

“THE UNITED STATES-CHINA ACT OF 1991” and CUSTOMARY INTERNATIONAL LAW

I. INTRODUCTION

In June 1989, the world watched as the government of the People's Republic of China brought a violent end to pro-democracy student protests in Beijing's Tiananmen Square.¹ The images of a lone figure facing a column of tanks and the students' makeshift Statue of Liberty have become symbolic expressions of “The Beijing Spring.”² The events of that spring, coupled with years of human rights abuses in the People's Republic of China and perceived inaction by the executive branch prompted the United States Congress to pass “The United States-China Act of 1991.” The Act imposed human rights conditions to the continuance of China's Most-Favored-Nation (MFN) status.³ Reacting quickly to Congress'

¹ University students began to occupy Beijing's Tiananmen Square in April 1989, demonstrating against the treatment of former party leader Hu Yaobang and expressing doubts about China's economic and social conditions. See Jeffrey A. McCredie, *Human Rights in the People's Republic of China: An Appraisal of Recent Events*, 3 TEMP. INT'L & COMP. L.J. 217, 217-18 (1989). The government imposed martial law in Beijing on May 20, 1989; arrests and beatings soon followed. *Id.* Estimates of casualties ranged from 500 to 1,000, though the Chinese government claimed that no deaths occurred in Tiananmen Square. *Id.* Ultimately, over 300,000 troops with tanks were necessary for the government to maintain control in Beijing. *Id.* Participants in the events of Tiananmen Square were arrested and imprisoned; reports also circulated that many demonstrators were executed. See generally RUTH CHERRINGTON, *CHINA'S STUDENTS: THE STRUGGLE FOR DEMOCRACY* (1991).

² See Emily MacFarquhar, *On the Defensive: As Washington Debates Whether to Get Tough, China Braces Itself*, U.S. NEWS AND WORLD REPORT, May 27, 1991, at 37; see also CHERRINGTON, *supra* note 1, at 151-70.

³ Basically, Most-Favored-Nation (MFN) treatment is an obligation by a state “to treat activities of a particular foreign country or its citizens at least as favorably as it treats the activities of any other country.” JOHN JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 136 (1989). MFN status entitles China to the low tariff rates accorded to all but a few countries by the United States. MacFarquhar, *supra* note 2, at 47. The United States has denied MFN status to many countries that have committed serious human rights violations, including Cambodia, Cuba and Vietnam. Robert F. Drinan, S.J. & Teresa T. Kuo, *The 1991 Battle for Human Rights in China*, 14 HUM. RTS. Q. 21, 37 (1992).

Congress imposed conditions to China's MFN status as a part of “The United States-China Act of 1991.” H.R. 2212, 102d Cong., 2d Sess. (1991). Originally sponsored by Representative Nancy Pelosi of California, the bill (H.R. 2212) was passed by the House of Representatives on July 10, 1991. H.R. 2212, Bill Tracking Report, March 18, 1992, *available in* LEXIS, Legis Library, Bltrck file. On July 23, the Senate passed its version of the bill. *Id.* The House disagreed with many of the changes; a conference report was eventually presented to the Senate on February 25, 1992, at which time “The United States-China Act of 1991” was cleared for presentment to United States President George Bush. *Id.* The bill was presented to the President on February 27, 1992, and the House received the President's

decision, the Chinese Foreign Ministry asserted, not for the first time, that it would not tolerate "interference in China's internal affairs."⁴

The Chinese government insists that it supports human rights;⁵ the factual evidence, however, indicates otherwise.⁶ For many years, China has not been held accountable for human rights violations.⁷ "The United States-China Act of 1991" attempted to ameliorate the situation in China by imposing conditions to the extension of MFN status.⁸ The issue is a complex one, involving questions of both law and policy. This Note, however, focuses on the legal questions, including the United States human rights conditions and how they reflect international law.

This Note argues that the United States conditions on China did not significantly differ from those prohibitions already binding China under customary international law, because the violations involve "the basic issues of freedom of thought, speech, association and assembly, freedom from arbitrary arrest, torture and

veto on March 3, 1992. *Id.* For further background to "The United States-China Act of 1991" and related legislation aimed at curbing human rights abuses in China, see Drinan & Kuo, *supra*, at 30-37.

⁴ *China Criticizes U.S. on Senate MFN Vote*, UPI, July 24, 1991, available in LEXIS, Nexis Library, UPI File.

⁵ In November 1991, the Chinese government issued a 62-page report, "Human Rights in China." Nicholas D. Kristof, *China Issues Rebuttal to Human Rights Critics*, N.Y. TIMES, Nov. 3, 1991, at A12. According to the *N.Y. Times*, the report claimed that China actively supports human rights, both political and socio-economic rights. *Id.* The report stated that "there is no censorship of Chinese newspapers, that prisoners live in humane conditions . . . and that the country has no political prisoners." *Id.* In August 1992, the Chinese government issued another report; according to the *N.Y. Times*, this report claimed that Chinese "prisoners are regarded as human beings . . . their dignity is insured and they receive fully humane treatment." Nicholas D. Kristof, *China Report Sees Prison as One Big, Happy Jail*, N.Y. TIMES, Aug. 12, 1992, at A7.

⁶ Human rights organizations, as well as many Chinese, deny that the government supports human rights in the way it claims. Nicholas D. Kristof, *China Issues Rebuttal to Human Rights Critics*, N.Y. TIMES, Nov. 3, 1991, at A12. One observer from the United States notes that "China's track record on human rights has been ghastly from the beginning." MacFarquhar, *supra* note 2, at 42.

⁷ Roberta Cohen, *People's Republic of China: Human Rights Exception*, 9 HUM. RTS. Q. 447, 459-68 (1987). Cohen lists reverence for Chinese culture, China's history as a subject of exploitation, and a suspicion of foreigners among the reasons why China has not been held accountable for human rights violations. *Id.* Other commentators have noted that deference to China on human rights issues is a result of political maneuvering; for example, the United States was "in the late 1970s moving toward formal recognition of the Chinese communist government—a movement inconvenienced by focusing on rights." DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS 112 (1989). Deference to China for political reasons continues today. See *infra* notes 172-189 and accompanying text.

⁸ H.R. 2212, 102d Cong., 2d Sess. (1991).

mistreatment, and the right to life in the broadest sense.”⁹ The international community has recognized these rights as fundamental to a human life of dignity. This Note also addresses policy issues, but only so far as those issues relate to the central legal question of how much human rights conditions of “The United States-China Act of 1991” reflected customary international law.

Comparing and contrasting the respective human rights standards under customary international law and “The United States-China Act of 1991” shows how the Act’s conditions may bind China because they parallel customary international law. Part II defines the human rights obligations of nations under the United Nations Charter and customary international law, outlining those human rights protected under customary law and determining their nature and extent. This part also catalogues specific human rights violations committed by China. Part III examines the human rights standard employed by the United States when it acts extraterritorially, focusing primarily on Congress’ articulation of that standard in “The United States-China Act of 1991.” Part IV compares the United States standard with its counterpart in customary international law, noting discrepancies between the two and how the United States may find in customary international law additional authority for imposing human rights conditions upon China. Finally, Part V concludes that the United States may take easy steps to bring its standards into exact parallel with customary international law, thereby asserting greater authority when invoking its human rights standards against other countries.

II. HUMAN RIGHTS AND CUSTOMARY INTERNATIONAL LAW

What are now referred to as “human rights” have been explicitly defined in an international context only since the Second World War.¹⁰ Human rights, however, have been a part of customary international law for centuries.¹¹ Today, the idea of human

⁹ Ann Kent, *Waiting for Rights: China’s Human Rights and China’s Constitutions, 1949–1989*, 13 HUM. RTS. Q. 170, 171 (1991).

¹⁰ Thomas Buergenthal, *International Human Rights and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 2 (1988).

¹¹ Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 1–3 (1982). Originally, human rights concepts developed around a state’s responsibility “for what happened within its territory and for its citizens’ conduct on the high seas” and around the foreigner’s home state’s entitlement to reparations for injury to its citizens. *Id.* at 2. In addition to the protection of diplomats, other historical precedents include movements to abolish slavery and the development of humanitarian law

rights encompasses layers of different rights¹² expressed through a number of international agreements and conventions, primarily through the Universal Declaration of Human Rights¹³ and the United Nations Covenant on Civil and Political Rights.¹⁴

Thus, two routes may be followed toward holding the People's Republic of China to a human rights standard: one may invoke the United Nations Charter and the aforementioned international documents, or one may find a human rights standard in customary international law. Because neither the United States nor China is a party to the United Nations Covenant on Civil and Political Rights, however, neither country is bound by that agreement.¹⁵ Nor is the Universal Declaration of Human Rights a binding document—it is a resolution that does not have the force of law.¹⁶ Therefore, customary international law seems the better path toward determining the scope of human rights obligations binding China. Before examining customary international law, however, it is worthwhile to note the United Nations Charter, and the human rights obligations it places upon its membership.

A. *Human Rights Obligations Under the United Nations Charter*

All nations that become members of the United Nations agree to the precepts of the United Nations Charter.¹⁷ Included among

concerning armed conflict. B.G. RAMCHARAN, *THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 13 (1989).

¹² See Buergenthal, *supra* note 10, at 6–13; Sohn, *supra* note 11, at 11.

¹³ Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948), *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 298 (Burns H. Weston et al. eds., 1990) [hereinafter BASIC DOCUMENTS].

¹⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976, *reprinted in* BASIC DOCUMENTS at 376.

¹⁵ While some of the protections against human rights violations contained in the International Covenant on Civil and Political Rights are a part of customary international law, the document as a whole is not. By 1991, only 87 states, or approximately 54 percent of those eligible to sign, were parties to the covenant. David P. Forsythe, *Human Rights in a Post-Cold War World*, 15 FLETCHER FORUM OF WORLD AFFAIRS 55, 58 (1991). This represents only a simple majority, falling far short of universal consensus.

¹⁶ See THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 29 (1988).

¹⁷ The United States of America has been represented in the United Nations since Oct. 24, 1945. BASIC DOCUMENTS, *supra* note 13, at 894. The People's Republic of China has been represented in the United Nations since Oct. 26, 1971. *Id.* When China joined the United Nations, "it made no statements suggesting in any way that it should be made an exception to UN guidelines or documents on human rights." John F. Copper, *Defining Human Rights in the People's Republic of China*, in HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA 15 (Yuan-Li Wu ed., 1988).

these precepts is Article 1(3), which states that promoting and encouraging human rights is one of the purposes of the United Nations.¹⁸ In addition, Article 55 indicates that all states must respect and observe all human rights and fundamental freedoms.¹⁹ Article 56 pledges members "to take joint and separate action" toward achieving these objectives.²⁰

Although the U.N. Charter makes clear that member states have an obligation to promote basic human rights and fundamental freedoms, it leaves these terms undefined.²¹ They are not without importance, however, as they make clear that human rights are no longer entirely an issue of domestic jurisdiction.²² The International Bill of Rights, especially the Universal Declaration of Human Rights, gives substance to the vague Charter obligations, but does not compel legal action against every state which violates basic human rights.

Few observers would deny that the United Nations Charter and the Universal Declaration embody the normative aspirations of the United Nations.²³ The United States invokes the U.N. Charter and its human rights provisions in "The United States-China Act of 1991."²⁴ Because the provisions' status as international law is still questionable, this Note analyzes China's human rights violations and attempts by the United States to remedy the situation under customary international law, that is, international law obligating China to respect certain fundamental human rights.²⁵

¹⁸ U.N. CHARTER art. 1, ¶ 3 (Among the purposes of the United Nations is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion . . .").

¹⁹ *Id.* at art. 55 ("With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote . . . (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.").

²⁰ *Id.* at art. 56 ("All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.").

²¹ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 cmt. d (1987) [hereinafter RESTATEMENT].

²² BUERGENTHAL, *supra* note 16, at 22.

²³ *Id.*

²⁴ H.R. 2212, 102d Cong., 2d Sess. § 2(a)(2)(1991).

²⁵ See *infra* note 28.

B. Customary International Law

Customary international law exists outside of any treaty obligation. The International Court of Justice defines it as the general practice of states which is accepted and observed as law.²⁶ Customary international law has been characterized as the crystallization of past uniform practices into normative behavior.²⁷ Norms become a part of customary international law "from a general and consistent practice of states which is followed by them from a sense of legal obligation."²⁸ Thus, the list of human rights protected by customary international law is not necessarily static; in the rapidly changing modern world, rights may be added to the list in a relatively short period of time as they become the common practice and belief of states.²⁹

As one commentator noted, locating customary international law can be an interminable task.³⁰ Using international agreements

²⁶ Statute of the International Court of Justice, art. 38(1)(b). *Done at San Francisco*, June 26, 1945. *Entered into force*, Oct. 24, 1945, *reprinted in* BASIC DOCUMENTS, *supra* note 13, at 33.

²⁷ LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 361 (1989). For example, through the long and continued practice of nations regarding piracy on the seas as criminal activity, the act of piracy became recognized as a violation of customary international law. Similarly, certain human rights norms have become a part of customary law through wide acceptance and recitation. *See* FORSYTHE, *supra* note 7, at 12; *see also* BUERGENTHAL, *supra* note 16, at 32.

If jurisdictional hurdles could be surmounted, and if the People's Republic of China could be brought before the International Court of Justice (ICJ) for human rights violations, the Statute of the ICJ allows the court to apply customary international law. Statute of the International Court of Justice, art. 38(1)(b), *supra* note 26.

²⁸ RESTATEMENT, *supra* note 21, § 102(2). The customary international law of human rights ranks higher than human rights treaties in terms of importance. *See generally* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1 (1986). This is because customary international law binds all nations, regardless of whether a state is a party to a particular human rights agreement. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3 (1989) [hereinafter CUSTOMARY LAW].

It is customary international law which binds states not parties to human rights treaties, and not identical treaty provisions. *Id.* Therefore, "customary international law continues to exist and apply, separately from international treaty law, even where these two categories of law have an identical content." *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986, I.C.J. 14 (June 27)(merits), *quoted in* CUSTOMARY LAW, *supra*, at 55. International agreements featuring provisions identical to customary international law may, however, be examined as articulations of customary international law.

²⁹ DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS 12 (1991). The time period for the adoption of a new norm into customary international law may be quite short. The International Court of Justice has said that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law." RESTATEMENT, *supra* note 21, § 102, reporters' note 2.

³⁰ Richard B. Bilder, *The Status of International Human Rights Law: An Overview*, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 1, 8 (James C. Tuttle ed., 1978).

that attempt to codify customary human rights norms, and cases in which international and domestic courts have applied customary international law in their decisions, it is possible to detail the specific human rights abuses that the international community acknowledges as prohibited by customary international law.

C. Human Rights Abuses Prohibited by Customary International Law

Customary international law binds all nations.³¹ Although attempts have been made over the past half-century to definitively codify those human rights entitled to international recognition and protection, only certain rights have become a part of customary international law through repeated use and recitation. These rights are the minimum standard of human rights, reflecting protection of a person's physical integrity, as well as basic civil rights.³²

The minimum standard of human rights includes freedom from violent attacks, slavery and related practices, torture, summary execution, mistreatment, starvation, hostage taking, racism, and war crimes.³³ The Restatement (Third) of the Foreign Relations Law of the United States³⁴ holds that a country is in violation of customary international law if it practices, encourages or condones:

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) the torture or other cruel, inhuman or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.³⁵

³¹ A rule of customary international law, however, is "not binding on any state indicating dissent during development of the rule." *RESTATEMENT*, *supra* note 21, § 102, reporters' note 12. Actual exemption from a rule of customary international law in practice has been rare. *Id.* The People's Republic of China does not fall into this category; in fact, China claims to actively support basic human rights. *See supra* note 5.

³² *See McCredie, supra* note 1, at 225.

³³ *FORSYTHE, supra* note 29, at 12.

³⁴ The *RESTATEMENT* sets forth "rules or principles of international law that apply to states generally. . . . [T]he word 'states' [refers] to the nation-states that constitute the international political community." *RESTATEMENT*, *supra* note 21, introductory note at 5.

³⁵ *RESTATEMENT*, *supra* note 21, § 702(a)-(g). In choosing this "laundry list" of human rights abuses violative of customary international law, the Restatement reporters "wisely have selected only those rights . . . 'whose status as customary law is generally accepted at this time and whose scope and content are generally agreed.'" Richard B. Lillich, *The Customary International Law of Human Rights in the Revised Restatement*, 89 AM. SOC'Y INT'L L. PROC. 84, 85 (1985).

The list emphasizes protection of an individual's physical integrity, the preeminent protection provided by customary international law. The abuse of rights in (a) through (f) are violations of customary international law even if such abuse is not consistent with, or a part of, a pattern.³⁶ These rights are *jus cogens*; that is, they are so fundamental that they may not be abridged, even by positive law.³⁷ The Restatement's listing of rights protected under customary international law is conservative; several commentators have suggested it include other human rights as well.³⁸

³⁶ RESTATEMENT, *supra* note 21, § 702 cmt. m.

³⁷ *Jus cogens* are peremptory norms. RESTATEMENT, *supra* note 21, § 702 cmt. n. Peremptory norms are principles of general international law so compelling that they are "recognized by the international community for the purpose of invalidating or forcing revision in ordinary norms of treaty or custom in conflict with them. For example . . . States [sic] ought not be able to agree to enslave a minority people, to liquidate a race, [or] to brutalize dissidents" Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 586 (1988).

³⁸ Some commentators believe that all of the rights enumerated in the Universal Declaration have become a part of customary international law. See Bilder, *supra* note 30, at 8; Sohn, *supra* note 11, at 16-17. Other commentators stake out a middle ground between this view and the RESTATEMENT. Professor Meron takes this middle position. CUSTOMARY LAW, *supra* note 28, at 96-97.

Among those additional rights Meron says are protected by customary international law are the right of self-determination and the prohibition of retroactive penal measures. *Id.* at 96. Some of the other due process guarantees from Article 14 of the International Covenant on Civil and Political Rights may also have claims to protection under customary international law. *Id.* Article 14 provides that:

....
(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

....
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

....
(g) not to be compelled to testify against himself or to confess guilt.

....
(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

International Covenant on Civil and Political Rights, *supra* note 14, at part III, art. 14.

Other commentators would go even further in listing rights protected under customary international law. For example, Professor Lillich would include the right to equality before the law and the right to non-discrimination, as well as the right of the individual to move freely between his or her own state and other states. Richard B. Lillich, *Civil Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW 115, 133, 151 (Theodor Meron ed., 1984). For the purposes of this Note, however, the list of protected human rights in customary international

In addition to the enumerated prohibitions (a) through (f), the minimum standard includes rights which, if continually abridged, would constitute a violation of customary international law. These gross violations are defined as those that are "particularly shocking because of the importance of the right or the gravity of the violation."³⁹ No state government would admit to violating these rights as a matter of national policy.⁴⁰

These gross violations of human rights must occur often enough to be considered a part of a "consistent pattern." To follow a "consistent pattern" means that these violations, though gross, do not offend customary international law if committed singly or even sporadically over time.⁴¹ Examples include systematic harassment, invasions of privacy of the home, arbitrary arrest and detention, denial of fair trial in criminal cases, grossly disproportionate punishment, denial of freedom of conscience and religion, and denial of the basic right to marry and to raise a family.⁴² This category of rights is purposefully flexible so as to allow additional rights to be added in the future.

D. *China's Violations of Customary International Law*

The People's Republic of China has violated customary international law by denying its citizens basic human rights. China has caused the disappearance of individuals,⁴³ and tortured⁴⁴ and arbitrarily detained persons for prolonged periods of time.⁴⁵ In addition, China is responsible for many consistent, gross violations of human rights, including arbitrary arrest and detention, denial of fair trial in criminal cases, denial of freedom of conscience and thought, denial of freedom of religion, and denial of the right to marry and to raise a family.⁴⁶ Finally, China is also responsible for many basic human rights abuses in Tibet.

law will be that of the most conservative listing, provided in the RESTATEMENT. *See also supra* note 35 and accompanying text.

³⁹ RESTATEMENT, *supra* note 21, § 702 cmt. m.

⁴⁰ *Id.* § 702, reporters' note 10.

⁴¹ *Id.* § 702, cmt. m.

⁴² *Id.*

⁴³ *Id.* § 702(c).

⁴⁴ *Id.* § 702(d).

⁴⁵ *Id.* § 702(e).

⁴⁶ *See id.* § 702 cmt. m.

1. Murder and Causing the Disappearance of Individuals

Murder and causing the disappearance of individuals has long been recognized as a violation of international law.⁴⁷ A state may not kill an individual, or cause an individual to disappear, other than as lawful punishment after conviction.⁴⁸ A single instance of murder or disappearance violates customary international law.⁴⁹

The case of Zhang Zhenggao offers an example of China's causing the disappearance of an individual.⁵⁰ While in the United States, Zhang, a former official from the Ministry of Petroleum Industry, went to a New York hospital for treatment related to a fall.⁵¹ He entered the hospital on April 19, 1984. Zhang applied for political asylum, but mysteriously disappeared on July 19, 1984.⁵² Following his disappearance, the Chinese Consul General announced that Zhang "had decided to return to China 'voluntarily.'" ⁵³ Many believe Chinese agents in the U.S. abducted Zhang.⁵⁴

2. Torture or Other Cruel, Inhuman or Degrading Treatment

The People's Republic of China also violates customary international law by engaging in torture and other cruel, inhuman and degrading treatment of persons.⁵⁵ Such behavior is defined as acts inflicting severe mental or physical pain and suffering upon an individual, by or with the permission of a public official.⁵⁶ State

⁴⁷ *Id.* § 702 cmt. f; *see also* International Covenant on Civil and Political Rights, *supra* note 14, at part III, art. 6(1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."); Universal Declaration, *supra* note 13, art. 3 ("Everyone has the right to life . . . and security of the person.").

⁴⁸ RESTATEMENT, *supra* note 21, § 702 cmt. f.

⁴⁹ *See supra* notes 36-37 and accompanying text.

⁵⁰ Hungdah Chiu, *Recent Legal Issues Between the U.S. and the People's Republic of China*, 12 MD. J. INT'L L. & TRADE 1, 8 (1987).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ RESTATEMENT, *supra* note 21, § 702(d); *see also* International Covenant on Civil and Political Rights, *supra* note 14, at part III, art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Universal Declaration, *supra* note 13, at art. 5 (identical language); *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (after examining the sources from which customary international law is derived—the practice of nations, judicial opinions, and the work of scholars—the court concluded that "official torture is now prohibited by the law of nations.").

⁵⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), G.A. Res. 3452, Dec. 10, 1948, 39 U.N. GAOR, Sess. 39, Supp. No.

action falls under this definition if it is inflicted to obtain information, to punish for an act committed or suspected of having been committed, or to intimidate.⁵⁷ Like murder and causing disappearance, a single instance of torture or cruel and degrading treatment violates customary international law.⁵⁸

Journalists and international human rights organizations have reported numerous instances of torture or other cruel and degrading treatment.⁵⁹ Amnesty International notes that the methods of torture most commonly applied in China include “severe beatings, shocks with electric batons and the use of handcuffs, shackles or ropes in positions deliberately intended to inflict pain.”⁶⁰ Information on practices of torture and other cruel and inhuman treatment has also been provided by both private Chinese citizens and government officials.⁶¹ For example, according to an account by Wei Jingsheng, a dissident arrested in 1979:

inmates reported “frequent beatings and torture by electric shocks, strong lights and drugs.” Prisoners received near starvation rations of food and were permitted “one change of clothes a year, a monthly shower and . . . work or exercise only if they [were] deemed to have a good attitude.”⁶²

Incidence of torture and cruel and unusual punishment is most likely higher than reported because few persons risk complaining, for fear of retribution.⁶³

3. Prolonged Arbitrary Detention

China is also responsible for subjecting persons to prolonged arbitrary detention.⁶⁴ Detention is considered arbitrary if it is not

51, at 197, U.N. Doc. E/Cn.4/1984/72 (1984), *entered into force* June 26, 1987, *reprinted in* BASIC DOCUMENTS, *supra* note 13, at 463.

⁵⁷ *Id.*

⁵⁸ See *supra* notes 36–37 and accompanying text.

⁵⁹ See Cohen, *supra* note 7, at 493–502.

⁶⁰ AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: VIOLATIONS OF HUMAN RIGHTS 13 (1991) [hereinafter AMNESTY REPORT]. Non-governmental organizations such as Amnesty International play a vital role “in the collection and dissemination of facts concerning alleged violations of human rights.” Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 CAL. W. INT'L L.J. 207, 207 (1990). Many organizations, including the United Nations, rely on information provided by these groups. *Id.*

⁶¹ See Cohen, *supra* note 7, at 494–95.

⁶² *Id.* at 494.

⁶³ AMNESTY REPORT, *supra* note 60, at 13.

⁶⁴ RESTATEMENT, *supra* note 21, § 702(e); see also *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (the court held that the clear consensus among nations is that prolonged arbitrary detention is a violation of customary international law).

pursuant to law, or if it is "incompatible with the principles of justice or with the dignity of the human person."⁶⁵ Detention may be arbitrary for a number of reasons:

if it is supported only by a general warrant, or is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.⁶⁶

Prolonged arbitrary detention is distinguished from arbitrary detention by the amount of time the individual is detained without being charged. A single episode of prolonged arbitrary detention, without charge, violates customary international law.⁶⁷

The recent case of Bao Tong provides an example of prolonged arbitrary detention. Jailed in connection with the 1989 Tiananmen uprising, Bao was political secretary to the Standing Committee of the Politburo before being taken into state custody.⁶⁸ The government incarcerated him in Quincheng Prison for more than two years before he was formally arrested and his family notified.⁶⁹ Bao's case is typical: Amnesty International notes that it is common for the Chinese government to detain persons for long periods of time without charge.⁷⁰

4. Other Consistent Gross Violations of Human Rights

Beyond those abuses already mentioned, the People's Republic of China has followed a pattern of continually violating other human rights of its citizens. Among these abuses are consistent arbitrary arrests and detentions.⁷¹ In January 1987, for example, Yang Wei, a Chinese student returning from the United States, was

⁶⁵ RESTATEMENT, *supra* note 21, § 702 cmt. h.

⁶⁶ *Id.*

⁶⁷ See *supra* notes 36-37 and accompanying text.

⁶⁸ Sheryl WuDunn, *Trial Nears for Ex-China Aide, Held 2 1/2 Years*, N.Y. TIMES, Feb. 9, 1992, at A6.

⁶⁹ *Id.*

⁷⁰ See AMNESTY REPORT, *supra* note 60, at 1.

⁷¹ Arbitrary arrest and detention, even if not prolonged, violate customary international law if committed consistently by a state. RESTATEMENT, *supra* note 21, § 702 cmt. m; see also International Covenant on Civil and Political Rights, *supra* note 14, at part III, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention."); Universal Declaration, *supra* note 13, at art. 9 (identical language).

arrested for unspecified charges and later sentenced to two years imprisonment.⁷² Hundreds of similar arrests took place in connection with the 1989 Tiananmen uprising.⁷³ The government's practice of administrative detention permits the police to detain people merely upon the suspicion that they may have committed a crime.⁷⁴

China has also continually denied fair trials in criminal cases.⁷⁵ Fair trials for criminal defendants in China are rare; since 1989, the government executed, after summary trials, over a thousand people convicted of ordinary offenses.⁷⁶ Authorities often render verdicts and sentences before a trial-type hearing takes place.⁷⁷

For those accused of political crimes, the outcome is usually equally bleak. The majority of political trials are closed to the public with, at best, only the defendants' close relatives or members of their "work unit" allowed to attend.⁷⁸ During the period of pre-trial detention, detainees have no access to a lawyer or their families.⁷⁹ Some Chinese believe that Bao Tong, like others detained for their political activities, would be tried in secret.⁸⁰

The government has also continually denied freedom of conscience and thought to the Chinese people.⁸¹ The Beijing government is known to have imprisoned many Chinese for their peaceful

⁷² Chiu, *supra* note 50, at 10.

⁷³ AMNESTY REPORT, *supra* note 60, at 3–4; CHERRINGTON, *supra* note 1, at 210; Emily MacFarquhar, *Back to the Future in China*, U.S. NEWS & WORLD REPORT, Mar. 12, 1990, at 42; Sheryl WuDunn, *China Reports Freeing 9 Democracy Campaigners*, N.Y. TIMES, Jan. 28, 1992, at A9.

⁷⁴ AMNESTY REPORT, *supra* note 60, at 2.

⁷⁵ Consistent denial by the state of fair trials in criminal cases violates customary international law. RESTATEMENT, *supra* note 21, § 702 cmt. m; *see also* International Covenant on Civil and Political Rights, *supra* note 14, at part III, art. 14(1) ("In the determination of any criminal charges against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); Universal Declaration, *supra* note 13, at art. 10 ("Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charges against him.").

⁷⁶ AMNESTY REPORT, *supra* note 60, at 6, 10–11.

⁷⁷ *Id.* Chinese jurists and citizens openly refer to the system as *xian pan hou shen* ("verdict first, trial second"). *Id.*; *see also* Drinan & Kuo, *supra* note 3, at 25.

⁷⁸ AMNESTY REPORT, *supra* note 60, at 7.

⁷⁹ *Id.*

⁸⁰ *See supra* notes 68–69 and accompanying text.

⁸¹ Continued denial by the state of freedom of conscience, thought and religion violates customary international law. RESTATEMENT, *supra* note 21, § 702 cmt. m; *see also* International Covenant on Civil and Political Rights, *supra* note 14, part III, art. 18(1) ("Everyone shall have the right to freedom of thought, conscience and religion."); Universal Declaration, *supra* note 13, at art. 18 ("Everyone has the freedom of thought, conscience and religion . . .").

expression of dissenting opinions.⁸² Among those jailed have been editors, Roman Catholic priests, and people who publicly protested poverty, unemployment, or miscarriages of justice.⁸³

Similarly, the Chinese people have continually been denied freedom of religion.⁸⁴ Religion is considered a possible competitor with the state for the people's loyalty.⁸⁵ In 1990, for example, "there was growing evidence of a tightening in the official policy on religion."⁸⁶ Between 1989 and late 1990, over 100 Roman Catholic priests, bishops and lay leaders were reported to officials; as of April 1991, the government still held several dozen.⁸⁷

Finally, the Chinese government has consistently abridged the right to marry and to raise a family.⁸⁸ The government supports a one-child family planning program.⁸⁹ Reports claim that doctors smash infants' skulls at birth, and that women are bound, thrown into hog cages and delivered by the truckload to abortion clinics.⁹⁰ In addition, intrauterine contraceptive devices are frequently implanted immediately after a woman gives birth to her first child, often without her consent or knowledge.⁹¹

⁸² See AMNESTY REPORT, *supra* note 60, at 4.

⁸³ Harry Anderson with Donna Foote, *China*; "A Wave of Mass Executions," NEWSWEEK, Oct. 8, 1984, at 38.

⁸⁴ See *supra* note 81.

⁸⁵ W. Gary Vause, *Tibet to Tiananmen: Chinese Human Rights and United States Foreign Policy*, 42 VAND. L. REV. 1575, 1598 (1989). The number of Chinese practicing religion has increased dramatically in the past two decades. *Id.* at 1600. Reports estimate that in 1987, China was home to three million Catholics, four million Protestants, fifteen million Muslims, and more than ten million Buddhists. *Id.* Ironically, outlawing popular religion caused it to move underground, where it often flourishes. THOMAS HEBERER, *CHINA AND ITS NATIONAL MINORITIES: AUTONOMY OR ASSIMILATION?* 113 (1989).

⁸⁶ AMNESTY REPORT, *supra* note 60, at 4.

⁸⁷ *Id.*

⁸⁸ Consistent denial by the state of the right to marry and to raise a family violates customary international law. RESTATEMENT, *supra* note 21 § 702 cmt. m; see also International Covenant on Civil and Political Rights, *supra* note 14, part III, art. 23(2) ("The right of men and women of marriageable age to marry and to found a family shall be recognized."); Universal Declaration, *supra* note 13, art. 16(1) ("Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."), art. 25(2) ("Motherhood and childhood are entitled to special care and assistance.").

⁸⁹ Chiu, *supra* note 50, at 8.

⁹⁰ Anne Joyce, Note, *China: United States Withdrawal of Support from the United Nations Fund for Population Activities*, 1 HARV. HUM. RTS. YRBK. 205, 205 (1988).

⁹¹ *Id.* See also Nicholas D. Kristof, *Stark Data On Women: 100 Million Are Missing*, N.Y. TIMES, Nov. 5, 1991, at C1. The author notes another effect of China's one-child policy: the killing of newborn girls. Each year, "about 600,000 fewer girl births are reported to the authorities than there should be, based on the number of boy births and the ratio that should exist between them." *Id.*

5. Human Rights Violations in Tibet

China has committed a long series of human rights abuses in Tibet. Chinese troops have occupied Tibet since 1950,⁹² when Tibet decided to negotiate with its powerful neighbor. Armed resistance began in 1954, and in 1959, Chinese forces suppressed a rebellion.⁹³ China established the "Tibet Autonomous Region" in 1965.⁹⁴

In 1983, Chinese forces arrested hundreds of Tibetan protestors for handing out petitions on independence to foreign journalists; several protestors were reportedly executed.⁹⁵ In addition, the government allegedly arrested more than a hundred Tibetans in 1986 for supposed ties to Tibetan groups abroad.⁹⁶ As of 1991, about 200 political prisoners were believed to be held in the Tibetan capital of Lhasa.⁹⁷ The Dalai Lama, Tibet's religious leader, has repeatedly asked for withdrawal of Chinese troops.⁹⁸

The human rights abuses committed by China against its own people and the citizens of Tibet involve fundamental rights, such as a person's right to be free of physical violation, whether that threat involves detention, torture, or worse. In addition, there is overwhelming evidence of China's continual disregard for many civil and political rights. In light of these basic human rights violations, the United States Congress attached human rights conditions to the continuance of MFN status for the People's Republic of China.

III. THE AMERICAN ARTICULATION OF HUMAN RIGHTS

The United States has frequently articulated its human rights standards in domestic legislation. The United States articulation may be traced back to the Revolutionary period and the Declaration of Independence;⁹⁹ various state constitutions also contain within

⁹² Chiu, *supra* note 50, at 11. For a brief history of Tibet, see HEBERER, *supra* note 85, at 118-20.

⁹³ Chiu, *supra* note 50, at 11.

⁹⁴ Vause, *supra* note 85, at 1578.

⁹⁵ Cohen, *supra* note 7, at 497.

⁹⁶ *Id.*

⁹⁷ AMNESTY REPORT, *supra* note 60, at 4.

⁹⁸ In 1987, for example, the Dalai Lama appeared before the Congressional Human Rights Caucus, presenting a five-point plan to transform Tibet into a "zone of peace and non-violence." Vause, *supra* note 85, at 1588.

⁹⁹ See Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 405 (1979).

them the embodiment of Revolutionary human rights theory.¹⁰⁰ The Founders codified their ideals in the Bill of Rights, the first ten amendments to the United States Constitution.¹⁰¹ Many of those rights have been incorporated into the standard of human rights articulated by the United States.

A. *The Modern Articulation*

In order to give meaning to "The United States-China Act of 1991," it is appropriate to look at how the United States has articulated human rights in the past, because the modern stance has its origins in United States history. Only since World War II and President Franklin D. Roosevelt's pronouncement of the Four Freedoms has the United States signalled its desire to encourage human rights outside of its own borders.¹⁰² The Four Freedoms were freedom of speech and expression, freedom of every person to worship God, freedom from want and freedom from fear.¹⁰³

Although the United States made few human rights pronouncements before the 1970s, Congress has since moved to create a human rights standard reflecting United States philosophy and tradition, which is applicable to dealings with foreign nations.¹⁰⁴ Because the United States has become a party to few human rights agreements, its human rights actions have been almost entirely

¹⁰⁰ Henkin, *supra* note 99, at 406; Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 851 (1989).

¹⁰¹ Henkin, *supra* note 99, at 407. The Bill of Rights details the rights the Framers considered fundamental to a human life of dignity. *Id.* at 411. The Bill of Rights restricts government interference with the Framers' idea of the natural and inalienable rights of man. See M. Glen Johnson, *Historical Perspectives on Human Rights and U.S. Foreign Policy*, 2 UNIV. HUM. RTS. 1, 6 (1980).

¹⁰² But see David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231, 232 (1977). The historical basis for U.S. concerns about human rights derives from the late 19th and early 20th centuries, "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." *Id.*

¹⁰³ See Buergethal, *supra* note 10, at 2–3. History would prove President Roosevelt almost utopian in his aspirations. Eleanor Roosevelt more accurately stated the perspective adopted by the United States. She explained that:

[B]asic human rights are simple and easily understood; freedom of speech and a free press; freedom of religion and worship; freedom of assembly and the right of petition; the right of men to be secure in their homes and free from unreasonable search and seizure and from arbitrary arrest and punishment.

Johnson, *supra* note 101, at 8. This articulation reflects the civil and political liberties inherent in the Declaration of Independence, and protected by the Bill of Rights.

¹⁰⁴ See Thomas Buergethal, *The U.S. and International Human Rights*, 9 HUM. RTS. L. J. 141, 152–57 (1988).

unilateral.¹⁰⁵ The international authority of a United States standard, therefore, rests on how much it complies with what is already expected of nations under customary international law. Because "The United States-China Act of 1991" is a product of Congress, it is helpful to review the extent of Congressional power in foreign affairs, and some of the legislation to which the Act owes its existence.

B. Congressional Foreign Policy Legislation

1. Constitutional Authority

Which branch of the United States government should guide foreign affairs has long been debated. It has been said that "[f]or national purposes, we are but one people, one nation, one power."¹⁰⁶ The debate has a long history. Alexander Hamilton espoused presidential supremacy in foreign relations, believing that any foreign affairs power not specifically granted Congress by the Constitution was reserved to the executive.¹⁰⁷ James Madison, on the other hand, thought that Congress should speak with the strongest voice in foreign affairs.¹⁰⁸ He believed that the constitutional powers in this area restricted the president, rather than limiting Congress.¹⁰⁹

Congress has in recent years found its way into foreign affairs, most often when it is displeased with a president's handling of foreign policy. Congress' power to exert control over foreign affairs derives from several articles of the Constitution. Congress has the power to provide for the common defense and to regulate foreign commerce.¹¹⁰ In addition, Congress also has the power to declare war, to make rules of war, to grant letters of marque and reprisal,¹¹¹ and to raise and support the United States armed forces.¹¹² The

¹⁰⁵ DAVID P. FORSYTHE, HUMAN RIGHTS AND U.S. FOREIGN POLICY: CONGRESS RECONSIDERED 2 (1988).

¹⁰⁶ *Zschernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J. concurring)(quoting *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889)).

¹⁰⁷ *Vause*, *supra* note 85, at 1607-08.

¹⁰⁸ *Id.* at 1609.

¹⁰⁹ *Id.* Madison also supported the inclusion of human rights in foreign policy considerations. See Johnson, *supra* note 101, at 3.

¹¹⁰ U.S. CONST. art. I, § 8, cls. 1, 3 ("The Congress shall have Power to . . . provide for the common Defence . . . To regulate Commerce with foreign Nations . . .").

¹¹¹ *Id.* art. I, § 8, cl. 11 (Congress has the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . .").

¹¹² *Id.* art. I, § 8, cls. 12, 13 (Congress has the power "[t]o raise and support Armies, . . . [t]o provide and maintain a Navy . . .").

Senate alone has specific foreign affairs power, to advise the president on treaties and to approve treaties by a two-thirds vote before ratification.¹¹³

Other articles of the Constitution grant Congress some power to deal with foreign affairs. Congress holds the spending power, a significant tool for making its will known to the executive branch.¹¹⁴ Exercise of congressional power under the spending authority means that "Congress virtually can veto programs essential to the presidential foreign affairs agenda."¹¹⁵ The "necessary and proper" clause has also been a source of congressional power in this area.¹¹⁶ Thus, it seems settled that Congress does have some authority in foreign affairs; use of that power in the area of international human rights is best demonstrated by previous congressional actions.

2. Early Congressional Legislation

The constitutional debate aside, the executive branch, primarily responsible for foreign policy, has led the way in human rights.¹¹⁷

¹¹³ *Id.* art. II, § 2, cl. 2 (The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

¹¹⁴ *Id.* art. I, § 8, cl. 1 (Congress has the power "[t]o lay and collect Taxes, Duties, Imposts and Excises . . .").

¹¹⁵ Vause, *supra* note 85, at 1609.

¹¹⁶ U.S. CONST. art. I, § 8, cl. 18 (Congress has the power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). For the most part, the United States Supreme Court has not addressed the fragile balance of power between the executive and legislative branches in the area of foreign affairs. In *Baker v. Carr*, Justice Brennan, writing for the majority, noted that the foreign relations power "is committed by the Constitution to the executive and legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." 369 U.S. 186, 211 n.31 (1962) (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

¹¹⁷ Foreign policy traditionally has been seen as a function of the executive branch, a view which derives from unquestioned practice dating back to the earliest days of the United States. See Michael J. Glennon, *War and the Constitution*, FOREIGN AFFAIRS, Spring, 1991, at 89; LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 29 (1990). The Department of State, an office of the executive branch, houses the Congressionally mandated Bureau of Human Rights and Humanitarian Affairs. Patricia M. Derian, *Human Rights in United States Foreign Policy—An Executive Perspective*, in INTERNATIONAL HUMAN RIGHTS IN LAW AND PRACTICE 183, 184 (James C. Tuttle ed., 1978).

When Jimmy Carter was elected to the White House in 1976, he became the first President to announce human rights as a substantive component of United States foreign policy. ROBERT A. DIVINE, SINCE 1945: POLITICS AND DIPLOMACY IN RECENT AMERICAN HISTORY 220 (3d ed. 1985); Weissbrodt, *supra* note 102, at 232. Carter emphasized the protection

In 1973, however, Congress held hearings on the subject of human rights in response to perceived inaction by the executive branch.¹¹⁸ The House Subcommittee on International Organizations and Movements of the House Committee on Foreign Affairs produced a report, "Human Rights and the World Community: A Call for U.S. Leadership,"¹¹⁹ which made several recommendations prompting new human rights legislation.¹²⁰ Those suggestions primarily called for integration of human rights into the formulation and execution of United States foreign policy.¹²¹ The human rights conditions to China's MFN status in "The United States-China Act of 1991" are directly related to Congress' 1970s activities.

The first result of Congress' new interest in human rights was the Foreign Assistance Act of 1973.¹²² The Act expressed the general human rights concerns of protecting physical integrity of the person and protecting political liberties. The Act declared that economic and military assistance should be denied any foreign country "which practices the internment or imprisonment of that country's citizens for political purposes."¹²³

In 1974, Congress added a new section to the Foreign Assistance Act of 1961.¹²⁴ The purpose of this addition was to reduce or terminate security assistance to any country engaged in "gross violations of international human rights."¹²⁵ The Act defined gross violations of human rights as torture, cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or

of physical integrity; in addition, he included specific civil and political rights, such as freedom of thought, of religion, of assembly, of speech, of the press, of movement within one's own country and freedom to take part in government. Johnson, *supra* note 101, at 9-10.

The Reagan administration emphasized traditional concerns related to the physical integrity of the individual and human dignity. Richard Schifter, *Building Firm Foundations: The Institutionalization of United States Human Rights Policy in the Reagan Years*, 2 HARV. HUM. RTS. YRBK. 3, 13 (1989). The primary concern of the Reagan administration, however, may not have been human rights at all, but justification for supporting so-called "friendly" counter-insurgency groups such as the *Contras* in Nicaragua. See A. GLENN MOWER, JR., HUMAN RIGHTS AND AMERICAN FOREIGN POLICY: THE CARTER AND REAGAN EXPERIENCE 48-49, 115 (1987); Jerome J. Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights Policy*, 2 HARV. HUM. RTS. YRBK. 25, 28 (1989).

¹¹⁸ Weissbrodt, *supra* note 102, at 239.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 240.

¹²¹ BUERGENTHAL, *supra* note 16, at 231.

¹²² Weissbrodt, *supra* note 102, at 241.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 242 n.41.

"other flagrant denials of life, liberty, and security of the person."¹²⁶ Derogation from this standard was acceptable in cases of extraordinary circumstances, which were not defined but left to the discretion of the executive.¹²⁷

This basic human rights statement became the building block for the United States articulation of human rights.¹²⁸ Congress purposefully mirrored language contained in many United Nations human rights documents.¹²⁹ Congressional use of similar language indicates "its desire to ensure that these laws would not constitute illegal intervention in the domestic affairs of other countries."¹³⁰ The phrasing remains virtually intact in "The United States-China Act of 1991."

B. "The United States-China Act of 1991"

The final draft of "The United States-China Act of 1991" was passed through the Senate on February 25, 1992.¹³¹ Legislators designed the bill to extend MFN treatment to the People's Republic of China, provided that Beijing meets certain human rights conditions. Congress formulated these requirements around human rights violations committed by the government of China, while following the human rights articulations of previous legislation.¹³² The

¹²⁶ *Id.*

¹²⁷ *Id.* at 242.

¹²⁸ For a discussion of general legislation containing human rights provisions, see Weissbrodt, *supra* note 102, at 240–50. In addition to general legislation, Congress also has employed this basic articulation of human rights in state-specific legislation directed toward such countries as Chile, El Salvador, Argentina and Haiti. Buergenthal, *supra* note 104, at 156–67; FORSYTHE, *supra* note 105, at 14–15.

¹²⁹ BUERGENTHAL, *supra* note 16, at 234.

¹³⁰ *Id.*

¹³¹ See *supra* note 3 and accompanying text. Like the Foreign Assistance Act, congressional ability to affect China policy derives from the constitutional commerce power. See *supra* note 110 and accompanying text.

¹³² Not all of the conditions of "The United States-China Act of 1991" related to human rights. Conditions included "Trade Objectives," calling for economic protection of United States intellectual property, fair access to Chinese markets, and an end to unfair trade practices. H.R. 2212, 102d Cong., 2d Sess. § 3(c)(1)–(3)(1991). In addition, the Act called for an end to weapons proliferation, including taking steps to assure that China "is not assisting and will not assist any non-nuclear weapons state, directly or indirectly, in acquiring nuclear explosive devices or the materials and components for such devices." *Id.* § 3(d)(1)–(2). The Act also called for China to adhere to the Joint Declaration on Hong Kong between the United Kingdom and the People's Republic of China. *Id.* § 3(b)(10). Hong Kong is to be transferred from British to Chinese sovereignty on July 1, 1997. JAN MORRIS, HONG KONG 23 (1989).

Act resulted in part from displeasure at President Bush's handling of China since the events of Tiananmen Square.¹³³

1. Findings and Conditions

In "The United States-China Act of 1991," Congress made findings which parallel many of the human rights abuses reported by Amnesty International and other international human rights organizations. Among Congress' findings was that the government of the People's Republic of China "continues to engage in flagrant violations of internationally recognized human rights."¹³⁴ In addition, China is continually violating internationally recognized human rights of Tibetans, and uses "the People's Liberation Army and police forces to intimidate and repress Tibetan and Chinese citizens peacefully demonstrating for democratic change and religious freedom."¹³⁵

Congress invoked the Trade Act of 1974 in "The United States-China Act of 1991" to require President Bush to deny MFN status to China unless certain conditions are met.¹³⁶ The conditions relating to human rights include China's accounting for citizens detained, accused, or sentenced as a result of nonviolent expression of their political beliefs, and the release of those people imprisoned for such reasons.¹³⁷ In addition, the Act requires China to take appropriate action to prevent gross violations of internationally recognized human rights,¹³⁸ and to end exports of products to the United States made by convict, forced, or indentured labor.¹³⁹

¹³³ H.R. 2212, § 2(a)(1).

¹³⁴ *Id.* § 2(a)(2).

¹³⁵ *Id.* § 2(a)(5).

¹³⁶ *Id.* § 3(a). The president may waive conditions to MFN treatment. Any such recommendation shall:

(A) be made not later than 30 days before the expiration of such authority;

(B) be made in a document transmitted to the House of Representatives and the Senate setting forth his reasons for recommending the extension of such authority; and

(C) include, for each country with respect to which a waiver granted under subsection (c) of this section is in effect, a determination that continuation of the waiver applicable to that country will substantially promote the objectives of this section, and a statement setting forth his reasons for such a determination.

19 U.S.C. § 2432(d)(1)(1975 & Supp. 1992).

¹³⁷ H.R. 2212, § 3(a)(1)(A).

¹³⁸ *Id.* § 3(b)(1).

¹³⁹ *Id.* § 3(b)(2).

Furthermore, the Chinese government is required to terminate religious persecution in both China and Tibet,¹⁴⁰ and to remove restrictions on freedom of the press and Voice of America broadcasts.¹⁴¹ The government must ensure access of human rights organizations to both China and Tibet and ensure freedom from torture and inhumane prison conditions.¹⁴² Finally, the Act called for an end to prohibitions on peaceful assembly and demonstration,¹⁴³ and a commitment from Beijing to engage in "high-level discussions on human rights issues."¹⁴⁴

2. Definitions

In its separate "Definitions" section, the Act outlines the standards by which human rights conditions should be measured.¹⁴⁵ Like the human rights legislation before it, the Act defines gross violations of internationally accepted human rights to include:

torture, cruel, inhuman, or degrading treatment or punishment, prolonged detention without charge and trial, causing the disappearance of persons by the abductions and clandestine detention of those persons, secret judicial proceedings, and other flagrant denial of the right to life, liberty, or the security of any person.¹⁴⁶

Other "flagrant denials" include freedom of the press, freedom of religion, freedom of association and freedom of conscience. The list is not exhaustive: the definitional section states that these violations include, but are not limited to, the violations which follow it.¹⁴⁷ The phrase "other flagrant denial" also allows a degree of flexibility to include human rights violations not specifically enumerated.

The Act also offered further explanations of several of its human rights terms. The terms "detained" and "imprisoned" include, but are not limited to: incarceration in jails, prisons, labor reform camps, labor reeducation camps and local police detention centers.¹⁴⁸ The term "forced labor" is defined as "all work or service

¹⁴⁰ *Id.* § 3(b)(3).

¹⁴¹ *Id.* § 3(b)(4).

¹⁴² *Id.* § 3(b)(6)–(7).

¹⁴³ *Id.* § 3(b)(8).

¹⁴⁴ *Id.* § 3(b)(9).

¹⁴⁵ *Id.* § 7.

¹⁴⁶ *Id.* § 7(4).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* § 7(2).

which is extracted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily.”¹⁴⁹

The human rights standard provided by these definitions embodies the protection of physical integrity and the political and civil rights determined by the United States Congress to be fundamental.¹⁵⁰ The elements of the standard reflect the philosophical underpinnings of United States due process and individual rights. Their legitimacy in an international forum, however, is based on how much they reflect the customary international law of human rights, not on their philosophical origins.

IV. “THE UNITED STATES-CHINA ACT OF 1991” AND CUSTOMARY INTERNATIONAL LAW

The People’s Republic of China is already bound to certain minimum standards of human rights under customary international law. The United States has tried to influence human rights in China by passing legislation that encourages change through conditions attached to the extension of MFN status. The imposition of such conditions has added authority if the conditions reflect what is already required of China under customary international law. A comparison shows that the conditions mirror customary law in significant respects.

A. *Consistencies*

The human rights conditions in “The United States-China Act of 1991” are consistent with customary international law on a number of points. The conditions relating to the detention of demonstrators comport with customary international law. The Act called for the release of citizens who were detained because of their participation in the events of Tiananmen Square.¹⁵¹ Many hundreds of demonstrators were detained without charge.¹⁵² Such persistent arbitrary arrest and detention violates customary international law.¹⁵³ Tiananmen Square participants were exercising their right to

¹⁴⁹ 19 U.S.C. § 1307 (1988 & Supp. 1992).

¹⁵⁰ Henkin, *supra* note 99, at 408.

¹⁵¹ H.R. 2212, § 3(a)(1).

¹⁵² See *supra* note 73 and accompanying text.

¹⁵³ RESTATEMENT, *supra* note 21, § 702(g) cmt. m; see *supra* note 75 and accompanying text.

freedom of conscience and nonviolent expression. The continued deprivation of these rights violates customary international law.¹⁵⁴

The Act's demand for an end to forced labor also reflects customary international law. The Act called for China to cease exporting products "made by prisoners and detainees assigned to labor camps, prisons, detention centers, and other facilities holding detainees."¹⁵⁵ Customary international law prohibits slavery in any form.¹⁵⁶ Convict labor may also fall under the prohibition of torture or cruel, inhuman or degrading treatment.¹⁵⁷

The Act called for an end to religious persecution.¹⁵⁸ The Act demanded the release of "leaders and members of all religious groups detained, incarcerated, or under house arrest as a result of the expression of their religious beliefs."¹⁵⁹ The consistent abridgment of religious freedom violates customary international law.¹⁶⁰

In order to comply with the Act, China would have to ensure that it does not engage in torture or other inhumane prison practices.¹⁶¹ Torture or other cruel, inhuman or degrading treatment is a fundamental human rights violation.¹⁶² In addition to preventing these abuses, the Act asked that international human rights and humanitarian organizations have access to prisoners, trials and places of detention.¹⁶³ This provision also involved China's consistent denial of fair trials in criminal cases by making such proceedings secret, a violation of customary international law.¹⁶⁴

Additionally, both the Act and customary international law may reach beyond the scope of those violations specifically enumerated, so as to include other violations. The Act allowed for "other flagrant"¹⁶⁵ violations to be added, just as customary international

¹⁵⁴ RESTATEMENT, *supra* note 21 § 702(g) cmt. m. Beijing has claimed that detentions made in response to the 1989 events in Tiananmen Square were not arbitrary, and that many people were involved in beating, smashing and looting. The government also used this phrase to describe similar detentions during the Cultural Revolution of the 1960s. MacFarquhar, *supra* note 73, at 42. Be that as it may, Amnesty International reports that hundreds of those detained are actually prisoners of conscience. See AMNESTY REPORT, *supra* note 60, at 1.

¹⁵⁵ H.R. 2212, § 3(b)(2).

¹⁵⁶ RESTATEMENT, *supra* note 21, § 702 cmt. e.

¹⁵⁷ *Id.* § 702 cmt. g.

¹⁵⁸ H.R. 2212, § 3(b)(3).

¹⁵⁹ *Id.*

¹⁶⁰ See *supra* note 81 and accompanying text.

¹⁶¹ H.R. 2212, § 3(b)(7).

¹⁶² See *supra* note 64 and accompanying text.

¹⁶³ H.R. 2212, § 3(b)(6).

¹⁶⁴ See *supra* note 75 and accompanying text.

¹⁶⁵ H.R. 2212, § 7(4).

law may prohibit other "gross violations of internationally recognized human rights."¹⁶⁶ The rate at which these acts must occur before they are considered gross violations, however, is one gap between the Act and customary international law.

B. Gaps

While the provisions of "The United States-China Act of 1991" reflect customary international law to a large extent, the fit is not perfect. The gaps involve the demand for an end to interference with the freedom of the press and Voice of America broadcasts in China, and the rate at which gross violations must occur before they transgress customary international law.

The Act called specifically for the removal of restrictions on "freedom of the press and on broadcasts by the Voice of America."¹⁶⁷ The right to freedom of the press, while constitutionally protected in the United States, has not yet been recognized as fundamental by the international community.¹⁶⁸ Similarly, the right of citizens to receive foreign radio and television transmissions has not yet become a part of customary international law.¹⁶⁹ Thus, for the present time, these freedoms fall outside the sphere of rights safeguarded by customary international law.

The second gap concerns the scope of the Act versus the scope of customary international law. With the exception of certain specific violations—those so fundamental, they are considered *jus cogens*—customary international law only precludes a "consistent pattern of gross violations."¹⁷⁰ The Act, on the other hand, does not place any such restrictions on the occurrence-rate of potential violations. The scope of customary international law, therefore, is narrower than that of the Act: a single gross human rights violation would invoke prohibition by the Act, but would not be sufficient to compromise customary international law.¹⁷¹

¹⁶⁶ RESTATEMENT, *supra* note 21, § 702(g).

¹⁶⁷ H.R. 2212, § 3(b)(4).

¹⁶⁸ See CUSTOMARY LAW, *supra* note 28, at 93–95.

¹⁶⁹ See *id.*

¹⁷⁰ RESTATEMENT, *supra* note 21, § 702(g) (emphasis added).

¹⁷¹ Of course, the phrase "flagrant denial" as used in the Act could be interpreted the same way as "consistent pattern" in referring to gross human rights violations. If so, the Act mirrored customary international law on this point; if not, it is a discrepancy which could have been easily avoided by United States lawmakers, had they considered customary international law. Bill drafters could have consulted with the Office of the Legal Advisor before completing legislation involving international law and standards. In the United States, the

To change the language of "The United States-China Act of 1991" in order to conform more closely with customary international law would be to delete the provision demanding that restrictions on freedom of the press and Voice of America broadcasts be lifted, and to adhere to the narrower standard of "consistent pattern" of gross violations currently embraced under customary international law. Because most of the values held fundamental by the United States—protection of the physical integrity of the person and protection of basic civil and political rights—are already a part of customary international law, tailoring the Act to track customary international law more closely would weaken it to only a small degree.

Closer adherence to customary international law would not allow the People's Republic of China to escape or avoid the Act's provisions by claiming that the conditions infringed upon its sovereignty in violation of customary international law. China could not then validly assert that the Act's conditions were singularly requirements of the United States, because they simply reflected the customary international law binding all nations. Furthermore, because many of the human rights violations in China are so basic, the United States should address these concerns before exploring other rights violations not currently a part of customary international law, such as freedom of the press.

C. *The MFN Status Debate*

Discussion of "The United States-China Act of 1991" involved heated debate between those who believed the Act would force China to recognize human rights, and those who felt it would simply antagonize the Beijing government. United States President George Bush recommended in early 1991 that MFN status be continued without restriction. He said conditions would isolate the government and help "the hardliners over the reformers."¹⁷²

Office of the Legal Advisor is a part of the Department of State. JOSEPH MODESTE SWEENEY ET AL., *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 29 (3d ed. 1988).

The Legal Advisor has an obligation "to encourage respect for, and to improve the international legal system." *Id.* at 30. As the in-house international law expert, the Legal Advisor can counsel the executive branch to take action to change pending human rights orders or legislation to better conform with customary law and practice. Congress may also call on the Legal Advisor for "information or its views concerning questions of international law." Richard B. Bilder, *The Office of the Legal Advisor: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 641 (1962).

¹⁷² Mitchell Locin, *Senate OKs Limit on China Trade Status*, CHI. TRIB., July 24, 1991, at 3.

On the other side of the debate, several of China's leading dissidents in exile urged that conditions be imposed.¹⁷³ Shen Tong, one of the exiled students, said that denial of MFN status is the "most effective weapon available to influence Chinese government policy."¹⁷⁴ In 1990, the Beijing government released several hundred political prisoners prior to a similar debate over the extension of MFN status to China.¹⁷⁵

Congressional discussion over "The United States-China Act of 1991" was heated as well, reflecting the two opposing camps in the MFN status debate. Discussion in both houses did not break down strictly according to party lines. Although each side considered exactly what action the United States should take, if any, concern for human rights was tempered with concern for the Act's domestic implications.

Favoring conditions to the extension of MFN status, Senator George Mitchell noted that a recent State Department report on China revealed that nothing had changed since Tiananmen Square with respect to human rights, and that it was time to implement a stronger policy.¹⁷⁶ Senator Lloyd Bentsen continued, saying that the Act sends a message to the Chinese leadership which the Bush administration failed to send.¹⁷⁷ If China wants to continue current trade relations with the United States, he said, and "if it wants to be an accepted member of the international community, a member in good standing, then it has to change its direction on human rights" ¹⁷⁸

Not all of the discussion was supportive of the Act, however. Senator Max S. Baucus took the opposite viewpoint, posing that withdrawal of MFN status would push China further into the hands

The Bush administration put forth three major reasons for rejecting conditioned MFN status: China is "special" and must be treated accordingly; withdrawal of MFN status threatens the economy of Hong Kong; and China has geostrategic importance. Drinan and Kuo, *supra* note 3, at 38.

¹⁷³ *Exiled Students Urge Bush to Accept Trade Conditions*, WASH. POST, July 25, 1991, at A31.

¹⁷⁴ *Id.* On September 1, 1992, Shen Tong was taken into custody while visiting his home in China. Merle Goldman, *In China, Brutality vs. Boom Times*, BOSTON GLOBE, Sept. 6, 1992, at A21. Reportedly, Chinese authorities arrested Shen because he held a press conference to announce "the establishment of a chapter of his Democracy for China Fund and for contacting underground student and worker pro-democracy groups." *Id.*

¹⁷⁵ *Exiled Students Urge Bush to Accept Trade Conditions*, WASH. POST, July 25, 1991, at A31; see also CHERRINGTON, *supra* note 1, at 210.

¹⁷⁶ 138 CONG. REC. S2132 (daily ed. Feb. 25, 1992)(statement of Sen. Mitchell).

¹⁷⁷ *Id.* at 2133 (statement of Sen. Bentsen).

¹⁷⁸ *Id.*

of the government hardliners.¹⁷⁹ He argued that the debate is not over ends, upon which all sides seem to agree, but over the best way to effect those ends.¹⁸⁰ Perhaps the main opposition to the Act came from those who cited the potential effect on United States business interests should MFN status be conditioned.¹⁸¹ In 1991, the United States exported over six billion dollars worth of goods to China.¹⁸² Particularly unmovable on this issue were those representatives and senators from the so-called "farm states."¹⁸³

D. Fate of "The United States-China Act of 1991"

Whether the conditions of "The United States-China Act of 1991" would have worked to encourage reform by the Chinese government, helping the Chinese people suffering human rights abuses, remains a hypothetical question. President Bush vetoed "The United States-China Act of 1991" on March 2, 1992.¹⁸⁴ Though the House of Representatives voted to override the veto, the Senate fell short of the votes needed to override.¹⁸⁵

After vetoing the Act, President Bush reiterated his position that human rights reform in China could best be accomplished through diplomatic pressure.¹⁸⁶ In a statement about his decision, he said, "Anyone familiar with recent Chinese history can attest that the most brutal and protracted periods of repression took place precisely when China turned inward, against the world."¹⁸⁷ Among the diplomatic efforts were a meeting between Premier Li Peng,

¹⁷⁹ *Id.* at 2134 (statement of Sen. Baucus).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2141 (statement of Sen. Murkowski).

¹⁸² *Id.* The United States began economic relations with the People's Republic of China in 1972 with the signing of the Shanghai Communiqué. K. HOLLY MAZE CARTER, *THE ASIAN DILEMMA IN U.S. FOREIGN POLICY* 114 (1989). A year after issuance of the communiqué, bilateral trade between the United States and China increased from \$5 million to \$95 million. *Id.* Formal diplomatic relations were established in 1979, when China first received MFN status. *Id.* at 116. By 1980, bilateral trade between the two countries had increased to \$4.8 billion. *Id.* at 117.

¹⁸³ Keith Bradsher, *China Will Keep Trade Privileges*, N.Y. TIMES, March 19, 1992, at A5. Senators from states with large agricultural communities opposed conditioning China's MFN status, "for fear China would retaliate against imports of food from the United States." *Id.*

¹⁸⁴ See *supra* note 3.

¹⁸⁵ Jim Mann, *Senate Fails to Override China Policy Veto*, L.A. TIMES, March 19, 1992, at A8. The Senate vote was sixty to thirty-eight, six votes shy of the two-thirds majority needed to overturn a presidential veto. *Id.*

¹⁸⁶ Keith Bradsher, *Bush Vetoes Conditions on Trade Status of China*, N.Y. TIMES, March 3, 1992, at A7.

¹⁸⁷ *Id.*

President Bush, and United States Secretary of State James A. Baker on January 31, 1992.¹⁸⁸ At the meeting, Li unequivocally refused to commit China to any changes in its human rights policies.¹⁸⁹

V. CONCLUSION

The United Nations aspires to have all countries respect basic human rights. Although human rights have become a legitimate issue of international concern, not all states, either through written agreements or consistent recitation and practice, have yet embraced the rights articulated in the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights as absolutely necessary for a human life of dignity. Countries that continually violate basic human rights can still be held accountable, however, under customary international law.

As far as human rights are concerned, "The United States-China Act of 1991" required only that the People's Republic of China honor many rights that it is already obliged to respect under customary international law. Because the Act closely paralleled customary international law, with minor exceptions, China cannot claim that the United States singled it out for special treatment. Elimination of those exceptions would bring such human rights legislation into complete accord with the standards of customary international law. The question for future action, then, is whether the United States should leave improving human rights in China to the vagaries of diplomatic contact, or whether the United States should support customary international law and its recognized obligations upon the world community.

Lawrence M. Friedman

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* In 1992, Congress again attempted to couple human rights conditions to the extension of MFN status in "The United States-China Act of 1992." S. 2808, 102d Cong., 2d Sess. (1992). Although the 1992 bill differed somewhat as to approach and deadlines for compliance, the human rights provisions were substantively the same as the 1991 act. *See id.* § 3(1)-(4). The 1992 act, however, invoked the Universal Declaration of Human Rights, which has not been accepted by the world community as customary international law in its entirety. *See supra* note 38 and accompanying text.

