human Rights and the World Community: A Call for U.S. Leadership."[31] The basic conclusion of the Subcommittee was that "the human rights factor

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93d Congress, the Subcommittee investigated human rights violations in Brazil and Syria.

Since the international human rights movement lacks a completely independent and universally recognized method for reliably determining the facts as to alleged human rights violations, the Subcommittee and other congressional hearings have afforded and continue to afford an opportunity for the evidence to be aired and United States policy to be analyzed. *See International Protection of Human Rights Hearings, supra* note 16, at 3. The Fraser hearings result in more than publicity, however; congressional hearings have a significant visibility and respect. They afford an opportunity for the presentation of conflicting views and the questioning of witnesses. The hearings have required the State Department to use its considerable information gathering resources and thus sometimes to verify and to publicize human rights violations. *See, e.g., Human Rights in South Korea: Implications for U.S. Policy: Hearings before the Subcomm. on Int'l Organizations and Subcomm. on Asian and Pacific Affairs, of the House Comm. on Int'l Relations,* 93d Cong., 2d Sess. (1974) (testimony of Philip C. Habib, Assistant Secretary, Bureau of East Asian and Pacific Affairs, Dept. of State). On other occasions, the hearings have afforded a platform for State Department apologies for repressive governments. *See, e.g.,* Dep't of State News Release, Sept. 8, 1976 (statement by Alfred L. Atherton, Jr., Assistant Secretary for Near Eastern and South Asian Affairs before the Subcomm. on Int'l Organizations of the House Int'l Relations Comm. regarding human rights in Iran).

Most nations probably do not distinguish, as more sophisticated domestic observers might, between congressional hearings and the official position of the United States government. For example, when there were congressional hearings recently concerning Argentina, the Argentine government protests made it quite clear that the government of Argentina did not understand how easy it is for a single Representative to hold a congressional hearing. The Argentine response also showed the considerable sensitivity of that government to criticism. *See, e.g.,* Duiguid, *Argentine Charges U.S. "Interference,"* Wash. Post, Oct. 7, 1976, § A, at 17, col. 1; *see also* Omang, *Argentina Hires U.S. Company to Improve Image,* Wash. Post, Dec. 28, 1976, § A, at 9, col. 1; and *see generally Human Rights in Argentina, Hearings before the Subcomm. on International Organizations of the House Comm. on International Relations,* 94th Cong., 2d Sess. (1976).

In sum, these congressional hearings represent a way by which the United States government can take official notice of human rights violations and involve a certain implicit threat that Congress may use the information obtained to impose aid, trade, or other sanctions against the human rights violators. This combination of a fact-finding mechanism with the implicit threat of sanctions may have gradually made the hearings one of the most potent weapons in the human rights arsenal of the United States during a period when the Administration refused actively to pursue human rights.

[30] *See* J. Salzberg, *The Parliamentary Role in the International Protection of Human Rights: The Recent Example of the Subcommittee on International Organizations and Movements* (unpublished memorandum, Dec. 1974) [hereinafter cited as Salzberg]; *see also* note 35 *infra.*

[31] *Fraser Subcommittee Report, supra* note 29.

is not accorded the high priority it deserves in our country's foreign policy."[32] The report observed:

> [Too often human rights] becomes invisible on the vast foreign policy horizon of political, economic and military affairs . . . . Unfortunately, the prevailing attitude has led the United States into embracing governments which practice torture and unabashedly violate almost every human rights guarantee pronounced by the world community. Through foreign aid and occasional intervention — both overt and covert — the United States supports those governments.[33]

The Fraser Subcommittee report makes 29 recommendations for United States action.[34] The Congress and the State Department have accepted several of the recommendations and have thus substantively changed the direction of United States human rights policy.[35]

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[32] *Id.* at 9.

[33] *Id.*

[34] *Id.* at 3-8: *see* Salzberg, *supra* note 30, at 3-9. Although the Fraser Subcommittee recommended that the United States maintain diplomatic relations with countries that violate human rights guarantees, other nations have severed relations on human rights grounds. *See, e.g.*, Omang, *Venezuela Breaks Ties to Uruguary*, Wash. Post, July 7, 1976, § A, at 21, col. 1.

[35] The State Department has, for example, appointed a Coordinator for Humanitarian Affairs and human rights officers in each of the five regional bureaus of the Department and in the Legal Advisor's office. *See* Letter from former Deputy Secretary of State Robert Ingersoll to Rep. Thomas Morgan, chairman of the House Committee on Foreign Affairs, July 28, 1975; Dep't of State airgram, Feb. 14, 1975, U.S. State Dep't *Report to Congress on the Human Rights Situation in Countries Receiving U.S. Security Assistance*, at Tab A (1975) [hereinafter cited as *1975 State Department Report*]. James M. Wilson was appointed to the post of Coordinator for Humanitarian Affairs in August 1974. *United States Policy and Human Rights*, 14 REV. INT'L COMM'N OF JURISTS 25 (1975). *See* statement of James M. Wilson in *Hearings Before the Subcomm. on Foreign Assistance and Economic Policy of the Senate Comm. on Foreign Relations*, 94th Cong., 2d Sess. (Dec. 4, 1975).

Congress in 1976 made the position of Coordinator for Human Rights and Humanitarian Affairs a post subject to Senate confirmation. Pub. L. No. 94-329, § 301(a) (June 30, 1976); 90 Stat. 748 (1976). Mr. Wilson was never confirmed for the post. Patricia Derian was selected by the Carter Administration as Coordinator. Lereaze, *Human Rights Backlash Concerns U.S. Officials*, Wash. Post, Mar. 8, 1977, § A, at 20, col. 2. She has indicated a need for a staff larger than the two or three persons who served with Mr. Wilson. *Id.* Also, persons responsible for human rights have been designated in the operating bureaus as well as in the regional bureaus of the State Department, the Policy Planning Staff, Congressional Relations, the U.S. Mission to the United Nations, the Agency for International Development, the staff of the National Security Council, and elsewhere in the Administration. *See* Participants, Informal Interagency Meeting on Human Rights, Feb. 2, 1977. For a further discussion of the increased human rights bureaucracy in the State Department, *see* Note, *Role of Non-Governmental Organizations in Implementing Human Rights in Latin America*, 7 GA. J. INT'L & COMP. L. 477, 501 (1977).

II. THE NEW HUMAN RIGHTS LEGISLATION

The most important outgrowth of the Fraser hearings may have been human rights legislation. Congress began with a very tentative, noncoercive and limited initiative. In the Foreign Assistance Act of 1973,[36] the Congress enacted section 32 which declared the "sense of Congress that the President should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes."[37] It should be noted that this provision did not purport to address any specific country, group of countries, or any human right of particular interest to the United States, but expressed a more general human rights concern.[38]

When the initiative was largely ignored by the State Department,[39] the Foreign Assistance Act of 1974 added a new section, 502B.[40] Section 502B stated the "sense of Congress . . . that, except in extraordinary circumstances, the President shall substantially

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[36] 87 Stat. 714 (1973).

[37] § 32, 87 Stat. 714, 733 (1973).

[38] *Compare* Jackson-Vanik amendment to the Trade Act of 1974, 19 U.S.C.A. § 2432 (Supp. 1977); Export-Import Bank Amendments of 1974 (Stevenson amendment) § 8(b), 12 U.S.C.A. § 635e(b) (Supp. 1976); see text at notes 140-50 *infra;* Right to Food Resolution, H. Con. Res. 737, passed House Sept. 21, 1976, 122 CONG. REC. H10715-16; Sen. Con. Res. 138, passed the Senate Sept. 16, 1976, H. Con. Res. 726, passed by House, Sept. 20, 1976, passed by Senate, Oct. 1, 1976; *see* 122 CONG. REC. S17580 (daily ed. Oct. 1, 1976) (urging release of Russian Baptist pastor); *see also* 122 CONG. REC. H. 10548 (daily ed. Sept. 20, 1976) (consideration of H. Con. Res. 726 by the House).

[39] In April 1974 the Department cabled instructions to 68 diplomatic posts — including all countries receiving military or economic aid — calling for an assessment of section 32 of the 1973 Foreign Assistance Act on the status of the foreign aid programs in each country. *Fiscal Year 1975 Foreign Assistance Request: Hearings Before the House Comm. on Foreign Affairs,* 93d Cong., 2d Sess. 283 (1974). *See 1975 State Department Report, supra* note 35, at 2; *see generally* Salzburg, *supra* note 30, at 25. Later in 1974 all embassies were asked "to transmit the text of Section 32 to governments of [aid-recipient] countries and to explain the seriousness with which the United States regards this section." *See* letter from Deputy Secretary of State Robert Ingersoll to Rep. Thomas Morgan, Chairman of the House Comm. on Foreign Affairs, June 27, 1974, in 120 CONG. REC. H. 6688-89 (daily ed. July 17, 1974). Deputy Secretary of State Ingersoll, testifying at the 1974 foreign aid hearings, informed the committee that the reporting and review features under section 32 would be a "permanent part of the State Department's fact-finding and decision-making process with respect to all countries" — not only aid-recipient countries. *Fiscal Year 1975 Foreign Assistance Request Hearings, supra* at 286. Despite these promises, however, Congress saw no evidence that section 32 changed the State Department's policies in regard to any single country. Furthermore, the State Department did not appear to use any information collected as a result of the cables in its policy deliberations.

[40] 88 Stat. 1795 (1974).

reduce or terminate security assistance to any government which engages in a consistent pattern of gross violations of internationally recognized human rights . . . ."[41] This section gives concrete examples of "gross violations" — torture, cruel, inhuman or degrading treatment or punishment, prolonged detention without charges or other flagrant denials of life, or security of a person.[42] If assistance were furnished notwithstanding gross human rights violations, the President was required to report to Congress the extraordinary circumstances necessitating the assistance.[43] Extraordinary circumstances were not defined. Again, Congress did not take a coercive measure, either out of concern for the President's traditional preeminence in foreign affairs[44] or because of an awareness as to the difficulties of imposing human rights standards on aid-recipient countries.[45]

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[41] *Id.* § 46, 88 Stat. 1795, 1815, § 546 (1974):

> Section 502B. Human Rights. — (a) It is the sense of Congress that, except in extraordinary circumstances, the President shall substantially reduce or terminate security assistance to any government which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman or degrading treatment or punishment; prolonged detention without charges; or other flagrant denials of the right to life, liberty, and the security of the person.
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> (b) Whenever proposing or furnishing security assistance to any government falling within the provisions of paragraph (a), the President shall advise the Congress of the extraordinary circumstances necessitating the assistance.
>
> (c) In determining whether or not a government falls within the provisions of subsection (a), consideration shall be given to the extent of cooperation by such government in permitting an unimpeded investigation of alleged violations of internationally recognized human rights by appropriate international organizations, including the International Committee of the Red Cross and any body acting under the authority of the United Nations or of the Organization of American States.
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> (d) For purposes of this section, "security assistance" means assistance under chapter 2 (military assistance) or chapter 4 (security supporting assistance of this part), assistance under part V (Indochina Postwar Reconstruction) or part VI (Middle East Peace) of this Act, sales under the Foreign Military Sales Act, or assistance for public safety under this or any other Act.

[42] *Id.*

[43] *Id.*; *see also* text at notes 133-38 *infra.*

[44] *See generally* A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973); R. WALTON, CONGRESS AND AMERICAN FOREIGN POLICY (1973); F. WILCOX, CONGRESS, THE EXECUTIVE AND FOREIGN POLICY (1971); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37 (1972); *see also Congress and Foreign Policy: Report of the Special Subcomm. on Investigations of the House Comm. on International Relations,* 94th Cong., 2d Sess. (1977); *Congress and Foreign Policy: Hearings Before the Special Subcomm. on Investigations of the House Comm. on International Relations,* 94th Cong., 2d Sess. (1976); *cf.* W. CHITTICK, STATE DEPARTMENT, PRESS, AND PRESSURE GROUPS: A ROLE ANALYSIS 18-20 (1970).

[45] *See, e.g., International Protection of Human Rights Hearings supra* note 16, at 433-37;

While the 1974 Foreign Assistance Act brought congressional attention to bear on human rights in regard to *military* assistance, the International Development and Food Assistance Act of 1975 tied the receipt of *economic* assistance to a human rights standard.[46] The Act adds a new section, 116, which was similar to section 502B. However, the completely noncoercive "sense of Congress" language was significantly removed: "No [economic] assistance may be provided to a government which engages in a consistent pattern of gross violations of internationally recognized human rights . . . ."[47]

It was apparently possible to strengthen somewhat the human rights aid cut-off provisions in section 116 because of a strange congressional alliance between two quite different groups: representa-

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see also note 27 *supra* and text at notes 88-89, 173-79, 181-83 *infra*.

[46] 22 U.S.C.A. § 2151n (Pamph. Supp. I, 1976). This provision is known as the Harkin Amendment for its principal House sponsor Representative Harkin of Iowa.

[47] 22 U.S.C.A. § 2151n(a) (Pamph. Supp. I, 1976). Section 116 in its entirety reads as follows:

> Sec. 116. Human Rights. — (a) No assistance may be provided under this part to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.
>
> (b) In determining whether this standard is being met with regard to funds allocated under this part, the Committee on Foreign Relations of the Senate or the Committee on International Relations of the House of Representatives may require the Administrator primarily responsible for administering part I of this Act to submit in writing information demonstrating that such assistance will directly benefit the needy people in such country, together with a detailed explanation of the assistance to be provided (including the dollar amounts of such assistance) and explanation of how such assistance will directly benefit the needy people in such country. If either committee or either House of Congress disagrees with the Administrator's justification, it may initiate action to terminate assistance to any country by a concurrent resolution under section 617 of this Act.
>
> (c) In determining whether or not a government falls within the provisions of subsection (a), consideration shall be given to the extent of cooperation of such government in permitting an unimpeded investigation of alleged violations of internationally recognized human rights by appropriate international organizations, including the International Committee of the Red Cross, or groups or persons acting under the authority of the United Nations or of the Organization of American States.
>
> (d) The President shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, in the annual presentation materials on proposed economic development assistance programs, a full and complete report regarding the steps he has taken to carry out the provisions of this section.

tives who disliked foreign economic assistance and members of Congress who were most concerned about human rights, but would ordinarily have supported aid.[48] The removal of the "sense of Congress" language was also prompted by frustration at what was perceived to be the continuing State Department resistance to congressional human rights initiatives[49] and by increasing congressional confid-

[48] E. Snyder, *Background Paper on U.S. Human Rights Legislation*, Oct. 22, 1976, at 2-3 (unpublished memorandum). Some commentators have begun to credit nongovernmental lobbyists with the passage of this human rights legislation. *E.g.*, Ottaway, *The Growing Lobby for Human Rights*, Wash. Post, Dec. 12, 1976, §B, at 5, col. 1.

In fact, nongovernmental organizations generally concerned with human rights devoted no significant attention to Congress during the critical formative period 1973 through 1975. It was individual members of Congress, including most prominently Senators Abourezk, Cranston, and Humphrey and Representatives Fraser and Harkin with their staffs, who drafted and generated the political will necessary to achieve passage of section 116 (the Harkin Amendment) and section 502B. A few scholars and international nongovernmental organizations (NGOs) were asked by Congress to provide factual information about human rights violations around the world and about international procedures for human rights implementation. *See International Protection of Human Rights Hearings, supra* note 16. The impulse for legislative action came almost entirely from Congress—not the NGOs.

By January 1976 a group of church-related organizations which had previously been concerned about peace issues became attracted to the already existing human rights activity on Capitol Hill. It took these organizations several months to learn about and to establish themselves in the human rights field. The present version of section 502B had already been drafted in December 1975 and none of the newly interested organizations had any significant hand in either its drafting or its eventual enactment in June 1976. Nevertheless, the "human rights lobby" may soon begin to have a considerable influence on how sections 116 and 502B are implemented by the State Department or extended by Congress.

[49] *See* 121 CONG. REC. S21276-78 (daily ed. Dec. 5, 1975) (remarks of Sen. Cranston). In response to enactment of the 1974 Foreign Assistance Act, the State Department cabled instructions to all diplomatic posts in January and February of 1975 requesting updated reporting on significant human rights developments. 1975 STATE DEPARTMENT REPORT, *supra* note 35, at App. 2 (cable of Jan. 17, 1975 to all diplomatic posts); *see id.* at App. 5-6 (airgram of Feb. 14, 1975). The cable specified that "facts obtained from this reporting would be used in formulating U.S. policy in considering country by country" what the United States should do "to promote respect for and observance of human rights both for their own sake and in response to increasing Congressional interest." *Id.* at App. 2. In response to these instructions, each post submitted to the State Department a classified analysis of the human rights situation in the country in which it was located. Despite the expansive promises of State Department cooperation with congressional human rights initiatives, however, the first "State Department Report to Congress on the Human Rights Situation in Countries Receiving U.S. Security Assistance" was a grave disappointment when it arrived on Capitol Hill in November 1975. 1975 STATE DEPARTMENT REPORT, *supra* note 35. The Report did not mention a single country as violating human rights, nor did it attempt to set out the objective facts in those countries receiving aid. Such a factual report was apparently prepared, but Secretary Kissinger suppressed the more informative document, on the ground that "since all but a handful of countries committed human rights violations it served no useful purpose to specify for criticism American allies and friends." Gwertzman, *U.S. Blocks Rights Data on Nations Getting Arms*, N.Y. Times, Nov. 19, 1975, at 14, col. 6. Instead, the report blandly asserted

ence that human rights legislation was possible.

Removal of the "sense of Congress" language hardly made aid termination mandatory upon the Administration, however. Under section 116 aid may be provided notwithstanding human rights violations if the "assistance will directly benefit the needy people in such a country."[50] If Congress believes basic rights are being denied by an aid-recipient government, the Agency for International Development (AID) must provide information demonstrating that assistance would directly benefit "needy people." If Congress finds the AID assurances unconvincing, a concurrent resolution can terminate aid.[51] As under section 502B, Congress required the President to report annually on steps taken to carry out the law.[52] But section

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that "some countries, of course, present more serious evidence of violations than others. Repressive laws and actions, arbitrary arrest and prolonged detention, torture or cruel, inhuman or degrading treatment or punishment . . . are not extraordinary events in the world community . . . ." 1975 STATE DEPARTMENT REPORT, *supra* note 35, at 3. The report therefore concluded:

> In view of the widespread nature of human rights violations in the world, we have found no adequately objective way to make distinctions of degree between nations. This fact leads us . . . to the conclusion that neither the U.S. security interests nor the human rights cause would be properly served by the public obloquy and impaired relations with security recipient countries that would follow the making of inherently subjective U.S. Government determinations that 'gross violations' do or do not exist . . . .

Id. at 5.

[50] 22 U.S.C.A. § 2151n(a) (Pamph. Supp. I, 1976). The section "is designed to provide safeguards against the possibility that authoritarian governments which deprive their citizens of basic political and human liberties do not divert U.S. assistance from its intended purposes or use such assistance to bolster their repressive regimes." S. REP. No. 406, 94th Cong., 1st Sess. 34-35 (1975).

[51] *Id.* § 2151n(b); *see* 22 U.S.C.A. § 2367 (Supp. 1976) regarding termination of assistance by Congress.

[52] International Development and Food Assistance Act of 1975 § 166(d), 89 Stat. 849 (1975). Congress has also passed human rights provisions conditioning the U.S. contribution to the African Development Fund and to the Inter-American Development Bank. 22 U.S.C.A. §§ 283y, 290g-9 (Supp. 1976), Pub. L. No. 94-302 (May 31, 1976). Section 211 directs the U.S. Executive Director of the African Development Fund to vote against any loan or extension of financial or technical assistance "to any country which engages in a consistent pattern of gross violations of internationally recognized human rights." 22 U.S.C.A. § 290g-9 (Supp. 1976). *See generally The African Development Fund, Hearings Before the Subcomm. on International Development Institutions and Finance of the House Comm. on Banking, Currency and Housing*, 94th Cong., 1st Sess. (1975). Similarly, section 103 directs the Executive Director to vote against loans or extension of assistance to countries that violate the human rights standard. In June 1976 the acting U.S. bank director cast the only vote against a $21 million loan to Chile. The United States Director "cited the findings of the Inter-American Human Rights Commission as showing a pattern of Chilean violations that precluded U.S. approval . . . ." Diuguid, *U.S. Vote on Chile Loan Stirs Question*, Wash. Post, July 9, 1976,

116 does not require that the Administration explain what human rights information it considered in determining if aid should be granted. The "needy people" exclusion is also very difficult to define and allows the Agency for International Development great discretion.[53]

Potentially, the most significant human rights legislation to date, however, was the revised section 502B in the International Security Assistance and Arms Export Control Act of 1976,[54] which was passed by clear majorities in both Houses. President Ford initially vetoed the measure on several grounds,[55] partially because of his concern that a provision permitting Congress to veto foreign aid for a particular country on human rights grounds, by concurrent resolution of either House, infringed upon the Presidential prerogatives in foreign affairs.[56] After altering the amended section 502B to require a joint

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§A, at 2, col. 1. *See also* notes 98-99 *infra*.

Every major foreign aid or trade bill in the coming years may contain similar human rights provisions, as Congress asserts its increasing interest in controlling foreign policy and particularly human rights policy. *See* Gwertzman, *U.S. for Rights Curb on World Bank Loan*, N.Y. Times, Mar. 24, 1977, at 1, col. 5; *see also* statement of William Goodfellow and James Morrell, Associates of the Center for International Policy, before the Subcomm. on International Development Institutions of the House Banking Finance and Urban Affairs Comm., Mar. 24, 1977 [hereinafter Goodfellow & Morrell Statement]. This statement concerned H.R. 4842, a bill to provide additional financing for the World Bank and Asian Development Bank. In their testimony, Goodfellow and Morrell urged Congress to include a provision in the legislation mandating a "no" vote on loans to gross and consistent human rights violators. *Id.* at 12. Multilateral funding is becoming an important part of the United States foreign aid picture. *Foreign Aid: Evading the Control of Congress*, 3 INT'L. POL'Y 1 (Jan. 1977); *see, e.g.*, Dole, *World Bank Votes Loans to Chile of $60 Million, with U.S. in Favor*, N.Y. Times, Dec. 22, 1976, at 3, col. 2; Southerland, *Congress Eyes Indirect Aid to Chile*, Christian Sci. Monitor, Dec. 1, 1976, at 1, col. 3. There has also been a considerable shift from bilateral aid to private loans. Oberdorfer, *Banks, not U.S., Now Give Brazil Its Foreign Aid*, Wash. Post, Mar. 20, 1977, §A, at 1, col. 6.

Such provisions tying multilateral or bilateral aid to other policy objectives may become rather common and may not be limited to the human rights field. For example, the Congress has similarly instructed the United States representative to the International Development Association to vote against loans for the benefit of any country that has failed to become a party to the Treaty on the Non-Proliferation of Nuclear Weapons. 22 U.S.C.A. § 284 (1976).

[53] 22 U.S.C.A. § 2151n(b) (Pamph. Supp. I, 1976); see Breslin, *Human Rights: Rhetoric or Action?*, Wash. Post, Feb. 27, 1977, §C, at 1, col. 3; *see also* Goodfellow & Morrell Statement, *supra* note 52. The legislative history on this exception for aid to "needy people" is not very enlightening. See 121 CONG. REC. H8608 (daily ed. Sept. 10, 1975); *see infra* note 93, at 111.

[54] 22 U.S.C.A. § 2304 (Pamph. Supp. III, Pt. 1, 1976).

[55] *See* 122 CONG. REC. S6715 (daily ed. May 10, 1976).

[56] The President's position may have been founded upon the veto power in Article I, § 7, cl. 3 of the Constitution, which provides in pertinent part: "Every Order, Resolution, or Vote

to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him . . . ." If read literally this clause might require the President's approval of every "vote" of either House of the Congress, even if the "vote" were preliminary to final approval of legislation. The word "necessary" may be read, however, to relate to other constitutional provisions, such as Article I, § 7, cl. 2, involving the exercise of legislative powers. Accordingly, the President would argue that for an "order, resolution, or vote" to have legislative effect, the President must be given an opportunity to exercise the veto power.

Furthermore, the President might contend that the policy decisions and legal consequences of a legislative veto are indistinguishable from the impact of ordinary legislation. The result of such provisions might be to exclude the President from decisions of Congress which in their effect are indistinguishable from statutes and which are the type of basic decisions which Article I, § 7 requires to be submitted to the President. The purpose of the veto provision is to insure that the President's role in the legislative process should not be eliminated merely by giving legislative decisions another name.

Congressional supporters of the legislative veto may point out that the President is afforded an opportunity to exercise a veto over the statute containing the legislative veto provision. Accordingly, the fact that the legislative veto provision must at some point be signed by the President serves the policies of Article I, § 7. It might also be argued that the legislative veto is not a form of legislation because it does not, of its own, have the force of law, but rather derives its force from the enabling act. Also, action under the veto, unlike a new legislative act, represents no inherent change in policy since it was contemplated in the enabling act.

However, the President might contend that the legislative veto allows Congress to interfere in the enforcement of the law and thus intrude upon executive functions, such as the power to conduct the foreign affairs of the United States. Congressional supporters of the legislative veto might, instead, point to the Congress' power of the purse and right to pass legislation.

During World War II Congress began to enact legislation which permitted Congress to pass a concurrent resolution and thus limit the President's power for directing the war effort, lend lease, price control, and labor dispute resolution. Furthermore, Congress delegated to itself the power to veto by resolution of either House, the President's executive reorganization plans. There are at least 20 statutes which permit legislative veto by concurrent resolution; 19 statutes allow either House of Congress to veto executive action, and seven statutes permit a veto by a congressional committee alone. 122 CONG. REC. S6833 (daily ed. May 11, 1976).

Similar state legislative veto provisions have generally been upheld under state constitutions. *See, e.g.*, Watrons v. Golden Chamber of Commerce, 121 Colo. 521, 218 P.2d 498 (1950); Opinion of the Justices, 110 N.H. 359, 266 A.2d 823 (1970); Opinion of the Justices, 96 N.H. 517, 83 A.2d 738 (1950); Moran v. LaGuardia, 270 N.Y. 450, 1 N.E.2d 961 (1936). The constitutionality of the legislative veto has never been authoritatively decided by the federal courts. The Supreme Court deliberately avoided the issue when it considered the Federal Election Campaign Act in Buckley v. Valeo, 96 S.Ct. 612, 692 n.176 (1976). Justice White, in a separate opinion concurring and dissenting, expressed the view that the legislative veto was constitutional, 96 S.Ct. at 757-58; *see also* 6 OP. ATT'Y GEN. 680 (1854); 9 OP. ATT'Y GEN. 387 (1859); 19 OP. ATT'Y GEN. 385 (1889); 37 OP. ATT'Y GEN. 56 (1933). Most commentators seem to agree that the legislative veto, in the form it has thus far been used, does not violate the constitutional allocation of powers between the legislative and executive branches. *Compare* 122 CONG. REC. S6830 (1976) *with* Rehnquist, *Committee Veto: Fifty Years of Sparring between the Executive and the Legislature,* Remarks before the Section of Administrative Law of the American Bar Association (Aug. 12, 1969); Ginnane, *The Control of Federal Administration by Congressional Resolutions & Committees*, 66 HARV. L. REV. 569, 611 (1953) (veto power rejected); Jackson, *A Presidential Legal Opinion,* 66 HARV. L. REV. 1353 (1953); Note, 13 HARV. J. LEGIS. 593 (1976); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive,* 63 CALIF. L. REV. 983 (1975); Cooper and Cooper, *The Legislative*

resolution[57] for aid termination and making several other changes not relevant to the human rights provision, Congress again enacted the legislation and the President signed it on June 30, 1976.

Thus, each succeeding provision in 1973,[58] 1974,[59] 1975,[60] and 1976[61] became more detailed and more directive than the preceding.

Veto and the Constitution, 30 GEO. WASH. L. REV. 467, 514 (1962); Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 FORDHAM L. REV. 638, 654 (1957) (congressional veto power sustained); Schwartz, *Legislative Control of Administrative Rules and Regulations*, 30 N.Y.U.L. REV. 1031 (1955); Newman and Keeton, *Congress and the Faithful Execution of the Laws — Should Legislators Supervise Administrators?* 41 CALIF. L. REV. 565 (1953); *but see* Note, 1976 DUKE L. J. 285 (1976).

[57] 6 U.S. CODE CONG. & AD. NEWS 2187 (1976). By changing the concurrent resolution to a joint resolution, Congress made it less likely that Congress would exercise a veto over aid under section 502B, because the assent of both Houses and the President's signature are required for making a joint resolution effective. United States ex rel. Levey v. Stockslager, 129 U.S. 470, 9 S.Ct. 382, 32 L.Ed. 785 (1889). Congress is already empowered to cut off aid by concurrent resolution under 22 U.S.C.A. § 2367 (Supp. 1976). A concurrent resolution is adopted by both houses of Congress, but need not be submitted to the President. Carlson v. Landon, 342 U.S. 524 (1952). In addition, Congress could merely amend any appropriations bill to change foreign aid to a particular country for human rights reasons. See text at notes 103-08 *infra*. Accordingly, the veto-engendered modification was more cosmetic than substantive.

[58] 87 Stat. 714, 733, § 32 (1973).

[59] 88 Stat. 1795, 1815, § 46 (1974).

[60] 22 U.S.C.A. § 2151n(b) (Pamph. Supp. I, 1976).

[61] 22 U.S.C.A. § 2304 (Pamph. Supp. III, Pt. 1, 1976). The full text of section 502B of the Foreign Assistance Act of 1961, as amended, states:

> (a)(1) It is the policy of the United States, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, to promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. To this end, a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights by all countries.
>
> (2) It is further the policy of the United States that, except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.
>
> (3) In furtherance of the foregoing policy the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States through such programs with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.
>
> (b) The Secretary of State shall transmit to the Congress, as part of the presentation materials for security assistance programs proposed for each fiscal year, a full and complete report, prepared with the assistance of the Coordinator for Human Rights and Humanitarian Affairs, with respect to practices regarding the observ-

ance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance. In determining whether a government falls within the provisions of subsection (a)(3) of this section and in the preparation of any report or statement required under this section, consideration shall be given to —

(1) the relevant findings of appropriate international organizations, including nongovernmental organizations, such as the International Committee of the Red Cross; and

(2) the extent of cooperation by such government in permitting an unimpeded investigation by any such organization of alleged violations of internationally recognized human rights.

(c)(1) Upon the request of the Senate or the House of Representatives by resolution of either such House, or upon the request of the Committee on Foreign Relations of the Senate or the Committee on International Relations of the House of Representatives, the Secretary of State shall, within thirty days after receipt of such request, transmit to both such committees a statement, prepared with the assistance of the Coordinator for Human Rights and Humanitarian Affairs, with respect to the country designated in such request, setting forth —

(A) all the available information about observance of and respect for human rights and fundamental freedom in that country, and a detailed description of practices by the recipient government with respect thereto:

(B) the steps the United States has taken to —

(i) promote respect for and observance of human rights in that country and discourage any practices which are inimical to internationally recognized human rights, and

(ii) publicly or privately call attention to, and disassociate the United Stats and any security assistance provided for such country from, such practices;

(C) whether, in the opinion of the Secretary of State, notwithstanding any such practices —

(i) extraordinary circumstances exist which necessitate a continuation of secuity assistance for such country, and, if so, a description of such circumstances and the extent to which such assistance should be continued (subject to such conditions as Congress may impose under this section), and

(ii) on all the facts it is in the national interest of the United States to provide such assistance; and

(D) such other information as such committee or such House may request.

(2)(A) A resolution of request under paragraph (1) of this subsection shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

(B) The term "certification" as used in section 601 of such Act, means, for the purposes of this subsection, a resolution of request of the Senate under paragraph (1) of this subsection.

(3) In the event a statement with respect to a country is requested pursuant to paragraph (1) of this subsection but is not transmitted in accordance therewith within thirty days after receipt of such request, no security assistance shall be delivered to such country except as may thereafter be specifically authorized by law from such country unless and until such statement is transmitted.

(4)(A) In the event a statement with respect to a country is transmitted under paragraph (1) of this subsection, the Congress may at any time thereafter adopt a joint resolution terminating, restricting, or continuing security assistance for such country. In the event such a joint resolution is adopted, such assistance shall be so terminated, so restricted, or so continued, as the case may be.

(B) Any such resolution shall be considered in the Senate in accordance with

This series culminated with section 502B of the Foreign Assistance Act, which contained four major provisions. First, section 502B(a)(1) declared that "a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights."[62]

Second, section 502B(a)(3) instructs the President that military aid programs must be formulated to promote human rights and avoid identification of the United States with repressive regimes.[63] Third, section 502B(a)(2) provides for the termination or restriction of security assistance "to any country which engages in a consistent pattern of gross violations of internationally recognized human rights."[64]

Finally, section 502B contains two very important reporting requirements which compel the Administration to make "a full and complete report" on the human rights situation in every country receiving security assistance[65] and which permit the foreign relations committee of either House to demand further information on human rights in aid-recipient countries.[66]

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the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

(C) The term "certification," as used in section 601 of such Act, means for the purposes of this paragraph, a statement transmitted under paragraph (1) of this subsection.

(d) For the purposes of this section —

(1) the term "gross violations of internationally recognized human rights" includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, and other flagrant denial of the right to life, liberty, or the security of person; and

(2) the term "security assistance" means —

(A) assistance under part II (military assistance) or part IV (security supporting assistance) or part V (military education and training) of this subchapter or subchapter V (assistance to the Middle East) of this chapter;

(B) sales of defense articles or services, extensions of credits (including participations in credits, and guaranties of loans under the Arms Export Control Act; or

(C) any license in effect with respect to the export of defense articles or defense services to or for the armed forces, police, intelligence, or other internal security forces of a foreign country under section 38 of the Arms Export Control Act.

[62] 22 U.S.C.A. § 2304(a)(1).

[63] *Id.* § 2304(a)(3).

[64] *Id.* § 2304(a)(2).

[65] *Id.* § 2304(b).

[66] *Id.* § 2304(c).

A. *The General Human Rights Policy Directive of Section 502B*

The first and, perhaps, the most significant provision in the revised section 502B does not deal specifically with military assistance, but contains a direction for the entire conduct of United States foreign policy:

> It is the policy of the United States, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States to promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. To this end, a principal goal of the foreign policy of the United States is to promote the increased observance of internationally recognized human rights by all countries.[67]

But what does it mean to make the "increased observance of internationally recognized human rights" "a principal goal of the foreign policy of the United States?" Section 502B(a)(1) refers to the "international obligations" of the United States "as set forth in the Charter of the United Nations" "to promote and encourage increased respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[68] This language derives verbatim from article 1 of the United Nations Charter, establishing the purposes of the United Nations. Indeed, under article 56 of the Charter the United States has an "international obligation" "to take joint and separate action in cooperation with" the United Nations to achieve "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[69]

In other words, section 502B(a)(1) makes an understanding of the principles and procedures of the United Nations indispensable to the interpretation of domestic legislation and to the development of domestic policies. Although section 502B establishes several bilateral procedures for the achievement of human rights objectives through reports to Congress and aid restrictions, the measure may be more meaningful insofar as it redirects attention to international norms and procedures.[70]

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[67] *Id.* § 2304(a)(1).

[68] *Id.*

[69] U.N. CHARTER, art. 55, § (c).

[70] As to the applicable international norms, *see* note 116 *infra*. As indicated at notes 94 and

B. *Formulation of Aid Programs to Promote Human Rights*

Section 502B envisions an additional mechanism for human rights implementation through the foreign aid process. Both sections 502B and 116 have received most attention because they authorize the termination or reduction of economic and military aid to "any government which engages in a consistent pattern of gross violations of internationally recognized human rights."[71] Section 502B(a)(3), however, may be just as important for its direction to the President:

> In furtherance of the foregoing policy, the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.[72]

While subsection 502B(a)(1) makes increased observance of human rights a general factor to be considered in formulating United States foreign policy, subsection (3) refers more specifically to the formulation and conduct of international security assistance programs. Under subsection (3) the President is "directed to formulate and conduct international security assistance programs . . . ." The use of the term "directed" suggests that subsection (3) is to be taken as more than advisory, but the direction is not very specific. The President is only ordered to take positive action to restructure the security assistance programs in furtherance of human rights. While subsection (2) requires evidence of "gross violations" and a "consistent pattern" before the termination of aid, subsection (3) simply directs the President to take action to avoid United States association with governments which deny to their people internationally recognized human rights. This language is far less specific than that of subsection (2) as to what situations might justify United States response.

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126 *infra*, some of the language in section 502B derives quite explicitly from international procedures.

[71] 22 U.S.C.A. § 2304(a)(2), 22 U.S.C.A. § 2151n(b); E. Snyder, Background Paper on U.S. Human Rights Legislation (unpublished memorandum 1976).

[72] 22 U.S.C.A. § 2304(a)(3).

Section 116 contains no similar provision as to the formulation of economic assistance in a manner which will promote human rights.[73] Nevertheless, in an unsuccessful attempt to prevent the Congress from enacting the more severe aid termination provision of section 116, the Agency for International Development began to consider how human rights factors ought to influence the structure of the United States aid program.[74] Even though the Congress was not sufficiently impressed to discard the more coercive aid termination measure of section 116, the Agency for International Development has continued to consider how to inject the human rights element into United States development assistance.[75] The proviso of section 116 that aid may, despite human rights violations, continue to "needy people" obliquely suggests such an inquiry.[76] Also, the general human rights mandate of section 502B(a)(1) requires that human rights be considered as a principal factor in all foreign policy decisions, including economic assistance. Accordingly, there is considerable justification for considering the human rights implications of foreign aid.

Certainly, both military and economic assistance have a human rights dimension. If the United States provides training or weapons to foreign military and police personnel, the United States may well assist the repression of political dissent in aid-recipient countries.[77] Indeed, there has been some evidence of direct complicity in foreign anti-insurgency activities, which have resulted in torture, political

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[73] *Id.* § 2151n.

[74] *See Chile: The Status of Human Rights and Its Relationship to U.S. Economic Assistance Programs: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 134 (1976).

[75] *See, e.g.*, Agency for International Development, *Human Rights and Economic Development: Civic Participation Notes* (unpublished memorandum 1976).

[76] 22 U.S.C.A. § 2151n(b). *See also* 22 U.S.C.A. §§ 2151, 2161 (1964); §§ 2167, 2168, 2171 (Supp. 1977).

[77] *See generally* Foreign Assistance Act of 1974 § 30, 22 U.S.C.A. § 2420 (Supp. 1976). The Senate Foreign Relations Committee recognized that:

> United States participation in the highly sensitive area of public safety and police training unavoidably invites criticism from persons who seek to identify the United States with every act of local police brutality or oppression in any country in which this program operates. It matters little whether the charges can be substantiated, they inevitably stigmatize the total United States foreign aid effort.

S. REP. No. 1299, 93d Cong., 2d Sess. 4, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6705, 6706-07. *See also* REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES: STOPPING U.S. ASSISTANCE TO FOREIGN POLICE AND PRISONS, Doc. No. B-170474 (Feb. 19, 1976); Klare & Stein, *Exporting the Tools of Repression*, NATION, Oct. 16, 1976, at 365.

imprisonment, and other forms of political oppression.[78] United States training programs for foreign military officers are numerous but have thus far evaded substantial human rights scrutiny.[79] Since military officers in many countries perform police functions and also engage in political repression, section 502B(a)(3) requires far greater attention as to how military training and weapons assistance programs are affecting human rights in recipient countries. In fact, while the State Department has begun to pay some heed to the mandate of section 502B, it is not at all clear that word of section 502B has reached the Defense Department. When the United States provides weapons, it should attempt to assure that the weapons are of a kind not useful or used for torture or internal political repression. If section 502B(a)(3) is taken seriously, many weapons may thus not be sold or given if unrelated to external defense.

Similarly, the Treasury Department maintains a program for the training of foreign police under the Drug Enforcement Administration.[80] There is evidence of torture and human rights abuses in the foreign sector of these Treasury activities.[81] In all these training programs the Administration should assure not only that torture is not being taught, but also that positive human rights education is provided.

As with military aid, the United States has long ignored the human rights impact of its economic development programs. When certain sectors of a foreign economy are fostered, related political sectors are encouraged.[82] Economic development is not politically neutral.[83] Indeed, economic aid may create more wealth in the aggregate, but may aggravate economic and political injustice. Cer-

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[78] *See, e.g., U.S. Official Expresses 'Regrets' for Role in Chile but is Disavowed,* N.Y. Times, Mar. 9, 1977, at 1, col. 4; *see generally* AMNESTY INTERNATIONAL, REPORT ON TORTURE, 79-105 (Case Study of Torture in Greece) (1975); *cf.* ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. Doc. No. 94-465, 94th Cong., 1st Sess. (1975).

[79] Klare & Stein, *Exporting the Tools of Repression,* NATION, Oct. 16, 1976, at 365, 366.

[80] The prohibition against the use of foreign assistance funds for training foreign police contained in § 30 of the Foreign Assistance Act of 1974, (*see* note 77 *supra*) is not applicable to narcotics training by the Drug Enforcement Administration. 22 U.S.C.A. § 2420(b) (Supp. 1976).

[81] *See, e.g.,* United States ex rel Lujan v. Gengler, 510 F.2d 62 (2d Cir. 1975), *cert. denied,* 421 U.S. 1001 (1975); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); *see generally* Note, 11 TEXAS INT'L L. J. 137 (1976).

[82] *See, e.g.,* AGENCY FOR INTERNATIONAL DEVELOPMENT REPORT, HUMAN RIGHTS AND ECONOMIC DEVELOPMENT 16 (Dec. 15, 1976) [hereinafter cited as AID 1976 REPORT.].

[83] *See generally id..*

tainly some of the most "successful" development programs of such countries as Brazil, Iran, and Indonesia have apparently been accompanied by both greater economic inequality and repression.[84] Accordingly, section 502B(a)(1) may require the United States to reconsider some of the basic assumptions underlying the economic aid programs of this country.

Not only should economic development programs take account of the human rights dimension, but section 502B might also suggest that some aid should be focused at resolving the human rights problems in a more direct way. For example, the United States Ambassador to Indonesia has apparently become involved in the recent efforts of that government to release some of the between 27,000 and 55,000 political prisoners who have been incarcerated in Indonesia for as long as twelve years.[85] The Indonesian government faces tremendous logistical problems in just moving, much less reintroducing, these prisoners into their former communities. The United States government might financially assist and thus facilitate the release and reintegration process.

Similarly, the United States might provide financial assistance indirectly through the United Nations[86] or through such organizations as the Inter-American Foundation, the Lawyers' Committee for Civil Rights Under Law (Africa Assistance Project), the World Council of Churches, and the International Defense and Aid Fund, which in turn provide defense lawyers to political detainees and much needed aid to the families of prisoners.[87] These limited examples of human rights-directed aid only begin to demonstrate how United States financial assistance might be used to support initiatives for the settlement of human rights problems.

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[84] *Cf. Torture and Oppression in Brazil, Hearings Before the Subcomm. on International Organizations and Movements of the House Comm. on Foreign Affairs,* 93d Cong., 2d Sess. (1974); AMNESTY INTERNATIONAL, REPORT ON ALLEGATIONS OF TORTURE IN BRAZIL (2d ed. 1974); *Human Rights in Indonesia and the Philippines: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations), 94th Cong., 1st & 2d Sess. (1976);* AMNESTY INTERNATIONAL, BRIEFING: IRAN (Nov. 1976); *see also* Manglapus, *Dictators and Myths,* Wash. Post, Feb. 9, 1977, §A, at 12, col. 1.

[85] *See* Weissbrodt, *The Role of International Nongovernmental Organizations in the Implementation of Human Rights,* 12 TEX. INT'L L. J. 293, 293 n.1 (1977).

[86] *E.g.,* U.S. Mission to United Nations, United States Pledges $50,000 for United Nations Training Program in Namibia, Press Release USUN - 14 (77), Mar. 21, 1977.

[87] *See* Weissbrodt, Testimony Before the Subcomm. on Foreign Assistance of the Senate Foreign Relations Comm., 95th Cong., 1st Sess. (Mar. 4, 1977) (unpublished statement).

C. *Limiting Aid*

The potential impact of a human rights directed aid-restructuring may be far greater than the result of the aid-termination provisions of sections 116 and 502B.[88] After all, many Third World countries may see section 502B and particularly section 116 as merely another excuse for the United States to refuse needed assistance.[89] These two provisions may also be construed as attempts by the United States to impose particular institutional structures on aid recipient countries. For these reasons, aid giving may, in fact, be more effective and less resented than aid restrictions.[90]

Nevertheless, the aid termination provisions of both sections 502B and 116 are important as potentially more coercive means of implementing human rights and insofar as they suggest a methodology for the whole United States human rights program. Sections 116 and 502B carry very similar aid cut-off language. Section 116, of course, applies to economic assistance and states:

> No assistance may be provided under this part to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the

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[88] *See* Jackson, *Foreign Aid: Strategy or Stopgap?*, 41 FOREIGN AFF. 90, 101 (1962).

[89] Argentina, Brazil, El Salvador, Guatemala, and Uruguay have stated their intention to refuse further United States aid, because of the Carter human rights campaign. Oberdorfer, *Banks, Not U.S. Now Give Brazil Its Foreign Aid*, Wash. Post. Mar. 20, 1977, §A, at 1, col. 6. Although Brazil explained its action initially as a result of the forthright report on human rights in Brazil issued by the State Department under section 502B of the Foreign Assistance Act, the Brazilian action may also have been motivated by displeasure at United States efforts to stop the transfer of plutonium technology to Brazil. Oberdorfer, *State Dept. Lists Rights in 82 Countries*, Wash. Post, Mar. 13, 1977, §A, at 1, col. 2. It may well be that the amounts of United States aid have so diminished as to make aid termination measures symbolic gestures.

[90] Certainly, the Hickenlooper Amendment limiting economic aid to countries which expropriate United States owned property did not succeed in its stated purpose and has been largely ignored in recent years. *See* R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT 141-45 (1965); Eder, *Expropriation: Hickenlooper and Hereafter*, 4 INT'L LAW. 611, 627 (1970); Furnish, *Eder's Hickenlooper: Some Clarifications Regarding Peru and Other Matters*, 5 INT'L LAW. 348, 352-53 (1971); Note, *Argentina and the Hickenlooper Amendment*, 54 CALIF. L. REV. 2078, 2079 (1966); Brown, *The Use of Foreign Aid as an Instrument to Secure Compliance with International Obligations*, 58 AM. SOC'Y INT'L L. PROC. 210, 211-14 (1964); Olmstead, *Foreign Aid as an Effective Means of Persuasion*, 58 AM. SOC'Y INT'L L. PROC. 205, 208-10 (1964).

> right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.[91]

Section 502B applies to all "security assistance" including military aid, military training, sales of defense implements or services, the extension of credit or loans for the purchase of weapons, and any license for the export of defense articles or services:

> It is further the policy of the United States that, except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.[92]

Both provisions require an understanding of three requirements: that the government "engage in"[93] human rights violations, that there be a "consistent pattern"[94] of violations, and that the viola-

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[91] 22 U.S.C.A. § 2151n(a).

[92] *Id.* § 2304(a)(2).

[93] *See generally Agency for International Development, Legal Interpretation - Section 116 of the Foreign Assistance Act of 1961: Human Rights Amendment in Chile: The Status of Human Rights and Its Relationship to U.S. Economic Assistance Program: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 106 (1976) [hereinafter cited as *AID Opinion*].

[94] The "gross" and "consistent" language of sections 502B and 116 appear to derive from a number of United Nations resolutions. The first U.N. reference to a "consistent pattern" and "gross violations" of human rights apparently occurred in resolution 8 of the Commission on Human Rights passed in 1967. Resolution 8 requested the Economic and Social Council to authorize the Commission on Human Rights and the Subcommission on the Prevention of Discrimination and Protection of Minorities to study and investigate "situations which reveal a consistent pattern of violations of human rights," and "to report with recommendations thereon to the Economic and Social Council." 42 ECOSOC Supp. No. 6, E/4322, U.N. Doc. E/CN.4/940 at 131 (1967). For a discussion of the background of this resolution, *see* Ermacora, *Procedure to Deal with Human Rights Violations: A Hopeful Start in the United Nations*, 7 HUMAN RIGHTS J. 670, 678 (1976) [hereinafter cited as Ermacora].

At its 42d session in June 1967, ECOSOC took positive action on the Commission's recommendation under resolution 1235 which authorized the Commission and Subcommission "to examine the information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of Apartheid . . . ." 42 ECOSOC Supp. 1, at 17, U.N. Doc. E/4393 (1967). ECOSOC adopted a second resolution, 1503, establishing further procedures to be used in dealing with individual communications concerning human rights violations. Operative paragraph 5 of resolution 1503 allows the Subcommission to refer to the Commission "particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights . . . ." 48 ECOSOC Supp. 1A, at 8, U.N. Doc. E/4835/Add. 1 (1970).

As Professor Ermacora has observed, the wording of resolution 1503 is more cautious than that of resolution 1235: "ECOSOC resolution 1503 (XLVIII) speaks about 'particular situations which appear to reveal' (instead of "situations which reveal") a consistent pattern of

tions be "gross."[95] Each term addresses to some extent the circum-

gross and reliably attested (instead of "gross violations") violations as exemplified by . . . ." Ermacora, *supra* at 678. The rest of the language in the two resolutions is essentially the same. Despite the similarity in the language of sections 502B and 116 to that of ECOSOC resolutions 1235 and 1503, the relative scarcity of information concerning the history of the U.N. "gross" and "consistent" language limits the utility of these documents as a definitional source for sections 502B and 116. Nevertheless, there is a need for more inquiry into concrete applications and elaborations of 1235, 1503, and similar provisions by U.N. bodies, in so far as they may shed light on the meaning of sections 502B and 116.

Looking at the legislative history of section 502B and its companion language in section 116 of the Foreign Assistance Act, there is also little to suggest how the phrase "consistent pattern" should be construed. At a minimum, however, the use of this language would seem to suggest that a single incident will not be enough to establish governmental responsibility within the meaning of either provision. Ermacora, *supra* at 678. Instead, the violations must recur often enough to be identified as a distinct course of action. Along these lines, Professor Ermacora suggests that the expression "consistent pattern" as it appears in ECOSOC resolutions 1235 and 1503, indicates a time element in the operative language. *Id.* In other words, the violation must be one with a certain continuity whose end cannot be foreseen.

A different interpretation of the significance of the phrase "consistent pattern" is provided by the Agency for International Development of the State Department which perceives this language as evidence of a congressional intent that governmental responsibility for the abuses be established before sections 502B and 116 will apply. *AID Opinion, supra* note 93, at 107 n.1. Hence, the Agency for International Development's Office of General Counsel construed section 116: "A finding that a consistent pattern exists would tend to refute assertions by the country concerned that violations which occurred were the acts of unauthorized officials and at variance with official policy." *Id.* The need to establish a linkage between the government and the human rights violations for purposes of sections 502B and 116 is emphasized as well by the use of the phrase "engaged in." The State Department's interpretation seems to suggest, however, that where a "consistent pattern" of human rights abuses occurs, government responsibility will be inferred. *Id.* In other words, it is enough to establish governmental involvement that the government knows of the violations and does nothing to stop them.

[95] Under sections 502B and 116 not only must there be a "consistent pattern" of human rights violations but these violations must be "gross." Indicative of the kinds of abuses that constitute "gross violations" is the list of enumerated abuses contained in sections 502B and 116 themselves. Accordingly, "torture, cruel, inhuman or degrading treatment or punishment; prolonged detention without charges and trial, and other flagrant denials of the right to life, liberty, or the security of person" clearly fall within the parameters of sections 502B and 116. The State Department has suggested that guidance as to what constitutes gross violations might also be found in "widely accepted statements and sources of international law." *Id.* By way of illustration, the State Department notes the "grave breaches" identified by the Geneva Conventions for the Protection of War Victims of 1949:

> Grave breaches to which the preceeding article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial . . . .

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, [1955] 6 U.S.T. 3517, 3618, T.I.A.S. No. 3365.

stances in which a government might justifiably be held responsible for human rights violations. Each also raises difficult definitional problems.[96]

Although sections 502B and 116 were never applied during the previous Administration, similar legislative language prompted the United States Director to the Inter-American Development Bank to vote against a $21 million loan to Chile in 1976.[97] The United States vote against the loan was cast pursuant to a 1976 law which specifically instructs the United States Director of the Inter-American Bank to oppose loans or extensions of financial assistance "to any country which engages in a consistent pattern of gross violations of internationally recognized human rights."[98] Hence, in the case of

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The legislative history of section 502B indicates that its restriction to cases involving "gross violations" reflects a congressional consensus that some human rights violations are more serious than others and that these must be addressed first. The House expressly rejected an amendment to the 1974 version of section 502B by Representative Gross which would, in its sponsor's words, have barred security assistance to any nation guilty of "the denial of human rights under any circumstances," 120 CONG. REC. H11,598 (daily ed. Dec. 11, 1974). In opposing this amendment, the bill's chief House sponsor Representative Donald Fraser expressed concern that such language "reaches too broadly and suggests that all countries have got to make good on everything all at once in order that we may continue to provide assistance." 120 CONG. REC. H11,597 (daily ed. Dec. 11, 1974). Fraser went on to explain that enforcement under the proposed legislation was to be directed not at violations of all human rights but at violations of "the most fundamental of all human rights, the right to the integrity of one's person." *Id.* The rationale for the restricted focus of the committee bill was apparently a concern that to overreach in terms of the rights covered would make the Act both unenforceable and ineffective. *Id.*

[96] The interpretation of this human rights legislation presents different problems of construction than usually faced by courts in construing statutes. Here it is not likely that a court will have an opportunity ever to construe this legislation. Instead, the statute is intended to regulate the relations between Congress and the Administration, probably without judicial intervention. Accordingly, the statute is applied and interpreted in the light of conflicts between Congress and the Administration. The bargains struck and accommodations reached constitute the most authoritative source of interpretation—aside from the statutory language.

Of course, courts defer to some extent to the interpretation given a statute by the administering agency. *Compare* Housing Foundation, Inc. v. Foreman, 421 U.S. 837, 838 (1975), and Morton v. Ruiz, 415 U.S. 199, 237 (1974) (if consistent with congressional purpose) *with* Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 94-95 (1973); and Columbia Braodcasting System v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973) (unless compelling indications agency interpretation is wrong). But in this human rights legislation it might be said that both the State Department and Congress are given administrative responsibility so that the State Department's view may be entitled to less weight than courts might give with another kind of statute.

[97] *See* note 52 *supra.*

[98] 22 U.S.C.A. § 283y (Pamph. Supp. III, Pt. 1, 1976). Section 211 of the same law (Pub. L. No. 94-302) directs the United States Executive Director of the African Development Fund to vote against any loan or extension of financial or technical assistance "to any country which

Chile, the United States has formally recognized the existence of conditions falling within the parameters of this prohibition. In voting against the loan to Chile, the United States representative did not explain what facts prompted the decision, although he did cite the Organization of American States Inter-American Commission report on human rights violations in Chile.[99] The Chile vote may begin to establish a benchmark for what constitutes a consistent pattern of gross violations of internationally recognized human rights.

By February 1977 the Carter Administration indicated its intention to limit military aid to Argentina, Uruguay, and Ethiopia on human rights grounds pursuant to section 502B.[100] In making these announcements, the State Department again did not explain the factual basis for the decision.[101] The Human Rights Reports submitted to Congress in March 1977 pursuant to section 502B(b) discussed the human rights situation in those three countries among the 82 nations mentioned.[102] But the 1977 Human Rights Reports failed to indicate facts which demonstrated the basis for a determination that those three countries were engaging in a "consistent pattern of gross violations of internationally recognized human rights."

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engages in a consistent pattern of gross violations of internationally recognized human rights." 22 U.S.C.A. § 290g-9 (Pamph. Supp. III, Pt. 1, 1976). *See generally The African Development Fund, Hearing Before the Subcomm. on International Development Institutions and Finance of the House Comm. on Banking, Currency and Housing,* 94th Cong., 1st Sess. (1975). *See also* note 52 *supra.*

[99] *See* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE STATUS OF HUMAN RIGHTS IN CHILE, OAS Doc. OEA/Ser. L/V/II.34, Doc. 21 (1974); *Chile: The Status of Human Rights and Its Relationship to U.S. Economic Assistance Programs, Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations,* 94th Cong., 2d Sess. 49-78 (1976) (testimony of Jose Zalaquett, defense attorney for political prisoners, Vicariate of Solidarity, Roman Catholic Church, Chile); *see also Human Rights in Chile: Hearing Before the Subcomm. on International Organization and Movements and on Inter-American Affairs of the House Comm. on Foreign Affairs,* 93d Cong., 2d Sess., Pts. 1 & 2 (1974). *See* Protection of Human Rights in Chile, Report of the Ad Hoc Working Group on the Situation of Human Rights in Chile, U.N. Doc. A/10285 (1975).

[100] *See* note 156 *infra.*

[101] *Id.*

[102] 1977 HUMAN RIGHTS REPORTS, note 111 *infra* at 106-08, 141-43, 89-90. As to Argentina *see* 122 CONG. REC. E3780 (daily ed. July 2, 1976) (remarks of Rep. Drinan). Argentina's failure to cooperate with inquiries about the arrest of United States citizens may have contributed to the decision. de Onis, *Argentina Beset by Arrest/Queries,* N.Y. Times, Aug. 13, 1976, at 5, col. 1.

In any case, it is quite doubtful that Congress would ever pursue the cumbersome aid termination process outlined in section 502B or even the less arduous concurrent resolution process prescribed by section 116. Instead of starting anew with time-consuming resolutions, Congress may take note of the information produced as a result of the section 502B reporting procedures, oversight hearings, and other human rights information, and then short-circuit the section 502B or 116 aid termination process by a simple motion in committee or on the floor of either House to amend the aid appropriation for particular countries.

Indeed, on several occasions before and since the passage of sections 116 and 502B, members of Congress have used this parallel approach to limit or terminate aid, on human rights grounds. For example, the Foreign Assistance Act of 1974 limited the amount of security assistance available to South Korea because of its poor human rights record.[103] In the same year Congress limited economic assistance for Chile to $25 million and purported to terminate military assistance altogether.[104] The following year the economic aid ceiling for Chile was raised to $90 million.[105] After receiving evidence that the Administration had frustrated the congressional aid limitations for Chile, Congress again limited economic aid to $27,500,000 and removed some of the means by which the Administration circumvented the limitations.[106] For example, instead of allowing military aid appropriated under previous years to be delivered, Congress was much more explicit:

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[103] Foreign Assistance Act of 1974, § 26, 88 Stat. 1802. In fiscal year 1974, grants and credit sales to South Korea totalled $178.6 million while the administration's 1975 request was nearly $253 million. The fiscal 1975 military assistance limitation was placed on South Korea because of "serious concern about the increasingly repressive measures of the South Korea Government." S. REP. NO. 1299, 93d Cong., 2d Sess., *reprinted in* [1974], 4 U.S. CODE CONG. & AD. NEWS 6703.

[104] Foreign Assistance Act of 1974, § 25, 88 Stat. 1802. The limitation on military assistance to Chile expressed Congressional concern about the "continuing disregard" for human rights in that country. The executive branch had requested a total Chile aid package of $84.9 million, of which $21.3 million was earmarked for military assistance and credit sales. S. REP. NO. 1299, 93d Cong., 2d Sess., *reprinted in* [1974]. 4 U.S. CODE CONG. & AD. NEWS 6705.

[105] International Development and Food Assistance Act of 1975 § 320, 89 Stat. 849 [1975].

[106] § 406(b)(1) of Pub. L. No. 94-329, 22 U.S.C.A. § 2370 note (Pamph. Supp. III, Pt. 1, 1976). The President was given the authority under the Act to increase the limit by $27,500,000 if he certified that Chile no longer was engaged in a consistent pattern of gross violations, that it had permitted an unimpeded investigation into alleged violations, and that it had taken steps to inform the families of prisoners of charges against them and of their condition. *Id.* § 406(b)(2).

> No military or security supporting assistance and no military education and training may be furnished under the Foreign Assistance Act of 1961 for Chile . . . . No deliveries of any such assistance, credits, or guarantees may be made to Chile on or after the date of enactment of this Section.[107]

Rather than use the "consistent pattern of gross violations" standard or the joint resolution approach of section 502B, Representative Koch moved during mid-1976 in the Foreign Operations Subcommittee of the House Committee on Appropriations to cut off all of the $3 million in military aid to Uruguay. Representative Koch explained his action on human rights grounds.[108] The State Department apparently lobbied with members of the House to have the Uruguayan aid continued, arguing that the Congress should instead use the newly enacted joint resolution procedure and "consistent pattern of gross violations" standard of section 502B. Nevertheless, the State Department argument failed to prevent passage of a Uruguay military aid termination provision.

These aid termination actions by Congress appear to be so quixotic and unrelated to the more carefully patterned response envisioned by section 502B that they draw into question the ability of Congress to contribute responsibly to the promotion of human rights. In fact, these aid terminations seem to have been motivated by Congress' desire to "do something — anything" about human rights and by anger at the State Department's refusal to take less coercive measures.[109] Also, individual members of Congress might be motivated by such extraneous factors as the need for publicity and the desire to take a relatively easy shot at an available target — the State Department or a small country. Since Congress clearly has the constitutional spending power to take these actions, the only limit must come from congressional self-restraint. Perhaps, as the State Department builds its credibility in carrying out the general congressional mandate in section 502B(a)(1) to promote human rights, the Congress will not need to intervene so bluntly in the process.

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[107] 22 U.S.C.A. § 2370 (Pamph. Supp. III, Pt. 1, 1976).

[108] *See* 122 CONG. REC. S16406 (daily ed. Sept. 22, 1976); Diuguid, *Congress Cuts Uruguay Aid; Rights Violations Are Cited,* Wash. Post, Sept. 20, 1976, §A, at 8, col. 1; *see also Uruguay's Military Leaders Angry Over Congressional Cutoff on Aid For Arms,* N.Y. Times, Oct. 5, 1976, at 13, col. 1; 122 CONG. REC. S4481 (daily ed. Aug. 10, 1976) (remarks of Rep. Koch).

[109] *See* 121 CONG. REC. S21276 (daily ed. Dec. 5, 1975) (statement of Senator Cranston).

D. *Investigatory and Reporting Provisions of Section 502B*

Section 502B establishes two legislative procedures requiring the State Department to make public declarations about human rights situations in an aid-giving context. Section 502B(b) requires a "full and complete report . . . with respect to practices regarding the observance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance."[110] This "full and complete report" must be transmitted to the Congress as part of the presentation materials for security assistance programs proposed for each fiscal year.[111] Although section

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[110] 22 U.S.C.A. § 2304(b).

[111] The State Department sent the first Human Rights Reports to Congress under section 502B(b) in early March 1977 and the Reports were made available to the public on March 18. The reports were largely prepared in December 1976 under the previous Administration. The documents were apparently re-formatted and changed slightly during late January and February to reflect the new Administration's views. But there was no time for gathering new information or even thorough redrafting. Accordingly, the reports largely reflect the attitudes of the previous Administration. 1977 HUMAN RIGHTS REPORTS, PREPARED BY THE DEPARTMENT OF STATE, SUBMITTED TO THE SUBCOMM. ON FOREIGN ASSISTANCE, SENATE COMM. ON FOREIGN RELATIONS, 95th Cong., 1st Sess. (1977) [hereinafter cited as 1977 HUMAN RIGHTS REPORTS].

Furthermore the first "full and complete report" may have been formulated and published independent of the security assistance request and may not have been the subject of serious consideration when the requested aid levels were proposed by the State Department. Such a procedure would, of course, violate the purposes of section 502B and particularly subsection 502B(a)(3), which states that the

> President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid indentification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this Section or otherwise.

The Administration was not required to report on human rights practices in all countries, but only those proposed as a recipient of security assistance, that is, military aid, training, loans for weapons, weapons sales, and any export licenses. 22 U.S.C.A. § 2304(b), (c)(4)(D)(2)(C). Export licenses for defense articles or services were issued during fiscal year 1976 for 139 countries but the State Department only produced reports for 82 countries. The State Department apparently decided without explanation to exclude countries receiving only arms sales. The State Department may have reasoned that a country purchasing arms was not "proposed as a recipient of security assistance." Such a limited reading of section 502B(b) appears rather begrudging, if not incorrect.

Also, the State Department decided not to give information on any country, *e.g.*, Chile, South Africa, and the Soviet Union, not receiving any such assistance. In other words, the State Department apparently chose not to issue a more evenhanded report on human rights in the world. The Department purported to give the Congress only what section 502B required or less. Unlike some of the initiatives of the same period, the Human Rights Reports did not constitute a new part of the human rights campaign of the Carter administration. Nevertheless, the reports were received by the media and other countries as part of the Carter human

502B(b) requires a "full and complete report," the section does not specify the contents of the report in any of the detail required by section 502B(c) for reports requested specifically by either House or

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rights campaign. *See, e.g., Angry Brazil Cancels Pact with U.S.*, Wash. Post, Mar. 12, 1977, §A, at 1, col. 4.

It is very difficult to characterize the context of the 82 reports in general terms because of their diverse authorship and approaches. Nevertheless, there are affirmative aspects of the document: (1) The State Department collected its own information about human rights issues and in several countries actually contributed to the fund of published knowledge (*e.g.*, Cameroon, Sudan, and Afghanistan); (2) The State Department information was sufficiently detailed in a few countries to present important comments on human rights situations (*e.g.*, Philippines, Korea, Brazil, and Israel). There are also problems inherent in the document: (1) Most of the reports are vague, extremely general, and "tactfully drafted" to protect the countries discussed (*e.g.*, Gabon, Ethiopia, and Argentina; *see* Breslin, *Human Rights: Rhetoric or Action?* Wash. Post, Feb. 27, 1977, §C, at 1, col. 5); and (2) the reports ignore available human rights information and stress historical, structural, and formally legalistic description — rather than discussing the human rights "practices" required by section 502B(b) (*e.g.*, Tunisia, Norway, Zaire, Uruguay, and Paraguay).

Each of the 82 reports devotes a section to "Other human rights reporting." In the previous six country report of December 31, 1976, the State Department mentioned Amnesty International and other NGOs in the text, particularly when the State Department wanted to express some uncomplimentary information without taking State Department responsibility. Accordingly, the separate section for NGO material is an improvement in format. The State Department took responsibility for at least some of the uncomplimentary information in the 1977 reports.

It will be remembered that section 502B(b) requires consideration to the relevant "findings" of international organizations and the "extent of cooperation" given those organizations. The State Department consistently reported upon the "findings" of only one international organization — Amnesty International. Amnesty International (AI) is mentioned in regard to 67 countries. Freedom House, which publishes an extremely summary, comparative index of "human freedom," is also mentioned frequently.

The State Department did not consider in any systematic way the cooperation given to the international organizations. Cooperation was mentioned in a few cases, for example, Haiti (the Inter-American Commission on Human Rights), India (AI), Iran (International Commission of Jurists) (ICJ), Honduras (AI), the Dominican Republic (AI), Bolivia (the International Committee of the Red Cross) (ICRC), and Brazil (ICRC). For example, the report on Brazil leaves the impression that Brazil has cooperated with the ICRC, while omitting to mention the refusal of Brazil to cooperate with all other international human rights organizations, including the O.A.S. Inter-American Commission on Human Rights, the ICJ and Amnesty International. The State Department did not systematically consider the findings of such international organizations as the ICRC, the International Commission of Jurists, the International League for Human Rights, the European Commission on Human Rights, and the U.N. Commission on Human Rights. The State Department did not even consider the findings of such international human rights organizations as the Minority Rights Group, Survival International, the Anti-Slavery Society, the Committee for Indigenous Populations, the Anti-Apartheid Movement, the International Federation for Human Rights, the Women's International League for Peace and Freedom, the Commission of the Churches for International Affairs, the Pontifical Commission Justice and Peace, the International Labor Organization, the International Press Institute, P.E.N., and Writers and Scholars International.

their respective committees on foreign relations.[112]

Under section 502B(c)(1), the Senate, the House of Representatives, or their respective foreign relations committees may request the Secretary of State to transmit within 30 days a human rights report as to any designated country. If the State Department fails to respond to the request for a report within 30 days, section 502B(c)(3) suspends military assistance, until the report is delivered or Congress expressly permits continuing aid.

By making a request for such a mandatory report under section 502B(c) or by requiring "a full and complete report" on all aid recipient countries under section 502B(b), Congress risked upsetting delicate diplomatic negotiations on particular human rights situations.[113] But section 502B was drafted at a time when there was a grave doubt as to whether serious diplomatic initiatives were being undertaken by the Administration on human rights questions. Congress may well have reasoned that it would be better to risk some improperly timed statements than to persevere with the then-prevailing inattention or inaction.

Under section 502B(c)(1)(A) the State Department is required to set forth "all the available information about observance of and respect for human rights and fundamental freedoms" in the country designated by the Congress and a "detailed description of practices by the recipient government with respect thereto."[114] Obviously, this provision was intended to force the State Department to use its considerable information gathering facilities to inform the Congress and the American people[115] about observance of and respect for human rights and fundamental freedoms in each country. In requiring the State Department to set forth "all available information" on "observance of" "human rights and fundamental freedoms," section 502B(c)(1)(A) demands a thorough review of all practices under the International Bill of Human Rights[116] — not merely a report on

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[112] 22 U.S.C.A. § 2304(b).

[113] *See, e.g.*, text at notes 173-79 *infra*.

[114] 22 U.S.C.A. § 2304(c)(1)(A).

[115] The State Department initially indicated that the reports to Congress mandated by 502B(c) were to be classified when the first reports arrived on Capital Hill. Congressman Fraser insisted that the information contained therein be declassified. The State Department responded by excising certain material but ultimately acceded to congressional pressure and in December 1976, the reports were made public. 1976 STATE DEPARTMENT REPORT, *infra* note 118, at III, V. Some parts of the State Department reply remained classified. *Id.* at 35 n.1.

[116] It appears that the potential universe of "internationally recognized human rights" or "human rights and fundamental freedom" is, indeed, expansive—including, but not limited

to, international treaties, declarations, resolutions and executive agreements, as well as multilateral or regional conventions and declarations. While documents from any one of these categories might be considered in specific situations, considerations of administrative convenience would seem to dictate a tentative narrowing of the list of references which those charged with administering section 502B must consult. Effective enforcement of 502B demands, at the outset, that those carrying out its mandate reach a consensus as to what constitutes "internationally recognized human rights."

Among international human rights instruments, the International Bill of Human Rights is probably at once the most widely recognized and readily accessible of documents. The International Bill of Human Rights is comprised of four documents:

(a) The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. 810, at 56 (1948);

(b) The International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1967), *entered into force* Mar. 23, 1976;

(c) The International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1967); and

(d) The Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1967), *entered into force* Mar. 23, 1976. *See* Sohn, *The Universal Declaration of Human Rights*, 8 J. INT'L COMP. JUR. 17 (1967); E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY (1964); CAREY, U.N. PROTECTION OF CIVIL AND POLITICAL RIGHTS 12-19 (1970); Newman, *Interpreting the Human Rights Clauses of the U.N. Charter*, 5 HUMAN RIGHTS J. 283, 285 n.7 (1972); Statement by Carlos Romulo, U.N. Secretariat, International Year for Human Rights Newsletter, No. 8, Supp. 1, at 29, 30 (1969); Humphrey, *The International Law of Human Rights in the Middle Twentieth Century* in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75, 85 (M. Bos. ed. 1973); E. LUARD, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 53 (1967). *See, e.g.*, T. BUERGENTHAL & J. TORNEY, INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL EDUCATION 163 (1976); HUMAN RIGHTS, A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, U.N. Doc. ST/HR/1, at 1-17 (1973); AMERICAN ASS'N FOR THE INT'L COMM'N OF JURISTS, INTERNATIONAL BILL OF HUMAN RIGHTS (undated 1976); *cf.* INTERNATIONAL HUMAN RIGHTS SELECTED DECLARATIONS AND AGREEMENTS, 94th Cong., 2d Sess. (1976).

Because the Covenants are more specific in delineating rights than the Universal Declaration and because the Covenants contain much better defined derogation clauses, reference to the full International Bill of Human Rights is preferable. *E.g., compare* art. 9 of the Universal Declaration *with* art. 9 of the Covenant on Civil and Political Rights; arts. 10 and 11 of the Universal Declaration *with* art. 14 of the Covenant on Civil and Political Rights; and art. 23 of the Universal Declaration *with* art. 7 of the Covenant on Economic, Social and Cultural Rights. *Compare also* art. 29(2) of the Universal Declaration *with* arts. 4, 8(1)(a) and 25 of the Covenant on Economic, Social and Cultural Rights and arts. 4, 12(3), 13, 14, 18(3), 19(3), 21, 22(2) and 47 of the Covenant on Civil and Political Rights. *But cf.* REPORT OF THE STUDY MISSION TO EUROPE TO THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE, 95th Cong., 1st Sess. 33-34 (1977).

In the interests of effective administration, it might be advisable—at least initially—to confine the rights considered for purposes of section 502B to those set forth in the four documents comprising the International Bill of Human Rights. Reference to the International Bill of Human Rights also could not easily be assailed as a United States-centric rather than an "internationally recognized" set of principles.

Since it is difficult to imagine a human right which does not arguably fall within the spectrum of rights covered by the Universal Declaration and the two Covenants, little would be lost by this restriction on sources of rights. Moreover, if a right were later to be identified

human rights violations nor only a report on the activities of the aid recipient government.

When Congress in fall 1976 first invoked this reporting requirement, it is clear that the State Department did not supply "all available information" including its own human rights material and data from other sources. Several times between 1974 and 1976 the Department had requested substantial human rights studies from all United States embassies abroad,[117] but the result of these surveys are not very evident in the reports received by Congress. Instead, when the report expressed derogatory human rights information, the Department usually quoted Amnesty International, the International Commission of Jurists, or testimony before the Subcommittee on International Organizations.[118] Indeed, the Department is required by section 502B(b)(1) and (2) to give consideration to:

> (1) The relevant findings of appropriate international organizations, including nongovernmental organizations, such as the International Committee of the Red Cross; and
> (2) The extent of cooperation by such government in permitting an unimpeded investigation by any such organization of alleged violations of internationally recognized human rights.[119]

The Department's report is extremely selective in noting the findings of international organizations and attempts generally to disassociate the Department from such information without confronting the data on any factual basis. Also, the 1976 report failed to explain the record of several governments in cooperating with major international organizations, except where the information was complimentary to the aid recipients. For example, the State Department did not indicate that Haiti has not cooperated with some Organiza-

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which did not fall within the parameters of the International Bill of Rights, there is nothing in the language or legislative history of 502B to preclude those charged with its enforcement from expanding the list of documents identifying "internationally recognized human rights." However, for the present, the International Bill provides the most convenient reference for implementing section 502B.

[117] *See, e.g.*, 1975 STATE DEPARTMENT REPORT, *supra* note 35, at app. 2 (Cable of Jan. 17, 1975, to all diplomatic posts); *see id.* at app. 5-6 (airgram of Feb. 14, 1975).

[118] HUMAN RIGHTS AND U.S. POLICY: ARGENTINA, HAITI, INDONESIA, IRAN, PERU AND THE PHILIPPINES, REPORTS SUBMITTED TO THE HOUSE COMM. ON INT'L RELATIONS BY THE DEPARTMENT OF STATE, 94th Cong., 2d Sess. 2-3, 8-9, 14, 20, 24, 29-30 (1976) [hereinafter cited as 1976 STATE DEPARTMENT REPORT]. For a criticism of the accuracy of these reports, *see* Americans for Democratic Action *et. al.*, Human Rights and U.S. Foreign Policy, (Jan. 14, 1977) (unpublished memorandum).

[119] 22 U.S.C.A. § 2304(b)(1)-(2).

tion of American States human rights inquiries.[120] While the report states that Iran cooperated with an International Commission of Jurists mission in 1975,[121] the report does not indicate that Iran has refused all Amnesty International requests for the admission of observers to trials since 1972.[122]

The 1976 report frustrates the congressional desire for the State Department to make a real contribution to the available information on human rights problems, to the fact-finding necessary for responsible congressional decision-making as to aid levels, and to forthright United States government statements about human rights situations. Instead, the Department's report so uncritically relies on the information evidently provided by the aid recipient governments[123] that the reports may serve perversely to identify the United States further with the human rights violators, rather than to disassociate the United States government from these lamentable practices. In any case, the congressional purpose as to public statements about human rights practices was not served by the 1976 report.

Furthermore, in its 1976 report to Congress the State Department expressly focused on only a few sections of the Universal Declaration of Human Rights[124]: article 3 (right to life, liberty, and security of person), 5 (torture, cruel, inhuman and degrading treatment or punishment), 8 (effective legal redress for human rights violations in domestic tribunals), 9 (arbitrary arrest, detention, or exile), 10 (fair hearing), and 11 (presumption of innocence, public trial, and double jeopardy). In addition to the very brief State Department comments on the observance of these six articles in aid-recipient countries, the reports contain even more summary references to "other freedoms," which include miscellaneous statements on such rights as the freedom of movement, political asylum, freedom of speech and press, freedom of association, racial equality, freedom of religion, and

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[120] *See* 1976 STATE DEPARTMENT REPORT, *supra* note 118, at 7-11; but the State Department noted this lack of cooperation, in 1977 HUMAN RIGHTS REPORTS, *supra* note 111, at 127; *see also* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON WORK ACCOMPLISHED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AT ITS THIRTIETH SESSION, OAS DOC. OEA/Ser.L/V/11.30, Doc. 45, rev. 1, at 50 (1973).

[121] *See* 1976 STATE DEPARTMENT REPORT, *supra* note 118, at 19.

[122] *See* Amnesty International, Briefing on Iran 10 (1976).

[123] *See* notes 111 and 124 *supra*.

[124] *See* 1976 STATE DEPARTMENT REPORT, *supra* note 118; *see also* 1977 HUMAN RIGHTS REPORTS, *supra* note 111.

property rights. The reports do not explain why some rights were separately treated, why some were barely mentioned as to a few countries, but omitted for others, and why many (even those in the Universal Declaration) were never mentioned at all.[125]

The Department was apparently attempting to restrict "internationally recognized human rights" to the rights mentioned in the section 502B definition of "gross violations of internationally recognized human rights" which "*includes*"

> torture, or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, and other flagrant denial of the right of life, liberty, or the security of person . . . .[126]

This clause, however, is a definition of "*gross violations* of internationally recognized human rights," which might trigger a termination of aid under section 502B(a)(2). The clause is not intended to limit the reporting provision of section 502B. The State Department is required by section 502B(c)(1)(A) to report "all available information about observance of and respect for *human rights and fundamental freedom* in that country . . ."[127] and by section 502B(b) to provide a "full and complete report . . . with respect to practices regarding the observance of and respect for internationally recognized human rights . . . ."[128] Accordingly, it appears evident that the State Department report is far too restrictive.

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[125] *Cf. Human Rights in Uruguay and Paraguay, Hearings before the Subcomm. on International Organizations of the House Comm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 116 (1976) (testimony of Ronald Palmer, former Deputy Coordinator for Human Rights).

[126] 22 U.S.C.A. § 2304(d)(1) (emphasis added).

The use of the word "includes," however, in connection with the examples provided in subsection (f) suggests that not all the rights included within the parameters of 502B are identified; nor are "internationally recognized" human rights necessarily limited to those documents from which the illustrations are drawn.

In drafting this language, Congress appears to have had in mind two parts of the International Bill of Human Rights—the Universal Declaration of Human Rights and the U.N. Covenant on Civil and Political Rights. *See* note 116 *supra*. Some of the phrasing of section 502B is identical to that found in the Universal Declaration and Covenant. For example, article 5 of the Declaration refers to "cruel, inhuman or degrading treatment or punishment;" and article 3 protects the right to "life, liberty and the security of person."

The examples provided in section 502B also parallel closely rights safeguarded in the Covenant on Civil and Political Rights. Article 7 of the Covenant refers, for example, to "cruel, inhuman or degrading treatment or punishment." Article 9 refers to "life, liberty and the security of person." Article 9 also contains a guarantee of an individual's right to be promptly informed of all charges brought against him and the right to a prompt trial.

[127] 22 U.S.C.A. § 2304(c)(1)(A) (emphasis added).

[128] *Id.* § 2304(b).

Indeed, in view of the emphasis in section 502B(a)(1) placed on "human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion," it is particularly difficult to understand the State Department's failure to stress at least these equality issues in their reports. In any case, the State Department's previous statements as to the scope of "internationally recognized human rights" and the best considered understanding of the legislative language indicate that the recent reports do not fulfill the legislative mandate. The State Department's selection of certain rights from the Universal Declaration is also troublesome, because the selection suggests an emphasis on certain United States preferred rights among "internationally recognized" human rights.[129]

Section 502B(c) also requires that the Secretary of State set forth the steps the United States has taken to:

> (i) Promote respect for an observance of human rights in that country and discourage any practices which are inimical to internationally recognized human rights, and
>
> (ii) Publicly or privately call attention to or disassociate the United States and any security assistance provided for such country from, such practices . . . .[130]

Again, it should be noted that the reports should include United States policies which discourage or disassociate our government from "*any practices* inimical to internationally recognized human rights" — not merely foreign government practices and not merely in regard to military assistance.[131]

The 1976 report describes a relatively impressive array of United States human rights activity, including private diplomatic contacts at various levels of government and on different human rights subjects.[132] Although these measures have not been applied uniformly,

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[129] 123 CONG. REC. S2641 (daily ed. Feb. 11, 1977) (remarks of Senator Jackson urging that freedom of emigration is the most fundamental of rights protected by the Universal Declaration).

[130] 22 U.S.C.A. § 2304(c)(1)(B).

[131] *Id.* § 2304(c)(1)(B)(i) (emphasis added).

[132] Also included are monitoring the observance of human rights in aid-recipient countries, inquiries about specific prisoners, a few public statements by United States government officials, the delivery of United States human rights legislation to foreign government officials at various levels, United States Information Service distribution of general State Department pronouncements on human rights, the transmission of these pronouncements to government officials, congressional hearings, briefings of foreign press on United States human rights

those listed are suggestive of the sorts of human rights actions the State Department has been willing during the previous two or three years to undertake. Unfortunately, section 502B does not require the Department to analyze the effectiveness of these measures in achieving human rights observance or discouraging "practices inimical" to human rights. Such an analysis of effectiveness might help to gauge the appropriateness of the measures already taken and to assist the Congress in determining whether aid should be continued.

Instead, section 502B(c)(1) requires only that the Secretary of State indicate whether, notwithstanding practices inimical to human rights:

> (i) Extraordinary circumstances exist which necessitate a continuation of security assistance for such country, and, if so, a description of such circumstances and the extent to which such assistance should be continued (subject to such conditions as Congress may impose under this section), and
>
> (ii) On all facts it is in the national interest of the United States to provide such assistance . . . .[133]

The section does not specify what might constitute "extraordinary circumstances" or "the national interest." Although it might be difficult to establish principles which could cover the variegated United States relations with all aid recipients, these phrases are so vague as to invite administrative abuse. Indeed, the 1976 State Department report easily concludes in regard to all six countries that the "national interest" requires the continuation of all security assistance, despite allegations of human rights violations.[134]

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attitudes, exchange programs during which human rights speakers have been presented to foreign audiences, and the structuring of military aid, particularly in regard to training of personnel and weapon sales, to avoid any application of the aid to internal security or police activities, which might involve torture or other human rights violations. *See* 1976 STATE DEPARTMENT REPORT, *supra* note 118, at 4, 5, 9-10, 15, 16, 21, 26, 31.

[133] 22 U.S.C.A. § 2304(c)(1).

[134] In its litany of justifications, the Department identified several of the competing goals of United States foreign policy: the generalized desire to keep "communication" with the dominant sector of each country so as to ensure other United States interests. 1976 STATE DEPARTMENT REPORT, *supra* note 118, at 6, 27, 33; the need for raw materials, for example, food, uranium, and oil, *id.* at 22; the need to safeguard United States investments, *id.* at 6; and loans, *id.* at 6; the desire to maintain United States influence with powerful or potentially powerful nations, *id.* at 16; the need to safeguard the military security of the United States, *id.* at 16, 32; its foreign military bases, *id.* at 11, 32; and U.S. allies, *id.* at 22, 32; the desire for "regional stability," *id.* at 17, 22, 32; and the wish to maintain general confidence over United States security commitments, *id.* at 27, 33.

Nevertheless, there were some shades of difference between the report on Argentina, for example, and the other reports. As to Argentina, the 1976 report foreshadows the Carter Administration's later decision to limit military aid to Argentina under section 502B(a)(2)[135]:

> The Department of State is of the opinion *at this* time that it is in the national interest of the United States to provide continued security assistance to Argentina. The Department is monitoring the situation closely.[136]

The conclusion on Indonesia is more supportive of aid:

> The Department of State believes that it is in the interest of regional security and continued good United States-Indonesian relations to try to be responsive to Indonesia, particularly at this time when it feels increasingly concerned about its national security. Specifically, the Department is of the opinion that continuation of our security assistance program to Indonesia is in the U.S. national interest.[137]

None of the declarations as to the need for continued assistance, however, set forth "extraordinary circumstances;" the State Department could make similar representations in regard to almost

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Many of these human rights, economic, military, or political goals are very similar, but may be expressed in somewhat different ways or may be addressed to longer or shorter time spans. Furthermore, the State Department document seems to insist that every other goal must take precedence over human rights. The Department, however, did not even purport to rely upon national security considerations in regard to at least three countries — Peru, Haiti, and Argentina. Instead, they invoked more general concepts of United States national interest or expressed doubt as to the efficacy of aid terminations for achieving human rights goals. Bruce Cameron, testifying on behalf of the Americans for Democratic Action before a Senate Subcommittee, argued for a limited definition of national security. Testimony of Bruce Cameron before the Subcomm. on Foreign Assistance of the Senate Comm. on Foreign Relations (Mar. 4, 1977) (unpublished statement).

Nowhere was there a pragmatic balancing of human rights, economic, political and military objectives, as required by section 502B(a)(1). Perhaps, this failure was due to the apparently overwhelming desire of the State Department to prevent the termination of military aid for any country. But section 502B does not require automatic termination upon a finding of human rights violations. Instead, it allows a panoply of human rights techniques. The restriction and termination of military aid are only two of the most extreme measures which might be taken.

[135] Oberdorfer, *In Rights Push, Vance Asks Cuts to 3 Countries,* Wash. Post, Feb. 25, 1977, §A, at 1, col. 3; Gwertzman, *U.S. Cuts Foreign Aid in Rights Violations; South Korea Exempt,* N.Y. Times, Feb. 25, 1977, at 1, col. 6.

[136] 1976 STATE DEPARTMENT REPORT, *supra* note 118, at 6.

[137] *Id.* at 16-17.

every country of the world. Such circumstances can hardly be "extraordinary."

As Congress accumulates more experience under section 502B, there may be a need to enforce, amend and tighten these provisions so as not to allow the State Department quite so much latitude. In the meantime, however, section 502B(c)(1)(D) permits either House of the Congress or the respective committees on foreign relations to ask the Secretary of State for "such other information as such committee or House may request." Accordingly, the Congress may be able to resolve some of the interpretation problems in the statute by making more specific requests for reports: for example, Congress may specify that the report must state which internationally recognized human rights, which sorts of information, and which factors the State Department considered in analyzing the national interest. Indeed, Congress might want to require the State Department to make a reasoned conclusion as to whether "all available information" indicates that a government "is engaging in a consistent pattern of gross violations of internationally recognized human rights."[138]

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[138] 22 U.S.C.A. § 2304(c)(1)(D), (a)(2). The State Department might also be pressured to be more honest in evaluating and reporting the information it possesses. For example, a congressional committee could conduct oversight hearings and cross-examine the officials who drafted the reports. *See* note 29 *supra*. Under the Legislative Reorganization Act of 1970, 2 U.S.C.A. § 190(d) (Pamph. Supp. 1975), Congress gave its committees broad oversight authority to "review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee." This oversight function is founded in substantial legislative practice (see 60 Stat. 812 (1946) repealed by 84 Stat. 1172 (1970)) and has been implied from the Constitution. Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Dougherty, 273 U.S. 135, 137 (1927). No one has apparently questioned the authority of congressional committees to hold hearings on the human rights situation in countries which receive foreign aid or might receive such aid in the future.

For a general discussion of congressional oversight responsibilities, see the following: SHAPIRO, JUDICIAL REVIEW: POLITICAL REALITY AND LEGISLATIVE PURPOSE: THE SUPREME COURT'S SUPERVISION OF CONGRESSIONAL INVESTIGATIONS 535, 542-47 (1962); Bibby, *Committee Characteristics and Legislative Oversight of Administration*, 10 MIDWEST J. POL. SCI. 78, 97-98 (1966); MacMahon, *Congressional Oversight of Administration: The Power of the Purse*, 58 POL. SCI. Q. 161-65 (1943); Newman & Keaton, *Congress and the Faithful Execution of the Laws—Should Legislators Supervise Administrators?*, 41 CALIF. L. REV. 565, 567-70 (when congressional interference with administrative actions appropriate, 570-84 (limitations on the scope of congressional oversight) (1953); Pearson, *Oversight: A Vital Yet Neglected Congressional Function*, 23 U. KAN. L. REV. 277, 278-79 (1975). Alternatively, the General Accounting Office might be asked to investigate the process by which the reports were prepared. *See* 2 U.S.C. § 190(d) (1970). While even stronger measures are available, it is doubtful that Congress possesses the political will to take more coercive measures. For example, Congress

Since section 502B(c) permits very little time (30 days) for response and requires considerable information, the Congress must be relatively sparing in making requests if the Department is to produce adequate reports. The poor reports produced thus far may also be evidence of the inadequate attention and staffing the Department has devoted to human rights.[139] In any case, careful choice as to when a report should be requested on a certain country and more precision in making the requests might lighten the administrative burden, give a little more certainty to such phrases as "internationally recognized human rights," and possibly make the reporting provisions of section 502B more meaningful.

E. *Other Legislative Measures for Human Rights*

In addition to the more general human rights provisions of sections 116 and 502B, Congress has also experimented with other measures addressed to human rights violations.[140] For example, Congress provided pressure for the Soviet Union and other communist countries to discontinue restrictive emigration practices. The Trade Act of 1974 authorizes the President to extend most-favored-nation status to those nonmarket economy countries which do not deny their citizens the right to emigrate.[141] Congress also passed a similar

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might withhold funding from the State Department until it complies with congressional directives. For a historical perspective on the relations between Congress and the State Department, *see* H. CARROLL, THE HOUSE OF REPRESENTATIVES AND FOREIGN AFFAIRS 154-93 (1958); *see also* F. WILSON & R. FRANK, THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 66-82 (1976); Bonfield, *Military and Foreign Affairs Function Rule-Making under the APA*, 71 MICH. L. REV. 221 (1972).

[139] *See* note 35 *supra*.

[140] *See* note 38 *supra*. Anti-boycott legislation is yet another measure designed to protect against human rights violations - particularly religious discrimination. *See* 1 BOYCOTT REPORT 1 (Mar. 1977); U.S. Department of State, Statement of Secretary of State, Mar. 1, 1977, at 1-2.

[141] 19 U.S.C.A. § 2432 (1977 Supp.):

SEC. 402. FREEDOM OF EMIGRATION IN EAST-WEST TRADE.

(a) To assure the continued dedication of the United States to fundamental human rights, and notwithstanding any other provision of law, on or after the date of the enactment of this Act products from any nonmarket economy country shall not be eligible to receive nondiscriminatory treatment (most-favored-nation treatment), such country shall not participate in any program of the Government of the United States which extends credits or credit guarantees or investment guarantees, directly or indirectly, and the President of the United States shall not conclude any commercial agreement with any country, during the period beginning with the date on which the President determines that such country —

(1) denies its citizens the right or opportunity to emigrate;

restriction on Export-Import Bank credits[142] for the Soviet Union to encourage Jewish emigration.

These measures raise very difficult issues of evenhandedness and effectiveness. The legislation is addressed principally to one group of nations which have been adversaries to the United States. The legislation deals with one particular human right of considerable interest to the United States.[143] As a result, the socialist nations might well conclude that this legislation is not part of a concern for human rights, but constitutes a new phase in the Cold War propaganda competition.[144]

Indeed, there is evidence that diplomatic efforts were succeeding in obtaining freer emigration from the Soviet Union until the intervention of Congress.[145] The Soviet Union took such offense at the

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(2) imposes more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or

(3) imposes more than a nominal tax, levy, fine, fee, or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice,

and ending on the date on which the President determines that such country is no longer in violation of paragraph (1), (2), or (3).

(b) After the date of the enactment of this Act, (A) products of a nonmarket economy country may be eligible to receive nondiscriminatory treatment (most-favored-nation treatment), (B) such country may participate in any program of the Government of the United States which extends credits or credit guarantees or investment guarantees, and (C) the President may conclude a commercial agreement with such country, only after the President has submitted to the Congress a report indicating that such country is not in violation of paragraph (1), (2), or (3) of subsection (a). Such report with respect to such country shall include information as to the nature and implementation of emigration laws and policies and restriction or discrimination applied to or against persons wishing to emigrate. The report required by this subsection shall be submitted initially as provided herein and, with current information, on or before each June 30 and December 31 thereafter so long as such treatment is received, such credits or guarantees are extended, or such agreement is in effect.

The President is authorized to waive the application of subsections (a) and (b) if he reports to Congress that the waiver would "substantially promote the objectives of this section" and that he has received assurances that future emigration practices would achieve the objectives. *Id.* § 402(c).

[142] Export-Import Bank Amendments of 1974 § 8(b), 12 U.S.C.A. § 635e(b) (Supp. 1976). The provision imposes a limit of $300,000,000 on the amount of credits and guarantees that could be provided for United States exports to the Soviet Union. The President may establish a higher limitation if approved by concurrent resolution of Congress.

[143] *See* text at notes 181-90 *infra.*

[144] *See* note 182 *infra.*

[145] *Congress and United States - Soviet Relations, Report of a Conference Between Members of the U.S. Senate and Delegates to the Supreme Soviet of the Soviet Union,* 94th Cong.,

Jackson and Stevenson Amendments that Jewish emigration has slowed since enactment.[146] Nevertheless, there is some evidence that Romania responded favorably to the provisions and has permitted greater emigration.[147]

The returns are not evident from these efforts but they do point to the apparently fewer alternative measures available for human rights implementation vis-a-vis the socialist nations. Most socialist countries do not receive United States aid. Accordingly, there is a risk that an overdependence on aid as a human rights mechanism may make the United States less evenhanded in its promotion of human rights—concentrating only on aid-recipients.

1st Sess. 5-8 (Comm. Print Nov. 1975) (staff of the Senate Comm. on Foreign Relations); *Reassessment of U.S. Foreign Policy, Hearings Before the Subcomm. on Future Foreign Policy Research and Development of House Comm. on International Relations*, 94th Cong., 1st Sess. 23-24 (1975) (testimony of W. Averell Harriman). *See* Kissinger News Conference at Dallas, Mar. 23, 1976, 74 DEP'T STATE BULL. 469 (1976). Emigration of Soviet Jews has sharply declined from approximately 38,000 in 1973 to 20,000 in 1974, and 13,000 in 1975. The Soviet Government has failed to act on 130,000 requests for exit visas, some of which were submitted five years ago or more. 122 CONG. REC. H4436 (daily ed. May 17, 1976) (remarks of Rep. Drinan). Further, no increase in emigration has occurred since the Soviet Union signed the Final Act of the Conference on Security and Cooperation in Europe (the Helsinki Agreement) on August 1, 1975, despite the language of part III which affirms that "the participating states will deal in a positive and humanitarian spirit with the applications of persons who wish to be re-united with members of their family." *Id.* at 4436-37. In order "to monitor the acts of the signatories which reflect compliance with or violation of [the Helsinki Agreement], with particular regard to the provisions relating to Cooperation in Humanitarian Fields," Congress recently established the Commission on Security and Cooperation in Europe. Pub. L. No. 94-304, §§ 1, 2 (June 3, 1976). The Commission, comprised of House and Senate members and administration officials, is empowered to subpoena witnesses and records and is required to periodically report to Congress. *Id.* §§ 3, 4, 6. *See* FIRST SEMIANNUAL REPORT BY THE PRESIDENT TO THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE, 94th Cong., 2d Sess. (1976); REPORT OF THE STUDY MISSION TO EUROPE TO THE COMMISSION ON SECURITY AND COOPERATION IN EUROPE, 95th Cong., 1st Sess. (1977).

[146] Meeker, *Foreign Policy and Human Rights*, 69 AM. SOC. INT'L L. PROC. 255, 257-58 (1975). Senator Jackson also believes that the Soviet government only reduced emigration after Secretary Kissinger gave the Soviet Union reason to hope that resistance might contribute to the demise of the Jackson-Vanik Amendment. 123 CONG. REC. S2641-42 (daily ed. Feb. 11, 1977).

[147] The Romanian Government approved over 2,000 exit visas for Jewish emigration to Israel during the period from January through July, 1975, and over 750 visas for emigration to the United States. 121 CONG. REC. H7619 (daily ed. July 28, 1975). *See Trade Benefit for Romania Asked in View of Visa Policy*, N.Y. Times, July 23, 1975, at 32, col. 3. Following the waiver of §§402(a), (b) of the Trade Act of 1974 by President Ford, Congress approved the extension of nondiscriminatory treatment for products of Romania. S. Con. Res. No. 35, 94th Cong., 1st Sess., 121 CONG. REC. H7629 (daily ed. July 28, 1975), *but see* 123 CONG. REC. H2538 (daily ed. March 23, 1977) (remarks of Rep. Koch); *Romania—U.S. trade deal likely to be extended*, Christian Sc. Monitor, Sept. 21, 1976, at 28, cols. 1-3.

If the United States human rights efforts are to be credible and effective, they must be perceived by every nation as motivated by a genuine desire to improve the observance of human rights and not motivated by political dominance of the Third World or by Cold War competition with the Soviet Union. Hence, it is very important that United States human rights legislation and overall United States human rights conduct be as evenhanded as possible and partake of internationally recognized norms and international procedures.

In addition, trade sanctions do not have a very encouraging record of success.[148] For example, experience under the League of Nations sanctions against the Italian invasion of Ethiopia[149] and the United Nations Security Council efforts on Rhodesia[150] suggest that one

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[148] *See, e.g.*, MacDonald, *Economic Sanctions in the International System*, [1969] CAN. Y.B. OF INT'L L. 61, 80; Taubenfield & Taubenfield, 58 AM. SOC. INT'L L. PROC. 183, 196-201 (1964). A full consideration of the effectiveness of national and international sanctions must fall outside the scope of this article. Similarly, issues as to whether trade, aid, or other human rights measures might involve impermissible intervention into the internal affairs of other nations or might constitute impermissible coercion at international law must be deferred to another day. *See* U.N. Charter, arts. 2(3), 2(4), 2(7), *supra* note 15; *see, e.g.*, R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 58-130 (1963); Dons, *Is the Question of Human Rights a Domestic Matter*, JUS GENTIUM I, 77 (1949); Lauterpacht, *The International Protection of Human Rights*, 70 HAGUE ACADEMY INT'L L.: RECEUIL DES COURS 5, 19 (1947); Watson, *Auto-interpretation, Competence, and the Continuing Validity of Article 2(7) of the U.N. Charter*, 71 AM. J. INT'L L. 84 (1977); Wright, *Is Discussion Intervention?*, 50 AM. J. INT'L L. 102-10 (1956); Report of the United Nations Commission on the Racial Situation in the Union of South Africa, 8 GAOR, Supp. No. 16 A/2505 and A/2505/Add. 1, at 16-34; *see* Gross, *Domestic Jurisdiction, Enforcement Measures and the Congo*, [1965] AUSTL. Y.B. INT'L L. 137; Preuss, *Article 2(7) of the Charter of the United Nations and Matters of Domestic Jurisdiction*, 74 HAGUE ACADEMY INT'L L.: RECUEIL DES COURS 553 (1949); Ross, *The Proviso Concerning "Domestic Jurisdiction" in Article 2(7) of the Charter of the United Nations*, 2 OSTERO. ZEIT. RECHT 562 (1950); Comment, 122 U. PA. L. REV. 983, 993-96, 1006-10 (1974); J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICTS 58-60 (1954); Bowett, *Economic Coercion and Reprisals by States*, 13 VA. J. INT'L L. 1, 9-10 (1972). *Cf.* Partridge, *Political and Economic Coercion: Within the Ambit of Article 52 of the Vienna Convention on the Law of Treaties?*, 5 INT'L LAW. 755, 761-67; 58 AM. SOC. INT'L L. PROC. 217 (1964) (remarks of Professor Fisher); MacDonald, *Economic Sanctions in the International System*, [1969] CAN. Y.B. OF INT'L L. 61. *See also* General Assembly Declaration on the Inadmissability of Intervention in the Domestic Affairs of States, G.A. Res. 2131, 20 U.N. GAOR Supp. 14, at 11, U.N. Doc. A/6220 (1965); The Declaration on Friendly Relations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, U.N. Doc. A/8028 (1970); The Charter of Economic Rights and Duties of States, G.A. Res. 3281, 29 U.N. GAOR Supp. 31, at 50, U.N. Doc. A/9631 (1974). *See also* Bowett, *International Law and Economic Coercion*, 12 VA. J. INT'L. L. 245 (1976).

[149] Taubenfield & Taubenfield, *The Economic Weapon: The League and the United Nations*, 58 AM. SOC. INT'L L. PROC. 183, 184-86 (1964).

[150] *See, e.g.* L. KAPUNGA, THE UNITED NATIONS AND ECONOMIC SANCTIONS AGAINST RHODESIA 129 (1971).

must not expect too much impact from trade restrictions. Instead, trade sanctions might be seen as a way of demonstrating world disapproval; if the sanctions actually have some practical effect, so much the better. But trade sanctions cannot be expected to bring the target government immediately into obedience.

Accordingly, trade and trade credit provisions for implementing human rights, such as the Stevenson and Jackson amendments, can not be off-handedly dismissed as failures or recommended as panaceas. They are merely one set of measures for consideration with other alternatives in an overall inventory of possible human rights actions.

III. UNITED STATES HUMAN RIGHTS APPROACHES

The first months of 1977 have been very lively in the attention devoted to human rights. First, for example, there were several general statements, including the Inaugural Address[151] and the United Nations speech of March 17th,[152] expressing concern for human rights and committing the United States to ratification of the United Nations Human Rights Covenants. Second, the State Department asked fervently for and achieved the repeal of the Byrd Amendment.[153] Third, there have been public statements on specific human rights problems, for example, in Czechoslovakia, Cuba, Namibia, Rhodesia, South Africa, the Soviet Union, and Uganda.[154]

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[151] 123 CONG. REC. S1131 (daily ed. Jan. 20, 1977).

[152] Address by President Carter, United Nations, *reprinted in* N.Y. Times, Mar. 18, 1977, at 10, col. 1; *see also* note 3 *supra*.

[153] Pub. L. No. 94-12 (March 18, 1977). Exec. Order 11978, 42 Fed. Reg. 15403 (Mar. 22, 1977); *see* Lescaze, *Vance Urges Halting of Chrome Imports to Press Rhodesia*, Wash. Post, Feb. 11, 1977, §A, at 2, col. 1; Hovey, *Vance Begins Drive to End U.S. Imports of Rhodesian Chrome*, N.Y. Times, Feb. 11, 1977, at 1, col. 1; *see generally* Scott, *Rhodesian Chrome Ban Made Law*, Wash. Post, Mar. 19, 1977, §A, at 2, col. 5; Lyons, *House Approves Authority to Bar Rhdesia Chrome*, Wash. Post, Mar. 18, 1977, §A, at 1, col. 5.

[154] *See, e.g.*, Gwertzman, *Carter Encouraged by Soviet on Arms; Adamant on Rights*, N.Y. Times, Mar. 23, 1977, at 1, col. 1; *U.S. Joins Vote Condemning Chile Rights Violations*, St. Paul Pioneer Press, Mar. 10, 1977, at 7, col. 1; *U.S. at Geneva: Isolate S. Africa*, Wash. Post, Mar. 1, 1977, §D, at 11, col. 1; *Carter: Uganda Actions 'Have Disgusted' the World*, Wash. Post, Feb. 24, 1977, §A, at 8, col. 1; Wren, *Sakharov Receives Carter Letter Affirming Commitment on Rights*, N.Y. Times, Feb. 18, 1977, at 3, col. 1; Scott, *Carter Outlines Basis for Better Ties with Cuba*, Wash. Post, Feb. 17, 1977, §A, at 1, col. 5; Birder, *Carter Says Cubans May Leave Angola, Is Receptive on Ties*, N.Y. Times, Feb. 17, 1977, at 1, col. 6; *U.S. Extends Actions on Soviet Rights to U.N.*, Wash. Post, Feb. 12, 1977, §A, at 2, col. 3; *U.S. Tells "Profound Concern" Over the Detention of Ginzburg*, Wash. Post, Feb. 8, 1977, §A, at 3, col. 1; Gwertzman, *U.S. Again comments on Soviet Dissident*, N.Y. Times, Feb. 8, 1977, at 1, col. 2; Gwertzman, *Carter Discusses Human Rights and Arms Issues with Dobrynin*,

Fourth, the Administration requested a reliably accused torturer from Chile to abbreviate his State Department-sponsored tour to the United States.[155] Fifth, the Administration, pursuant to section 502B, voluntarily limited military assistance for Argentina, Ethiopia, and Uruguay on human rights grounds.[156] Sixth, the Administration issued Human Rights Reports on 82 countries as required by section 502B(b) of the Foreign Assistance Act.[157]

These efforts are a tribute to the new Administration's concern for human rights and a vindication of the work of Congress for the last several years.[158] It is necessary, however, to explicate United States human rights policies in some detail and in the context of an overall human rights strategy under section 502B(a)(1). Ad hoc action is not policy and is no replacement for a more predictable and more regularized approach to human rights.[159] Without such a considered strategy, United States actions will be less effective,[160] vulnerable to charges of a double standard,[161] and subject to unnecessary risks of retribution.[162]

N.Y. Times, Feb. 2, 1977, at 1, col. 1; Marder, *Vance Warns Rhodesia*, Wash. Post, Feb. 1, 1977, §A at 1, col. 5; *Carter Backs But Didn't Clear the Statement on Sakharov*, Wash. Post, Jan. 31, 1977, §A, at 4, col. 2; *U.S. Cautions Soviet on Sakharov Curbs*, N.Y. Times, Jan. 28, 1977, at 1, col. 3; Gwertzman, *U.S. Asserts Prague Violates Covenants About Human Rights*, N.Y. Times, Jan 27, 1977, at 1, col. 1; *see also* statement of Philip Habib before the House Subcommittee on African Affairs (Mar. 3, 1977) (unpublished statement).

[155] DeYoung, *Alleged Chilean Torturer Asked to Cut Short U.S. Visit*, Wash. Post, Jan. 29, 1977, §A at 13, col. 1.

[156] Oberdorfer, *In Rights Push, Vance Asks Cuts to Three Countries*, Wash. Post, Feb. 25, 1977, §A, at 1, col. 3; Gwertzman, *U.S. cuts Foreign Aid in Rights Violations; South Korea Exempt*, N.Y. Times, Feb. 25, 1977, at 1, col. 6.

[157] 1977 HUMAN RIGHTS REPORTS, *supra* note 111.

[158] *See* Smith, *Carter's Diplomacy in Public Causing Questions and Complications*, N.Y. Times, Mar. 18, 1977, at 6, col. 1; G. Aldrich, *A Sensible Human Rights Policy*, Dec. 7, 1976, at 1 (unpublished memorandum).

[159] *Cf.* Rosenfeld, *The Risks of Human Rights Policy*, Wash. Post, Feb. 11, 1977, §A, at 23, col. 1.

[160] *Soviet Press, TV Strikes Back, Hits U.S. for Rights Violations*, Wash. Post, Feb. 22, 1977, §A, at 14, col. 1; Osnos, *Brezhnev Attacks Interference*, Wash. Post, Mar. 22, 1977, §A, at 1, col. 3; *Cf.* Willis, *Soviets Criticize Carter by Name on Many Issues*, Christian Sci. Monitor, Mar. 14, 1977, at 1, col. 1. *See, e.g.*, Shipler, *Moscow, Criticized on Dissidents, Cites U.S. Shortcomings*, N.Y. Times, Mar. 3, 1977, at 1, col. 1; Gwertzman, *Russ Avails Vance on Rights Stance*, Minneapolis Trib., Mar. 29, 1977, §A, at 3, col. 2; Hofmann, *Prague Spokesman Says Dissidence is Being Fanned from Abroad*, N.Y. Times, Feb. 11, 1977, at 6, col. 1.

[161] U.S. Department of State, Press Conference of Secretary of State, Jan. 31, 1977, at 3 (question of Marvin Kalb).

[162] *E.g., Reporter Held; U.S. Protests to Prague*, Wash. Post, Feb. 9, 1977, §A, at 12, col. 1; Marder, *Dobrynin Cautions Vance on Support of Sakharov*, Wash. Post, Jan. 29, 1977, §A, at 2 col. 1.

There may be no way of preventing these problems, but it might be possible to improve the credibility, effectiveness, and evenhandedness of the human rights concern of the United States government, if some general approach to human rights can be formulated. Such a general approach to human rights action under section 502B must commence with a definition of this country's goals, including the reasons for promoting the observance of human rights, a review of the most effective methods for achieving these goals, and at least a tentative choice of the methods most appropriate to particular human rights situations.

President Carter, in his first speech before the United Nations set forth the most authoritative recent restatement of United States foreign policy objectives:

> These then are our basic priorities as we work with other members to strengthen and to improve the United Nations:
>
> First, we will strive for peace in the troubled areas of the world.
>
> Second, we will aggressively seek to control the weaponry of war.
>
> Third, we will promote a new system of international economic progress and cooperation.
>
> And fourth, we will be steadfast in our dedication to the dignity and well-being of people throughout the world.
>
> I believe that this is a foreign policy that is consistent with my own nation's historic values and commitments. I believe it is a foreign policy that is consonant with the ideals of the United Nations.[163]

It should be noted that human rights sits fourth—not first—within this ordering of foreign policy objectives. Nevertheless, the ranking does not appear to have made the Carter Administration conclude that human rights must always be subordinated to other goals, such that the human rights goal never affects policy. Human rights goals may be consistent with other objectives or may be so strong in some cases as to demand priority.

There are several reasons for giving human rights priority in specific circumstances: since respect for fundamental rights is basic to United States national traditions, any foreign policy which conflicts with these American values may fail for lack of popular support.[164]

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[163] *See* note 152 *supra*.

[164] *See* Rostow, *Great Cases Make Bad Law: The War Powers Act*, in THE VIETNAM WAR AND INTERNATIONAL LAW 751 (R. Falk ed. 1976); B. Cameron, *Human Rights and Security Assistance*, Feb. 4, 1977, at 1 (unpublished memorandum).

Identification with repressive regimes may harm the United States image in the world.[165] Human rights violations should be avoided, because they may, at least in very egregious cases, lead to war.[166] Regimes that violate the human rights of their citizens may therefore be politically unstable, thus presenting risks to peace, trade and investment.[167] If the United States assists a government to engage in repression, the former victims may eventually take power and may not be particularly friendly to the countries which aided the former oppressors. The United States may thus lose access to natural resources, military facilities and other opportunities.[168] Some American citizens may fall victims to human rights violations by foreign governments.[169] Respect for human rights may form the foundations for good relations among the community of nations which share these concerns.[170] And perhaps most importantly, the United States has an international obligation under the United Nations Charter, as reaffirmed by section 502B(a)(1), to promote the observance of international human rights.[171]

In regard to each country, United States policy planners must balance the competing objectives and derive a considered strategy in the light of all the available measures. The analyst must consider the potential for each country to improve its observance of and respect for internationally recognized human rights. It is then necessary to complete an inventory of all the bilateral and multilateral

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[165] *Human Rights in the World Community: A Call for U.S. Leadership, supra* note 29, at 1.

[166] *See, e.g.*, International Commission of Jurists, The Events in East Pakistan, at 97 (1971).

[167] *See, e.g.*, AMNESTY INTERNATIONAL, REPORT ON TORTURE 79 (1975) (Greece under the Colonels). Of course, this consideration might be subject to abuse, if human rights were not considered to include economic rights.

[168] *See, e.g., Revolution into Democracy, Portugal After the Coup: Senate Comm. on Foreign Relations*, 94th Cong., 2d Sess. 82-90 (1976).

[169] de Onis, *Argentina Beset by Arrest Queries*, N.Y. Times, Aug. 16, 1976, at 5, col. 1; *Ex-Minneapolis Woman Jailed in Argentina*, Minneapolis Trib., May 18, 1976, §A, at 8, col. 3; *5 Americans Held in Yugoslav Jails*, N.Y. Times, July 29, 1976, at 5, col. 3.

[170] *See, e.g.*, The Atlantic Charter, 55 Stat. 1603 (1942), E.A.S. No. 236, Organization for Economic Cooperation and Development, *entered into force* Sept. 30, 1961, [1961] 12 U.S.T. 1728, U.S. T.I.A.S. 4891; European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, *entered into force*, Sept. 3, 1953.

[171] *See, e.g.*, Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, [1971] I.C.J. 16, *reprinted in* 66 AM. J. INT'L L. 145 (1972); *see generally S.W. Africa Opinion of the ICJ: A Symposium*, 11 COLUM. J. TRANSNAT'L L. 1 (1972); Brown, *1971 Advisory Opinion on Southwest Africa*, 5 VAND. J. TRANSNAT'L L. 213 (1971).

measures available to the United States for promoting the observance of internationally recognized human rights.[172] Once all the alternative measures are known, the country analyst can begin to ask some of the harder questions:[173]

1. Will any particular measure be helpful in achieving an improvement in the observance of internationally recognized human rights?[174]

2. What would be the most effective way of implementing the measure?[175]

3. What are the risks and benefits for the United States, third countries, and international organizations?[176]

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[172] *See generally* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 30-31 (1961); N. PALMER & H. PERKINS, INTERNATIONAL RELATIONS 160-78 (2d ed. 1957); testimony of Edward F. Snyder, Friends Committee on National Legislation, Before the Subcomm. on Foreign Assistance of the Senate Foreign Relations Comm., Mar. 4, 1977 (unpublished statement); International League for Human Rights, Report of the Conference on Implementing a Human Rights Commitment in United States Foreign Policy, Mar. 4, 1977; G. Aldrich. *A Sensible Human Rights Policy*, Dec. 7, 1976, at 6-14 (unpublished memorandum); *cf., e.g.*, Hoagland, *S. Africa, With U.S. Aid, Near A-Bomb*, Wash. Post, Feb. 16, 1977, §A, at 12, col. 1.

[173] For a first effort at similar policy questions, *see* W. Christopher, Deputy Secretary of State, Opening Remarks before Humphrey Subcommittee, March 7, 1977 (unpublished statement); *see also* address of former Assistant Secretary of State for Inter-American Affairs Rogers, Pan American Society, Boston, Nov. 4, 1975.

[174] For example, will the measure be seen by the government violating human rights as such a threat to its existence that the government may become even more oppressive? Will outside pressure generate a popular reaction in support of the government's repressive policies or at least create an excuse for more oppression to resist the external threat? Or will the measure encourage the human rights victims and other sympathetic persons in the affected nation? Is the human rights problem structural or capable of shorter term resolution? To what extent will the measure be acceptable to the criticized government and to the victims, because the measure embodies principles recognized by the world community and (at least in other contexts) by the government?

[175] For example, should the United States act alone? Should it attempt to obtain the cooperation of other governments in taking parallel action? Should the U.S. act only in concert with other governments rather than pursuing an overt leadership role? Should the United States invoke international human rights procedures of intergovernmental organizations which require international consensus? Should the United States ask the assistance of nongovernmental organizations and the good offices of respected individuals? Is international cooperation anticipated? What governments, organizations, or individuals would be the most effective in achieving human rights progress? Even if there is a small chance that the United States action will be successful, should the United States speak out or take other action anyway, because silence or inaction would violate United States or world values?

[176] What sorts of retaliation might be anticipated? What countermeasures or precautions are available? How serious would be the impact of retaliation on United States interests or of countermeasures on peoples in other countries? To what extent must the American public and others be prepared for retaliation so as to avoid undercutting support for the initial

4. If the measure is successful, what action would the United States be willing to take alone or together with others to reinforce further observance of internationally recognized human rights?[177]

5. If the measure is unsuccessful or is not expected to succeed alone, how long or with what frequency should the measure be applied?[178]

These initial questions may require refinement and supplementation as the United States government accumulates experience in promoting human rights. The formulation of policy cannot proceed without a thorough review of the available measures for human rights implementation and a careful study of each country in which those measures may be applied.[179] But a typical pattern of bilateral and multilateral actions for a particular country might begin with diplomatic communications; then if necessary, public comment by increasingly more important officials; then invocation of domestic or international fact-finding procedures; then sending of United States or international observers; then perhaps, restructuring of foreign aid programs; if human rights problems persist, threat of aid termination or reduction; and more coercive measures.

IV. CONCLUSION

The new Administration has begun to implement some aspects of the congressional human rights legislation. This United States human rights campaign may have two basic objectives — one foreign and one domestic. Administration strategists may have decided that the United States must have a positive international rallying call, rather than the tired, negative imperative of anti-communism. In this view the United States will talk about human

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measure? What other harms to U.S. interests can be anticipated? How critical are those interests in the short, middle, or long-term in comparison with the objective sought by the human rights measure? What are the risks and benefits for other countries? Would the use of an international procedure strengthen the procedure for better overall promotion of respect for human rights? Or would a measure discredit or disrupt the function of human rights institutions?

[177] What evidence will the United States accept as indications of success or failure? Is the United States in search of quick success or will it accept long-term improvement? What time perspective would be the best for the human rights victims?

[178] Are there other measures which would work well in tandem or in sequence with the first action?

[179] It appears the process of creating such an inventory may have begun at least in the State Department. *See* Cyrus Vance, Memorandum for All Assistant Secretaries, Feb. 11, 1977, *reprinted in* 1 CHECKLIST OF HUMAN RIGHTS DOCUMENTS, App. D (Dec. 1976).

rights, just as the Soviets or the Third World raise exploitation and imperialism as their issues. In other words, human rights can be used as a legitimating theory for other American foreign policies.

The domestic objective is quite related to the foreign goal. The dual traumas of Watergate and Vietnam have caused the United States populace a loss of confidence in its leadership and role in the world community. The Administration's advisors may believe that human rights can provide a sense of purpose and unity for the American people.[180] Accordingly, the human rights campaign may not necessarily be directed toward promoting greater observance of human rights, so much as achieving other United States foreign and domestic policy goals.

Seen in their most favorable light, however, all the human rights efforts of the first months of the Administration may only have been designed to make a clear demarcation between this Administration and its predecessors. Also, the Carter Administration may have wanted to establish the credibility of its desire to improve human rights and its willingness to use publicity or even more coercive measures for human rights implementation.

Even if the President's desire is purely to encourage greater respect for human rights, other countries and the media are not perceiving his activities in a way conducive to the achievement of that desire.[181] The socialist countries apparently view the human rights campaign as a new phase in the Cold War propaganda competition.[182] Third World countries may see the policy as a form of moral neo-imperialism.[183]

Human rights advocates have labored long to defend human rights from charges that the concept is entirely Western.[184] More

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[180] *See Standing Firm Somewhere*, Wall St. J., Feb. 15, 1977, at 18, col. 1.

[181] Indeed, there is some indication that Carter advisors may see the present human rights campaign as a way to reassert Administration leadership and end congressional control. As George Aldrich, Deputy Legal Advisor of the State Department suggested, the new Administration "needs to win the trust of the American people and Congress so that it can in due course gain freedom from the Harkin Amendment and remain free from other mandatory sanctions." G. Aldrich, *A Sensible Human Rights Policy*, Dec. 7, 1976, at 6 (unpublished memorandum).

[182] *See, e.g.* Bacon, *Vance's Moscow Visit Will Test Carter Stand on Human Rights*, Wall St. J., Mar. 24, 1977, at 1, col. 1; *East Europe Plans Rights Retort*, N.Y. Times, Feb. 15, 1977, at 3, col. 2; Willis, *Carter's Rights Push Straining Soviet Ties*, Christian Sci. Monitor, Feb. 14, 1977, at 1, col.1.

[183] *See Carter's Morality Play*, TIME, Mar. 7, 1977, at 10.

[184] *See generally* Castberg, *Natural Law and Human Rights*, in 1 HUMAN RIGHTS J. 14

universalist precedents for human rights principles have been found in all the major world religions,[185] in socialist thought,[186] and in the traditions of Third World societies.[187] Major human rights instruments have been evolved in international forums through world consensus.[188] International procedures have been painstakingly developed to apply these principles where world agreement will permit.[189]

The Carter human rights campaign presents a serious risk of imprinting human rights with an unmistakable United States identification. The work of human rights activists will consequently be suspect as subservient to United States objectives. Perhaps, this country cannot grasp an idea without making it into a crusade or at least a campaign. Human rights problems are simply not susceptible of such unsubtle, shock treatment. The United States can, and should, make human rights an important factor in its foreign policy pursuant to section 502B(a)(1) without turning human rights into the central, dominant theme of United States relations with all countries and all international institutions.

Put in the perspective of section 502B, the United States must undertake a thorough reappraisal of its relations with all its allies and competitors. Part of that new accounting will require an inventory of all the available multilateral and bilateral methods to improve human rights around the world. Once such an inventory is assembled, it may be possible to consider which methods would be most effective in which countries—as to which internationally rec-

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(1968); McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in HUMAN RIGHTS (UNESCO Symposium 1949) at 35-46; H. LAUTERPACHT, THE INTERNATIONAL BILL OF THE RIGHTS OF MAN 16-53 (1945).

[185] *See* Hessen, *The Rights of Man in Liberalism, Socialism and Communism* (UNESCO), in HUMAN RIGHTS (UNESCO Symposium 1949) at 117; Puntambekor, *The Hindu Concept of Human Rights*, in HUMAN RIGHTS (UNESCO Symposium 1949) at 195-98.

[186] *See, e.g.*, Hessen, *The Rights of Man in Liberalism, Socialism, and Communism*, in HUMAN RIGHTS (UNESCO Symposium) at 108-42; Sommerville, *Comparison of Soviet and Western Democratic Principles with Special Reference to Human Rights*, in HUMAN RIGHTS (UNESCO Symposium 1949) at 152-55; Tchechko, *The Conception of the Rights of Man in The USSR Based on Official Documents*, in HUMAN RIGHTS (UNESCO Symposium 1949) at 158-76; Przetacznik, *L'Attitude Des Etats Socialistes a L'Egard De La Protection Internationale Des Droits De L'Homme*, 7 HUMAN RIGHTS J. 175 (1974).

[187] *See, e.g.*, Zamudio, *Latin American Procedures for the Protection of the Individual*, 9 INT'L COMM. JUR. J. 61 (1968).

[188] *See* notes 26 and 116 *supra*.

[189] *See* note 85 *supra; see also*, Fraser, *Freedom and Foreign Policy*, 26 FOREIGN POLICY 140, 151-53 (1977).

ognized human rights. Sections 116 and 502B contribute several significant measures to the United States human rights arsenal.

Before an inventory of human rights measures and a country-by-country analysis is completed, it is very difficult to determine which methods would be advisable or whether, for example, bilateral methods should be used in preference to multilateral human rights procedures. Nevertheless, multilateral efforts appear at present to involve fewer risks for the human rights movement and for United States interests. As to many countries and many human rights problems, bilateral measures may appear at first attractive. For example, the United States does not need any other government's agreement to cut off economic or military aid. The United States can make its human rights point forcefully and promptly. Nor does the State Department or the President require international consensus to comment upon or criticize human rights violations. But bilateral action may present both moral and practical risks of ineffectiveness, retaliation and accusations that United States actions are politically motivated.

Instead, by stressing "internationally recognized human rights," section 502B suggests that the United States should not try to set its own traditions as an example for the world. Internationally recognized human rights, such as the International Bill of Human Rights, implemented by international institutions such as the United Nations Human Rights Commission, have a greater chance of acceptance by the criticized country and by the world community. Multilateral action must rely upon the extremely feeble international institutions available and upon the need for achieving consensus among nations—some basically unsympathetic to human rights. Such institutions as the United Nations Commission on Human Rights, the Subcommission on the Protection of Minorities and the Prevention of Racial Discrimination, and the Organization of American States' Inter-American Commission on Human Rights do not presently boast very impressive records for human rights implementation in concrete cases.[190] The United States should attempt, nonetheless, to strengthen these international institutions through contributions for more staff and through intelligent utilization of their good offices.

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[190] *Id.*

There are at least two serious barriers to United States support for multilateral human rights initiatives rather than bilateral activities. The greatest barrier is general ignorance as to the existence of, functioning of, and ways of achieving results through these international human rights institutions. The second barrier is impatience. Universal respect for human rights cannot be achieved immediately. National societies and their institutions which create human rights violations are slow to change. Human rights cannot be the subject of a successful campaign. Progress is achieved through an incremental and carefully considered process.