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The Comprehensive Anti-Apartheid Act: A Case Study In The Legality Of Economic Sanctions

THE COMPREHENSIVE ANTI-APARTHEID ACT: A CASE STUDY IN THE LEGALITY OF ECONOMIC SANCTIONS

Imposing economic sanctions to attain foreign policy objectives is a common weapon in international relations.[1] Traditionally states have levied economic sanctions to induce other states to observe international obligations.[2] More recently, states have employed economic sanctions to change

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1. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086-116 (Act) (prohibiting certain economic interaction between United States and South Africa); G. HUFBAUER, J. SCHOTT & K. ELLIOTT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY 1 (1985) (hereinafter HUFBAUER & SCHOTT) (summarizing 103 cases of economic intervention between 1914-1984); Perlow, *Taking Peacetime Trade Sanctions to the Limit: The Soviet Pipeline Embargo,* 15 CASE W. RES. J. INT. L. 253, 253 (1983) (discussing United States economic sanctions against Poland to lift martial law). An economic sanction is a deliberate government-directed withdrawal, or threat of withdrawal, of customary trade or financial relations. HUFBAUER & SCHOTT, *supra,* at 2.

In a study published by the Institute for International Economics, G. Hufbauer and J. Schott divided the use of economic sanctions for foreign policy purposes into five categories, classified according to the possible policy objective of the sender state. *Id.* The first objective might be to change the target state's policies in a modest way, relative to the sender's national goals. *Id.* A second objective might be to destabilize the target nation's government, including changing both the foreign and domestic policy of a target nation. *Id.* A third objective could be to disrupt a minor military adventure initiated by the target state. *Id.* The fourth objective could be to impair the military potential of the target government. *Id.* The fifth objective might be to change the target nation's foreign or domestic policy in a major way. *Id.* An example of the fifth category is the United Nations' campaign against South Africa over apartheid and South African control over Namibia. *Id; see infra* note 40 and accompanying text (noting United Nations' actions relevant to apartheid).

2. *See* L. HENKIN, HOW NATIONS BEHAVE 49, 93 (2d ed. 1979) (imposing economic sanctions induces target nation to observe international obligations). An early example of the use of economic sanctions occurred in 432 B.C., when Pericles, leader of Athens, limited the entry of the products of Megara—a Greek city—into the Athenian marketplace in response to the kidnapping of three women by Megaran townsmen. *See* HUFBAUER & SCHOTT, *supra* note 1, at 4, 21 (describing early known use of ecconomic sanctions); C. Fonara, *Plutarch and the Megarian Decree,* IN 24 YALE CLASSICAL STUDIES 222-26 (1975) (describing economic sanctions in 432 B.C.). The records detailing the use of economic sanctions up to World War One indicate that economic sanctions either foreshadowed or accompanied warfare. *See* HUFBAUER & SCHOTT, *supra* note 1, at 4 (summarizing use of economic sanctions through 1914). Since World War One states frequently have used economic sanctions as a substitute for armed hostilities or in conjunction with armed hostilities. *Id.* In recent years, states have used economic sanctions with great regularity. *See id.* (identifing 103 cases of economic sanctions between 1914-1984, and noting increased use of economic sanctions over past decade). For example, in 1977 President Carter imposed a grain embargo against the Soviet Union as a protest against the Soviet invasion of Afganistan. *See* Recent Developments, *Apartheid and Economic Sanctions,* 15 J. WORLD TRADE L. 366, 368 (1981)(discussing President Carter's grain embargo against Soviet Union). In 1982 Great Britain administered economic sanctions against Argentina during the Falkland Island War. *See* Minter, *South Africa: Straight Talk on Sanctions,* 65 FOREIGN POL'Y 43, 44 (1986-1987) (noting British sanctions against Argentina during wartime). In 1986 President Reagan issued an executive order banning all export and

internal policies of a target state.[3] Despite frequent employment of economic sanctions by states to redirect the internal policies of other states, the use of such sanctions may violate international law.[4] In the Comprehensive Anti-Apartheid Act of 1986 (the Act) the United States Congress imposed economic sanctions on South Africa to exert influence on the South African Government's apartheid[5] policy toward the black majority in South Africa.[6]

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import trade with Libya, in retaliation for the December 27, 1985 terrorist attacks at the Vienna and Rome airports that resulted in the deaths of five Americans. *See* Exec. Order No. 12543, 51 Fed. Reg. 875-76 (1986) (imposing economic sanctions against Libya); Nash, *Contemporary Practice of the United States,* 90 AM. J. INT'L L. 629, 629-31 (1986) (discussing United States economic sanctions against Libya); *see also infra* note 6 and accompanying text (noting authority for presidential imposition of economic sanctions against other states). The United States imposed further economic sanctions against Libya on June 30, 1986 following the bombing of a Berlin discotheque. *See* Nash, *supra,* at 988-91 (1986) (noting additional sanctions imposed against Libya).

3. *See* HUFBAUER & SCHOTT, *supra* note 1, at 29 (noting that some nations employ sanctions to change domestic policies of target nation's government). In the last decade many states have imposed economic sanctions on target states to change the internal policies of the target state. HUFBAUER & SCHOTT, *supra* note 1, at 2. For example, in 1977 the United States imposed economic sanctions against Paraquay, Guatemala, Argentina, Nicaragua, El Salvador, and Brazil to induce those countries to ameliorate alleged human rights violations in those states. *Id.* at 550-63, 568-82. In 1981 the United States imposed economic sanctions against Poland to induce the Polish Government to lift martial law, free dissidents, and resume talks with Solidarity. *Id.* at 696-711. In 1981 the European Community imposed economic sanctions against Turkey to induce the Turkish Government to restore democracy in Turkey. *Id.* at 712-16. In 1982 the United States and the Netherlands imposed economic sanctions against Suriname to improve human rights in Suriname and to limit Suriname's alliance with Communist states. *Id.* at 725-29. In 1982 South Africa imposed economic sanctions against Lesotho to induce Lesotho to return refugees suspected of anti-South African activities to South Africa. *Id.* at 730-33.

4. *See* Lillich, *Economic Coercion and the "New International Economic Order:" A Second Look at Some First Impressions,* 16 VA. J. INT'L L. 233, 234 (1976) (noting that economic coercion by states may violate international law); Note, *Economic Sanctions Against South Africa: Problems and Prospects for Enforcement of Human Rights Norms,* 22 VA. J. INT'L L. 345, 373-75 (1982) (noting that unilateral imposition of sanctions may violate international law).

5. *See* O. OZGUR, APARTHEID: THE UNITED NATIONS AND PEACEFUL CHANGE IN SOUTH AFRICA 1-11 (1982) (discussing South African Government's Apartheid policy toward South African blacks). Currently 24 million black people are living in South Africa under apartheid, which is an Afrikaner word meaning separateness or apartness. *See* Minter, *supra* note 2, at 60 (describing demographics of South African society); Note, *The Constitutionality of State and Local Government's Response to Apartheid: Divestment Legislation,* 13 FORDHAM URB. L. J. 763, 763 n. 1 (1985) (describing demographics of South Africa and defining apartheid). About 1/2 of the South African black population lives in all-black "Bantustans," or homelands, while the rest live in all-black townships near white cities where the blacks work. *See* Felton, *Capitol Hill Taking a New Look at Apartheid,* 43 CONG. Q. WEEKLY REP. 440, 440 (1985) (detailing history and nature of apartheid). The 5 million member white minority, which has dominated life in South Africa for the last 300 years, is composed of Afrikaner and predominately white English-speaking people. *See* Minter, *supra* note 2, at 60 (describing demographics of South Africa); Note, *supra,* at 763 n. 3 (describing history of white minority in South Africa). The term Afrikaner describes a people of Dutch, French Hugueonot, and German ancestry that settled in southern Africa in the 1600s. *See* Note, *supra,* at 763 n.3 (describing

The Act raises serious questions concerning the legality of economic sanctions under international law.

Afrikaner population). The Afrikaners are members of the white minority and form the National Party that controls the South African Government. *Id.*

In 1985 the South African Parliament replaced the South African Government under the Westminster system set up in 1910. DEPARTMENT OF FOREIGN AFFAIRS, REPUBLIC OF SOUTH AFRICA, SOUTH AFRICA CONSTITUTION AND SYSTEM OF GOVERNMENT 1 (1985). The new constitutional system consists of three houses of government. *Id.* The House of Assembly is for whites, the House of Representatives is for Coloureds, and the House of Delegates is for Indians. *Id.* at 4. The constitutional system does not provide a House for South African blacks, who mostly are split into ten national states that serve as a base for self-government. *Id.* at 1. The South African Government has appointed a special cabinet committee to develop a framework for including urban blacks into the South African constitutional system. *Id.* Presently, blacks over the age of 18 may vote for members of the Legislative Assembly of the nation state of which they are citizens. *Id.* at 29.

Blacks protested the new constitutional system that denied blacks significant political representation. *See* Smith, *Black Rage, White Fist*, TIME, Aug. 5, 1985, at 24. Many blacks and whites died in the ensuing violence. *Id.* The South African Government responded by imposing a state of emergency on July 21, 1985, in 36 magisterial districts in South Africa that gave the police and army wide discretion to quash the turmoil. *See generally* Recent Developments, *Economic Sanctions: United States Sanctions Against South Africa*, 27 HARV. INT'L L. J. 235, 236 (1986) (noting state of emergency in South Africa); Rule, *Apartheid Foes Condemn New Cape Town Decree*, N.Y. Times, Oct. 27, 1985, at 23, col. 1 (on October 26, 1985, South African Government extended state of emergency to Cape Town and seven surrounding districts following 30 violent deaths in preceding two-week period, while lifting emergency rules in six other districts); Cowell, *Emergency Power Granted To Police By South Africa*, N.Y. Times, July 21, 1985, at 1, col. 6 (prompted by months of widening violence in which 500 people died, South Africa Government imposed state of emergency in 36 magisterial districts).

6. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086-116. In 1985 Congress drafted legislation concerning South African sanctions when President Reagan issued Executive Order No. 12532 which imposed limited economic sanctions on South Africa. *See* Exec. Order No. 12532, 50 Fed. Reg. 36,861 (1985) (Executive Order did not include ban on krugerrands and failed to provide further sanctions should South Africa not comply with Executive Order); Recent Developments, *supra* note 5, at 235 (noting that Exec. Order No. 12532 was of symbolic importance, but failed to back anti-apartheid rhetoric with substantive action). President Reagan issued the executive order under the authority vested in him by the International Emergency Economic Powers Act of 1977 (IEEPA) and the National Emergencies Act (NEA). *See* International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1702-1706 (Supp. 1985) (President may issue executive orders that prohibit imports and exports with foreign nations); The National Emergencies Act, 50 U.S.C. §§ 1601-1651 (Supp. 1985) (President may issue executive orders curtailing imports and exports with other nations). IEEPA requires that the President find that a foreign nation's domestic or foreign policy constitutes an unusual and extraordinary threat to the economy and foreign policy of the United States. 50 U.S.C. § 1701 (Supp. 1985). President Reagan declared that the policy of the Government of South Africa constituted an unusual and extraordinary threat to the foreign policy and economy of the United States and declared a national emergency in response to that threat in the form of limited economic sanctions. *See* 50 U.S.C. § 1701 (Supp. 1985) (President Reagan declares apartheid national emergency and unusual and extraordinary threat to United States).

On June 18, 1986 the House passed H.R. 4868, which provided for a near total trade embargo against South Africa. H.R. 4868, 99th Cong., 2d Sess. (1986). *See* Felton, *House May Buy Into Senate Bill Setting South African Sanctions*, 44 CONG. Q. WEEKLY REP. 1982,

On October 2, 1986 Congress passed the Act, which immediately prohibited imports of South African iron, steel, sugar, and other agricultural products and food.[7] The Act also banned immediately exports to South Africa of crude oil and petroleum products, as well as computers and computer technology for the Government of South Africa.[8] Sanctions that the Act phased in later included a ban on new investment in South Africa.[9] In addition, the Act prohibited imports from South Africa of uranium, coal, and textiles ninety days after the Act's passage.[10] Another provision, to commence ten days after the Act's enactment, provided that the President direct the United States Secretary of Transportation to deny landing rights to South African Airways in the United States and prohibit the takeoff and landing in South Africa of aircraft owned or controlled by United States nationals.[11] The provision also directed the United States Secretary of State to terminate a bilateral treaty of air travel between the United States and South Africa.[12] The Act further provided that if South Africa has not

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1982 (1986) [hereinafter Felton *House Buys*] (discussing passage of H.R. 4868); Felton, *Senate Votes a Bill to Impose New Sanctions on South Africa*, 44 CONG Q. WEEKLY REP. 1860, 1860 (1986) [hereinafter Felton *Senate Votes*] (same). On August 15, 1986 the Senate passed a stronger version of H.R. 4868. H.R. 4868, 99th Cong., 2d Sess. (1986). The House accepted the Senate version and sent the Bill to President Reagan. H.R. 4868, 99th Cong., 2d Sess. (1986). *See* Felton, *Senate Votes*, *supra*, at 1860 (discussing history of Act); Felton, *House Buys*, *supra*, at 1982 (same). Stating that economic sanctions would hurt South African blacks instead of help them, President Reagan vetoed H.R. 4868 on September 20, 1986. *See* Felton, *Hill Overrides Veto of South African Sanctions*, 44 CONG. Q. WEEKLY REP. 2338, 2338 (1986). The House overrode the President's veto on September 29 and the Senate overrode the veto on October 2, 1986. *Id.* When the Senate overrode President Reagan's veto on October 2, the vote was the first override of a major foreign policy issue since Congress passed the War Powers Resolution over President Nixon's veto in 1973. *Id.* at 2339.

7. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 320, 323, 319, 100 Stat. 1086, 1105-06. Section 319 of the Act prohibits imports of South African agricultural products or articles suitable for human consumption. *Id.* § 319, at 1105. In 1985 the United States imported $52 million in fruits and vegetables and $129 million in other agricultural products from South Africa. Stine, *Sanctions Levied Against South Africa*, 44 CONG. Q. WEEKLY REP. 2270, 2271 (1986). In 1985 the United States imported $293.6 million of South African iron and steel. *Id.*

8. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 321, 304, 100 Stat. 1086, 1105, 1099-1110. The Act's prohibition on exports of crude oil and petroleum products does not apply to exports contracted before October 2, 1986. *Id.* at 1105.

9. *Id.* § 310(b), at 1102. The Act provided that the ban on new investment in South Africa would take effect 45 days after the passage of the Act. *Id.* Under the Act, however, a United States citizen may make new investments with firms owned by black South Africans. *Id.*

10. *Id.* § 309, at 1102. In 1985 the United States imported $140 million in South African uranium, $43.4 million in South African coal, and $55.1 million in South African textiles. Stine, *supra* note 7, at 2271.

11. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 306(a)(2), (b)(3), 100 Stat. 1086, 1100-01. In 1985 95,000 passengers landed in the United States aboard South Africa Airways. Stine, *supra* note 7, at 2271.

12. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 306(b)(1), 100 Stat. 1086, 1100; *see* Air Transport Services Agreement Between the Government of the United

progressed by October 2, 1987 in ending apartheid and establishing a nonracial democracy in South Africa, the President may impose additional economic sanctions, including a ban on imports of South African diamonds and strategic minerals.[13]

By means of the Act Congress sought an end to the apartheid system of government in South Africa.[14] Congress declared in the Act that the United States policy is to use any effective means, such as economic, political, and diplomatic measures, to remove apartheid from South Africa and to assist the victims of apartheid.[15] Congress stipulated that the Act's economic sanctions will terminate if the Government of South Africa complies with five demands.[16] First, the Act demands the release of African National Congress leader chief Nelson Mandela as well as the release of all other persons persecuted for their political beliefs.[17] Second, the Act demands that the South African Government repeal the present state of emergency

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States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, May 23, 1947, 61 Stat. 3057, T.I.A.S. No. 1639 [hereinafter Air Transport Agreement] (air transport agreement between United States and South Africa).

13. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 501(c)(3), (c)(5), 100 Stat. 1086, 1108.

14. *Id.* §§ 103(a), (b)(2) & 201-212, at 1090-91, 1094-99; *see supra* note 5 and accompanying text (describing South African constitutional system of apartheid). The policy goals of the Act are the immediate repeal of the present state of emergency in South Africa, and, ultimately, an end to apartheid and the establishment of a nonracial and democratic form of government in South Africa. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 101, 100 Stat. 1086, 1089.

The Act provides that United States policy is to induce the African National Congress (ANC) to support an end to racial violence. *Id.* §102(a), at 1090. The goal of the ANC, composed of members of racial groups, is to create a nonracial democracy in South Africa. O. OZGUR, *supra* note 5, at 29. The South African Government banned the ANC in 1960. *Id.* 32, 41. The United States Congress also specifically condemned the practice of "necklacing," which is a form of torture imposed by blacks on other blacks thought to be government informants. *Id.* § 312(c), at 1104. Necklacing occurs when black protesters place gasoline-filled tires around the necks and legs of alleged informants and set the tires on fire. Felton, *Senate Votes*, *supra* note 6, at 1861. In August 1986, 242 blacks died in South Africa. *Id.* Many of the dead were victims of necklacing. *Id.* Many Americans view incidents such as necklacing as crimes against humanity. *Id.*

15. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 103(a), (b)(2) & 201-212, 100 Stat. 1086, 1090, 1094-99; *see supra* note 5 and accompanying text (describing South African constitutional system of apartheid); *supra* note 14 and accompanying text (noting United States policy goals behind passage of Act).

16. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, §§ 311(a)(1)-311(a)(5), 1086, 1103; *see infra* note 22 and accompanying text (describing Act's alternative termination procedures).

17. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 311(a)(1), 100 Stat. 1086, 1103; *see supra* note 14 and accompanying text (describing ANC). Nelson Mandela, a lawyer and an ANC leader and in jail since 1962, has been serving a life sentence on the Robben Island prison since 1964. O. OZGUR, *supra* note 5, at 30. Although the South African Government has imprisoned many political malcontents, Nelson Mandela has come to symbolize the movement for a nonracial democracy. *Id.*

in South Africa.[18] Third, the Act requires South Africa to permit the formation of democratic parties and allow members of all races to participate in the political process in South Africa.[19] Fourth, the Act demands that South Africa repeal all South African acts and measures that limit where nonwhites may live and work.[20] Last, the Act requires that the Government of South Africa agree to enter into good faith negotiations with representatives of the black majority in South Africa.[21] Alternatively, the Act authorizes the President of the United States to terminate the economic sanctions of the Act if the President reports to Congress that the South African Government has fulfilled the Act's purposes and policy goals.[22]

Because the United States implemented the Act to change the internal policies of South Africa, the use of economic sanctions by the United States may be illegal under international law.[23] Although all states have the sovereign right to regulate their foreign trade with other states, economic conduct that undermines the sovereign authority of a target state may violate international law.[24] The International Court of Justice (ICJ) settles inter-

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18. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 311(a)(2), 100 Stat. 1086, 1103; *see supra* note 5 and accompanying text (describing present state of emergency in South Africa).

19. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 311(a)(3), 100 Stat. 1086, 1103; *see supra* note 5 and accompanying text (describing present form of government in South Africa).

20. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 311(a)(4), 100 Stat. 1086, 1103.

21. *Id.* § 311(a)(5) at 1103.

22. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 311(b), 100 Stat. 1086, 1103. Under §§ 501(c), 504(b), and 301-323 of the Act the President of the United States can suspend or modify the sanctions 30 days after reporting to Congress that the Government of South Africa has achieved three measures. *Id.* § 311, at 1103. The first measure is the release of Nelson Mandela and other political prisoners. *Id.* §311 (b)(1), at 1103; *see supra* notes 14 & 17 and accompanying text (discussing ANC, Mandela and other political prisoners). The second measure is the accomplishment by the South African Government of three of the following four actions: 1) the repeal of the present state of emergency; 2) the legalization of democratic political parties available to all races; 3) the repeal of acts that restrict where nonwhites live and work; and 4) the agreement to enter into good faith negotiations with black leaders. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 311(b)(2), 100 Stat. 1086, 1103. The third measure is presidential determination that the Government of South Africa has made substantial progress toward dismantling apartheid. *Id.* § 311(b)(3), at 1103. Within the 30-day period Congress may pass a joint resolution under the Act not to terminate the sanctions suggested by the President, despite South Africa's compliance with the presidential termination measures. *Id.* §§ 311(b), 602, at 1103, 1112-13.

The Act also authorizes the President of the United States to terminate the sanctions banning imports from South Africa of coal or strategic and critical material. *Id.* § 502(a), at 1109. If the President finds that nonimportation of these materials from South Africa would force the United States to import the strategic materials from communist countries to levels above the average annual imports from the communist countries between 1981 to 1985, then the President can lift the particular sanction or sanctions. *Id.* § 502(b), at 1109.

23. *See supra* notes 14-22 and accompanying text (describing how Act may change internal structure of South African society).

24. *See* C. EAGLETON, INTERNATIONAL GOVERNMENT 86-87 (3d ed. 1957) (states are free

national disputes, such as alleged infringements of sovereign authority, that contestant states submit to the ICJ's jurisdiction.[25] Article 38 of the Statute of the International Court of Justice (ICJ Statute) identifies the traditional sources of international law used by the ICJ to determine the legality of a state's international conduct.[26] Under article 38 of the ICJ Statute the ICJ is to apply international conventions and treaties that establish rules expressly recognized by the disputants, international custom as defined by the accepted practice of states, general principles of international law recognized by civilized nations, and judicial decisions and the scholarship of internationally respected publicists.[27] The sources of international law in article 38 of the ICJ Statute constitute the commonly accepted sources used to evaluate

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not to trade with other states); E. VATTEL, LAW OF NATIONS 39 (Chitty ed.1883) (states are free to trade with any other nation); *see also* Muir, *The Boycott in International Law*, 9 J. INT'L L. & ECON. 187, 192 (1974) (noting right of nations to regulate their trade as long as regulation is not motivated to undermine target state's sovereignty); Note, *The Legitimacy of the United States Embargo of Uganda*, 13 J. INT'L. L. & ECON. 651, 656-57 (1979)(noting that embargo against Uganda in response to human rights violations may constitute properly motivated breach of customary international law); Note, *supra* note 4, at 353 (noting that test of legality of use of economic force rests on propriety of motivation and not necessarily on impact of result); *infra* note 108 and accompanying text (noting that intervention violates international law if directed against target's sovereignty).

25. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute]. Annexed to the Charter of the United Nations, the ICJ Statute prescribes rules of operation for the International Court of Justice (ICJ). *Id.* In cases before the ICJ, only states may be parties. *Id.* at art. 34(1). The jurisdiction of the ICJ is dependent on the consent of a state to appear, and that consent may take several forms. *Id.* at art. 36. Parties to a dispute specifically may refer the dispute to the ICJ's jurisdiction or they may confer jurisdiction to the ICJ by treaty. *Id.* at art. 36(1). Alternatively, states that are parties to the ICJ Statute may accept the compulsory jurisdiction of the ICJ by prior declaration. *Id.* at art. 36(2). A state that has accepted the compulsory jurisdiction of the ICJ by declaration may be brought before the ICJ only by other states that that have made similar declarations. *Id.* If the claimant state has attached reservations to its declaration, the defendant state may use the reservation before the ICJ. *Id.* Judgements of the ICJ in contentious cases are binding upon the parties, but the United Nations Charter allows wide discretion to the Security Council to enforce the judgement. *See* U.N. CHARTER art. 94, para. 2 (if party fails to follow judgment rendered by ICJ, recourse is to Security Council, which determines appropriate measures). When states accept the ICJ's jurisdiction in a dispute, they in effect accept the ICJ's judgement as well. *See* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 209 (5th ed. 1984) (acceptance by state of ICJ's authority to decide reflects state's willingness to abide by ICJ's judgement). Both the United States and South Africa are *ipso facto* parties to the ICJ Statute. U.N. CHARTER art. 93.

26. *See* ICJ Statute, *supra* note 25, at art. 38(1) (noting that ICJ applies article 38 of Statute to settle disputes between states).

27. *See* ICJ Statute, *supra* note 25, at art. 38(1) (enumerating traditional sources of international law). A "convention" is the same as a treaty for purposes of identifying sources of international law. *See* M. AKEHURST, *supra* note 25, at 23-24 (stating that convention is treaty in international law). A treaty is an understanding between two or more states or international organizations that establishes a binding agreement between the parties subject to international law. *See* A. MCNAIR, LAW OF TREATIES 3-4 (1961) (analyzing treaties in transnational relations).

potential violations of international law.[28] Of the sources of international law in article 38, treaties and international custom are the fundamental sources used to determine the legality of a state's conduct toward another state.[29] A determination of the legal status of the United States economic sanctions against South Africa, therefore, should consider treaties signed by the parties as well as customary international law.[30]

The Charter of the United Nations (Charter) exemplifies international law created by treaty.[31] Because the United States and South Africa have signed the Charter, the Charter is binding on both parties.[32] Several articles of the Charter are applicable to the question of whether the use of economic sanctions by one member state to change the domestic policies of another member state violates international law.[33] Article 2(4) of the Charter proscribes the threat or use of force by one member state against any other member state in a manner that violates the sovereign authority of that state or contravenes the purposes of the United Nations.[34] The question of whether

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28. *See* ICJ Statute, *supra* note 25, at art. 38. *See* M. AKEHURST, *supra* note 25, at 23 (article 38 of ICJ Statute enumerates generally accepted sources of international law); C. PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 5-27 (1965) (discussing article 38 of ICJ Statute and sources of international law); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 249 (2d ed. 1976) (same).

29. *See* L. OPPENHEIM, INTERNATIONAL LAW § 19 (8th ed. H. Lauterpacht 1955) (treaties and custom are two principal sources of international law); Bowett, *International Law and Economic Coercion,* 16 VA. J. INT'L L. 245, 245-49 (1976) (discussing use of treaties and custom to analyze economic coercion under international law).

30. *See infra* notes 32, 71 & 88 and accompanying text (discussing treaties signed by United States and South Africa); *infra* notes 101, 113-26 and accompanying text (discussing customary international law and economic sanctions).

31. U.N. CHARTER, June 6, 1945, 59 Stat. 1031, T.S. No. 993; L. OPPENHEIM, *supra* note 29, at § 18. Treaties may change customary rules of international law as between the parties. *Id*; *see* R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963) (Charter is declaratory of customary international law); Note, *supra* note 24, at 660 (Charter reflects or declares customary international law); Comment, *U.S. Trade Sanctions Against Uganda: Legality Under International Law,* 11 L. & POL'Y INT'L BUS., 1149, 1174-75 (Charter represents foremost example of international law created by treaty).

32. U.N. CHARTER, June 6, 1945, 59 Stat. 1031, T.S. No. 993. A treaty is binding upon the treaty's signatories. L. OPPENHEIM, *supra* note 29, at § 519. *See* Vienna Convention on the Law of Treaties, art. 34, U.N. Doc. A/CONF. 39/27 (1969)(treaties do not create obligations or rights for third state without its consent) *reprinted in* 63 AM. J. INT'L. L. 875 (1969).

33. *See infra* notes 34-50 and accompanying text (discussing economic sanctions and article 2(4) of Charter); *infra* notes 52-70 and accompanying text (discussing economic sanctions and articles 2(3), 33, 55, and preamble of Charter).

34. U.N. CHARTER art. 2, para. 4. Article 1 of the Charter expresses the purposes of the United Nations. *Id.* at art. 1. The purposes of the United Nations are to maintain international peace and security, promote international co-operation in solving international problems, and foster friendly relations among nations. *Id.* To further the development of friendly international relations, the Charter recognizes the principle of equal rights and self-determination of peoples. *Id.* at art. 1(2). Another purpose of the United Nations is to achieve international cooperation in solving international problems of a humanitarian character and

economic coercion by one member state against another member state constitutes a threat or use of force under article 2(4) has created much debate.[35] The "narrow" reading, yet majority interpretation, of article 2(4) suggests that article 2(4) does not forbid the use of economic sanctions by one member state against another member state because article 2(4) "force" only includes armed force.[36] Failed attempts to construe article 2(4) to include economic coercion support the narrow interpretation of article 2(4).[37] One failed attempt occurred when the San Francisco Conference writing the Charter voted to defeat a proposal that the prohibitions in article 2(4) include economic measures.[38] Under the narrow interpretation of article

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in promoting respect for human rights and fundamental freedoms without racial distinctions. *Id.* at art. 1, para. 3; *see infra* note 40 and accompanying text (noting United Nations purposes incorporate respect for human rights and fundamental freedoms).

35. *See infra* notes 34-50 and accompanying text (discussing economic sanctions and article 2(4)). *Compare* Lillich, *supra* note 4, at 235-36 (that article 2(4) "force" does not include economic measures is conventional wisdom); and Bowett, *supra* note 29, at 245 (article 2(4) should not include economic coercion); *with* J. Fonteyne, *The Customary International Law Doctrine of Humanitarian Interventions: Its Current Validity Under the U.N. Charter*, 17 COMP. JURID. REV. 27, 58-59, 62 (1980) (classic view of article 2(4) "force" encompasses entire range of force, including economic and polical coercion); and Akehurst, *Humanitarian Intervention*, in INTERVENTION IN WORLD POLITICS 95, 104-06 (Bull ed. 1984) (article 2(4) imposes total ban on use of force, including economic and political measures).

36. *See* Lillich, *supra* note 4, at 235-36 (article 2(4) "force" does not include economic measures); *see also infra* notes 46-50 (discussing narrow view of article 2(4)). *Cf.* J. STONE, AGGRESSION AND WORLD ORDER 54, 58-60, 66-68, 111 (1958)(Charter definition of aggression, as analogy to force, is limited to armed aggression).

37. *See* 21 U.N. GAOR Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States (25th mtg.) at 12, para. 23, U.N. Doc. A/AC.125/SR.25 (1966)(hereinafter Special Committee Concerning Friendly Relations)(noting that United Arab Republic delegate unsuccessfully argued that article 2(4) should include economic and political pressure as an illegal use of force); Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation Among States, 25 U.N. GAOR, Supp.(No. 18) at 120, U.N. Doc. A/8018 (1970)(hereinafter Report Concerning Friendly Relations)(noting article 2(4) use of force concerns threat or use of armed, or physical, force only); Bowett, *supra* note 29, at 245 (article 2(4) should not include economic coercion); Lillich, *supra* note 4, at 235 (noting failed attempts to include economic measures under article 2(4)'s prohibition of force); *infra* note 38 and accompanying text (noting failed attempt at San Francisco Conference to construe article 2(4) of Charter as including economic coercion). *Cf.* J. STONE, *supra* note 36, at 54, 58-60, 66-68, 111 (1958) (stating that General Assembly's definition of aggression analogous to definition of aggression in Charter and is limited to armed aggression); Lillich, *supra* note 4, at 234-236 (same).

The United Nations condemned economic coercion in the Special Committee Concerning Friendly Relations, but only in the context of the duty of nonintervention under customary international law, rather than in the context of the prohibition against the use of force located in article 2(4). *See* Special Committee Concerning Friendly Relations, *supra*, at 16, para. 39 (statement of Mr. Sinclair, delegate of the United Kingdom); Lillich, *supra* note 4, at 236-37 (noting statement of United Kingdom delegate); *infra* note 108 and accompanying text (noting duty of nonintervention in customary international law).

38. *See* Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 331, 334-35 (1945) (noting failure at San Francisco Conference to include economic measures in article 2(4)). In 1945 a Brazilian delegate to the San Francisco Conference that authored the Charter proposed that the prohibitions in

2(4), therefore, the Act does not violate article 2(4) because the Act does not include armed force.[39] Moreover, the Act arguably supports the purposes of the United Nations. Because one of the four purposes of the United Nations is to promote human rights and fundamental freedoms without racial distinctions, and because the Act has similar goals, the United Nations may even condone the United States sanctions.[40]

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article 2(4) include economic measures, but the Conference defeated the Brazilian proposal 26 to 2. *Id*; *see* Lillich, *supra* note 4, at 234-36 (noting defeat of measure to include economic measures in article 2(4) at San Francisco Conference); Comment, *supra* note 31, at 1181 (noting failure of Charter framers to include economic measures in article 2(4)).

39. U.N. CHARTER at art. 2 para. 4; *see supra* note 15 and accompanying text (noting that Act implementation does not require resort to armed force).

40. *See* U.N. CHARTER art. 1, para. 3 (purpose of United Nations is to solve international humanitarian problems and to promote international respect for human rights and fundamental freedoms without distinction regarding race); *supra* note 14 and accompanying text (purpose of Act is to promote establishment of nonracial and democratic form of government for South Africa). In a recent editorial comment, a legal adviser to the Government of Baharian expressed his personal views on the relation between force in article 2(4) of the Charter and the purposes of the United Nations. Nawaz, "Editorial Comment: What Limits on the Use of Force? Can Force Be Used to Depose An Oppressive Government?," 24 INDIAN J. INT'L L 406 (1984). The author noted that textually article 2(4) not only prohibits the threat or use of force by one member state against the territorial integrity or political independenceof another member state, but also prescribes the threat or use of force that is contrary to the purposes of the United Nations. *Id.* at 408. Article 1 of the U.N. Charter States that the purposes of the United Nations are to maintain international peace and security, to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, to promote human rights and to act as a center for international harmony in the attainment of these purposes. Nawaz, *supra* at 408; U.N. CHARTER art. 1. Presumably state action that does not include armed force and that is not contrary to the purposes of the United Nations is permissible.

Three articles of the Charter link racial nondiscrimination with respect for human rights and fundamental freedoms. U.N. CHARTER at art. 1, para. 3, art. 62, para. 2, & art. 76. para. c. A purpose of the United Nations is to achieve international cooperation in solving international problems of a humanitarian character and in promoting respect for human rights and fundamental freedoms. *Id.* at art. 1, para. 3. Article 62 of the Charter empowers the United Nations Economic and Social Council, elected by the United Nations General Assembly, to promote respect for and observance of human rights and fundamental freedoms. *Id.* at art. 62, para. 2. Article 76 provides that a basic principle of the International Trusteeship System of the United Nations is to to encourage respect for human rights and fundamental freedoms regardless of race. *Id.* at art. 76, para. c. Respect for human rights and fundamental freedoms, therefore, are an integral part of the Charter. *See* O. OZGUR, *supra* note 5, at 4-6 (racial nondiscrimination including enjoyment of human rights and fundamental freedoms is keystone of Charter). Because Article 2 of the Charter provides that all member states must fulfill Charter obligations in good faith, South Africa is bound by the Charter to respect human rights and fundamental freedoms. *See* U.N. CHARTER at art. 2, para. 2 (stating that Members of United Nations shall fulfill in good faith obligations under the Charter).

In addition to the Charter, United Nations human rights instruments support the principle of racial nondiscrimination. The Universal Declaration of Human Rights (Universal Declaration), adopted by the U.N. General Assembly in 1948, promotes the principle of racial nondiscrimination. *See* Universal Declaration of Human Rights, G.A. Res. 217 A, 3 U.N. GAOR A/810, (1948)[hereinafter Universal Declaration](United Nations opposes racial discrimination); O. OZGUR, *supra* note 5, at 6 (irrespective of its binding force, Universal Declaration

Contrary to the majority interpretation, the "broad" reading or minority interpretation of article 2(4) is that article 2(4) force refers to all forms of intervention, including economic coercion, by one member state into the affairs of another member state.[41] The Charter prescribes that only United

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is authoritative interpretation of Charter provisions on human rights and fundamental freedoms). The International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), gave legal force to the Universal Declaration. *See id.* at 7 (stating that ICESCR and ICCPR give legal force to Universal Declaration). G.A. Res. 2200 A, U.N. GAOR Supp. (No.16), U.N. Doc. A/6316 (1966). Article 2 of both covenants prohibit racial discrimination. *See* O. OZGUR, *supra* note 5, at 7-8 (discussing both covenants).

The United Nations also has adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid (Crime of Apartheid Convention), which establishes international criminal responsibility for individuals and members or representatives of organizations, institutions, and states who commit the crime of apartheid. International Convention on the Suppression and Punishment of the Crime of Apartheid, 26 U.N. GAOR (1406th plen. mtg.) U.N. Doc. A/C.3/L.1871 (1971). Article 1 of the Crime of Apartheid Convention declares that apartheid is a crime against humanity, that apartheid violates the purposes and principles of the Charter, and that apartheid constitutes a serious threat to international peace and security. *Id.* at art. 1; *see* O. OZGUR, *supra* note 5, at 9-11 (discussing Crime of Apartheid Convention).

Even though the Charter and United Nations human rights instruments support the principle of racial nondiscrimination, article 2(7) of the Charter limits the competence of the United Nations to intervene in matters that are essentially within the domestic jurisdiction of a member state. U.N. CHARTER art. 2, para. 7. Thus, an apparent disjunction exists between the jurisdiction of the United Nations and the domestic jurisdiction of states. *See* O. OZGUR, *supra* note 5, at 13-21 (noting ambiguity of Charter regarding overlap of United Nations and domestic jurisdiction of Member states concerning human rights violations). The Charter excludes, however, violations of human rights and fundamental freedoms from domestic jurisdiction if the violations are a threat to international peace and the violations obstruct the application of the provisions of the Charter. U.N. CHARTER at art. 2, para. 7; O. OZGUR, *supra* note 5, at 18. At the very least, gross or consistent patterns of human rights violations are within the concurrent jurisdiction of both the United Nations and the state where the violations occur. O. OZGUR, *supra* note 5,
at 20. Furthermore, since the Charter contains a pledge to encourage respect for human rights, the Charter implies an obligation of member states not to undermine human rights in their own state. *See* J.L. BRIERLY, THE LAW OF NATIONS 293 (6th ed. 1963) (analyzing Charter's obligation of states not to undermine human rights, which South Africa's apartheid policy appears to contravene); O. OZGUR, *supra* note 5, at 20 (same).

In addition to the United Nations theoretical support for the imposition of economic sanctions by one state acting alone to rectify human rights transgressions, the United Nations has imposed its own sanctions against South Africa's policy of apartheid. O. OZGUR, *supra* note 5, at 77.

41. *See* Fonteyne, *supra* note 35, at 62-76 (noting that article 2(4) force encompasses broad range of situations). The exponents of the broad interpretation of article 2(4) of the Charter maintain that article 2(4) forbids all forms of intervention by one member state into the internal affairs of another member state. *See* Akehurst, *supra* note 35 at 104-05 (Bull ed. 1984) (stating that all forms of intervention are illegal and rejecting applicability of narrow interpretation of article 2(4)); Franck & Rodley, *After Bangladesh: The Law of Humanitarian Intervention By Military Force,* 67 AM. J. INT'L. L. 275, 299-302 (1973) (same). One advocate of a broad interpretation of article 2(4) force states that article 2(4) concerns a broad range of situations, that article 2(4) is inclusive, and that article 2(4) forbids all forms of intervention,

Nations Security Council[42] (Security Council) approval or legitimate claims of self-defense permit a member state to use "force" against another member state.[43] Under the broad interpretation of article 2(4), therefore, a state cannot use economic coercion against another state unless the Security Council approves or unless the use of economic coercion constitutes a legitimate exercise of self-defense.[44] Thus, under the broad interpretation of article 2(4), the United States sanctions against South Africa may constitute a use of force that violates article 2(4) of the Charter.[45]

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including economic sanctions. Fonteyne, *supra* note 35, at 28 n. 4, 62, 64 & 66. If article 2(4) does forbid economic sanctions, then the use of economic sanctions for any purpose violates the Charter. *See infra* note 117 and accompanying text (noting that broad interpretation of article 2(4) forbids economic sanctions used to effect humanitarian goals).

42. U.N. CHARTER Chapter V. The Security Council consists of fifteen Members of the United Nations. *Id.* at art. 23, para. 1. China, France, the Soviet Union, the United Kingdom, and the United States are permanent members of the Security Council. *Id.* The General Assembly elects the remaining ten members of the Security Council to two year terms. *Id.* at art. 23, para. 2. The Security Council has primary responsibility for the maintenance of international peace and security. *Id.* at art. 24, para. 1.

43. U.N. CHARTER arts. 42, 51. A member state of the United Nations legitimately may use force against another Member state if the Security Council of the United Nations (Security Council) has determined that other measures are or would prove to be inadequate. *Id.* at art. 42. Under article 39 of the Charter the Security Council may determine whether a threat to international peace or an act of aggression exists that warrants measures, short of armed force, to restore international peace and security. *Id.* at art 39. The Security Council then is free to impose economic sanctions as a measure to thwart threats to international peace and security. *Id.* If peaceful measures prove inadequate to restore international peace, the Security Council, under article 42, may decide that armed force is necessary. *Id.* at art. 42. Also, a member state legitimately may use armed force in self-defense in response to armed force. *Id.* at art. 51. Because the Charter recognizes the sovereignty of each state and the inviolability of each state's internal affairs, the two exceptions to the use of force by one member state against another member state arise either as a result of a Security Council determination that an aggressor state has abused the sovereignty of a target state or that a state needs to defend its own sovereignty with an armed response. *See* U.N. CHARTER at art. 2, para. 1 (United Nations based on principle of sovereign equality of all Members); *id.* art. 2, para. 7 (United Nations may not intervene in matters essentially within domestic jurisdiction of any state, except pursuant to Security Council recommendation); *id.* at art. 39 (Security Council shall determine existence of any threat to peace or act of aggression and shall make recommendations to maintain or restore international peace and security); *id.* at art. 41 (Security Council shall decide what measures short of armed force to employ to restore international peace and security); *id.* at art. 42 (Security Council shall decide if armed force is necessary to maintain or restore international peace and security); *id.* at art. 51 (Member states have an inherent right of individual or collective self-defense against armed attack); *infra*, note 111 (defining sovereignty).

44. *See supra* note 41 and accompanying text (under broad interpretation of article 2(4), article 2(4) of Charter forbids use of any force by one member state against another member state, including use of economic measures).

45. *See* Akehurst, *supra* note 35, at 104-06 (force under article 2(4) includes economic and political measures). Proponents of the broad interpretation of article 2(4) suggest that accelerated world economic interdependence lends credence to the inclusion of economic measures under article 2(4) because a state's control over its internal policies may become vulnerable to another state's foreign economic policy. *See* Comment, *supra* note 31, at 1182-87 (broad view of article 2(4) notes that increasing world economic interdependence necessitates

Although lacking international censensus, the majority view that force refers to only armed force and not economic and political pressure is most consistent with the goal of article 2(4).[46] The goal of article 2(4) is the protection of a state's sovereignty.[47] Armed force by one state against

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rethinking definition of "force" in article 2(4)). As a result of increasing world economic interdependence, economic force has the potential to create undesirable consequences such as economic instability, threat to national security or widespread loss of life in a target state. *Id.* Proponents of the broad view argue, therefore, that accelerated international economic interdependence might support the inclusion under article 2(4) of economic measures because economic force might be as devastating to a target nation as armed force. *Id.* Proponents of the broad view assert, furthermore, that article 2(4) forbids any use of force that undermines the territorial integrity or political independence of a target state. *Id.*; Akehurst, *supra* note 35, at 104-06. U.N. CHARTER art. 2, para. 4. *See supra* notes 34 & 40 and accompanying text (noting purposes of the United Nations); *infra* note 111 and accompanying text (noting definition of sovereignty). Proponents of the broad interpretation of article 2(4) continue that if economic force is used in a manner that undermines a nation's territorial integrity or political independence, then perhaps economic force should be subject to the strictures of article 2(4). Akehurst, *supra* note 35, at 105; Comment, *supra* note 31, at 1184-86. Under the broad interpretation of article 2(4) the United States sanctions imposed against South Africa, therefore, violate article 2(4) because the United States use of the sanctions unduly will influence the South African Government's determination of the form of government for South Africa. *See supra* note 34 and accompanying text (noting that article 2(4) of the Charter proscribes use of force by one member state that violates sovereign authority of another member state); *infra* note 111 and accompanying text (noting definition of sovereignty); *supra* note 14 and accompanying text (noting that policy goal of Act is to establish a nonracial and democratic form of government in South Africa).

A further aspect of increasing world economic interdependence is the eroding of state sovereignty and nonintervention as reliable principles supporting international law and international interaction among nations. *See* C. THOMAS, NEW STATES, SOVEREIGNTY AND NONINTERVENTION 5-6 (1985) (questioning principles of sovereignty and nonintervention as sound bases of international legal system). In theory, recognition of a state's sovereignty entails an understanding of the inviolability of a sovereign state's borders from outside influence. *See supra* note 111 and accompanying text (analyzing principle of sovereignty). In practice, however, state borders increasingly are vulnerable to foreign leverage and persuasion. C. THOMAS, *supra*, at 1-9. Scientific and technological advances concerning communications, international trade, and sophisticated military weapons continue to make state borders more accessible to external influences. *Id.* at 5-6. Furthermore, state borders appear freely susceptible to international terrorism. *Id.* at 4-6. The division between sovereignty in theory and practice may produce confusion about permissible transnational conduct. *Id.* The confusion may cripple trust in the future relationship between states based on the principle of sovereignty. Thus, under the broad interpretation of article 2(4), the question concerning the applicability of economic sanctions to article 2(4) rests on a determination of whether the use of economic sanctions in a particular episode constitutes a forbidden use of force. One method to determine whether economic sanctions constitutes a forbidden use of force might be for the Security Council to determine the scope of article 2(4) force on an *ad hoc* basis. In that event, the same sanctions applied against a small nation may violate article 2(4) because smaller nations may be unable to withstand outside economic pressure that would not violate article 2(4) when applied against a larger, more economically independent state.

46. *See* L. OPPENHEIM, INTERNATIONAL LAW § 52(a), at 154 (7th ed. Lauterpacht 1952) (expression "force" in article 2(4) refers to armed force and not to economic or political pressure).

47. *See* U.N. CHARTER at art. 2, para. 1 (United Nations based on principle of sovereign

another state nearly always violates the territorial integrity and sovereign authority of the target state.[48] Economic force, however, may or may not violate the target state's sovereignty.[49] The narrow interpretation, therefore, limiting the threat or use of force proscribed by article 2(4) to include only armed force, is the more correct interpretation of article 2(4). Under the narrow interpretation of article 2(4) the Act does not violate article 2(4) of the Charter.[50]

In addition to article 2(4) of the Charter, other provisions of the Charter may be relevant in examining the United States sanctions against South Africa.[51] Article 2(3) requires the members of the United Nations to use peaceful means to settle disputes that are likely to endanger international peace and security.[52] No international consensus has emerged, however,

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equality of all Members); art. 2, para. 4 (Members shall refrain from use of force directed against territorial integrity or political independence of any state); L. OPPENHEIM, *supra* note 46, § 52(a), at 154 (territorial integrity and political independence in article 2(4) refer to territorial inviolability); *infra* note 111 and accompanying text (defining sovereignty).

48. *See* L. OPPENHEIM, *supra* note 46, § 52(a) at 154 (armed force violates territorial integrity and sovereign authority of target state, except in fulfillment of obligations to give effect to Charter or in pursuance of self-defense). Except in rare instances, the use of armed force violates article 2(4) under both the narrow and broad interpretations. *See supra* note 36 and accompanying text (noting narrow interpretation of article 2(4) forbids use of armed force by one Member state against another Member state); *supra* note 41 and accompanying text (noting broad interpretation of article 2(4) of Charter forbids use of armed force by one Member state against another Member state); *infra* note 108 and accompanying text (noting duty of states under customary international law not to use armed force to intervene in sovereign affairs of other states). An example of when armed force does not violate the prohibition against the use of force in article 2(4) occurs when the force is in self-defense or if the sovereign authority of the state where the force is used requested the force. *See* U.N. CHARTER at art. 51 (armed force permitted in self-defense only in response to armed attack); L. OPPENHEIM *supra* note 29, at §134 (noting that interference at request of target state does not violate international law); *infra* note 108 and accompanying text (describing illegality of intervention).

49. *See* Akehurst, *supra* note 35, at 106 (stating article 2(4) forbids use of economic measures by one Member state against another Member state). *But see* Lillich, *supra* note 4, at 234-36 (noting defeat of proposal to include economic measures in article 2(4) at San Francisco conference). Because the Charter framers specifically failed to include economic measures in article 2(4), the framers failed to define whether the use of economic sanctions might contravene article 2(4). *See* Lillich, *supra* note 4, at 234-35 (noting failure at San Francisco conference to include economic measures in article 2(4)). In the final analysis, then, economic measures in conjunction with armed aggression surely would violate article 2(4). To conclude that economic sanctions alone might constitute a contravention of article 2(4) use of force is to ignore the general principle that states have the right to regulate their foreign trade as a sovereign right. *See supra* note 24 and accompanying text (noting general principle that states have right to regulate their foreign trade as a sovereign right). Thus, to hold the view that article 2(4) does include a prohibition against the use of economic force necessitates a fine line drawing of when economic measures violate article 2(4) and when economic measures are a legitimate exercise of a nation's right to regulate its own foreign trade.

50. *See supra* notes 34-40 and accompanying text (discussing narow interpretation of article 2(4)).

51. *See infra* notes 52-70 and accompanying text (noting other provisions of Charter in examining legality of United States economic sanctions against South Africa).

52. U.N. CHARTER art. 2, para. 3.

regarding what constitutes a dispute under article 2(3). The Permanent Court of International Justice has defined a dispute as a legal conflict or disagreement.[53] In addition, one commentator has defined a dispute as a disagreement or controversy in the form of claims, refusals, counterclaims, or accusations.[54] The events leading up to the Act's passage satisfies either definition because the United States Congress, disagreeing with South Africa's apartheid system, has accused the South African Government of refusing to grant South African blacks adequate legal rights.[55] For the

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53. The Mavrommatis Palestine Concessions, [1924] P.C.I.J., ser. A, No. 2, at 11, *quoted in* Brosche, *The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations*, 7 CASE W. J. INT'L. L. 3, 31 (1974). The Permanent Court of International Justice (PCIJ), came into force in 1920. M. AKEHURST, *supra* note 25 , at 205. The League of Nations elected the judges to the PCIJ. *Id.* The PCIJ, dissolved in 1946 at the same time as the League of Nations, is similar to its successor, the ICJ. *Id.*

In 1914, the PCIJ discussed whether a dispute existed between Greece and Britain. The alleged dispute arose when a Greek subject, M. Mavrommatis, was on the point of obtaining from competent Ottoman authorities contracted concessions. *See* M.O. HUDSON, PERMANENT COURT OF INTERNATIONAL JUSTICE 100 (1925)(discussing Mavrommatis case). M. Mavrommatis complained to the PCIJ that the Ottoman Government, and subsequently the British Government, wrongly refused to recognize the contracts. *Id.* M. Mavrommatis sought reparations. *Id.* The Greek Government intervened on Mavrommatis' behalf asserting a right to ensure respect for the rules of international law in the person of its subjects. *Id.* at 102. Thus, the first question for the PCIJ was whether a dispute existed between the two states. *Id.* The PCIJ decided that a dispute did exist. *Id.*

54. *See* Brosche, *supra* note 53, at 31 (noting dispute entails disagreement or controversy in form of claims met by refusals, counterclaims, accusations, and denials). The definition that a dispute is a disagreement or controversy in the form of claims, refusals, counterclaims, and accusations has supported the argument that the Arab states' oil embargo against the United States amounted to some sort of counterclaim and, therefore, a dispute concerning appropriate Isreali policy existed between the Arab states and the United States. *Id.* The same definition, however, does not support one state's efforts to change the political and economic situation of another state, unless the effort at change is a matter of "international concern". Brosche, *supra* note 53, at 31. Because the Security Council specifically has labelled apartheid a matter of international concern, the United States sanctions against South Africa constitute a dispute subject to article 2(3). *See* S.C. Res. 417, 32 U.N. SCOR (2045th mtg.) at 4-5, U.N. Doc. S/INF/33 (1977) (stating that policies of South African Government will lead to serious international repercussions); S.C. Res. 392, 31 U.N. SCOR (1930th mtg.) at 11, U.N. Doc. S/INF/32 (1976) (stating that apartheid is crime against conscience and dignity of mankind and seriously disturbs international peace and security); S.C. Res. 311, 27 U.N. SCOR (1639th mtg.) at 10, U.N. Doc. S/INF/28 (1972) (stating that apartheid seriously disturbs international peace and security).

55. *See supra* note 53 and accompanying text (defining dispute as legal conflict or disagreement between nations). The events leading up to the Act's passage constitute a legal conflict or disagreement because the United States proclaimed a humanitarian impetus behind the Act's sanctions occasioned by the South African Government's denial of human rights for black South African citizens. *See infra* notes 116-26 and accompanying text (describing humanitarian intervention); *see also supra* note 53 and accompanying text (defining dispute as disagreement or controversy between nations in form of accusations). The events leading up to the Act's passage also constitute a dispute because by passing the Act, the United States tacitly has accused the South African Government of not granting black South Africans adequate legal rights. *See supra* note 14 and accompanying text (purpose of Act is to promote

purpose of article 2(3), therefore, a dispute exists between the United States and South Africa concerning the South African Government's policy of apartheid.

Concerning disputes that are likely to endanger international peace and security, member states of the United Nations must seek solutions by any of the peaceful means enumerated in article 33 of the Charter.[56] Article 33 provides that to settle disputes states should negotiate, mediate, resort to third party adjudication, or otherwise mutually agree upon appropriate forms of redress.[57] The United States has attempted to settle the dispute with South Africa over apartheid by means of President Reagan's policy of "constructive engagement."[58] Constructive engagement, a policy designed to bring diplomatic pressure against the Government of South Africa to negotiate with South African blacks concerning racial reforms in South Africa and to better interstate relations between the states of Southern Africa, is thus a form of negotiation under article 33.[59] Failing to effect an

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establishment of nonracial and democratic form of government for all South Africans). Not only does a dispute exist under the first definition, but the United Nations has stated that apartheid endangers international peace and security. *See supra* note 54 and accompanying text (noting United Nations declaration that apartheid seriously disturbs international peace); *supra* note 40 and accompanying text (apartheid endangers international peace and security and is crime against humanity).

56. U.N. CHARTER art. 33. To qualify as a dispute under article 33 an interaction between states must endanger international peace and security. *Id.*

57. *Id.*

58. *See* Felton, *'Less Than Brilliant' Administrative Role Contributed to Momentum For Sanctions*, 44 CONG. Q. WEEKLY REP. 2340, 2340 (1986)[hereinafter Felton, *Administrative Role*](detailing President Reagan's policy of constructive engagement designed to ameliorate effects of apartheid in South Africa). Before late 1984, President Reagan pursued a passive policy toward apartheid in South Africa and allowed the United States State Department's Africa bureau, headed by assistant Secretary Chester Crocker, to formulate United States policy toward South Africa. *Id.* In 1981 Crocker drafted, with Presidential approval, a policy named "constructive engagement." *Id.* The core of Crocker's policy comprised friendly persuasion toward racial reform in South Africa as well as toward settlement of disputes between the states of Southern Africa. *Id.* Anti-apartheid protesters in the United States felt that constructive engagement lacked sufficient persuasive power and began to picket the South African Embassy in Washington. *Id.* The House quickly passed a sanctions bill that went to a House-Senate conference on July 31, 1985. *Id.* Shortly thereafter, on September 9, 1985, President Reagan issued an executive order imposing many of the sanctions in the House Bill. *Id.* Pleased with the Presidential initiative, a Republican filibuster in the Senate effectively terminated the bill in conference. *Id.* Continued racial violence in South Africa, however, led to a rejuvenated sanctions movement in Congress and the House passed a new bill in June, 1986. *Id*; *see supra* note 6 and accompanying text (detailing history of Act).

59. *See supra* note 58 and accompanying text (describing constructive engagement). Negotiation is interaction between two or more states as initiated and directed to effect an understanding between them or to settle a dispute. L. OPPENHEIM, *supra* note 29, § 477, at 867 (defining concept of negotiation). The purpose of negotiation may be to exchange views on a particular subject, to arrange a possible future course of action, or to settle a dispute. *Id.* at § 479, at 868 (discussing various purposes of negotiations). The form of negotiations may be spoken or through written communication. *Id.* §§ 481-482, at 868 (noting forms of negotiation). Constructive engagement is, thus, a spoken form of negotiation initiated and directed to settle the dispute between South Africa and the United States. *See supra* notes 51-55 and accompanying text (discussing current dispute between United States and South Africa.)

end to apartheid through this policy of negotiation, the United States imposed economic sanctions against South Africa.[60] Although article 33 does not specifically address economic sanctions,[61] the United States still has complied with articles 2(3) and 33 of the Charter by attempting first to resolve its dispute with South Africa by the peaceful method of constructive engagement.[62]

In addition to complying with the requirements of articles 2(3) and 33, the Act is consistent with important goals of the Charter.[63] For example, the goals of articles 2(3) and 33 include the maintenance of international peace and security.[64] In addition, to further the general goal of international peace and security both the preamble and article 55 of the Charter advocate respect for and observance of human rights and fundamental freedoms.[65] Similarly, the policy goals of the Act are to use economic means to ensure equal rights for South African blacks by inducing the South African Government to abandon the policy of apartheid.[66] Because the Act constricts certain economic sectors of the South African economy, however, the Act may aggravate racial tensions by displacing blacks who work in the affected sectors.[67] Unemployed as a result of the sanctions, South African blacks may be attracted to violent revolution.[68] Absent domestic violence, however, the long-term gains, such as equal voting rights by black South Africans, may outweigh such short-term losses as lost jobs, if the Government of

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60. *See supra* note 6 and accompanying text (noting imposition of economic sanctions by United States against South Africa). Crocker's policy of constructive engagement did accomplish diplomatic success in negotiating limited agreements. Felton, *Administrative Role*, *supra* note 58, at 2340

61. *See* U.N. CHARTER at art.33 (discussing pacific settlement of disputes). Parties to a dispute that is likely to endanger international peace and security shall seek a solution by negotiation, mediation, arbitration, or other mutually agreed upon means of dispute settlement. *Id.* at art. 33, para. 1. The forms of pacific settlement listed under article 33 do not include economic sanctions.

62. *See supra* notes 58-61 and accompanying text (noting constructive engagement qualifies as form of negotiation initiated to settle dispute between United States and South Africa).

63. *See supra* notes 34 & 40 (noting that sanctions imposed to dismantle apartheid support Charter because apartheid is against international law and violates Charter).

64. *See* U.N. CHARTER art. 2, para. 3 (member states shall settle their disputes peacefully, without endangering international peace and security); *id.* at art. 33 (member states peacefully shall settle disputes that might threaten international peace and security); *supra* note 54 and accompanying text (noting that apartheid endangers international peace and security).

65. *See* U.N. CHARTER preamble (reaffirming faith in fundamental human rights, dignity, and worth of human beings, to maintain international peace and security); *Id.* at art. 55, para. c (to promote peaceful and friendly relations among nations, United Nations shall facilitate respect and observance of human rights and fundamental freedoms without distinction regarding race).

66. *See supra* note 14 and accompanying text (noting that purpose of Act is to replace apartheid in South Africa with nonracial and democratic form of government).

67. *See* Minter, *supra* note 2, at 44 (economic sanctions against South Africa most likely will cause short-term injustice to South African blacks).

68. *See id.* (economic sanctions against South Africa most likely will result in temporary economic losses to South African blacks).

South Africa quickly complies with the Act's demands.[69] Thus, even though article 33 does not address economic sanctions, and even though the Act may result in short-term racial violence, economic sanctions against South Africa are consistent with the Charter because the Act arguably supports the purposes of the Charter and because the United States is continuing to negotiate a peaceful settlement through diplomatic pressure.[70]

In addition to the United Nations Charter, the United States and South Africa are parties to the General Agreement on Tariffs and Trade (GATT).[71] GATT is a multilateral treaty that regulates international trade.[72] The purpose of GATT is to reduce trade barriers and eliminate discriminatory treatment in international commercial relations.[73] Two of the provisions of GATT are particularly relevant in assessing the legality under international law of the United States sanctions against South Africa.[74] Article 11 of Gatt proscribes certain prohibitions and restrictions on imports and exports between GATT members.[75] In addition, article 13 of GATT requires that if a GATT member prohibits or restricts the products of another member state, the restrictions must apply against all member states.[76] Because the Act prohibits some imports from and exports to South Africa and because the Act restricts the import-export trade with South Africa alone, and not

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69. *See id.* at 44 (long-term gains by blacks, including equal political representation, will outweigh short-term injustice to black South Africans prompted by economic sanctions); *supra* notes 16-21 (noting Act's five demands).

70. *See supra* note 52 and accompanying text (article 2(3) of Charter requires pacific settlement of disputes between member states); *supra* note 57 and accompanying text (article 33 notes peaceful means of dispute settlement include negotiation or mutually agreed upon form of redress); *supra* notes 67-69 and accompanying text (economic sanctions initially may aggravate racial tension, but ultimately will promote international peace and security); *supra* notes 34 & 40 and accompanying text (noting that purposes of Charter include achievement of international cooperation in solving international problems of humanitarian character and in promoting respect for human rights and fundamental freedoms).

71. General Agreement on Tariffs and Trade (GATT), *opened for signature* Oct. 30, 1947, 61 Stat. (5) A3 & (6), A1365, T.I.A.S. No. 1200, 55 U.N.T.S. 68.

72. *Id.*

73. *Id. See generally*, J. JACKSON, WORLD TRADE AND THE LAW OF GATT 53-56 (1969) (analyzing GATT and international trade).

74. *See* GATT, *supra* note 71, at art. 11 (proscribing prohibitions on imports and exports between GATT members); *id.* at art. 13 (stating policy of nondiscrimination in trade agreement); Lillich, *supra* note 4, at 247-48 (focusing on articles 11 and 13 of GATT in analyzing legality of economic coercion); Note, *supra* note 24, at 665-66 (same); Comment, *supra* note 31, at 1187-89 (same); Note, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua,* 43 WASH. & LEE L. REV. 167, 184 (1986) (same).

75. *See* GATT, *supra* note 71, at art. 11 (proscribing prohibitions on imports and exports between GATT members). The provisions of article 11 of GATT apply to any tariff quota instituted or maintained by any contracting party against any other contracting party. *Id.* at art. 11(5); *see* L. OPPENHEIM, *supra* note 29, at § 142 (noting that GATT instituted principles and obligations promoting international trade and removing trade restrictions). To protect international trade, GATT constitutes a substantial limitation on the freedom of action of the contracting parties. L. Oppenheim, *supra* note 29, at § 142.

76. *See* GATT, *supra* note 71, at art. 13 (stating policy of nondiscrimination in trade agreement).

with all GATT member states, the Act arguably violates articles 11 and 13 of GATT.[77]

Although the Act initially appears to violate articles 11 and 13 of GATT, article 20 of GATT contains exceptions to GATT's general requirement of nondiscriminatory treatment in trade relations.[78] Under article 20 a contracting party may adopt or enforce any measure necessary to protect domestic or foreign public morals, or human life or health, even if the measure economically discriminates against another contracting party.[79] The goal of the Act is to remove South Africa's apartheid system of government, which the Security Council has called a crime against humanity.[80] The Act's provisions thus could fall under the article 20 exceptions protecting public morals and human life and health.[81] A state may not act in a discriminatory manner under article 20's humanitarian exception, however, if the discriminatory treatment is arbitrary, or a disguised restriction on international trade, or if the alleged offense against public morals, human life, or health also exists in the sender's country.[82] The restrictions to article 20's humanitarian exception do not apply to the Act because apartheid does not exist in the United States and because the trade measures of the Act have no goal other than to eradicate apartheid.[83] If a target state, however, believes that the discriminatory treatment is arbitrary or unjustified the target state can seek redress under article 23 of GATT.[84] Thus, if South Africa considers the sanctions in the Act to breach GATT, then South Africa can file a protest under article 23 of GATT and seek a determination of legality from the original contracting parties.[85] Assuming South Africa does file, a majority of the original contracting parties probably will follow the United

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77. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086-1116 (prohibiting certain economic interaction between United States and South Africa); GATT, *supra* note 71, at arts. 11, 13 (proscribing prohibitions on imports and exports between GATT members and stating policy of nondiscrimination).

78. *See* GATT, *supra* note 71, at art. 20 (containing general exceptions to rule against discrimination between GATT members).

79. *See* GATT, *supra* note 71, at art. 20(1)(a), (b) (condoning discrimination for nonviolent motives such as protection of public morals and human life). Precise definitions for the words in article 20 of GATT created trouble for the contracting parties. J. JACKSON, *supra* note 73, at 745.

80. *See supra* note 5 and accompanying text (describing apartheid system of government in South Africa); *supra* note 14 (purpose of Act is to promote establishment of nonracial and democratic form of government for South Africa); *supra* note 54 (noting Security Council's statment that apartheid is crime against humanity endangering international peace and security).

81. *See* GATT, *supra* note 71, at art. 20(b) (condoning trade discrimination for nonviolent motives such as protection of public morals and human life).

82. *See* GATT, *supra* note 71, at art. 20 (condoning discriminatory treatment to serve humanitarian ends that is not arbitrary, unjustified, or disguised restriction on international trade).

83. *See supra* note 82 and accompanying text (noting restrictions to article 20's humanitarian intervention). *See also supra* note 14 and accompanying text (noting Act's policy goals).

84. GATT, *supra* note 71, at art. 23.

85. *See id.* (greivance procedure under GATT).

Nations view that apartheid is an offense against humanity and the United States sanctions will qualify for article 20's humanitarian exception.[86] Therefore, although the Act contravenes articles 11 and 13 of GATT, article 20 justifies the sanctions under GATT.[87]

In addition to the Charter and GATT, the United States sanctions against South Africa affect the Air Transport Services Agreement Between the Government of the United States and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories (Air Transport Agreement), which is a bilateral treaty of air travel between South Africa and the United States.[88] The Air Transport Agreement, signed May 23, 1947, granted reciprocal landing rights in the United States and South Africa to one or more air carriers of each state.[89] A purpose of the Air Transport Agreement was to stimulate international air travel as a means of promoting international understanding and good will.[90] According to the Air Transport Agreement, either state may terminate the treaty upon notice to the other state.[91] The termination is to become effective one year after the nonterminating state receives the notice, unless the terminating state withdraws its notice before the expiration date.[92] In compliance with the Air Transport Agreement's termination provisions, the Act provided that the United States Secretary of State notify the Government of South Africa that the United States planned to terminate the Air Transport Agreement.[93] The Act also authorized the Secretary of Transportation to prohibit landing rights to aircraft owned or operated by South African citizens following

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86. *See supra* note 54 and accompanying text (noting Security Council's determination that apartheid is crime against humanity); *supra* note 78 and accompanying text (noting GATT's article 20 humanitarian exception to GATT's general requirement of nondiscriminatory treatment in trade relations). *See* J. JACKSON, *supra* note 73, at 178-87 (noting broad range of possible redress under article 23 of GATT). Under article 23 of Gatt, the range of possible redress includes compensation, suspension of the discriminatory measure, suspension of the contracting party from GATT, or any other measure deemed appropriate by the contracting parties. *Id.* Both the United States and South Africa are original contracting parties to GATT. *Id.* at 899.

87. *See supra* notes 71-86 and accompanying text (noting discussion of GATT).

88. Air Transport Services Agreement Between the Government of the United States of America and the Government of the Union of South Africa Relating to Air Services Between Their Respective Territories, May 23, 1947, 61 Stat. 3057, T.I.A.S. No. 1639, *supra* note 12; *see supra* notes 12-13 and accompanying text (describing Act's termination of Air Transport Agreement).

89. Air Transport Agreement, *supra* note 12, at annex 1-3.

90. *Id.* at annex 4.

91. *Id.* at art. 11.

92. *Id.*

93. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 306(b)(1), 100 Stat. 1086, 1100; Air Transport Agreement, *supra* note 12, at art. 11 (Air Transport Agreement to terminate one year after date of receipt of notice to terminate by other contracting party unless notice withdrawn by agreement in interim). Secretary of State George Shultz gave South Africa notice of termination of the Air Transport Agreement by the United States on October 8, 1986. DEP'T ST. BULL. 84, 87 (December 1986). The notice became effective October 10, 1987. *Id.*

termination of the Air Transport Agreement.[94] Furthermore, the Act directed the Secretary of Transportation to restrict landing rights following termination in South Africa of aircraft owned or operated by United States citizens.[95]

The United States has complied with the termination provisions of the Air Transport Agreement.[96] On October 8, 1986, Secretary of State George Shultz gave notice that the Air Transport Agreement would terminate on October 10, 1987.[97] Before the termination becomes effective, both United States and South African airlines may continue to operate between the two states.[98] During the interim, the United States can withdraw the notice if South Africa complies with the termination provisions of the Act.[99] The Act, therefore, does not violate the United States treaty obligations under the Air Transport Agreement because the United States has complied with the termination provisions and the United States is not violating any provisions of the Air Transport Agreement during this period.[100]

In addition to treaties, customary international law can help determine the status under international law of the United States sanctions against

94. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 306(b)(2), 100 Stat. 1086, 1100. Section 306(b)(2) of the Act provided that the Secretary of Transportation prohibit aircraft owned or operated by the Government of South Africa or by South African Citizens from engaging in air transportation with respect to the United States. *Id.* Under section 306(a)(2), the Act authorized the president within ten days following enactment of the Act, to direct the Secretary of Transportation to revoke the right of any air carrier designated by the Government of South Africa to provide service pursuant to the Air Transport Agreement. *Id.* § 306(a)(2), at 1100. Secretary of State George Schultz gave South Africa notice of termination of the Air Transport Agreement by the United States effective from October 8, 1986. *See supra* note 93 and accompanying text (noting termination of Air Transport Agreement). On October 27, 1986 the President issued Executive Order 12,571 directing the Secretary of Transportation to comply with section 306(a)(2) of the Act. Exec. Order No. 12,571 51 Fed. Reg. 39,505 (1986). Elizabeth Dole, the Secretary of Transportation, accordingly issued Department of Transportation Final Order 86-11-29 (Final Order). After review by the President, the Final Order, revoking South African Airways landing rights in the United States, became effective November 16, 1986. Subsequently, South African Airways sought an emergency delay of the Final Order before the District of Columbia Circuit of the United States Court of Appeals. South African Airways v. Dole, 817 F.2d 119 (D.C. Cir. 1987). The Court of Appeals held that the issuance of the Final Order was a valid exercise of Congressionally mandated authority not in violation of the Act. *Id.* On October 13, 1987 the Supreme Court of the United States denied certiorari. South African Airways v. Dole, 98 L. Ed. 2d. 188, 108 S. Ct. 229 (1987).

95. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 306(b)(3), 100 Stat. 1086, 1100.

96. *See supra* note 93 and accompanying text (noting Secretary of State George Shulz gave South Africa notice of termination in compliance with Air Transport Agreement).

97. *Id.*

98. Air Transport Agreement, *supra* note 12, at art. 11; *see supra*, notes 91-93 and accompanying text (noting termination provision of Air Transport Agreement).

99. *See supra* notes 16-22 and accompanying text (noting termination provisions of the Act); *supra* notes 91-93 and accompanying text (noting termination provisions of Air Transport Agreement).

100. *See supra* note 12 and accompanying text (noting Act's compliance with termination procedure of Air Transport Agreement); *supra* notes 91-93 and accompanying text (noting termination provisions of Air Transport Agreement).

South Africa.[101] A particular mode of transnational conduct may attain the status of a rule of international law if states recognize the mode of interaction by constant and uniform usage.[102] An example of a rule of international law created by the practice of states is the duty of states to refrain from the use of force against the sovereign authority of another state.[103] The basis for rules of customary international law concerns not only the forms of conduct in which states engage, but also why states engage in certain forms of conduct.[104] If states act out of a sense of legal duty, rather than for another reason such as political expediency, that action may attain the status of a rule of customary international law.[105] The doctrine of *Opinio juris sive necessitatus* (*opinio juris*) requires that states adhere to certain forms of international conduct out of a sense of legal obligation before that conduct may attain the status of a rule of international law.[106] In addition, other states must acquiesce in the particular habitual practice at issue for the practice to attain the status of a customary rule of international law.[107] An habitual practice of states, therefore, may rise to

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101. *See* ICJ Statute, *supra* note 25, at art. 38(1)(b) (international custom, as evidence of general practice accepted as law, is source of international law); *supra* notes 27-29 and accompanying text (noting customary international law among sources of international law for purposes of determining legality of transnational interactions).

102. *See Asylum* Case (Colom. v. Peru), 1950 I.C.J. 266, 276-77 (constant and uniform usage is basis of customary rule of international law); *see also* M. AKEHURST, *supra* note 25, at 27-28 (repetition over period of time is basis of customary international law); J.L. BRIERLY, *supra* note 40, at 61 (constant usage over time is basis of customary rule of international law). To attain the status of a rule of international law, a practice of states cannot have major inconsistencies. M. AKEHURST, *supra* note 25, at 27-28. Major inconsistencies are large amounts of practice that go against the rule in question, while minor inconsistencies are small amounts of contrary practice. *Id.* at 28. When no contrary practice to an alleged rule of international law exists, a small amount of practice may attain the status of a rule, even if only a small number of states follow the practice and for a short time. *Id.*

103. L. OPPENHEIM, *supra* note 29, at §§ 125-126 (state is not allowed to send its troops or to exercise act of legislative or judicial administration into or through foreign territory without permission).

104. *See* M. AKEHURST, *supra* note 25, at 29 (explaining pyschological basis of customary rules of international law).

105. *See Asylum* Case (Colum. v. Peru), 1950 I.C.J. 266, 277. (sense of legal obligation accompanies customary rules of international law).

106. *See* M. AKEHURST, *supra* note 25, at 29-30 (discussing *opinio juris* as requirement for creation of customary rules of international law).

107. *See id.* When a state follows an alleged rule, the adherence must result from a sense of obligation or duty. *Id.* A state may show adherence to a rule out of a sense of duty by express acknowledgment. *Id.* Conversely, if interested states condemn as illegal a state's failure to act in a manner required by the alleged rule, the condemnation may help to prove the obligatory nature of the conduct which, in turn, helps to establish *opinio juris*. *Id.* at 30. *Opinio juris*, however, does not presuppose that all rules of international law stem from legal duty. *Id.* at 29. Permissive rules of customary law are rules that states may act in a particular manner even though such conduct is not obligatory upon the state. *Id.* An example of a permissive rule is that a state may prosecute foreigners for crimes committed within the states territory. *Id.* Lack of protest by an interested state that a state's conduct is illegal may help to prove the existence of a permissive rule of international law. *Id.*

the status of customary international law if states recognize the practice by constant and uniform usage, engage in the practice out of a sense of legal duty, and other states acquiesce in the practice. One rule of customary international law is the duty of states not to intervene in the sovereign affairs of other states.[108] Intervention that violates international law is a dictatorial or coercive interference by one state in the domestic or foreign affairs of another state, which impairs that state's sovereignty.[109] The broad

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108. L. OPPENHEIM, *supra* note 29, at § 134. Intervention is not always illegal and may take place by right, such as to enforce treaty obligations. *Id.* at § 135(3); Bull, *Introduction*, in INTERVENTION IN WORLD POLITICS, *supra* note 35, at 1. The principle of a state's sovereign right to determine that state's own internal and external affairs forms the basis of the principle of nonintervention. *See* C. THOMAS, *supra* note 45, at 1-3 (discussing interrelationship of principles of sovereignty and nonintervention); Comment, *supra* note 31, at 1166 (duty of nonintervention guarantees principle of sovereignty). The principle of state sovereignty, recognized by the Peace of Westphalia in 1648, supports the territorial integrity and legal equality of legitimate states. *See* C. THOMAS, *supra* note 45, at 34 (discussing principle of sovereignty). Sovereignty also includes the recognition of the right of a state to exercise exclusive jurisdiction over that state's own citizens. *See* J.L. BRIERLY, *supra* note 40, at 1, 47 (right of state to treat state's citizens as state determines is element of state sovereignty); Comment, *supra* note 31, at 1166 (same). The duty of nonintervention is a corollary to sovereignty because interference by one state into the affairs of another is an encroachment upon the latter state's sovereign authority to determine that state's own affairs. *See* J.L. BRIERLY, *supra* note 40, at 402 (basis of duty of nonintervention is respect for state sovereign authority to determine own internal and external afffairs); C. THOMAS, *supra* note 45, at 3 (same); Comment, *supra* note 31, at 1166 (duty of nonintervention prohibits one state from interfering in another state's affairs in manner that impairs latter's independence). Intervention violates international law if the intervention involves force, is against the target state's wishes, and constrains the independent will and decision-making capability of a sovereign state. *See* L. OPPENHEIM, *supra* note 29, at § 134 (intervention is dictatorial interference and does not include intervention in cooperation with target state); A. THOMAS & A. THOMAS, NONINTERVENTION 71-72 (1956) (noting definition of intervention); C. THOMAS, *supra* note 45, at 21 (coercive attempt to usurp decision-making capability of sovereign state by another state is act of intervention that violates duty of nonintervention); Comment, *supra* note 31, at 1166 (international persuasion is impermissible if uninvited by target state and if for purpose of constraining sovereign will of target).

In addition to the duty of nonintervention, racial nondiscrimination may have become a norm of customary international law. *See* O. OZGUR *supra* note 5, at 3-21 (noting that Charter provisions, numerous international human rights instruments, International Law Commission and ICJ statements, and state declarations against apartheid, are tantamount to creation of duty of racial nondiscrimination); *supra* note 40 and accompanying text (noting provisions of Charter and numerous international human rights instruments that support racial nondiscrimination).

109. I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 44 (1963). Intervention consists of dictatorial interference by one state into the internal affairs or sovereignty of another state. *Id.* Diplomatic protest or official comment concerning the internal affairs of another state constitutes dictatorial intervention. *Id. See* J. L. BRIERLY, *supra* note 40, at 402 (intervention consists of dictatorial interference in domestic or foreign affairs of another state impairing that state's independence or sovereignty); Bull, *supra* note 99, at 1 (intervention consists of dictatorial or coercive interference into sphere of jurisdiction of sovereign state or independent political community); *see generally* L. OPPENHEIM, *supra* note 29, at §§ 134-140 (intervention is dictatorial interference into internal affairs of one state by another state, to maintain or alter target states sovereign authority). *But see* L. OPPENHEIM, *supra* note 29, at § 134 (good offices and mediation is not dictatorial intervention and, hence, does not constitute intervention).

construction of dictatorial interference includes any interference against a state's political, economic, and cultural elements.[110] Sovereignty is a state's authority to regulate activities in that state's own territory and activities of that state's citizens, as well as the right to determine that state's own internal and external affairs.[111] Intervention does not violate international law when the target state invites the intervention or when the intervention is in self-defense.[112]

Under the principle of nonintervention the United States economic sanctions against South Africa initially appear to violate customary international law because the sanctions impair South Africa's sovereign authority to regulate the activities of South Africa's black population and South Africa's right to determine South Africa's own internal affairs.[113] The stated purpose of the Act is to use any effective means to remove the apartheid system of government in South Africa.[114] The Act is an uninvited attempt to shape South Africa's decision-making authority and, therefore, violates the principle of nonintervention.[115]

Although the sanctions against South Africa constitute an intervention, the purpose of the Act may justify the sanctions under the doctrine of

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110. Short Article, *Humanitarian Intervention in International Law: The French Intervention in Syria Re-examined*, 35 INT'L & COMP. L. Q. 183, 189 n. 37. Intervention does not consist necessarily of armed force or the threat of armed force. *Id*; *see* L. OPPENHEIM, *supra* note 29, at § 168(f)(c) (stating that recommendations calculated to exercise direct pressure and likely to be reinforced constitute intervention). Intervention may consist of coercion by one state of another state to subordinate or usurp the target state's sovereign rights, without recourse to armed force. *See* Declaration on the Inadmisibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G. A. Res. 2131, 20 U.N. GAOR Supp. (No. 14)(1408th plen. mtg.) at 11, U.N. Doc. A/6014 (1966) (interference that violates target state's sovereignty constitutes intervention). Intervention motivated by a desire to usurp a state's sovereign rights is consistent with dictatorial intervention. Short Article, *supra* note 110, at 189 n. 37.

111. L. OPPENHEIM, *supra* note 29, §§ 123-124, at 285-89. Sovereignty consists of three qualities. *Id.* First, a sovereign state has external independence to manage its international affairs according to that state's own discretion. *Id.* An example of external independence is the freedom of action to enter into alliances and conclude treaties. *Id.* Second, a sovereign state has internal independence to manage its own internal affairs. *Id.* An example of internal independence is the freedom to adopt a constitution of the state's choice. *Id.* Last, a sovereign state has territorial supremacy to exercise supreme authority over all persons and things within its territory. *Id.* A consequence of territorial supremacy is the power of a state to treat its subjects as the state chooses, subject to international obligations. *Id.* In particular, concerning the limitations on a state's territorial supremacy, a Member state of the United Nations must obey the general obligations of the United Nations Charter concerning human rights and fundamental freedoms. *Id.*

112. *Id.* § 125; *see supra* note 111 and accompanying text (detailing what constitutes sovereign authority).

113. *See supra* note 14 and accompanying text (purpose of Act is to dismantle apartheid system of government in South Africa); *supra* notes 109-110 and accompanying text (detailing what constitutes nonintervention).

114. *See supra* note 14 and accompanying text (discussing purpose of Act).

115. *See id.* (discussing purpose of Act); *supra* notes 113-14 and accompanying text (discussing principle of nonintervention).

humanitarian intervention.[116] Humanitarian intervention, an exception to the principle of nonintervention, is intervention by one state into the affairs of a target state to protect the inhabitants of the target state from arbitrary and abusive treatment by that state's government, which treatment exceeds the boundaries of legitimate sovereign authority.[117] Humanitarian interven-

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116. *See supra* note 14 and accompanying text (discussing purpose of Act); *infra* notes 117-26 and accompanying text (discussing humanitarian intervention).

117. E.C. STOWELL, INTERVENTION IN INTERNATIONAL LAW 53 (1921) (humanitarian intervention is justified use of force to protect inhabitants of state from unjust and arbitrary treatment by that state's sovereign). Humanitarian intervention loses justification if the intervention becomes self-serving instead of addressing human rights violations. *See* Hoffman, *The Problem of Intervention,* in INTERVENTION IN WORLD POLITICS, *supra* note 35 at 24 (noting that problem with principle of humanitarian intervention is knowing juncture at which it becomes self-serving). An example of when humanitarian intervention has become self-serving is the Vietnamese invasion of Cambodia, which began as an attempt to remove the barbaric Pol Pot regime and ended in the imposition of an equally nefarious Vietnamese neo-colonial rule. *Id.* at 24. States have invoked humanitarian intervention for commercial and strategic purposes. *See, eg.*, BROWNLIE, *supra* note 109 at 338-40; Franck and Rodley, *supra* note 46, at 279-85 (noting circumstances when states have invoked humanitarian intervention).

Although humanitarian intervention is a generally accepted principle of international law, proponents of a broad interpretation of article 2(4) have maintained that humanitarian intervention violates article 2(4) of the Charter. *See* Akehurst, *supra* note 35, at 104 (stating armed humanitarian intervention is illegal under article 2(4)). Proponents of a broad interpretation of article 2(4) consider intervention for humanitarian purposes illegal for three reasons. First, article 2(4) forbids any type intervention, including humanitarian intervention. *See supra* note 41 and accompanying text (noting broad interpretation of article 2(4) includes any form of aggression in article 2(4) prohibition against use of force). Second, to allow unilateral intervention by one state into the internal affairs of another state for humanitarian purposes creates the potential for unscrupulous states to abuse the privilege which, in turn, undermines the Charter's authority. *See* Fonteyne, *supra* note 35, at 68-69 (allowing intervention by one state into sovereign affairs of another state for humanitarian reasons creates opportunities for abuse by states intervening for self-serving ends under guise of humanitarian intervention, undermining Charter's authority). Last, the proponents of the broad interpretation of article 2(4) disagree with the argument that humanitarian intervention falls outside the purview of article 2(4) because humanitarian intervention does not seek to invade the territorial integrity or political independence of the target state and is not inconsistent with the purposes of the U.N. Charter. *See* J. STONE, *supra* note 36, at 43, 95-96 (stating that article 2(4) does not forbid humanitarian intervention because humanitarian intervention does not seek to infringe sovereign authority of target and is not contrary to purposes of United Nations); Reisman, *Humanitarian Intervention to Protect the Ibos, in* HUMANITARIAN INTERVENTION AND THE U.N. 167, 177 (Lillich ed. 1973). Proponents of the broad interpretation of article 2(4) state that the narrow view considers a state's motives and goals and that article 2(4) is not meant to consider a state's motives or goals. Fonteyne, *supra* note 35, at 73. Further, proponents of the broad view maintain that all forms of humanitarian intervention constitute a violation of the target state's territorial integrity and political independence, especially where the announced goal of the intervenor is to rescue an entire population from systematic persecution by the target state. *See* Akehurst *supra* note 35, at 105 (population rescues necessarily change target government's character as well as status of territory under which persecuted citizens had lived); *infra* notes 117-26 and accompanying text (discussing humanitarian intervention). Proponents of the broad interpretation note that article 2(4) is a total ban on any use of armed force because "territorial integrity" in article 2(4) means "territorial inviolability." *See* L. OPPENHEIM, *supra* note 46, at 154 (stating "territorial integrity" and "political independence" means

tion has four generally recognized prerequisites.[118] First, the intervenor cannot attempt to establish a new sovereign authority in the target state, but only can limit the internal scope of the present sovereign's power.[119] Second, gross violations of human rights must exist in the target state and the local government must be either unable or unwilling to correct the problem.[120] Third, the intervenor must use force that is proportional to the alleged wrong.[121] Finally, the intervention must be contrary to the wishes of the target state and, thus, constitute dictatorial interference in the affairs of the target government.[122]

The United States economic sanctions against South Africa qualify as an example of humanitarian intervention. The United States desires that

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territorial inviolability). *But see* L. OPPENHEIM *supra* note 46, at 154 (stating article 2(4) prohibition absolute except to fulfill obligations of Charter or in self-defense); L. OPPENHEIM, *supra* note 29, at § 137 (stating humanitarian intervention is legally permissable); *supra* notes 34 & 40 and accompanying text (noting purposes of United Nations).

Proponents of a broad interpretation of article 2(4) have advocated several solutions to rectify the problem of a state persecuting its own citizens and still adhering to the broad interpretation of article 2(4). *See* Akehurst *supra* note 35, at 111-12 (international organizations only should solve human rights violations); Fonteyne *supra* note 35, at 73-75 (article 2(4) obligations should cease when state undertakes humanitarian intervention). One proponent's solution is to create international collective machinery specifically to address episodes of a sovereign state persecuting its own citizens. Akehurst, *supra* note 35, at 111-12. Fearing that a foreign state acting unilaterally may cause more harm than benefits, and conscious of differing world attitudes of what may constitute adequate human rights, the proponent of the solution advocates the creation of an international organization to investigate and implement appropriate remedies. *Id.* at 110-12. Another proponent's solution to the problem of a state persecuting its own citizens is to by-pass the Charter. Fonteyne, *supra* note 35, at 73-75. Balancing the United Nations goals of world conflict minimalization against protection of human rights, the proponent of this solution has recommended that the United Nations temporarily relieve a state of the restraints and obligations of article 2(4) and allow that state to intervene in the target state for humanitarian ends. *Id.* The solution, however, appears to undermine the rationale that article 2(4) forbids all forms of intervention. Finally, another solution is to adopt the narrow interpretation that article 2(4) does not encompass economic intervention. *See* Lillich, *supra* note 4, at 234-36 (detailing narrow interpretation that article 2(4) does not forbid economic intervention); *infra* note 39 and accompanying text (same). Under a narrow interpretation of article 2(4), humanitarian intervention is a legal exception to the general duty of nonintervention. *See supra* notes 107-16 (doctrine of humanitarian intervention is viable and justifies any intervention the Act may impose).

118. *See* J.L. BRIERLY, *supra* note 40, at 402 (stating characteristics of humanitarian intervention).

119. Hoffman, *The Problem of Intervention, supra* note 35 at 26.

120. *See* L. OPPENHEIM, *supra* note 29, at § 137 (humanitarian intervention requires gross violations of human rights in target state that target state is unwilling or unable to alleviate); Short Article, *supra* note 110, at 186-7 n. 29(same).

121. *See* Comment, *supra* note 31, at 1173-74 (intervention must be proportional to crime committed by target government); Short Article, *supra* note 110, at 186-87 n. 29 (armed force is characteristic of humanitarian intervention).

122. Short Article, *supra* note 110, at 186-87 n. 29 (humanitarian intervention must amount to dictatorial interference in target government's affairs). *See supra* note 109 and accompanying text (discussing dictatorial intervention). Nondictatorial intervention does not need the label "humanitarian" to achieve legitimacy.

black South Africans receive adequate legal rights but publically has not supported a replacement of the present sovereign authority in South Africa with any specific form of sovereign authority.[123] Further, the United Nations has determined that gross violations of human rights exist in South Africa and the South African government appears to be unable or unwilling to rectify the problem.[124] In addition, the use of sanctions by the United States is proportionate to the gravity of the harm presented by apartheid in South Africa.[125] Economic sanctions are a nonviolent form of pressure to induce a change in widespread systemic transgression of basic human rights. Finally, the South African Government did not elicit the United States sanctions against South Africa and, thus, the sanctions constitute dictatorial interference in the affairs of the South African Government.[126] The sanctions, therefore, are an example of humanitarian intervention and do not violate international law.

The economic sanctions imposed by the United States against South Africa in the Comprehensive Anti-Apartheid Act do not violate international law. Specifically the Act does not violate the U.N. Charter, GATT or the Air Transport Agreement between South Africa and the United States.[127] Even though the Act provides for discrimination in the regulation of exports and imports with South Africa, the Act does not violate GATT because GATT justifies trade discrimination prompted by humanitarian interests.[128] Furthermore, although the Act's sanctions constitute a dictatorial interference in the sovereign right of South Africa to order South African society, the intervention is justified on humanitarian grounds.[129] If South Africa

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123. *See supra* note 14 and accompanying text (noting purposes and goals of Act).

124. *See supra* note 54 (noting Security Council's recognition of apartheid as crime against humanity); O. OZGUR, *supra* note 5, at 20 (noting that United Nations considers apartheid gross and persistent violation of human rights).

125. *See supra* notes 36 & 46 and accompanying text (noting that under narrow interpretation of article 2(4) of Charter economic sanctions do not constitute "force"); *supra* notes 67-69 and accompanying text (noting that quick compliance with Act's demands will outweigh negative impact of sanctions); *supra* notes 16-22 and accompanying text (noting Act's five demands). *But see supra* notes 109-10 and accompanying text (noting that dictatorial intervention may include economic coercion).

126. *See supra* note 14 and accompanying text (noting goal of Act is to dismantle apartheid); *supra* note 109 and accompanying text (stating that intervention impedes sovereignty of target government); *supra* note 111 and accompanying text (describing sovereignty as authority of state to regulate that state's territory, citizens, and internal and external affairs).

127. *See supra* notes 34-50 and accompanying text (proposing that Act does not violate article 2(4) of Charter); *supra* note 52-70 and accompanying text (proposing that Act does not violate articles 2(3) or 33 of Charter, and Act supports purposes of United Nations); *supra* notes 71-87 and accompanying text (proposing that Act does not violate Gatt); *supra* notes 88-100 and accompanying text (stating Act does not violate Air Transport Agreement).

128. *See supra* note 77 and accompanying text (noting that Act contravenes trade regulations of GATT); *supra* note 79 and accompanying text (noting GATT justifies trade discrimination prompted by humanitarian concerns).

129. *See supra* notes 108-10 & 113-115 and accompanying text (noting Act constitutes dictatorial interference); *supra* notes 116-26 and accompanying text (justifying Act as humanitarian intervention).

dismantles apartheid and alleviates the problems caused by widespread systemic transgressions of human rights, the United States will lift the sanctions.[130] If not the President of the United States may impose additional sanctions on the importation of South African diamonds and strategic minerals.[131] Created by Congress and expressive of United States domestic opinion, the Act wields economic power to shape the fate of South African society.

Accelerated global economic interdependence may lead to a redefinition of a world order based upon the principles of sovereignty and nonintervention[132] For now, the consensual nature of customary international law allows moral suasion to justify economic invasions of sovereign authority.

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130. *See supra* notes 16-21 and accompanying text (noting that if South Africa meets Act's five demands United States will lift sanctions).

131. *See supra* note 22 and accompanying text (noting additional sanctions provided by Act).

132. *See supra* notes 45 & 108 and accompanying text (noting view that increasing world economic interdependence erodes state sovereignty and nonintervention as reliable principles supporting international law and international interaction among nations).